RECEIVED
Nov 10 2021
SC Court of Appeals

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Unpublished Opinion No. 2021-UP-336 (S.C. Ct.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,

PETITIONER'S INDEX OF RECORD ON APPEAL

Matthew T. Foss
S.C. Bar No.: 104390
Alexis W. McCumber
S.C. Bar No.: 101611
Eric M. Poulin
S.C. Bar No.: 100209
Roy T. Willey, IV
S.C. Bar No.: 101010
Anastopoulo Law Firm, LLC
32 Ann Street
Charleston, SC 29403
(843) 614-8888
Attorneys for Petitioner

BOBBY FOSTER V. JULIAN NEIL ARMSTRONG

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE HORRY JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

ORDER FOR PUBLICATION

FILED
HORRY COUNTY
15 NOV 23 PM 1:13
CLERK OF COURT

THIS MATTER comes before the Court pursuant to the Plaintiff's petition requesting an Order of Publication authorizing the service of the Defendant via publication.

Having reviewed the Plaintiff's Petition, and Affidavit, the Court finds that after due diligence, the Defendant cannot be found in this state, or at Defendant's last known residence. The Court finds that it is appropriate and necessary to serve the Defendant via publication in the daily newspaper of Defendant's last known residence, 186 Williamsburg Road, Little River, South Carolina.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED, that service upon the Defendant shall be effectuated by publishing the Summons, and notice of filing of the Complaint in the above referenced case in local newspaper, once weekly for three (3) consecutive weeks, and by forwarding a copy of the pleadings to the Defendant at Defendant's last known address.

IT IS SO ORDERED.

Clerk of Court ~~PRESIDING JUDGE~~ Melanie Huggins-Ward
COURT OF COMMON PLEAS
HORRY JUDICIAL CIRCUIT

DATED: 11/24/15

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE HORRY JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

PETITION FOR PUBLICATION

FILED
HORRY COUNTY
2015 NOV 23 PM 12:13
JULIE ANN HOOS-WARD
CLERK OF COURT

The Plaintiff herein would respectfully show unto this Honorable court as follows:

1. That this is an action of Common Pleas, based upon automobile accident case against the Defendant, Julian Neil Armstrong, whose last known address was 186 Williamsburg Road, Little River, South Carolina.

2. That, although due and diligent search has been made for the Defendant, the Plaintiff has been unable to locate the Defendant in the County of Horry, State of South Carolina (see attached affidavit of non-service).

3. The Plaintiff is informed and believes that it is necessary that the Defendant be served by publication, and it requests that this Court issue an Order allowing such service, and that this Court issue an Order authorizing service of the Summons, and Notice of filing the Complaint in a daily newspaper of the city of the Defendant's last known address.

WHEREFORE, the Plaintiff must request this Court enter an Order authorizing service by publication of this matter.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
SC Bar Number: 101729
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Rd.
North Charleston, SC 29418
(843) 614-8888

Charleston, South Carolina
Nov. 19, 2015

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE HORRY JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

AFFIDAVIT FOR PUBLICATION

15 NOV 23 PM 12:13
CLERK OF COURT

Personally appeared before me, Sam Flynn, who being duly sworn, states that:

1. I am an attorney for the Plaintiff, BOBBY FOSTER, in the above referenced action. The Plaintiff and Defendant have an action of Common Pleas for an automobile accident.

2. My office has attempted to serve the Defendant, Julien Neil Armstrong, through the Horry County Sheriff's Office. An Affidavit of Non-Service was issued by the Sheriff's Office and stated that the Defendant moved and left no forwarding address.

4. The last known address for the Defendant, Julian Neil Armstrong, was 186 Williamsburg Road, Little River, South Carolina; however the Sheriff confirmed that Defendant is not at this address, and his whereabouts are unknown. (Exhibit A)

5. I believe that although the Plaintiff has tried to contact the Defendant with due diligence, the Defendant cannot be located at this time.

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
SC Bar Number: 101729
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Rd.
North Charleston, SC 29418

Sworn to and subscribed before me
this 19th day of November, 2015

Margaret C Stanley
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 12-4-2017

STATE OF SOUTH CAROLINA,)
)
COUNTY OF HORRY)

CASE NUMBER:# 2015CP265633

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD

who being duly sworn states that he/she is a Deputy Sheriff for Horry County, South Carolina and that the SUMMONS AND COMPLAINT, COVER SHEET

on behalf of BOBBY FOSTER was delivered to the
VS
JULIAN NEIL ARMSTRONG

Sheriff of Horry County on the 24th day of SEPTEMBER 2015, for service on the Defendant at 186 WILLIAMSBURG ROAD
LITTLE RIVER, SC

South Carolina; and that Deponent made a diligent search, but was unable to locate JULIAN NEIL ARMSTRONG

Sworn to before me this 26th
day of OCTOBER , 2015.

Phillip E. Thompson
Sheriff of Horry County

NOTARY PUBLIC FOR SOUTH CAROLINA

DAVID FLOYD
Deputy Sheriff

MY COMMISSION EXPIRES: 9-15-2016

UNABLE TO LOCATE. NEIGHBOR ADVISED THAT SUBJECT HAS MOVED.

FILED
HORRY COUNTY
15 OCT 23 PM 12:13
ELIZABETH S. WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA,)
)
COUNTY OF HORRY)

CASE NUMBER:# 2015CP265633

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD

who being duly sworn states that he/she is a Deputy Sheriff for Horry County, South Carolina and that the SUMMONS AND COMPLAINT, COVER SHEET

on behalf of BOBBY FOSTER was delivered to the
VS
JULIAN NEIL ARMSTRONG

Sheriff of Horry County on the 24th day of SEPTEMBER 2015, for service on the Defendant at 186 WILLIAMSBURG ROAD
LITTLE RIVER, SC

South Carolina; and that Deponent made a diligent search, but was unable to locate JULIAN NEIL ARMSTRONG

Sworn to before me this 26th
day of OCTOBER , 2015.

Phillip E. Thompson
Sheriff of Horry County

NOTARY PUBLIC FOR SOUTH CAROLINA

DAVID FLOYD
Deputy Sheriff

MY COMMISSION EXPIRES: 9-15-2016

UNABLE TO LOCATE. NEIGHBOR ADVISED THAT SUBJECT HAS MOVED.

FILED
HORRY COUNTY
15 NOV 23 PM 12:13
HELANE BROOKS-WARD
CLERK OF COURT

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

CASE NO.: 2015-CP-26-5633

MOTION AND ORDER
INFORMATION FORM AND COVER SHEET

FILED
MELANIE HUGGINS-WARD
CLERK OF COURT
2016 MAR -8 PM 3:16
HORRY COUNTY

Plaintiff's Attorney: Matthew Nall, Eric Poulin, Roy Willey
Bar Number: 102329, 100209, 101010
Address: 62 Columbus St., Charleston SC 29403
Phone: 843-614-8888 Fax: 843-853-2291
E-Mail: matt@akimlawfirm.com,
eric@akimlawfi

Defendant's Attorney:
Bar Number:
Address:

Phone:
E-Mail:

PAID

☒ **MOTION HE**
☐ **FORM MOTI**
☐ **PROPOSED O**

When Completed. Let Linda Johnson to know so she can set a hearing.

Nature of Motior
Estimated Time I

☐ Written motio
☒ Form Motion /
I hereby mo

er.

bruary 10, 2016
mitted

☒ PAID – AMOU
☐ EXEMPT:
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposal order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE
CODE: _____ DATE: _____

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

CASE NO.: 2015-CP-26-5633

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

FILED
2016 MAR -8 PM 3:16
MELANIE HUGGINS-WARD
CLERK OF COURT

Plaintiff's Attorney: Matthew Nall, Eric Poulin, Roy Willey Bar Number: 102329, 100209, 101010 Address: 62 Columbus St., Charleston SC 29403 Phone: 843-614-8888 Fax: 843-853-2291 E-Mail: matt@akimlawfirm.com, eric@akimlawfirm.com, roy@akimlawfirm.com	Defendant's Attorney: Bar Number: Address: Phone: E-Mail: PAID

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTINONS III and III)**
☐ **PROPOSED ORDER / CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Entry of Default – Request for Damages Hearing
Estimated Time Needed: 15 Min. Court Reporter Need: ☒ YES / ☐ NO

SECTION II: Motion / Order Type

☐ Written motion attached
☒ Form Motion / Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendants — Wednesday, February 10, 2016 Date Submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT:
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposal order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ DATE: _____

CLERK'S SECTION

Collected by: 4025.00

Date Filed: 3/7/16

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 14TH JUDICIAL CIRCUIT CASE NO: 2015-CP-26-5633
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	**PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT AND REQUEST FOR HEARING ON DAMAGES**

FILED
2016 FEB 8 PM 3:16
MELANIE WILKINS WALKER
CLERK OF COURT

COMES NOW the Plaintiff, by and through undersigned counsel, who asks the Clerk of Court to enter default against the Defendant Julien Neil Armstrong and schedule a hearing to determine damages.

INTRODUCTION

1. Plaintiff brought this action against Defendant Julian Neil Armstrong as a result of injuries suffered in an automobile accident that occurred on April 8, 2013. After an unsuccessful attempt to serve the Defendant personally through certified mail and the Horry County Sheriff, Plaintiff published Notice of the Summons and Complaint in The North Myrtle Beach Times. Defendant Julien Neil Armstrong did not file a responsive pleading or otherwise defend the suit.

2. Plaintiff is, therefore, entitled to entry of default and a hearing on damages.

ARGUMENT AND AUTHORITIES

3. Rule 55(a) directs the Clerk of the Court to enter default against a party who has not filed a responsive pleading or otherwise defended the suit. SCRCP 55(a).

4. Rule 55(b) permits the court to enter default judgment against a party against whom

PRAYER

13. For these reasons, Plaintiff asks the Court to enter a Default against Defendant Julien Neil Armstrong and to schedule an evidentiary hearing to determine Plaintiff's damages.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

Matthew L. Nall, Esquire
SC Bar Number: 102329
Eric M. Poulin, Esquire
SC Bar Number: 100209
Roy T. Willey, IV, Esquire
SC Bar Number: 101010
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

Charleston, South Carolina
March 2, 2016

EXHIBIT A
(Affidavit of Counsel)

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

AFFIDAVIT OF MATTHEW NALL

FILED
2016 MAR -8 PM 3:16
MELANIE HUDSON-MARSH
CLERK OF COURT

COMES NOW, the affiant, Matthew Nall, and first being duly sworn upon his oath under the pains and penalties of perjury now states the following:

1. I am the above named affiant, Matthew Nall.

2. I, Matthew Nall, am an attorney with Anastopoulo Law Firm, LLC.

3. Plaintiff attempted to serve Defendant Armstrong via USPS Certified Mail Restricted Delivery, the package was returned unclaimed after the maximum holding time expired on August 31, 2015. The package was sent to Defendant's last known address:

Julian Neil Armstrong
186 Williamsburg Road
Little River, SC 29566

4. Plaintiff attempted to serve the Summons and Complaint upon Defendant Armstrong through the Horry County Sheriff's Office, and was given an Affidavit of Non-Service on September 24, 2015.

5. Plaintiff then petitioned the Court to published Notice of the Summons and Complaint in The North Myrtle Beach Times. After approval, The North Myrtle Beach Times published the Notice on December 24, 31, and January 7.

6. Upon information and belief, Defendant Julian Neil Armstrong is neither an infant nor incompetent adult.

7. As of today's date, March 2, 2016, Defendant Julian Neil Armstrong has failed to file a responsive pleading.

SIGNATURE ON FOLLOWING PAGE

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

FILED
2016 MAR -8 PM 3:16
MELANIE HUGGINS-WARD
CLERK OF COURT
HORRY COUNTY

AFFIDAVIT OF NON-MILITARY SERVICE

Personally appeared before me the undersigned attorney, who first being duly sworn, deposes and says:

That he is familiar with the provisions of 50 App. Section 520, Civil Relief Act of 1940, and to induce the Court to enter a default judgment against Defendant Julian Neil Armstrong, represents to the Court that from his file in this matter, and on information and belief based on the hereinafter enumerated facts, Defendant Julian Neil Armstrong is/are not in the Military Service of the United States and is/are not entitled to the protection of the Civil Relief Act of 1940 and Amendments thereto. The source of information on which he bases his belief is as follows: Research made by the Anastopoulo Law Firm, LLC and Bobby Foster, Plaintiff herein.

Signature of Affiant:

Matthew Nall, ESQ.

SWORN BEFORE ME THIS 2nd day of March 2016.

Margaret A Leahy

NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA
My commission expires: 12-4-2017

EXHIBIT C
(Proof of Service)

ANASTOPOULO
LAW FIRM

Akim A. Anastopoulo (SC)
Kate L. Bostrom (NC)
Samuel R. Flynn (SC)
Marianthe L. Kolokithas (SC)
Eric M. Poulin (GA)(NC)(SC)(CA)
Casey Van Valkenburgh (SC)(IL)
P. Heath Ward (SC)
Katie M. Wilensky (SC)
Roy T. Willey, IV (SC)
Evan P. Williams (SC)

Toll Free: 1 (800) 313-2546
Facsimile: (843) 494-5536

Reply to Columbus Street Office
www.AkimLawFirm.com

FILED
2016 MAR -8 PM 3:17
MELANIE HUGGINS-WARD
CLERK OF COURT

Thursday, August 13, 2015

Sent Via Certified Mail, Restricted Delivery
7015 0640 0005 7946 3544

Julian Neil Armstrong
186 Williamsburg Road
Little River, SC 29566

RE: *Bobby Foster v. Julian Neil Armstrong*
Case No.: 2015-CP-26-5633

Dear Mr. Armstrong:

Enclosed for service upon you, and pursuant to Rule 5 of the S.C.R.C.P., please find a copy of the Summons & Complaint that has been filed in the above referenced action.

Upon receipt, please forward this letter and these important legal papers to your insurance company **immediately**. These documents are time sensitive.

Sincerely,

Peggy Teasley
Litigation Manager

Enclosure

Cc: Bobby Foster

Mailing: 62 Columbus Street, Charleston, South Carolina 29403
North Charleston: 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418
Pee Dee: 150 W. Evans Street, Florence, South Carolina 29501
Columbia: 1201 Main Street, Suite 1901, Columbia, South Carolina 29201

Appointment Only: Myrtle Beach * Wilmington, North Carolina

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Product & Tracking Information

Postal Product:
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Features:
Certified Mail Restricted Delivery Return Receipt

See tracking for related item: 9590952106150123692623

DATE & TIME	STATUS OF ITEM	LOCATION
September 4, 2015 , 12:52 am	**Departed USPS Facility**	**CHARLESTON, SC 29423**

Your item departed our USPS facility in CHARLESTON SC 29423 on September 4, 2015 at 12:52 am.
The item is currently in transit to the destination.

September 3, 2015 , 1:37 pm	Arrived at USPS Facility	CHARLESTON, SC 29423
September 2, 2015 , 3:42 pm	Departed USPS Facility	COLUMBIA, SC 29201
August 31, 2015 , 9:05 am	Unclaimed/Max Hold Time Expired	LITTLE RIVER, SC 29566
August 15, 2015 , 1:13 pm	Notice Left	LITTLE RIVER, SC 29566
August 14, 2015 , 8:55 am	Arrived at USPS Facility	COLUMBIA, SC 29201
August 14, 2015 , 6:26 am	Departed USPS Facility	CHARLESTON, SC 29423
August 13, 2015 , 10:45 pm	Arrived at USPS Facility	CHARLESTON, SC 29423
August 13, 2015 , 4:30 pm	Acceptance	CHARLESTON, SC 29403

Available Actions

FILED
2016 MAR -8 PM 3:17
MELANIE HUGGINS-WARE
CLERK OF COURT

Track Another Package

Tracking (or receipt) number

Track It

Manage Incoming Packages

Track all your packages from a dashboard.
No tracking numbers necessary.

Sign up for My USPS ›



STATE OF SOUTH CAROLINA,)
)
COUNTY OF HORRY)

CASE NUMBER:# 2015CP265633

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD

who being duly sworn states that he/she is a Deputy Sheriff for Horry County, South Carolina and that the SUMMONS AND COMPLAINT, COVER SHEET

on behalf of BOBBY FOSTER
VS
JULIAN NEIL ARMSTRONG

was delivered to the

Sheriff of Horry County on the 24th day of SEPTEMBER 2015, for service on the Defendant at 186 WILLIAMSBURG ROAD
LITTLE RIVER,SC

South Carolina; and that Deponent made a diligent search, but was unable to locate JULIAN NEIL ARMSTRONG

Sworn to before me this 26th
day of OCTOBER , 2015.

Phillip R. Thompson
Sheriff of Horry County

NOTARY PUBLIC FOR SOUTH CAROLINA

DAVID FLOYD
Deputy Sheriff

MY COMMISSION EXPIRES: 9-15-2016

UNABLE TO LOCATE. NEIGHBOR ADVISED THAT SUBJECT HAS MOVED.

FILED
HORRY COUNTY
2016 MAR -8 PM 3:17
MELANIE HUGGINS-WARD
CLERK OF COURT

[redacted]

AFFIDAVIT OF PUBLICATION

FILED

State of South Carolina

County of Horry

Pauline L. Lowman

Personally appears before me,

and after being duly sworn,

That she is the Publisher of

the North Myrtle Beach Times

a newspaper published at

North Myrtle Beach in

the County and State aforesaid;

that the Legal Notice

was printed and published in said newspaper

for and during the weekly publication,

and appeared in the issues of the

North Myrtle Beach Times December 24th, 31st

and January 7th A.D. 2016

Pauline L. Lowman

Sworn to and subscribed before me

this 7th day of January

A.D. 2016

Henry C Hecker, Sr

Notary Public for South Carolina

Commission Expires May 26, 2020.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2015-CP-26-5633
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT

SUMMONS

TO THE DEFENDANT NAMED ABOVE:
YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.
s/Sam Flynn, Esquire
82 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

NOTICE

TO THE DEFENDANT NAMED ABOVE:
TAKE NOTICE, that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the
s/Sam Flynn, Esquire
82 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina

N 12/24, 31; 1/7-STC

FILED
2016 MAR -8 PM 3:17
MELANIE HUGGINS-WARE
CLERK OF COURT
HORRY COUN

[redacted]

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

ORDER FOR ENTRY OF DEFAULT AND REFERRAL FOR HEARING ON DAMAGES

FILED
HORRY COUNTY
2016 MAR -8 PM 3:17
MELANIE HUGGINS-WARD
CLERK OF COURT

The Notice of Summons and Complaint in this matter was published in The North Myrtle Beach Times published the Notice on December 24, 31, and January 7. Defendant Julien Neil Armstrong failed to submit a responsive pleading or defend the suit and on March 2, 2016, Plaintiff filed a Motion for Entry of Default and Request for a Hearing on Damages.

THE COURT HEREBY FINDS Defendant Julien Neil Armstrong was properly served with notice via publication and failed to file and/or serve a responsive pleading within 30 days after the last day of publication and Plaintiff properly moved for entry of default on March 2, 2016.

IT ORDERED that Defendant Julien Neil Armstrong, is in Default and this Entry of Default is considered effective as of March 2, 2016, the date the Court was first notified of Defendant Julien Neil Armstrong's default through Plaintiff's Motion For Entry of Default.

IT SO FURTHER ORDERED that this matter is to be set on the Court's docket for a hearing on damages pursuant to Plaintiff's request.

Dated: 3/8/16

Melanie Huggins-Ward
Clerk of Court
Horry County Court of Common Pleas

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 **CP**-26-05633

Bobby Foster — PLAINTIFF(S)

Julian Neil Armstrong — DEFENDANT(S)

Submitted by: Clerk of Court

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Defendant Motion to Set Aside Default - Granted
Atty Gangi to submit a formal order

FILED
16 OCT 19 PM 2:22
CLERK OF COURT
HORRY COUNTY, SC

ORDER INFORMATION

This order ☐ ends ☑ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	$ N/A
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Maureen H Culbertson — 2148 — 10-17-16

SCRCP Form 4C (03/2013)

Circuit Court Judge | Judge Code | Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Samuel Robert Flynn
Eric Marc Poulin
Matthew Nall
ATTORNEY(S) FOR THE PLAINTIFF(S)

Linda Weeks Gangi
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Natalie Dahl

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
	)	
Bobby Foster,	)	CASE NO.
☐ Plaintiff	)	2015--CP-26-5633
	)	
v.	)	MOTION AND ORDER INFORMATION
	)	FORM AND COVER SHEET
Julian Neil Armstrong,	)	
☒ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
Matthew Nall, Bar No.	Linda Weeks Gangi, Bar No. 002365
Address:	Address:
62 Columbus St, Charleston, SC 29403	POB 1740, Conway, SC 29528-1740
phone: 843-614-8888 fax: 843-853-229	phone: 843-248-5741 fax: 843-248-5112
e-mail: matt@akimlawfirm.com other:	e-mail: lgangi@thompsonlaw.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Order Setting Aside Order for Publication, Default & Referral for Hearing on Damages
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — October 26, 2015 Date submitted

2015 OCT 26 PM 3:05
HORRY COUNTY
CLERK OF COURT

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	_____ JUDGE
☐ Other:	CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:
Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

copies mailed

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**ORDER SETTING ASIDE ORDER FOR PUBLICATION AND SETTING ASIDE ORDER FOR ENTRY OF DEFAULT AND REFERRAL FOR HEARING ON DAMAGES**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

MELANIE [illegible] COUNTY
CLERK OF COURT
2016 OCT 26 PM 3:

PLAINTIFF'S ATTORNEY:	MATTHEW NALL, ESQ.
DEFENDANT'S ATTORNEY:	LINDA WEEKS GANGI, ESQ.
HEARING DATE:	OCTOBER 17, 2016
PRESIDING JUDGE:	BENJAMIN H. CULBERTSON

The Defendant filed a Motion to Set Aside Order for Entry of Default and Order for Publication on September 21, 2016. Thereafter, that Motion came to be heard before the undersigned on October 17, 2016. The Plaintiff was represented by Matthew Nall, Esq. of Anastapoulo Law Firm, LLC and the Defendant was represented by Linda Weeks Gangi, Esq. of Thompson & Henry, P.A. at the time of the hearing. This Court heard such arguments of counsel and reviewed all documents filed with the Court in this action.

One basis for the Defendant's Motion is that the Plaintiff's Summons is insufficient. Rule 4(b) of the *South Carolina Rules of Civil Procedure* specifically requires the following:

> "The Summons shall . . . contain . . . the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint."

The Summons filed in this action does not notify the Defendant that if he fails to appear and defend

MHC

a judgment by default will be rendered against him. The failure of the Summons to comply with the provisions of Rule 4(b) of the *South Carolina Rules of Civil Procedure* results in the court having no personal jurisdiction over the defendant; thus, the Orders issued in this case are void. Ex parte *South Carolina Dept. of Revenue*, 350 S.C. 404, 566 S.E.2d 196 (S.C. App. 2001) and *State Board of Medical Examiners vs. Finwick Hall, Inc.*, 387 S.E.2d 458 (1990). Furthermore, the Summons published in the newspaper does not comply with S.C. Code Ann. §15-9-740 which requires that the information which is published must state the time and place of filing the Summons and Complaint. The publication of the Summons in this case does not state the date of the filing of the Summons in the Court of Common Pleas for Horry County, South Carolina. Failure to comply with S.C. Code Ann. §15-9-740 results in this Court having no personal jurisdiction over the Defendant.

The Order for Publication signed by the Clerk of Court and dated November 24, 2015 required that the Defendant be served "via publication in the daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Summons was published in the North Myrtle Beach Times. The Defendant did not live in North Myrtle Beach at the time of the accident or at any time subsequent thereto. The North Myrtle Beach Times is not a newspaper of general circulation in Horry County. Publication of the Summons in the North Myrtle Beach Times is not proper service and does not meet the requirements of S.C. Code Ann. §15-9-740.

The Defendant never received notice of this lawsuit until August of 2016. The Defendant moved from 186 Williamsburg Road, Little River, South Carolina to 4153 Horseshoe Road, Little River, South Carolina in August of 2015. The Affidavit signed by the Sheriff's deputy who attempted service of the Summons and Complaint on the Defendant at 186 Williamsburg Road, Little River, South Carolina indicated that the Defendant had moved. The Defendant's cellphone

MHC

number is reflected on the Accident Report. That cellphone number is still the Defendant's cellphone number so his location could have easily been determined by calling the Defendant's cellphone number. S.C. Code Ann. §15-9-740 requires that reasonable diligence be used to ascertain the residence of the Defendant. If the Plaintiff had used reasonable diligence as required by S.C. Code Ann. §15-9-740, the Defendant's whereabouts could easily have been ascertained and proper service effected.

Based on the failure of the original Summons filed with the Court to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure,* the failure of the publication to include the date of filing of the Summons and Complaint as required by S.C. Code Ann. §15-9-740, the failure to publish the Summons in a newspaper of general circulation in Horry County, and the failure of the Plaintiff to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740, this Court finds that this Court has no personal jurisdiction over the Defendant and that service of the Summons and Complaint was not properly perfected on the Defendant. The Order for Publication and the Order for Entry of Default and Referral for Hearing on Damages are hereby set aside and declared null and void and of no force and effect. The Plaintiff shall amend the Summons to comply with Rule 4(b). The Defendant through his attorney, Linda Weeks Gangi, Esq., has agreed to accept service of the Summons and Complaint in the above-captioned action and will file an Answer within thirty (30) days from the date of receipt of this Order.

AND IT IS SO ORDERED this the 21st day of October, 2016.

In Chambers

The Honorable Benjamin H. Culbertson
Presiding Judge of the Fifteenth Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2605633

Bobby Foster **Matthew L. Nall**		**Julian Neil Armstrong**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by: Clerk of Court		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);

☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award: ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Plaintiff's Motion to Reconsider Ruling to Set Aside Publication is Denied. Formal Order Forthcoming.

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

CPFORM4C'm
SCCA SCRCP Form 4C (Revised 12/2016

Benjamin H Culbertson | 2148 | 2/27/2017

Circuit Court Judge - Hon. Benjamin H. Culbertson | Judge Code | Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Samuel R. Flynn 2375 Sir Barton Way Apt. 2320 Lexington, KY 40509
Eric Marc Poulin 62 Columbus Street Charleston, SC 29403
Matthew L. Nall 62 Columbus St. Charleston, SC 29403

Linda Weeks Gangi Thompson & Henry, P.A. PO Box 1740 Conway, SC 29528

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter – Natalie Dahl

Renee N. Elvis - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Copy of Order/
filed 3/2/17 mailed to all
parties not in default on 3/2/17
Initials

CPFORM40m
SCCA SCRCP Form 4C (Revised 12/2016)

ELECTRONICALLY FILED - 2017 Apr 24 12:41 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2605633

Bobby Foster **Matthew L. Nall**		**Julian Neil Armstrong**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by:		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Summary Judgment was granted. Formal Order to follow by attorney Linda Gangi.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
N/A	**N/A**	**N/A**

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

	2152	4/19/2017
Circuit Court Judge Larry B. Hyman	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Samuel R. Flynn 2375 Sir Barton Way Apt. 2320 Lexington, KY 40509
Eric Marc Poulin 62 Columbus Street Charleston, SC 29403
Matthew L. Nall 62 Columbus St. Charleston, SC 29403

Linda Weeks Gangi Thompson & Henry, P.A. PO Box 1740 Conway, SC 29528

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Renee N. Elvis - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ELECTRONICALLY FILED - 2017 Apr 24 12:41 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ELECTRONICALLY FILED - 2017 Apr 24 12:41 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Horry Common Pleas

Case Caption: Bobby Foster VS Julian Neil Armstrong

Case Number: 2015CP2605633

Type: Order/Form 4

So Ordered

s/ Larry B. Hyman 2152

ELECTRONICALLY FILED - 2018 Apr 09 4:16 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO.: 2015-CP-26-05633

Bobby Foster,

Plaintiff,

vs.

Julian Neil Armstrong,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER GRANTING SUMMARY JUDGMENT AND DISMISSING THE ACTION WITH PREJUDICE

PLAINTIFF'S ATTORNEY:	BENJAMIN W. LEE, ESQUIRE
DEFENDANT'S ATTORNEY:	LINDA WEEKS GANGI, ESQUIRE
HEARING DATE:	MARCH 26, 2018
PRESIDING JUDGE:	LARRY B. HYMAN, JR.

The Plaintiff represented by Benjamin W. Lee and the Defendant represented by Linda Weeks Gangi came before this Court on the Plaintiff's Motion to Reconsider this Court's Order Granting the Defendant's Motion for Summary Judgment. The Defendant asserts that this action is precluded by the Statute of Limitations. This Court heard the arguments of counsel as it deemed appropriate.

The automobile accident which is the subject matter of this action, occurred on April 8, 2013 in Horry County (See Complaint paragraphs 3, 5 and 6). Thereafter, the Plaintiff attempted to serve the Defendant by personal service through the Sheriff's Department but was unable to do so as more clearly reflected on the Affidavit of Service filed with the Court on November 23, 2015. Thereafter, Plaintiff's counsel obtained an Order for Publication which was filed on November 23, 2015. The Order states in pertinent part "the court finds that it is appropriate and necessary to serve the defendant via publication in the daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Order of Publication goes on to state "service upon the defendant shall be effectuated by publishing the Summons, and a Notice of

ELECTRONICALLY FILED - 2018 Apr 09 4:16 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Filing the Complaint in the above-referenced case in a local newspaper, once weekly for three consecutive weeks, and by forwarding a copy of the pleading to the defendant at the defendant's last known address." The Plaintiff then filed an Affidavit of Default and obtained an Order for Entry of Default and Referral for Hearing on Damages which was filed on March 8, 2016. Defense counsel filed a Notice of Appearance after having received notice that a damages hearing was scheduled. The Notice of Appearance filed on July 19, 2016 simply gives the Court and Counsel notice that she is representing the defendant and asks that all notices concerning this matter be sent to her. Thereafter, on September 16, 2016 the defendant filed a Motion to Set Aside the Order for Entry of Default and Order for Publication. After hearing the matter, Judge Culbertson issued an Order setting aside the Order for Publication and setting aside the Order for Entry of Default and Referral for Hearing on Damages and the Order was filed with the Court on October 26, 2016. Judge Culbertson found that 1) the Summons failed to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*, 2) the Publication failed to include the date of the filing of the Summons and Complaint as required by the Order of Publication and S.C. Code Ann. §15-9-740, 3) the Plaintiff failed to properly publish the Summons in accordance with the Order for Publication which required that it be published in a daily newspaper of the defendant's last known address, and 4) the Plaintiff failed to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740. See Court Order dated October 21, 2016 and filed October 26, 2016. Judge Culbertson further found that this Court had no personal jurisdiction over the Defendant. The Plaintiff filed a Motion to Reconsider which specifically states "Plaintiff respectfully requests this Court reconsider its October 21, 2016 Order on Defendant's Motion so that litigation is not precluded by the Statute of Limitations." The Motion for Reconsideration was denied.

ELECTRONICALLY FILED - 2018 Apr 09 4:16 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

The Order setting aside the Order for Publication and setting aside the Order for Entry of Default specifically required that the Plaintiff amend the Summons to comply with Rule 4(b). The Summons has never been amended. After the October 21, 2016 Order was issued by the Court, an Answer was filed on behalf of the Defendant raising the issue of the Statute of Limitations.

As stated previously, Judge Culbertson specifically found that this Court had no jurisdiction over the Defendant as of October 21, 2016, the date he issued the Order declaring the Order for Publication and the Order for Entry of Default null and void and of no force and effect. The Statute of Limitations ran on April 8, 2016, more than six months before Judge Culbertson's Order finding that the Court still had no personal jurisdiction over the Defendant as of October 21, 2016. Thus, there are no issues of facts in controversy and the Defendant is entitled to Summary Judgment on the basis that the Statute of Limitations expired prior to proper service of the Summons and Complaint on the Defendant. The Court hereby denies the Plaintiff's Motion for Reconsideration of its Order Granting Summary Judgment. This case is hereby dismissed with prejudice.

AND IT IS SO ORDERED this the _____ day of _____, 2018.

In Chambers

_____

The Honorable Larry B. Hyman, Jr.
Presiding Judge of the Fifteenth Judicial Circuit

ELECTRONICALLY FILED - 2018 Apr 09 4:16 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633



Horry Common Pleas

Case Caption: Bobby Foster VS Julian Neil Armstrong

Case Number: 2015CP2605633

Type: Order/Other

So Ordered

s/ Larry B. Hyman 2152

Electronically signed on 2018-04-09 11:58:40 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2605633

Bobby Foster		**Julian Neil Armstrong**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by: Clerk Of Court		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Plaintiff's Motion/Reconsideration Judge Hyman is bound by the Court's unappealed finding, the Motion is DENIED.

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

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E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	2152	3/26/2018
Circuit Court Judge	**Judge Code**	**Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

ELECTRONICALLY FILED - 2018 Mar 27 2:20 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Samuel R. Flynn 2375 Sir Barton Way Apt. 2320 Lexington, KY 40509
Eric Marc Poulin 32 Ann Street Charleston, SC 29403
Matthew L. Nall 32 Ann Street Charleston, SC 29403

Linda Weeks Gangi Thompson & Henry, P.A. PO Box 1740 Conway, SC 29528

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter - Teresa Bautz

Renee N. Elvis - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ELECTRONICALLY FILED - 2018 Mar 27 2:20 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ELECTRONICALLY FILED - 2018 Mar 27 2:20 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Horry Common Pleas

Case Caption: Bobby Foster VS Julian Neil Armstrong

Case Number: 2015CP2605633

Type: Order/Form 4

So Ordered

s/ Larry B. Hyman 2152

ELECTRONICALLY FILED - 2018 Apr 09 4:16 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO.: 2015-CP-26-05633

Bobby Foster,

Plaintiff,

vs.

Julian Neil Armstrong,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER GRANTING SUMMARY JUDGMENT AND DISMISSING THE ACTION WITH PREJUDICE

PLAINTIFF'S ATTORNEY:	BENJAMIN W. LEE, ESQUIRE
DEFENDANT'S ATTORNEY:	LINDA WEEKS GANGI, ESQUIRE
HEARING DATE:	MARCH 26, 2018
PRESIDING JUDGE:	LARRY B. HYMAN, JR.

The Plaintiff represented by Benjamin W. Lee and the Defendant represented by Linda Weeks Gangi came before this Court on the Plaintiff's Motion to Reconsider this Court's Order Granting the Defendant's Motion for Summary Judgment. The Defendant asserts that this action is precluded by the Statute of Limitations. This Court heard the arguments of counsel as it deemed appropriate.

The automobile accident which is the subject matter of this action, occurred on April 8, 2013 in Horry County (See Complaint paragraphs 3, 5 and 6). Thereafter, the Plaintiff attempted to serve the Defendant by personal service through the Sheriff's Department but was unable to do so as more clearly reflected on the Affidavit of Service filed with the Court on November 23, 2015. Thereafter, Plaintiff's counsel obtained an Order for Publication which was filed on November 23, 2015. The Order states in pertinent part "the court finds that it is appropriate and necessary to serve the defendant via publication in the daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Order of Publication goes on to state "service upon the defendant shall be effectuated by publishing the Summons, and a Notice of

ELECTRONICALLY FILED - 2018 Apr 09 4:16 PM - HORRY - COMMON PLEAS - CASE#2015CP260633

Filing the Complaint in the above-referenced case in a local newspaper, once weekly for three consecutive weeks, and by forwarding a copy of the pleading to the defendant at the defendant's last known address." The Plaintiff then filed an Affidavit of Default and obtained an Order for Entry of Default and Referral for Hearing on Damages which was filed on March 8, 2016. Defense counsel filed a Notice of Appearance after having received notice that a damages hearing was scheduled. The Notice of Appearance filed on July 19, 2016 simply gives the Court and Counsel notice that she is representing the defendant and asks that all notices concerning this matter be sent to her. Thereafter, on September 16, 2016 the defendant filed a Motion to Set Aside the Order for Entry of Default and Order for Publication. After hearing the matter, Judge Culbertson issued an Order setting aside the Order for Publication and setting aside the Order for Entry of Default and Referral for Hearing on Damages and the Order was filed with the Court on October 26, 2016. Judge Culbertson found that 1) the Summons failed to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*, 2) the Publication failed to include the date of the filing of the Summons and Complaint as required by the Order of Publication and S.C. Code Ann. §15-9-740, 3) the Plaintiff failed to properly publish the Summons in accordance with the Order for Publication which required that it be published in a daily newspaper of the defendant's last known address, and 4) the Plaintiff failed to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740. See Court Order dated October 21, 2016 and filed October 26, 2016. Judge Culbertson further found that this Court had no personal jurisdiction over the Defendant. The Plaintiff filed a Motion to Reconsider which specifically states "Plaintiff respectfully requests this Court reconsider its October 21, 2016 Order on Defendant's Motion so that litigation is not precluded by the Statute of Limitations." The Motion for Reconsideration was denied.

ELECTRONICALLY FILED - 2018 Apr 09 4:16 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

The Order setting aside the Order for Publication and setting aside the Order for Entry of Default specifically required that the Plaintiff amend the Summons to comply with Rule 4(b). The Summons has never been amended. After the October 21, 2016 Order was issued by the Court, an Answer was filed on behalf of the Defendant raising the issue of the Statute of Limitations.

As stated previously, Judge Culbertson specifically found that this Court had no jurisdiction over the Defendant as of October 21, 2016, the date he issued the Order declaring the Order for Publication and the Order for Entry of Default null and void and of no force and effect. The Statute of Limitations ran on April 8, 2016, more than six months before Judge Culbertson's Order finding that the Court still had no personal jurisdiction over the Defendant as of October 21, 2016. Thus, there are no issues of facts in controversy and the Defendant is entitled to Summary Judgment on the basis that the Statute of Limitations expired prior to proper service of the Summons and Complaint on the Defendant. The Court hereby denies the Plaintiff's Motion for Reconsideration of its Order Granting Summary Judgment. This case is hereby dismissed with prejudice.

AND IT IS SO ORDERED this the _____ day of _____, 2018.

In Chambers

_____
The Honorable Larry B. Hyman, Jr.
Presiding Judge of the Fifteenth Judicial Circuit

ELECTRONICALLY FILED - 2018 Apr 09 4:16 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Horry Common Pleas

Case Caption: Bobby Foster VS Julian Neil Armstrong

Case Number: 2015CP2605633

Type: Order/Other

So Ordered

s/ Larry B. Hyman 2152

ELECTRONICALLY FILED - 2018 Jul 12 4:37 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO.: 2015-CP-26-5633

Bobby Foster,

Plaintiff,

vs.

Julian Neil Armstrong,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT AND DISMISSING ACTION WITH PREJUDICE

PLAINTIFF'S ATTORNEY:	STEFAN FEIDLER, ESQUIRE
DEFENDANT'S ATTORNEY:	LINDA WEEKS GANGI, ESQUIRE
HEARING DATE:	APRIL 17, 2017
PRESIDING JUDGE:	LARRY B. HYMAN, JR.

The Plaintiff represented by Stefan Feidler and the Defendant represented by Linda Weeks Gangi came before this Court on the Defendant's Motion for Summary Judgment. The Defendant asserts that this action is precluded by the Statute of Limitations. This Court heard the arguments of counsel as it deemed appropriate.

The automobile accident which is the subject matter of this action, occurred on April 8, 2013 in Horry County (See Complaint paragraphs 3, 5 and 6). Thereafter, the Plaintiff attempted to serve the Defendant by personal service through the Sheriff's Department but was unable to do so as more clearly reflected on the Affidavit of Service filed with the Court on November 23, 2015. Thereafter, Plaintiff's counsel obtained an Order for Publication which was filed on November 23, 2015. The Order states in pertinent part "the court finds that it is appropriate and necessary to serve the defendant via publication in the daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Order of Publication goes on to state "service upon the defendant shall be effectuated by publishing the Summons, and a Notice of Filing the Complaint in the above-referenced case in a local newspaper, once weekly for three

ELECTRONICALLY FILED - 2018 Jul 12 4:37 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

consecutive weeks, and by forwarding a copy of the pleading to the defendant at the defendant's last known address." The Plaintiff then filed an Affidavit of Default and obtained an Order for Entry of Default and Referral for Hearing on Damages which was filed on March 8, 2016. Defense counsel filed a Notice of Appearance after having received notice that a damages hearing was scheduled. The Notice of Appearance filed on July 19, 2016 simply gives the Court and Counsel notice that she is representing the defendant and asks that all notices concerning this matter be sent to her. Thereafter, on September 16, 2016 the defendant filed a Motion to Set Aside the Order for Entry of Default and Order for Publication. After hearing the matter, Judge Culbertson issued an Order setting aside the Order for Publication and setting aside the Order for Entry of Default and Referral for Hearing on Damages and the Order was filed with the Court on October 26, 2016. Judge Culbertson found that 1) the Summons failed to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*, 2) the Publication failed to include the date of the filing of the Summons and Complaint as required by the Order of Publication and S.C. Code Ann. §15-9-740, 3) the Plaintiff failed to properly publish the Summons in accordance with the Order for Publication which required that it be published in a daily newspaper of the defendant's last known address, and 4) the Plaintiff failed to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740. See Court Order dated October 21, 2016 and filed October 26, 2016. Judge Culbertson further found that this Court had no personal jurisdiction over the Defendant. The Plaintiff filed a Motion to Reconsider which specifically states "Plaintiff respectfully requests this Court reconsider its October 21, 2016 Order on Defendant's Motion so that litigation is not precluded by the Statute of Limitations." The Motion for Reconsideration was denied.

The Order setting aside the Order for Publication and setting aside the Order for Entry of Default specifically required that the Plaintiff amend the Summons to comply with Rule 4(b). The

Summons has never been amended. After the October 21, 2016 Order was issued by the Court, an Answer was filed on behalf of the Defendant raising the issue of the Statute of Limitations.

As stated previously, Judge Culbertson specifically found that this Court had no jurisdiction over the Defendant as of October 21, 2016, the date he issued the Order declaring the Order for Publication and the Order for Entry of Default null and void and of no force and effect. The Statute of Limitations ran on April 8, 2016, more than six months before Judge Culbertson's Order finding that the Court still had no personal jurisdiction over the Defendant as of October 21, 2016. Thus, there are no issues of facts in controversy and the Defendant is entitled to Summary Judgment on the basis that the Statute of Limitations expired prior to proper service of the Summons and Complaint on the Defendant. This case is hereby dismissed with prejudice.

AND IT IS SO ORDERED this the 26 day of MARCH, 2018.

In Chambers

The Honorable Larry B. Hyman, Jr.
Presiding Judge of the Fifteenth Judicial Circuit

ELECTRONICALLY FILED - 2018 Jul 12 4:37 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)

BOBBY FOSTER)
Plaintiff(s)) CIVIL ACTION COVERSHEET

vs.) 2015 CP 26 2633

JULIAN NEIL ARMSTRONG)
Defendant(s))

(Please Print)
Submitted By: Eric Poulin/Roy Willey/Sam Flynn
Address: 62 Columbus Street, Charleston, SC 29403

SC Bar #: 100209/101010/101729
Telephone #: (843)614-8888
Fax #: (843)853-2291
Other:
E-mail: eric@akimlawfirm.com
roy@akimlawfirm.com
sam@akimlawfirm.com

2015 JUL 27 PM 2:11
HORRY COUNTY
CLERK OF COURT

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-CP-_____-_____

- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☒ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** 7/22/2015

1

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS) FOR THE FIFTEENTH JUDICIAL CIRCUIT CASE NO: 2015-CP-26- 5633
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	**SUMMONS** **(Jury Trial Demanded)**

HORRY COUNTY
2015 JUL 27 PM 2:11
MELANIE ... CLERK OF COURT

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or his attorney, Sam Flynn, at his office, 62 Columbus Street Charleston, South Carolina, 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.

Dated at Charleston, South Carolina on the 22nd day of July, 2015.

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
S.C. Bar No.: 101729
Roy T. Willey, IV, Esquire
S.C. Bar No.: 101010
Eric M. Poulin, Esquire
S.C. Bar No.: 100209
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26- 2633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

COMPLAINT
(Jury Trial Demanded)

HORRY COUNTY
2015 JUL 27 PM 2:11
MELANIE [illegible]
CLERK OF COURT

The Plaintiff, complaining of the Defendant, alleges and says as follows:

1. That the Plaintiff, Bobby Foster, (herein referred to as "Plaintiff") is a citizen and resident of the city of Ash, State of North Carolina.
2. That upon information and belief, Defendant Julian Neil Armstrong, (herein referred to as "Defendant") is a citizen and resident of Horry County, State of South Carolina.
3. That the motor vehicle collision that is the subject of this action occurred in Horry County, State of South Carolina.
4. That this Court has jurisdiction over the parties and the subject matter of this action.
5. That on or about April 8, 2013, Plaintiff was lawfully traveling east on SC 90 in a 2000 Dodge Van license plate YPM6186, VIN number 2B4GP44G0YR523493.
6. That on or about April 8, 2013, Defendant was traveling east on SC 90 in a 1995 Lexus license plate DWP624, VIN number JT8GK13T5S0090073.
7. That on or about April 8, 2013, Plaintiff came to a lawful stop for traffic.
8. That on or about April 8, 2013 Defendant was following too closely, travelling too fast for conditions, failed to stop, and violently struck Plaintiff's vehicle from behind.
9. That at all times material hereto, Defendant had a duty to operate his vehicle in a safe and prudent manner and to avoid injuring other motorists.

10. That the collision and the resulting injuries and damages to Plaintiff were caused directly and proximately by one or more of the following negligent, grossly negligent, negligent *per* se, careless, reckless, willful, wanton and unlawful acts, and/or omissions of the Defendant in any one or more of the following respects:

a. In failing to keep a proper lookout while operating the vehicle;

b. In failing to maintain control of the vehicle;

c. In failing to stay in his lane of traffic;

d. In failing to slow down to a controllable speed to stay in his lane of traffic;

e. In failing to keep a safe distance from Plaintiff;

f. In failing to use due care;

g. In failing to properly observe the road and traffic conditions;

h. In failing to obey traffic laws and/or signs;

i. In failing to use his horn, if he had any;

j. In traveling too fast for conditions;

k. In failing to properly maintain the vehicle;

l. In failing to yield the right of way;

m. In failing to apply his brakes or use his steering mechanism to avoid the collision;

n. In negligently and carelessly operating the vehicle in a high and excessive rate of speed under the circumstances then and there existing;

o. In operating the vehicle at a high rate of speed and far in excess of the reasonable and prudent speed under the circumstances and conditions then and there existing;

p. In operating the vehicle without using due care and without regard for safety and rights of Plaintiff;

q. In operating the vehicle in a negligent, grossly negligent, careless, reckless,

willful, wanton and unlawful manner so as to create a dangerous situation;

r. In failing to exercise the degree of care and caution that a reasonable and prudent person would have exercised under the circumstances then and there prevailing;

s. In negligently and carelessly operating the vehicle in such a manner to cause the vehicle to strike Plaintiff and cause personal injuries;

t. In driving while distracted;

u. In failing to immediately report an accident involving personal injury;

v. In any other acts that represent a breach of the statutory or common laws of the State of South Carolina; and

w. In any other such manner that Plaintiff may become aware of through discovery and/or at trial.

11. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff was injured, has endured pain and suffering, has suffered mentally and emotionally, and has incurred, and will incur, various medical expenses, and has otherwise been damaged and injured.

12. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff was jerked, thrown and slammed within the interior of his vehicle by the force of the Defendant's vehicle, causing him to sustain serious and painful personal injuries including, but not limited to, pain and suffering, and injuries to his back and shoulder.

13. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff has been damaged and injured in the following respects:

a) Plaintiff has been required to expend a significant amount of money for his medical care, treatment and attendant services;

b) Upon information and belief, the nature of Plaintiff's injuries will require him to expend a significant amount of money for his medical care, treatment and attendant services in the future;

c) Plaintiff has been unable to work and has been deprived of his income;

d) Upon information and belief, the nature of Plaintiff's injuries will deprive him of employment opportunity and income in the future;

e) The pain of his injuries has resulted in his loss of enjoyment of life and change in his personality, all to permanent detriment to his health and physical well-being; and

f) Upon information and belief, the Plaintiff was required to expend significant amounts of money to replace and repair property damage caused in the accident.

14. That Defendant's acts and omissions, as is set forth more fully above, show willful misconduct, malice, wantonness and an entire want of care, raising a presumption of the Defendant's conscious indifference to the consequences of such acts and omissions.

15. That because of the Defendant's acts and omissions and the proximate harm resulting to Plaintiff, Plaintiff should be awarded punitive damages in an amount to be determined by the trier of fact, in order to punish and penalize the Defendant and to deter the Defendant and others from similar behavior.

16. That upon information and belief, Plaintiff is entitled to judgment against the Defendant for actual, compensatory and exemplary or punitive damages for his personal injuries and property damages set forth herein in an amount that is fair, just and reasonable under the circumstances, plus whatever costs, interest and attorney fees that she may be entitled, to be determined by a jury.

WHEREFORE, the Plaintiff prays for judgment against the Defendant for an amount to be ascertained by the jury at the trial of this action, for all damages, punitive and actual, for the cost and disbursements of this action, and both prejudgment and post judgment interest, and for such other and further relief, in law or in equity, as this court may deem just and proper.

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
S.C. Bar No.: 101729
Roy T. Willey, IV, Esquire
S.C. Bar No.: 101010
Eric M. Poulin, Esquire
S.C. Bar No.: 100209
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

Dated at Charleston, SC
This 22nd day of July, 2015.

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE HORRY JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

ORDER FOR PUBLICATION

FILED
15 NOV 23 PM 1:13
CLERK OF COURT

THIS MATTER comes before the Court pursuant to the Plaintiff's petition requesting an Order of Publication authorizing the service of the Defendant via publication.

Having reviewed the Plaintiff's Petition, and Affidavit, the Court finds that after due diligence, the Defendant cannot be found in this state, or at Defendant's last known residence. The Court finds that it is appropriate and necessary to serve the Defendant via publication in the daily newspaper of Defendant's last known residence, 186 Williamsburg Road, Little River, South Carolina.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED, that service upon the Defendant shall be effectuated by publishing the Summons, and notice of filing of the Complaint in the above referenced case in local newspaper, once weekly for three (3) consecutive weeks, and by forwarding a copy of the pleadings to the Defendant at Defendant's last known address.

IT IS SO ORDERED.

Melanie Hassell-Ward
Clerk of Court PRESIDING JUDGE COURT OF COMMON PLEAS
HORRY JUDICIAL CIRCUIT

DATED: 11/24/15

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE HORRY JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

PETITION FOR PUBLICATION

FILED
HORRY COUNTY
2015 NOV 23 PM 12: 13
JIMMY RICHARDSON-WARD
CLERK OF COURT

The Plaintiff herein would respectfully show unto this Honorable court as follows:

1. That this is an action of Common Pleas, based upon automobile accident case against the Defendant, Julian Neil Armstrong, whose last known address was 186 Williamsburg Road, Little River, South Carolina.

2. That, although due and diligent search has been made for the Defendant, the Plaintiff has been unable to locate the Defendant in the County of Horry, State of South Carolina (see attached affidavit of non-service).

3. The Plaintiff is informed and believes that it is necessary that the Defendant be served by publication, and it requests that this Court issue an Order allowing such service, and that this Court issue an Order authorizing service of the Summons, and Notice of filing the Complaint in a daily newspaper of the city of the Defendant's last known address.

WHEREFORE, the Plaintiff must request this Court enter an Order authorizing service by publication of this matter.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
SC Bar Number: 101729
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Rd.
North Charleston, SC 29418
(843) 614-8888

Charleston, South Carolina
Nov. 19, 2015

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE HORRY JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

AFFIDAVIT FOR PUBLICATION

FILED
HORRY COUNTY
2015 NOV 23 PM 1:13
JEANNE BURNS-WARD
CLERK OF COURT

Personally appeared before me, Sam Flynn, who being duly sworn, states that:

1. I am an attorney for the Plaintiff, BOBBY FOSTER, in the above referenced action. The Plaintiff and Defendant have an action of Common Pleas for an automobile accident.

2. My office has attempted to serve the Defendant, Julien Neil Armstrong, through the Horry County Sheriff's Office. An Affidavit of Non-Service was issued by the Sheriff's Office and stated that the Defendant moved and left no forwarding address.

4. The last known address for the Defendant, Julian Neil Armstrong, was 186 Williamsburg Road, Little River, South Carolina; however the Sheriff confirmed that Defendant is not at this address, and his whereabouts are unknown. (Exhibit A)

5. I believe that although the Plaintiff has tried to contact the Defendant with due diligence, the Defendant cannot be located at this time.

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
SC Bar Number: 101729
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Rd.
North Charleston, SC 29418

Sworn to and subscribed before me
this 19th day of November, 2015

Margaret C. Stanley
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 12-4-2017

STATE OF SOUTH CAROLINA,)
)
COUNTY OF HORRY)

CASE NUMBER:# 2015CP265633

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD who being duly sworn states that he/she is a Deputy Sheriff for Horry County, South Carolina and that the SUMMONS AND COMPLAINT, COVER SHEET on behalf of BOBBY FOSTER was delivered to the
VS
JULIAN NEIL ARMSTRONG
Sheriff of Horry County on the 24th day of SEPTEMBER 2015, for service on the Defendant at 186 WILLIAMSBURG ROAD
LITTLE RIVER, SC

South Carolina; and that Deponent made a diligent search, but was unable to locate JULIAN NEIL ARMSTRONG

Sworn to before me this 26th day of OCTOBER , 2015.

Phillip M. Thompson
Sheriff of Horry County

NOTARY PUBLIC FOR SOUTH CAROLINA

DAVID FLOYD
Deputy Sheriff

MY COMMISSION EXPIRES: 9-15-2016

UNABLE TO LOCATE. NEIGHBOR ADVISED THAT SUBJECT HAS MOVED.

FILED
HORRY COUNTY
15 NOV 23 PM 12:13
CLERK OF COURT

STATE OF SOUTH CAROLINA,)
)
COUNTY OF HORRY)

CASE NUMBER:# 2015CP265633

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD

who being duly sworn states that he/she is a Deputy Sheriff for Horry County, South Carolina and that the SUMMONS AND COMPLAINT, COVER SHEET

on behalf of BOBBY FOSTER
VS
JULIAN NEIL ARMSTRONG

was delivered to the Sheriff of Horry County on the 24th day of SEPTEMBER 2015, for service on the Defendant at 186 WILLIAMSBURG ROAD
LITTLE RIVER, SC

South Carolina; and that Deponent made a diligent search, but was unable to locate JULIAN NEIL ARMSTRONG

Sworn to before me this 26th
day of OCTOBER , 2015.

Phillip E. Thompson
Sheriff of Horry County

NOTARY PUBLIC FOR SOUTH CAROLINA

DAVID FLOYD
Deputy Sheriff

MY COMMISSION EXPIRES: 9-15-2016

UNABLE TO LOCATE. NEIGHBOR ADVISED THAT SUBJECT HAS MOVED.

FILED
HORRY COUNTY
15 NOV 23 PM 11:13
HELAINE BROOKS-WARD
CLERK OF COURT

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE HORRY JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

AFFIDAVIT FOR PUBLICATION

15 NOV 23 PM 1:13
CLERK OF COURT

Personally appeared before me, Sam Flynn, who being duly sworn, states that:

1. I am an attorney for the Plaintiff, BOBBY FOSTER, in the above referenced action. The Plaintiff and Defendant have an action of Common Pleas for an automobile accident.

2. My office has attempted to serve the Defendant, Julien Neil Armstrong, through the Horry County Sheriff's Office. An Affidavit of Non-Service was issued by the Sheriff's Office and stated that the Defendant moved and left no forwarding address.

4. The last known address for the Defendant, Julian Neil Armstrong, was 186 Williamsburg Road, Little River, South Carolina; however the Sheriff confirmed that Defendant is not at this address, and his whereabouts are unknown. (Exhibit A)

5. I believe that although the Plaintiff has tried to contact the Defendant with due diligence, the Defendant cannot be located at this time.

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
SC Bar Number: 101729
Anastopoulo Law Firm, LLC
2557 Ashley Phosphate Rd.
North Charleston, SC 29418

Sworn to and subscribed before me
this 19th day of November, 2015

Margaret C Stanley
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 12-4-2017

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT AND REQUEST FOR HEARING ON DAMAGES

FILED
HORRY COUNTY
2016 MAR 28 PM 3:25
MELANIE J. ROBBINS-WARD
CLERK OF COURT

COMES NOW the Plaintiff, by and through undersigned counsel, who asks the Clerk of Court to enter default against the Defendant Julien Neil Armstrong and schedule a hearing to determine damages.

INTRODUCTION

1. Plaintiff brought this action against Defendant Julian Neil Armstrong as a result of injuries suffered in an automobile accident that occurred on April 8, 2013. After an unsuccessful attempt to serve the Defendant personally through certified mail and the Horry County Sheriff, Plaintiff published Notice of the Summons and Complaint in The North Myrtle Beach Times. Defendant Julien Neil Armstrong did not file a responsive pleading or otherwise defend the suit.

2. Plaintiff is, therefore, entitled to entry of default and a hearing on damages.

ARGUMENT AND AUTHORITIES

3. Rule 55(a) directs the Clerk of the Court to enter default against a party who has not filed a responsive pleading or otherwise defended the suit. SCRCP 55(a).

4. Rule 55(b) permits the court to enter default judgment against a party against whom

default has been entered. SCRCP 55(b)(1).

5. Plaintiff meets the procedural requirements for obtaining an entry of default as demonstrated by attorney Matthew Nall's sworn affidavit, attached as Exhibit A.

6. Plaintiff does not seek affirmative relief against an infant, an incompetent person, or the State of South Carolina.

Upon information and belief, Defendant Julien Neil Armstrong is not in the Military Service of the United States and is not entitled to the protection of the Civil Relief Act of 1940 and Amendments thereto. [Exhibit B].

7. Plaintiff attempted to serve Defendant Armstrong via USPS Certified Mail Restricted Delivery, the package was returned unclaimed after the maximum holding time expired on August 31, 2015. [Exhibit C].

8. Plaintiff attempted to serve the Summons and Complaint upon Defendant Armstrong through the Horry County Sheriff's Office, and was given an Affidavit of Non-Service on September 24, 2015. [Exhibit D].

9. Plaintiff then petitioned the Court to published Notice of the Summons and Complaint in The North Myrtle Beach Times. After approval, The North Myrtle Beach Times published the Notice on December 24, 31, and January 7. [Exhibit E].

10. Under SCRCP 12(a), the time for Defendant to respond is thirty (30) days after being served with process.

11. Because Defendant Julien Neil Armstrong did not file a responsive pleading or otherwise defend, Plaintiff is entitled to Entry of Default.

12. Plaintiff's damages are unliquidated and a hearing is requested to receive evidence of Plaintiff's damages.

PRAYER

13. For these reasons, Plaintiff asks the Court to enter a Default against Defendant Julien Neil Armstrong and to schedule an evidentiary hearing to determine Plaintiff's damages.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

Matthew L. Nall, Esquire
SC Bar Number: 102329
Eric M. Poulin, Esquire
SC Bar Number: 100209
Roy T. Willey, IV, Esquire
SC Bar Number: 101010
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

Charleston, South Carolina
March 2, 2016

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 14TH JUDICIAL CIRCUIT CASE NO: 2015-CP-26-5633
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	**AFFIDAVIT OF MATTHEW NALL**

FILED
HORRY COUNTY
2016 MAR -8 PM 3:25
MELANIE HUGGINS-WARD
CLERK OF COURT

COMES NOW, the affiant, Matthew Nall, and first being duly sworn upon his oath under the pains and penalties of perjury now states the following:

1. I am the above named affiant, Matthew Nall.

2. I, Matthew Nall, am an attorney with Anastopoulo Law Firm, LLC.

3. Plaintiff attempted to serve Defendant Armstrong via USPS Certified Mail Restricted Delivery, the package was returned unclaimed after the maximum holding time expired on August 31, 2015. The package was sent to Defendant's last known address:

Julian Neil Armstrong
186 Williamsburg Road
Little River, SC 29566

4. Plaintiff attempted to serve the Summons and Complaint upon Defendant Armstrong through the Horry County Sheriff's Office, and was given an Affidavit of Non-Service on September 24, 2015.

5. Plaintiff then petitioned the Court to published Notice of the Summons and Complaint in The North Myrtle Beach Times. After approval, The North Myrtle Beach Times published the Notice on December 24, 31, and January 7.

6. Upon information and belief, Defendant Julian Neil Armstrong is neither an infant nor incompetent adult.

7. As of today's date, March 2, 2016, Defendant Julian Neil Armstrong has failed to file a responsive pleading.

SIGNATURE ON FOLLOWING PAGE

Signature of Affiant

Matthew Nall, ESQ.

SWORN BEFORE ME THIS 2nd day of March 2016.

NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA
My commission expires: 12-4-2017

EXHIBIT B
(Affidavit of Non-Military Service)

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 14TH JUDICIAL CIRCUIT CASE NO: 2015-CP-26-5633
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	**AFFIDAVIT OF NON-MILITARY SERVICE**

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

Personally appeared before me the undersigned attorney, who first being duly sworn, deposes and says:

That he is familiar with the provisions of 50 App. Section 520, Civil Relief Act of 1940, and to induce the Court to enter a default judgment against Defendant Julian Neil Armstrong, represents to the Court that from his file in this matter, and on information and belief based on the hereinafter enumerated facts, Defendant Julian Neil Armstrong is/are not in the Military Service of the United States and is/are not entitled to the protection of the Civil Relief Act of 1940 and Amendments thereto. The source of information on which he bases his belief is as follows: Research made by the Anastopoulo Law Firm, LLC and Bobby Foster, Plaintiff herein.

Signature of Affiant:

Matthew Nall, ESQ.

SWORN BEFORE ME THIS 2nd day of March 2016.

NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA
My commission expires: 12-4-2017

EXHIBIT C
(Proof of Service)

Akim A. Anastopoulo (SC)
Kate L. Bostrom (NC)
Samuel R. Flynn (SC)
Marianthe L. Kolokithas (SC)
Eric M. Poulin (GA)(NC)(SC)(CA)
Casey Van Valkenburgh (SC)(IL)
P. Heath Ward (SC)
Katie M. Wilensky (SC)
Roy T. Willey, IV (SC)
Evan P. Williams (SC)

ANASTOPOULO
LAW FIRM

Toll Free: 1 (800) 313-2546
Facsimile: (843) 494-5536

Reply to Columbus Street Office
www.AkimLawFirm.com

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

Thursday, August 13, 2015

Sent Via Certified Mail, Restricted Delivery
7015 0640 0005 7946 3544

Julian Neil Armstrong
186 Williamsburg Road
Little River, SC 29566

RE: *Bobby Foster v. Julian Neil Armstrong*
Case No.: 2015-CP-26-5633

Dear Mr. Armstrong:

Enclosed for service upon you, and pursuant to Rule 5 of the S.C.R.C.P., please find a copy of the Summons & Complaint that has been filed in the above referenced action.

Upon receipt, please forward this letter and these important legal papers to your insurance company **immediately**. These documents are time sensitive.

Sincerely,

Peggy Teasley
Litigation Manager

Enclosure

Cc: Bobby Foster



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Product & Tracking Information

Postal Product:
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Features:
Certified Mail Restricted Delivery Return Receipt

See tracking for related item: 9590952106150123692623

DATE & TIME	STATUS OF ITEM	LOCATION
September 4, 2015 , 12:52 am	**Departed USPS Facility**	**CHARLESTON, SC 29423**

Your item departed our USPS facility in CHARLESTON, SC 29423 on September 4, 2015 at 12:52 am. The item is currently in transit to the destination.

September 3, 2015 , 1:37 pm	Arrived at USPS Facility	CHARLESTON, SC 29423
September 2, 2015 , 3:42 pm	Departed USPS Facility	COLUMBIA, SC 29201
August 31, 2015 , 9:05 am	Unclaimed/Max Hold Time Expired	LITTLE RIVER, SC 29566
August 15, 2015 , 1:13 pm	Notice Left	LITTLE RIVER, SC 29566
August 14, 2015 , 8:55 am	Arrived at USPS Facility	COLUMBIA, SC 29201
August 14, 2015 , 6:26 am	Departed USPS Facility	CHARLESTON, SC 29423
August 13, 2015 , 10:45 pm	Arrived at USPS Facility	CHARLESTON, SC 29423
August 13, 2015 , 4:30 pm	Acceptance	CHARLESTON, SC 29403

Available Actions

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

Track Another Package

Tracking (or receipt) number

Track It

Manage Incoming Packages

Track all your packages from a dashboard.
No tracking numbers necessary.

Sign up for My USPS ›

STATE OF SOUTH CAROLINA,)
)
COUNTY OF HORRY)

CASE NUMBER:# 2015CP265633

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD who being duly sworn states that he/she is a Deputy Sheriff for Horry County, South Carolina and that the SUMMONS AND COMPLAINT, COVER SHEET on behalf of BOBBY FOSTER was delivered to the

VS

JULIAN NEIL ARMSTRONG

Sheriff of Horry County on the 24th day of SEPTEMBER 2015, for service on the Defendant at 186 WILLIAMSBURG ROAD
LITTLE RIVER, SC

South Carolina; and that Deponent made a diligent search, but was unable to locate JULIAN NEIL ARMSTRONG

Sworn to before me this 26th day of OCTOBER , 2015.

Joyce B. Jenkins
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 9-15-2016

Phillip E. Thompson
Sheriff of Horry County

David Floyd
DAVID FLOYD
Deputy Sheriff

UNABLE TO LOCATE. NEIGHBOR ADVISED THAT SUBJECT HAS MOVED.

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

PLAINTIFF'S EXHIBIT
D

AFFIDAVIT OF PUBLICATION

FILED
HORRY COUNTY
2016 JAN 20 AM 10:46
MELANIE HUGGINS-WARD
CLERK OF COURT

State of South Carolina

County of Horry

Pauline L. Lowman

Personally appears before me,

and after being duly sworn,

That she is the Publisher of

the North Myrtle Beach Times

a newspaper published at

North Myrtle Beach in

the County and State aforesaid;

that the Legal Notice

was printed and published in said newspaper

for and during the weekly publication,

and appeared in the issues of the

North Myrtle Beach Times December 24th, 31st

and January 7th A.D. 2016

Pauline L. Lowman

Sworn to and subscribed before me

this 7th day of January

A.D. 2016

Henry C Hester, Sr

Notary Public for South Carolina

Commission Expires May 26, 2020.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2015-CP-26-5633
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT

SUMMONS

TO THE DEFENDANT NAMED ABOVE:
YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

NOTICE

TO THE DEFENDANT NAMED ABOVE:
TAKE NOTICE, that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina

N 12/24, 31, 1/7-3TC

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

PLAINTIFF'S EXHIBIT
E

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

ORDER FOR ENTRY OF DEFAULT AND REFERRAL FOR HEARING ON DAMAGES

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

The Notice of Summons and Complaint in this matter was published in The North Myrtle Beach Times published the Notice on December 24, 31, and January 7. Defendant Julien Neil Armstrong failed to submit a responsive pleading or defend the suit and on March 2, 2016, Plaintiff filed a Motion for Entry of Default and Request for a Hearing on Damages.

THE COURT HEREBY FINDS Defendant Julien Neil Armstrong was properly served with notice via publication and failed to file and/or serve a responsive pleading within 30 days after the last day of publication and Plaintiff properly moved for entry of default on March 2, 2016.

IT ORDERED that Defendant Julien Neil Armstrong, is in Default and this Entry of Default is considered effective as of March 2, 2016, the date the Court was first notified of Defendant Julien Neil Armstrong's default through Plaintiff's Motion For Entry of Default.

IT SO FURTHER ORDERED that this matter is to be set on the Court's docket for a hearing on damages pursuant to Plaintiff's request.

Dated: 3/8/16

Melanie Huggins-Ward

Clerk of Court
Horry County Court of Common Pleas

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

CASE NO.: 2015-CP-26-5633

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

FILED
HORRY COUNTY
2016 MAR -8 PM 3:25
MELANIE HUGGINS-WARD
CLERK OF COURT

Plaintiff's Attorney: Matthew Nall, Eric Poulin, Roy Willey Bar Number: 102329, 100209, 101010 Address: 62 Columbus St., Charleston SC 29403 Phone: 843-614-8888 Fax: 843-853-2291 E-Mail: matt@akimlawfirm.com, eric@akimlawfirm.com, roy@akimlawfirm.com	Defendant's Attorney: Bar Number: Address: Phone: E-Mail:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTINONS III and III)**
☐ **PROPOSED ORDER / CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Entry of Default – Request for Damages Hearing
Estimated Time Needed: 15 Min. Court Reporter Need: ☒ YES / ☐ NO

SECTION II: Motion / Order Type

☐ Written motion attached
☒ Form Motion / Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendants — Wednesday, February 10, 2016 Date Submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT:
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposal order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

Copy

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE
CODE: _____ DATE: _____

CLERK'S SECTION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**NOTICE OF APPEARANCE**
)	(Jury Trial Requested)
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

The undersigned hereby provides the Court and counsel of notice that she is representing the Defendant in the above-captioned action. All notices concerning this matter including, but not limited to, notice of a damages hearing should be sent to the undersigned.

THOMPSON & HENRY, P.A.

Conway, South Carolina

July 18, 2016.

Linda Weeks Gangi - SC Bar #: 002365
Attorney for the Defendant
Post Office Box 1740
Conway, South Carolina 29528
Telephone: (843) 248-5741
Fax: (843) 248-5112
lgangi@thompsonlaw.com

2016 JUL 19 PM 3:09
CLERK OF COURT
HORRY COUNTY

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**CERTIFICATE OF MAILING**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

I, Ann Shearin, an employee for Thompson & Henry, P.A., attorneys for the Defendant in the above-captioned action, certify that I have this 19th day of July 2016 mailed a copy of the **Notice of Appearance and Certificate of Mailing** to the undersigned counsel for Plaintiff at his/her/their address of record, with sufficient postage attached thereto, as follows:

eric@anastapoulolawfirm.com
Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403

Ann Shearin

2016 JUL 19 PM 3:10

STATE OF SOUTH CAROLINA COUNTY OF HORRY Bobby Foster, ☐ Plaintiff v. Julian Neil Armstrong, ☒ Defendant.	))))))))))	IN THE COURT OF COMMON PLEAS CASE NO. 2015--CP-26-5633 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
Eric Poulin, Bar No. 100209 Address: 62 Columbus St, Charleston, SC 29403 phone: 843-614-8888 fax: 843-853-229 e-mail: eric@akimlawfirm.com other:	Linda Weeks Gangi, Bar No. 002365 Address: POB 1740, Conway, SC 29528-1740 phone: 843-248-5741 fax: 843-248-5112 e-mail: lgangi@thompsonlaw.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

2016 SEP 21 PM 3:12

SECTION I: Hearing Information

Nature of Motion: Motion to Set Aside Default
Estimated Time Needed:15 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐Plaintiff / ☒Defendant — September 21st, 2016 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: Jacks — Date Filed: 9-21-16

☐ MOTION FEE COLLECTED: 25
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**MOTION TO SET ASIDE ORDER FOR ENTRY OF DEFAULT AND ORDER FOR PUBLICATION**
	)	
JULIAN NEIL ARMSTRONG,	)	
	)	
Defendant.	)	
	)	

2016 SEP 21 PM 3:12

TO: THE PLAINTIFF AND ERIC POULIN, ATTORNEY FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendant through his undersigned attorney will move before the Presiding Judge of the Court of Common Pleas at the Horry County Courthouse in Conway, South Carolina on the tenth (10th) day after service hereof or as soon as counsel might be heard for an Order setting aside the Order for Entry of Default and Referral for Hearing on Damages as well as the Order for Publication.

The basis for this Motion is that the Plaintiff's Summons is insufficient. Rule 4(b) of the *South Carolina Rules of Civil Procedure* specifically requires the following:

> "The Summons shall . . . contain . . . the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint."

The Summons filed in this action does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him. The failure of the Summons to comply with the provisions of Rule 4(b) of the *South Carolina Rules of Civil Procedure* results in the court having no personal jurisdiction over the defendant and the judgment is void. Ex parte *South Carolina Dept.*

of Revenue, 350 S.C. 404, 566 S.E.2d 196 (S.C. App. 2001) and *State Board of Medical Examiners vs. Finwick Hall, Inc.*, 387 S.E.2d 458 (1990). Furthermore, the Summons published in the newspaper does not comply with S.C. Code Ann. §15-9-740 which requires that the information which is published must state the time and place of filing the Summons and Complaint. The publication of the Summons in this case does not state the date of the filing of the Summons in the Court of Common Pleas for Horry County, South Carolina. Furthermore, the Order for Publication signed by the Clerk of Court and dated November 24, 2015 required that the Defendant be served "via publication in the daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Summons was published in the North Myrtle Beach Times. The Defendant did not live in North Myrtle Beach at the time of the accident or at any time subsequent thereto. The Defendant never received notice of this lawsuit until August of 2016. The Defendant moved from 186 Williamsburg Road, Little River, South Carolina to 4153 Horseshoe Road, Little River, South Carolina in August of 2015. The Defendant's cellphone number is reflected on the Accident Report. That cellphone number is still the Defendant's cellphone number so his location could have easily been determined had Plaintiff's counsel called Defendant's cellphone number. If the Plaintiff had used reasonable diligence as required by S. C. Code Ann. §15-9-740, the Defendant's whereabouts could easily have been obtained Therefore, the Defendant requests that this Court set aside the Order for Entry of Default and Referral for Hearing on Damages, allow the Defendant to answer and allow the Defendant to fully defend this action before a jury. The Defendant has a meritorious defense.

The undersigned asserts that this Motion completely sets forth the Defendant's position and the filing of a Memorandum would serve no purpose.

Conway, South Carolina

September 20, 2016.

THOMPSON & HENRY, P.A.

Linda Weeks Gangi - SC Bar #: 002365
Attorney for the Defendant
Post Office Box 1740
Conway, SC 29528-1740
(843) 248-5741 (p)
(843) 248-5112 (f)
lgangi@thompsonlaw.com

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**CERTIFICATE OF MAILING**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

HORRY COUNTY
CLERK OF COURT
2016 SEP 21 PM 3:12

I, Ann Shearin, an employee for Thompson & Henry, P.A., attorneys for the Defendant in the above-captioned action, certify that I have this 21st day of September 2016 mailed a copy of the **Motion to Set Aside Order for Entry of Default and Order for Publication and Certificate of Mailing** to the undersigned counsel for Plaintiff at his address of record, with sufficient postage attached thereto, as follows:

eric@akimlawfirm.com
Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403

Ann Shearin

STATE OF SOUTH CAROLINA) **)** **COUNTY OF HORRY)**	**IN THE COURT OF COMMON PLEAS** **FIFTEENTH JUDICIAL CIRCUIT** **CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)) Plaintiff,)) vs.)) JULIAN NEIL ARMSTRONG,)) Defendant.)	**AFFIDAVIT OF JULIAN NEIL ARMSTRONG**

I, Julian Neil Armstrong, first being duly sworn depose and state as follows:

1. I am the Defendant in the above-captioned action.

2. My date of birth is August 5, 1995.

3. I never received notice of this lawsuit until I was contacted by my attorney, Linda Weeks Gangi, in August of 2016.

2016 OCT 11 PM 3:04

4. In August of 2015, my family and I moved from 186 Williamsburg Road, Little River, South Carolina to 4153 Horseshoe Road, Little River, South Carolina. I have never lived in North Myrtle Beach, South Carolian. I never received any correspondence from Plaintiff's counsel forwarding to me the Summons and Complaint. I never received notice through publication that this lawsuit was pending against me and being served on me.

5. My cellphone number, 843-504-0638, appears on the Accident Report. That cellphone number has been my cellphone number since prior to the automobile accident which is the subject matter of this action and continues to be my correct cellphone number as of the signing of this Affidavit. I could have been readily contacted by calling my cellphone.

Julian Neil Armstrong

Julian Neil Armstrong

SWORN to before me this

30th day of September, 2016.

Sandra Arthelia Ward (L.S.)
Notary Public for

My Commission Expires: 12/02/2019

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**CERTIFICATE OF SERVICE**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

I, Ann Shearin, an employee for Thompson & Henry, P.A., attorneys for the Defendant in the above-captioned action, certify that I have this 11th day of October 2016 emailed and mailed a copies of the **Affidavit of Julian Neil Armstrong** to be used in support of the **Motion to Set Aside Order for Entry of Default and Order for Publication; and a Certificate of Service** to the undersigned counsel for Plaintiff at his address of record, with sufficient postage attached thereto, as follows:

2016 OCT 11 PM 3:05

eric@akimlawfirm.com
Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403

Ann Shearin

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 15TH JUDICIAL CIRCUIT CASE NO: 2015-CP-26-5633
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	**PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT AND ORDER FOR PUBLICATION**

2016 OCT 14 PM 1:49
HORRY COUNTY
CLERK OF COURT

TO: THE HONORABLE COURT AND ALL COUNSEL OF RECORD:

Pursuant to Rules 4, 8, and 55 of the South Carolina Rules of Civil Procedure, Plaintiff Bobby Foster ("Foster") submits this memorandum of law in opposition to Defendant Julian Neil Armstrong's ("Armstrong") Motion to Set Aside Default and Order for Publication. The grounds for Foster's opposition are as follows:

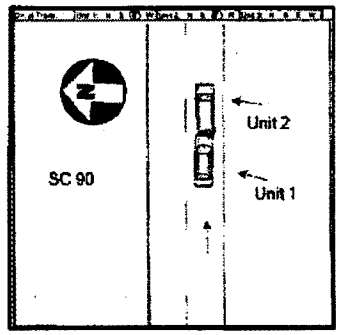
- Foster's Summons is in accord with Rule 4 because it informs Armstrong that he has thirty days to answer the Complaint and failing to do so will result in Foster asking the Court for the relief demanded.
- Foster's published Summons sufficiently informed Armstrong about the place and filing of the suit and was published in a newspaper that is circulated near his last known address.
- Armstrong does not state "good cause" under Rule 55 to warrant the set aside of default.

Additionally, Foster relies on all applicable statutes, rules, decisions of the court, and any arguments made by Counsel at a hearing on this matter.

INTRODUCTION

This case arose from a rear-end collision that happened in Horry County in April 2013. Both Foster and Armstrong were travelling East on SC-90. Exhibit 1: Police Report. Armstrong

("Unit 1") struck Foster ("Unit 2") from behind as Foster was stopped for traffic. Foster was injured as a result.



Foster filed suit against Armstrong in July 2015. Exhibit 2: Compl. Foster employed the Horry County Sheriff's Department to effectuate service upon Armstrong. Exhibit 3: Cert. of Service. Despite a diligent search, the Sheriff's Deputies were unable to locate Armstrong. Id. Thereafter, this Court approved service via publication. Exhibit 4: Order Approving Pub. Because all information indicated that Armstrong lived in the small community of Little River, South Carolina, Foster published notice in the North Myrtle Beach Times. Exhibit 5: Aff. of Pub. The Notice ran during the weeks of December 24 and 31, 2015, and January 7, 2016. Id. Following three consecutive weeks of publication, Foster moved this Court for an Order of Default on March 2, 2016. Exhibit 6: Mot. for Default. Default was entered on March 8, 2016.

In July 2016, Armstrong's Counsel appeared and notified Foster's Counsel that she was representing Armstrong. In August 2016, Foster's damages hearing was scheduled. Shortly after, Armstrong's Counsel requested a continuance, which was ultimately granted. In September 2016, Armstrong filed his Motion to Set Aside Default, nine months after the publication had run and more than a month after Counsel had appeared.

LEGAL STANDARD

"When the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion." 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). Furthermore, the trial court has no "authority to overrule the finding of the clerk of court that . . . 'after due diligence, [the defendant

cannot] be found in the County and State of their last known residence.'" Yarbrough, 293 S.C. at 292–293, 360 S.E.2d at 301.

"Exacting compliance with the rules is not required to effect service of process. Rather, [the court must] inquire 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." Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010) (internal citations omitted).

When a party fails to respond to a Complaint, Rule 55(a) requires the clerk to record an Entry of Default. SCRCP 55(a). A party placed in default may move the Court to set aside the Entry of Default, if that party demonstrates "good cause." SCRCP 55(c). That standard requires that the party seeking the set aside from the Entry of Default provide an explanation for the default and give reasons why vacation of the entry would serve the interests of justice. Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607 (2009).

ARGUMENT

Armstrong's Motion to Set Aside Order for Entry of Default and Order of Publication must be denied. Armstrong's Motion only makes collateral attacks Foster's Summons and Notice inconsequential to the Order of Default and not within the standard applied to set aside the same. Armstrong's arguments must be rejected because a "decision to order service by publication is final absent fraud or collusion. Yarbrough v. Collins, 293 S.C. 290, 360 S.E.2d 300 (1987). Like in Mull, supra, Foster substantially complied with the service of process statutes. Moreover, Armstrong neither states "good cause" under Rule 55 to warrant the Default Order to be set aside. Each of these issues is addressed, below.

I. FOSTER'S SUMMONS IS IN ACCORD WITH RULE 4 BECAUSE IT INFORMS ARMSTRONG THAT HE HAS THIRTY DAYS TO ANSWER THE COMPLAINT AND FAILING TO DO SO WILL RESULT IN FOSTER ASKING THE COURT FOR THE RELIEF DEMANDED.

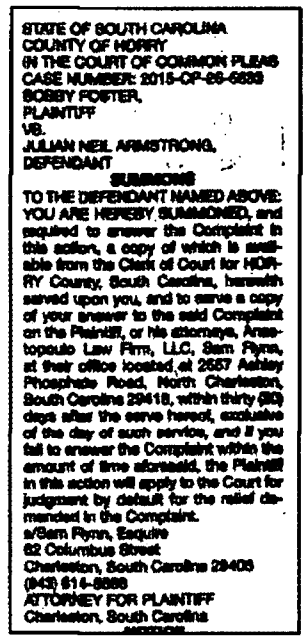
Rule 4(b) of the South Carolina Rules of Civil Procedure requires that the summons in a civil matter contain a statement detailing the "time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint." SCRCP 4(b). Armstrong claims that "[T]he Summons filed in this action does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him." Def. Mot. to Set Aside Order for Defaut at 1.

However, Foster's filed Summons (excerpted, below) clearly states that Armstrong is "required to Answer the Complaint . . . within 30 days . . . and if you fail to Answer the

> **YOU ARE HEREBY SUMMONED** and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or his attorney, Sam Flynn, at his office, 62 Columbus Street Charleston, South Carolina, 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.
>
> Dated at Charleston, South Carolina on the 22nd day of July, 2015.

Complaint . . . Plaintiff will apply to the court for the relief demanded . . . . " Exhibit 2. Id. Foster's Summons clearly states that Armstrong has thirty days to Answer the Complaint and that failure to do so will result in Foster asking the Court for the relief demanded. Accordingly, Foster's Summons is not ambiguous and complies with the dictates of Rule 4(b).

Likewise, Foster's published Summons (excerpted, right) states that the Complaint was filed in Horry County and that Armstrong must respond within thirty days, or Foster will "apply to the Court for judgment by default for the relief demanded in the Complaint." Ex. 5. In both the filed Summons and the published Summons, Foster fully complied with Rule 4(b)'s requirements.


STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2015-CP-26-5838
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT

SUMMONS

TO THE DEFENDANT NAMED ABOVE:
YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

Accordingly, Armstrong's argument that Foster's Summons fails to notify Armstrong that his failure to appear will result in a default judgment against him must be denied. Both the filed and published Summons warn Armstrong about the consequences of his failure to appear.

II. FOSTER'S PUBLISHED SUMMONS SUFFICIENTLY INFORMED ARMSTRONG ABOUT THE PLACE OF FILING OF THE SUIT AND WAS PUBLISHED IN A NEWSPAPER THAT IS CIRCULATED NEAR HIS LAST KNOWN ADDRESS.

Armstrong's Motion cites S.C. Code Ann. § 15-9-740 for the propositions that notice by publication must be made in "the one newspaper . . . most likely to give notice to the person to be served" and that "the summons, as published, must state the time and place of such filing." S.C. Code Ann. § 15-9-740. Armstrong claims error in Foster's use of the North Myrtle Beach Times as the newspaper of publication, as well as the published Summons' missing the date of filing. Here, the North Myrtle Beach Times is the closest general circulation paper to Armstrong's last known address, and the Summons' missing date is not fatal to the publication.

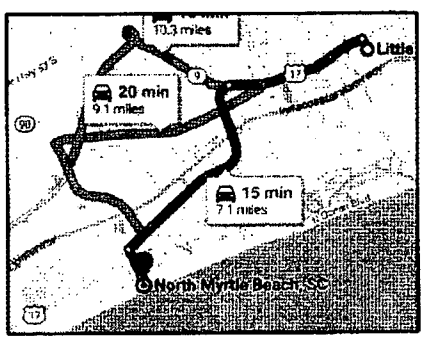
A. Publication in The North Myrtle Beach Times was proper because it is the closest general circulation newspaper to Armstrong's residence in Little River, South Carolina.

South Carolina requires that notice via publication be accomplished by a newspaper "most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks." S.C. Code Ann. § 15-9-740. The South Carolina Attorney General consistently states that "whether a periodical is sufficient as an instrument of service by publication can only be determined by the particular facts and circumstances, on a case-by-case basis. Ops. S.C. Atty. Gen., July 19, 1990; August 19, 1977. The Attorney General's office has laid out a list of criteria for determining whether a "newspaper" sufficiently meets the requirements of S.C. Code Ann. § 15-9-740. Those criteria include:

a) The paper must be published regularly at short intervals;
b) The paper must contain intelligence of current events and news of general interest;
c) The paper must be intended for general circulation; however circulation may be limited to a specific geographic area;
d) The paper must be either sold or distributed gratis.

Ops. S.C. Atty. Gen., June 30, 2005. In this case, Armstrong's last known address was in Little River, South Carolina. Foster published his Notice in the North Myrtle Beach Times.

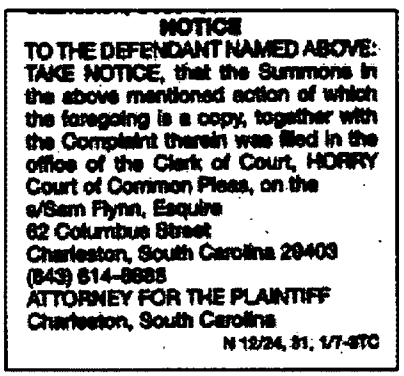
Little River is a community in Horry County, South Carolina with a population of nearly 9,000. According to Google Maps, Little River is approximately seven miles from North Myrtle Beach. The North Myrtle Beach Times is a weekly news publication that is distributed to both Little River and Loris, South Carolina. Exhibit 7: North Myrtle Beach Times Website.



Foster is unaware of a timely publication solely intended for the Little River community. Therefore, the North Myrtle Beach is the only realistic option for publication given its proximity to Little River, the weekly nature of publication, and the nature of intelligent information provided within the paper, itself. In light of these facts, Armstrong's argument that the North Myrtle Beach Times was the inappropriate newspaper to publish Notice must fail.

B. The lack of date contained in Foster's Notice is not fatal to his publication because the date of filing has no bearing on a civil motor vehicle collision case.

Precise compliance "with the rules is not required to effect service of process." Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010). Instead, a court reviewing Notice compliance must analyze "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. (internal citations omitted)(emphasis added). Armstrong claims fault with Foster's Notice because it does not contain the Complaint's date of filing.



NOTICE
TO THE DEFENDANT NAMED ABOVE:
TAKE NOTICE, that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina
N 12/24, 31; 1/7-8TC

The Code does state, "In all cases in which publication is made the complaint must first be filed and the summons, as published, must state the time and place of such filing." S.C. Code Ann. § 15-9-740. However, the Supreme Court has routinely held "notice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950).

Foster's Notice stated that the Complaint was "filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the [sic]". Ex. 5. Clearly, this is a scrivener's error in the

Notice, as it did not include the date of filing. Yet, this error is not fatal to the information conveyed by the Notice. The Notice informed readers that:

1) A Summons & Complaint were filed against Armstrong;
2) In the Horry County Court of Common Pleas;
3) The name, address, and telephone number of the filing attorney.

Ex. 5. The Notice provided information to Armstrong that there was a suit filed against him, where it could be obtained, and who he could contact if he had any questions. The date of filing, or lack there of is inconsequential to this matter. To be sure, there are circumstances where a suit's filing date 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.

This case is different. In a personal injury civil suit, based on a motor vehicle accident, the date of filing is irrelevant to a defendant being served via publication. The defendant, who was unable to be located, does not lose any constitutional right to object by being unaware of the suit's filing date. In this circumstance, the only dates that are germane to this analysis are the dates in which the publication ran in the local newspaper. Here, the Notice ran December 24 and 31, 2015, and January 7, 2016. Ex. 5. Therefore, the thirty days for Armstrong to respond to the Complaint began running on January 7, 2016, the last day of publication.

C. Foster used reasonable diligence to locate Armstrong because he hired the Horry County Sheriff's Department to serve process upon Armstrong.

Armstrong's Motion takes issue with Foster's "reasonable diligence" to locate Armstrong. As stated above, "in the absence of fraud or collusion, the decision of the officer ordering service by publication is final." Montgomery v. Mullins, 325 S.C. 500, 506, 480 S.E.2d

467, 470 (Ct. App. 1997). To effectuate service upon Armstrong, Foster utilized the Horry County Sheriff's Department to locate and serve him. Ultimately, the Sheriff's Department – the law enforcement authority for Horry County – returned an affidavit of non-service despite their due diligence. Ex. 3. The use of the Sheriff's Department was sufficient for the Court to Order service by publication for Armstrong.

Still, Armstrong argues that Foster could have obtained his address by simply calling his cell phone. First, it is unlikely that an individual would be forthcoming with their current address when faced with the knowledge that a law firm was attempting to track them down to sue them. Second, the Horry County Sheriff's Department had equal access to the cell phone number and presumably used any and all resources available to locate Armstrong. Accordingly, Armstrong's argument must fail because he has not shown any fraud or collusion on the part of Foster and the decision of the Court issuing a publication order is final.

III. ARMSTRONG DOES NOT STATE "GOOD CAUSE" UNDER RULE 55 TO WARRANT THE SET ASIDE OF DEFAULT.

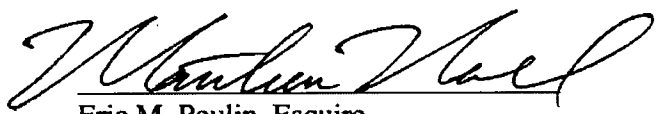
Armstrong's Motion neither provides an explanation for the default, nor give reasons why vacation of the entry would serve the interests of justice. Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 607 (2009). Armstrong merely provides collateral attacks on Foster's Summons, Notice, and Order of Publication. None of these complaints warrant the Default be set aside. Armstrong does not state any reason explaining why he has a meritorious defense for rear-ending Foster. Armstrong does not state how he became aware of his Default or why he allowed the Complaint to go unanswered for nearly eight months. Armstrong has not met his burden to be relieved of the Default Order against him.

CONCLUSION

Armstrong ran into the rear end of Foster's vehicle in April 2013. Armstrong has been in Default since March 2016. Foster used reasonable diligence to locate Armstrong by the standard practice of using the Horry County Sheriff's Department. Foster obtained his Order of Publication under valid circumstances. Foster published his Notice in the newspaper closest to Armstrong's residence. Foster's Notice further contained sufficient information that should it be seen by Armstrong, he could locate the Summons and Complaint with relative ease. For all the foregoing reasons, Armstrong's Motion to Set Aside Default and Vacate the Order of Publication must be denied. Foster substantially complied with all publication and notice rules and Armstrong was served via publication properly.

Respectfully Submitted,

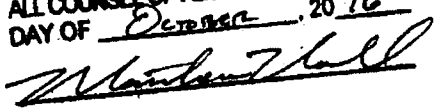
ANASTOPOULO LAW FIRM, LLC



Eric M. Poulin, Esquire
SC Bar Number: 100209
Roy T. Willey, IV, Esquire
SC Bar Number: 101010
Matthew L. Nall, Esquire
SC Bar Number: 102329
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888

ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES THAT (S)HE SERVED A COPY OF THE PLEADING OR FOREGOING PAPERS ON ALL COUNSEL OF RECORD THIS 13th DAY OF December, 2016



Charleston, South Carolina
December 13, 2016

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**ANSWER ON BEHALF OF THE DEFENDANT**
)	(Jury Trial Requested)
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

FILED
HORRY COUNTY
2016 OCT 28 PM 2:05
MELANIE HUGGINS-WARD
CLERK OF COURT

The Defendant answering the Plaintiff's Complaint would respectfully show unto this Court:

1. Each and every allegation of the Plaintiff's Complaint which is not hereafter specifically admitted, modified or explained is denied and strict proof demanded thereof.

FOR A FIRST DEFENSE:

2. The Defendant does not have sufficient information to form a belief as to the allegations contained in paragraph 1 and therefore denies same and demands strict proof thereof.

3. The Defendant admits the allegations contained in paragraphs 2, 3 and 4.

4. The Defendant admits so much of the allegations of paragraphs 5, 6, 7 and 8 as they state that on or about April 8, 2013 a collision occurred between a vehicle driven by the Plaintiff and a vehicle driven by the Defendant. The Defendant denies the remaining allegations contained in paragraphs 5, 6, 7 and 8 and demands strict proof thereof.

5. The Defendant admits so much of the allegations of paragraph 9 as they are consistent with Title 56 of the South Carolina Code and the Rules of the Road as set forth in South Carolina

case law. The Defendant denies any allegations contained in paragraph 9 that are inconsistent therewith.

6. The Defendant denies the allegations contained in paragraphs 10, 11, 12, 13, 14, 15 and 16 and demands strict proof thereof.

FOR A SECOND DEFENSE:

7. Each and every allegation of the first defense is incorporated herein when not inconsistent herewith.

8. The accident referred to in the Plaintiff's Complaint and the Plaintiff's alleged injuries and damages, if any, were due to and caused by the negligence, gross negligence, recklessness, willfulness and wantonness of the Plaintiff combining and concurring with any and all acts of the Defendant as a direct and proximate cause thereof, and without which the same would not have occurred.

9. Therefore, the Plaintiff's alleged injuries and damages were caused in whole or in part, or were contributed to by the Plaintiff's own negligence and recklessness, and not by any negligence on the part of the Defendant.

10. Therefore, the Defendant pleads the Plaintiff's sole negligence or negligence equal to or greater than that of the Defendant, and contributory recklessness of the Plaintiff as a complete defense to this action; and pleads overall the South Carolina doctrine of comparative negligence as a defense to this action and any amount of recovery available to the Plaintiff herein.

FOR A THIRD DEFENSE:

11. Each and every allegation of the first and second defenses is incorporated herein when not inconsistent herewith.

12. Plaintiff's seeking punitive damages violates Defendant's rights under Article I, §10 of the United States Constitution, as well as the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the similar provisions of the Constitution of South Carolina including but not limited to Article I, §3 and Article I, §15 of the Constitution of South Carolina for the following reasons:

(a) The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because the jury or fact finder has total discretionary power to award punitive damages, and adequate objective legal standards do not exist to guide and limit the jury's or fact finder's discretion, thus allowing an award of punitive damages to be irrational, arbitrary and capricious and based upon vague, unpredictable, conflicting and purely subjective standards;

(b) The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because the vague and inconsistent legal standards for the imposition of punitive damages deprive these defendants of sufficient notice of the type of conduct and mental state upon which a punitive damage award could result from alleged misconduct;

(c) The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because the guidelines, standards, procedures and instructions for the imposition of punitive damages are ambiguous, indefinite, vague, uncertain, conflicting, purely subjective, and fundamentally unfair;

(d) The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because no objective limitations are established concerning the amount or severity of punitive damages awards;

(e) The Eighth Amendment of the United States Constitution and the same or similar provisions of the South Carolina Constitution

including, but not limited to, Article I, §15 of the South Carolina Constitution are violated because punitive damages constitute penal damages and amount to an unconstitutional criminal and excessive fine or punishment in a civil proceeding;

(f) The Fifth and Sixth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution including, but not limited to, Article I, §12, Article I, §14 and Article I, §23 of the South Carolina Constitution are violated because Defendant is not allowed to exercise in this case all the constitutional and statutory rights which must be accorded to a party which is subject to the imposition of a criminal penalty in the form of punitive damages;

(g) The equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution including, but not limited to, Article I, §3 of the South Carolina Constitution are violated because the imposition of punitive damages discriminates against Defendants on the basis of wealth and greater amounts of punitive damages for the identical claims may be awarded against some Defendants who have more economic wealth than other Defendants;

(h) The First Amendment of the United States Constitution and the same or similar provisions of the South Carolina Constitution including, but not limited to, Article I, §2 of the South Carolina Constitution are violated because the imposition of punitive damages is based upon vague, conflicting, uncertain, and purely subjective standards, without adequate notice to Defendant, and thereby create a chilling effect on speech and expression;

(i) The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution including, but not limited to, Article I, §3 of the South Carolina Constitution are violated because the imposition of punitive damages impairs Defendant's right of access to the courts to adjudicate civil disputes;

(j) Article I, §10 of the United States Constitution and the same or similar provision of the South Carolina Constitution including, but not limited to, Article I, §4 are violated because the imposition of punitive damages impairs Defendant's right to contract.

(k) Further, this answering Defendant asserts that should the jury award punitive damages, the Court determine that the punitive damages do not violate procedural due process or substantive due process, then this answering Defendant would assert that punitive damages should be limited as provided by S. C. Code Ann. §15-32-530(A).

FOR A FOURTH DEFENSE:

13. Each and every allegation of the first, second and third defenses is incorporated herein when not inconsistent herewith.

14. The Defendant would assert that the Plaintiff failed to timely serve the Defendant within the statute of limitations and thus, pleads the statute of limitations as a complete defense.

WHEREFORE, having fully answered the Plaintiff's Complaint, the Defendant prays that same be dismissed, for the cost of this action and for such other and further relief as this Court may deem just and proper

Conway, South Carolina

October 26, 2016.

THOMPSON & HENRY, P.A.

Linda Weeks Gangi
Attorney for the Defendant
Post Office Box 1740
Conway, South Carolina 29528
Telephone: (843) 248-5741
Fax: (843) 248-5112
lgangi@thompsonlaw.com
SC Bar #: 002365

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CERTIFICATE OF MAILING**
	)	
JULIAN NEIL ARMSTRONG,	)	
	)	
Defendant.	)	
	)	

FILED
HORRY COUNTY
2016 OCT 28 PM 2:05
MELANIE HUGGINS-WARD
CLERK OF COURT

I, Ann Shearin, an employee for Thompson & Henry, P.A., attorneys for the Defendant in the above-captioned action, certify that I have this 28th day of October 2016 mailed copies of the following documents:

a. Answer on Behalf of the Defendant;
b. Defendant's Interrogatories to the Plaintiff;
c. Defendant's First Request for Production of Documents to the Plaintiff;
d. Notice of Taking Deposition of the Plaintiff; and
e. Certificate of Mailing

to the undersigned counsel for Plaintiff at his address of record, with sufficient postage attached thereto, as follows:

eric@akimlawfirm.com
Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
Attorney for the Plaintiff

Ann Shearin
ann@thompsonlaw.com

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	CASE NO.: 2015-CP-26-5633 **MOTION AND ORDER INFORMATION FORM AND COVER SHEET**

Plaintiff's Attorney: Eric Poulin, Roy Willey Matthew Nall Bar Number: 100209, 101010, 102329 Address: 62 Columbus Street, Charleston, SC 29403 Phone: 843-614-8888 Fax: 843-494-5536 E-Mail: eric@akimlawfirm.com, roy@akimlawfirm.com, matt@akimlawfirm.com	Defendant's Attorney: Linda Weeks Gangi Bar Number: Address: Post Office Box 1740 Conway, SC 29528 Phone: (843) 248-5741 E-Mail: lgangi@thompsonlaw.com

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTINONS III and III)**
☐ **PROPOSED ORDER / CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider
Estimated Time Needed: 15 minutesCourt Reporter Need: ☒ YES / ☐ NO

SECTION II: Motion / Order Type

☒Written motion attached
☐Form Motion / Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendants — November 02, 2016 Date Submitted

SECTION III: Motion Fee

☒PAID – AMOUNT: $25.00
☐EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposal order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

2016 NOV 10 AM 11:4

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ DATE: _____

CLERK'S SECTION

Collected by: 425.00

Date Filed: 11/10/16

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 15TH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

PLAINTIFF'S MOTION TO RECONSDIER

2016 NOV 10 AM 11:49

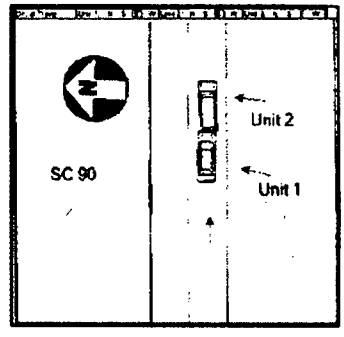
TO: THE HONORABLE JUDGE CULBERTSON AND ALL COUNSEL OF RECORD

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, Plaintiff Bobby Foster ("Plaintiff") submits this Motion to Reconsider this Court's Judgment on Defendant Julian Armstrong's ("Defendant") Motion to Set Aside Order for Publication and to Set Aside Order for Entry of Default and Referral for Hearing on Damages. The grounds for Plaintiff's Motion are as follows:

- The Court removed Defendant's default in order for the case to move forward on its merits. Therefore the Court should reconsider its Order to clarify that it has personal jurisdiction over the Defendant and the suit is not barred by the statute of limitations.

Therefore, Plaintiff respectfully requests this Court reconsider its October 21, 2016 Order on Defendant's Motion so that litigation is not precluded by the statute of limitations. This Motion is supported by the applicable statutes, rules of court, pleadings, memoranda, and any oral arguments presented by counsel at a hearing on this matter.

STATEMENT OF FACTS



This case arose from an April 2013 rear-end collision in Horry County in. Plaintiff and Defendant were eastbound on SC-90. Exhibit 1: Police Report. Defendant ("Unit 1") struck Plaintiff ("Unit 2") from

behind as Plaintiff was stopped for traffic. Plaintiff was injured as a result.

Plaintiff filed suit against Defendant in July 2015. Exhibit 2: Compl. Plaintiff employed the Horry County Sheriff's Department to serve Defendant. Exhibit 3: Cert. of Service. Despite a diligent search, the Sheriff's Deputies were unable to serve Defendant. Id. Thereafter, this Court approved service via publication. Exhibit 4: Order Approving Pub. All information indicated that Defendant lived in the small community of Little River, South Carolina, so Plaintiff published notice in the North Myrtle Beach Times. Exhibit 5: Aff. of Pub. The Notice ran during the weeks of December 24 and 31, 2015, and January 7, 2016. Id. After three consecutive weeks of publication, Plaintiff moved this Court for an Order of Default on March 2, 2016. Exhibit 6: Mot. for Default. Default was entered on March 8, 2016.

In July 2016, Defendant's Counsel appeared. In August 2016, Plaintiff's damages hearing was scheduled for the second time. Shortly after, Defendant's Counsel requested a continuance, which was granted. In September 2016, Defendant filed a Motion to Set Aside Default, nine months after the publication had run and more than a month after Counsel had appeared.

Defendant's Motion claimed that Plaintiff's Summons, attached to his Complaint, was insufficient because it did not "notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him." Def. Mot. to Set Aside Default 2. Defendant's Motion further argued that the Summons, which was published in the newspaper, was statutorily incompliant because it lacked the Complaint's filing location and date. Id. Defendant also took issue with publication in the North Myrtle Beach Times, despite Defendant's residence in Little River. Id. Defendant claimed that Plaintiff did not use reasonable diligence because he did not call Defendant's cell phone number to ascertain his whereabouts. Id.

On Monday, October 17, 2016, the Court heard arguments on Defendant's Motion to Set Aside Order of Publication and to Set Aside the Entry of Default and Referral for Damages Hearing. Both parties argued the issues as laid out in their respective memoranda. Ultimately, the Court stated it would not address issues of personal jurisdiction, but stated that because the published summons lacked a filing date, it would remove the default. Correspondingly, the Court asked Defense Counsel to accept service on behalf of the Defendant and provide a written order.

Later, Defendant circulated his Proposed Order which substantially repeated the same issues in his Motion to Set Aside Order of Publication and to Set Aside the Entry of Default and Referral for Damages. The Proposed Order stated that the Court is without personal jurisdiction over Defendant and the Orders of Publication and Default were void. Plaintiff emailed the Court and Defense Counsel stating his objection to the findings of no jurisdiction and voiding the order of publication. Exhibit 7. Plaintiff stated his concern that should Defendant's Proposed Order be signed by the Court, Defendant would be able to allege noncompliance with the statute of limitations, since the wreck occurred in April 2013. Id. The Court signed Defendant's Proposed Order.

As a result, Defendant filed his Answer with the Court and raised the statute of limitations as an affirmative defense. Def. Answer ∏ 13. Concurrent with Defendant's Answer, he also served initial discovery requests and noticed Plaintiff's deposition. Exhibit 8.

LEGAL STANDARD

Rule 59(e) allows a party to file a motion to reconsider a judgment for two specific reasons. SCRCP 59; Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). First, a motion to reconsider is appropriate when a party "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes

for the court to reconsider or rule on it." Elam, 361 S.C. at 24, 602 S.E.2d at 780. Second, "a party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Id.

ARGUMENT

This Court should reconsider its Order on Defendant's Motion to Set Aside Order of Publication and Order of Default and Request for Damages Hearing because the current Order does not accurately reflect the outcome of the hearing. The Court granted Defendant's Motion to Set Aside Default due to a typographical error in the published Summons and requested Defense Counsel accept service of the Complaint. However, the Order states that the Court has no jurisdiction over the Defendant. Defendant's Default was vacated by a technicality; likewise, Plaintiff should not be prohibited from litigating his claim due to a technicality.

I. THE COURT REMOVED DEFENDANT'S DEFAULT IN ORDER FOR THE CASE TO MOVE FORWARD ON ITS MERITS. THEREFORE, THE COURT SHOULD RECONSIDER ITS OPINION TO CLARIFY THAT IT HAS PERSONAL JURISDICTION OVER THE DEFENDANT AND THE SUIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

At the hearing on this matter, the Court decided to allow the Defendant out of Default because Plaintiff's published Notice did not contain the Complaint filing date. However, the signed Order is overly broad and does not accurately reflect the results of the hearing. The Order states that "The Court has no personal jurisdiction over the Defendant and that service of the Summons and Complaint was not properly perfected on the Defendant." This statement seems to contradict the Court's request that Defense Counsel accept service on behalf of Defendant and allow the case to move forward. Based on this Order, Defendant is out of default and has filed his Answer stating that this case is barred by the statute of limitations. However, this suit has been filed since July 2015 and Plaintiff used reasonable diligence to prosecute his case. In the

interest of justice, the Court should reconsider its Motion to bar Defendant from claiming the statute of limitations as an affirmative defense.

A. Plaintiff's filed and published Summons complied with Rule 4 because both stated Defendant must respond within thirty days.

Rule 4(b) of the South Carolina Rules of Civil Procedure requires that the summons in a civil matter contain a statement detailing the "time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint." SCRCP 4(b). The signed Order states, "The Summons filed in this action does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him." This statement is incorrect because Plaintiff's filed Summons states that the Defendant must answer within thirty days or Plaintiff will apply for the relief demanded in the Complaint.

Specifically, Plaintiff's Summons (filed with the Complaint and excerpted, below) clearly states that Defendant is "required to Answer the Complaint . . . within 30 days . . . and if you fail to Answer the Complaint . . . Plaintiff will apply to the court for the relief demanded . . . . " Exhibit 2.

> **YOU ARE HEREBY SUMMONED** and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or his attorney, Sam Flynn, at his office, 62 Columbus Street Charleston, South Carolina, 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.
>
> Dated at Charleston, South Carolina on the 22nd day of July, 2015.

Clearly, the filed Summons complies with Rule 4(b) because it notifies the Defendant that he must respond within thirty days and that failure to do so will have consequences. The filed Summons is not ambiguous and conforms with Rule 4(b).

Likewise, Plaintiff's published Summons (excerpted, right) states that Defendant must respond within thirty days, or Plaintiff will "apply to the Court for judgment by default for the relief demanded in the Complaint." Ex. 5.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2015-CP-26-5833
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT
SUMMONS
TO THE DEFENDANT NAMED ABOVE:
YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

In both the filed Summons and the published Summons, Plaintiff fully complied with Rule 4(b) because he notified Defendant that he will apply for relief in thirty days absent Defendant's Answer. Both the filed and published Summons warn Defendant about the consequences of his failure to appear.

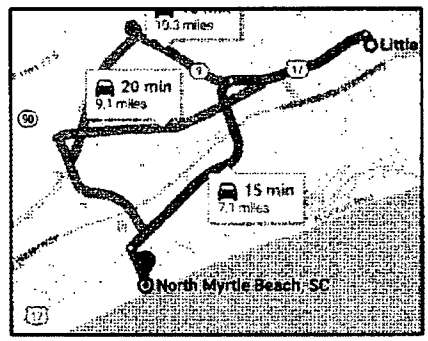
However, the signed Order on this issue states that the Summons, presumably the filed Summons, does not comply with Rule 4(b). On this basis, the Order states that there is no personal jurisdiction over the Defendant. This portion contradicts the Court's statement that it would not address issues of personal jurisdiction. The Court should reconsider this issue because both Summons satisfy Rule 4's requirements. Furthermore, this issue is deserving of reconsideration because the signed Order voids the Court's jurisdiction over Defendant and creates a statute of limitations issue.

B. Publication in the North Myrtle Beach Times was proper.

The signed Order on Defendant's Motion cites S.C. Code Ann. § 15-9-740 for the proposition that notice by publication must be made in "the one newspaper . . . most likely to give notice to the person to be served" and that "the summons, as published, must state the time

and place of such filing." S.C. Code Ann. § 15-9-740. The Order states Plaintiff's publication in the North Myrtle Beach Times was improper because it is not a paper of "general circulation in Horry County" and because Defendant lived in Little River, not North Myrtle Beach.

Little River is a community in Horry County, South Carolina with a population of nearly 9,000. Little River is approximately seven miles from North Myrtle Beach. The North Myrtle Beach Times is a weekly news publication that is distributed to Little River and Loris, South Carolina. Exhibit 9: North Myrtle Beach Times Website. The North Myrtle Beach Times is the newspaper published closest to Little River. Therefore, the North Myrtle Beach is the only realistic option for publication given its proximity to Little River. Furthermore, the weekly nature of publication, and the information provided within the paper make it the most likely newspaper to provide notice to Defendant.



Accordingly, the Court should reconsider this issue to the extent that the Order states service was not proper because notice was not published in a paper of general circulation in Horry County. The North Myrtle Beach Times is the closest publication to Defendant's last known address and most reasonably targeted to give him notice of suit.

C. Defendant neither alleged nor proved fraud or collusion, therefore the Order of Publication is final.

The signed Order on Defendant's Motion states Defendant did not use "reasonable diligence" to locate Defendant because he did not call Defendant's cell phone. However, the law on this issue is clear: "in the absence of fraud or collusion, the decision of the officer ordering service by publication is final." Montgomery v. Mullins, 325 S.C. 500, 506, 480 S.E.2d 467, 470

(Ct. App. 1997). Plaintiff used the Horry County Sheriff's Department to locate and serve Defendant. Ultimately, the Sheriff's Department – the law enforcement authority for Horry County – returned an affidavit of non-service despite their due diligence. Ex. 3. The use of the Sheriff's Department was sufficient for the Court to order service by publication.

Still, the Order states Plaintiff could have obtained his address by simply calling Defendant's cell phone. But, it is unlikely that an individual would be forthcoming with their current address knowing that a law firm is attempting to track them down to sue them. The Court should reconsider this portion of the Order insofar as an Order of Publication is final absent fraud or collusion and Plaintiff did use reasonable diligence. Defendant did not present any evidence of fraud or collusion. Defendant's only argument is that Plaintiff did not call Defendant on his cell phone.

D. Plaintiff's Notice substantially complied with the statutes on service and the lack of filing date is not fatal to proper service.

Precise compliance "with the rules is not required to effect service of process." Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010). Instead, a court reviewing Notice compliance must analyze "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. (internal citations omitted)(emphasis added). "In all cases in which publication is made the complaint must first be filed and the summons, as published, must state the time and place of such filing." S.C. Code Ann. § 15-9-740. However, the Supreme Court has routinely held "notice [must be] reasonably calculated, under all the circumstances, to apprise interested

NOTICE
TO THE DEFENDANT NAMED ABOVE:
TAKE NOTICE, that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the
s/Sam Flynn, Esquire
82 Columbus Street
Charleston, South Carolina 29403
(843) 614-9888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina
N 12/24, 31, 1/7-9TC

parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950).

Plaintiff's Notice stated that the Complaint was "filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the [sic]". Ex. 5. Clearly, this is a scrivener's error in the Notice, as it did not include the date of filing. Yet, this error is not fatal to the information conveyed by the Notice. The Notice informed readers that:

1) A Summons & Complaint were filed against Defendant;
2) In the Horry County Court of Common Pleas;
3) The name, address, and telephone number of the filing attorney and law firm.

Ex. 5. The Notice provided information that there was a suit filed against Defendant, where it could be obtained, and who he could contact if he had any questions. The date of filing, or lack there of is inconsequential to this matter. To be sure, there are circumstances where a suit's filing date 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.

This case is different. In a personal injury civil suit, based on a motor vehicle accident, the date of filing is irrelevant to a defendant being served via publication. The defendant, who was unable to be located, does not lose any constitutional right to object by being unaware of the suit'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 local newspaper. Here, the Notice ran December 24 and 31, 2015, and January 7, 2016. Ex. 5. Therefore, the thirty days for Armstrong to respond to the Complaint began running on January 7, 2016, the last day of publication.

Plaintiff sufficiently complied with the statute controlling notice via publication. Yet, the Court decided that after the appearance of Defense Counsel, the case would be best served by allowing the defendant to submit an Answer because the Notice did not contain the Complaint's filing date. Therefore, the Court should reconsider its Order on this issue to the extent that the Order states the Notice was not statutorily compliant. The notice must only *substantially* comply with the statute, and the lack of filing date does not deprive the court of jurisdiction over Defendant.

CONCLUSION

At the hearing Defendant's Motion, the Court decided that good cause was shown to remove the default and allow Defendant to answer because there was no date on the Notice. Tellingly, the Court asked Defense Counsel if she would be willing to accept service of the Complaint. Defense Counsel agreed to accept service. It is apparent that the Court thought this matter should move forward on its merits in the interest of justice. Unfortunately, this case arose from an April 2013 car wreck. The Court's Order states that it has no personal jurisdiction over the Defendant, the Notice of Publication was in error and now void, and vacated the entry of default. Based on the Order, Defendant filed an Answer claiming the statute of limitations as a total defense. Therefore, Plaintiff respectfully requests that the Court clarify its opinion on this matter to address the issue of the statute of limitations. Plaintiff has used reasonable diligence to move his case forward and should not be blocked out from justice on a technicality.

SIGNATURE ON FOLLOWING PAGE

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

Eric M. Poulin, Esquire
SC Bar Number: 100209
Roy T. Willey, IV, Esquire
SC Bar Number: 101010
Matthew L. Nall, Esquire
SC Bar Number: 102329
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888

Charleston, South Carolina
November 2, 2016

ATTORNEYS FOR THE PLAINTIFF

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES THAT (S)HE SERVED A COPY OF THE PLEADING OR FOREGOING PAPERS ON ALL COUNSEL OF RECORD THIS 2nd DAY OF November, 2016

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)

Bobby Foster,) CASE NO.
☐ Plaintiff) 2015--CP-26-5633

PAID

v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Julian Neil Armstrong,)
☒ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Eric Poulin, Bar No. 100209	Linda Weeks Gangi, Bar No. 002365
Address:	Address:
62 Columbus St, Charleston, SC 29403	POB 1740, Conway, SC 29528-1740
phone: 843-614-8888 fax: 843-853-229	phone: 843-248-5741 fax: 843-248-5112
e-mail: eric@akimlawfirm.com other:	e-mail: lgangi@thompsonlaw.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Compel
Estimated Time Needed: 15 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

FILED
HORRY COUNTY, SC
2017 JAN 17 PM 3:04
CLERK OF COURT
HORRY COUNTY, SC

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — January 17, 2017 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE
☐ Other:	CODE: Date:

CLERK'S VERIFICATION

Collected by: JB Date Filed: 1-17-2017

☒ MOTION FEE COLLECTED: 25.00
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**MOTION TO COMPEL**
	)	
JULIAN NEIL ARMSTRONG,	)	
	)	
Defendant.	)	

FILED
HORRY COUNTY
2017 JAN 17 PM 3:04
ROBERTA ELVIS
CLERK OF COURT
HORRY COUNTY, SC

TO: THE PLAINTIFF AND ERIC POULIN, ATTORNEY FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendant through his undersigned attorney will move before the Presiding Judge of the Court of Common Pleas at the Horry County Courthouse in Conway, South Carolina on the tenth (10th) day after service hereof or as soon as counsel might be heard for an Order compelling the Plaintiff to answer Interrogatories and the Request to Produce, as well as provide all documents received by the Anastopoulo Law Firm from AT&T.

The basis for this Motion is that the Defendant sent Plaintiff's Counsel Interrogatories and Request to Produce dated October 26, 2016. As of today's date, the Interrogatories and Request to Produce have not been answered. Furthermore, Plaintiff's counsel sent a subpoena to AT&T for records regarding the Defendant's cell phone. That subpoena is dated October 18, 2016. The Defendant requested copies of those documents on October 24, 2016 and on December 5, 2016. To date, AT&T records have not been provided to Defense counsel.

Conway, South Carolina

January 11, 2017.

THOMPSON & HENRY, P.A.

Linda Weeks Gangi - SC Bar #: 002365
Attorney for the Defendant
Post Office Box 1740
Conway, SC 29528-1740
(843) 248-5741 (p)
(843) 248-5112 (f)
lgangi@thompsonlaw.com

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**RULE 11 CERTIFICATION**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

FILED
HORRY COUNTY
2017 JAN 17 PM 3:04
RENEE H. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

I HEREBY CERTIFY that prior to filing the attached Motion to Compel Answers to Interrogatories and Request for Production of Documents, I wrote to the Plaintiff's counsel, Eric Poulin of the Anastopoulo Law Firm, on December 5, 2016, asking that he provide responses in ten days from the date of the letter. No response has been made to that letter.

This Certification is made in satisfaction of Rule 11(a) of the *South Carolina Rules of Civil Procedure*.

Conway, South Carolina

January 11, 2017

THOMPSON & HENRY, P.A.

Linda Weeks Gangi
Attorney for the Defendants
Post Office Box 1740
Conway, SC 29528-1740
Telephone: (843) 248-5741
Fax: (843) 248-5112
lgangi@thompsonlaw.com
S.C. Bar No. 002365

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**CERTIFICATE OF MAILING**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

I, Neicey Smith, an employee for Thompson & Henry, P.A., attorneys for the Defendant in the above-captioned action, certify that I have this 13th day of January, 2017 mailed copies of the following documents:

a. Motion to Compel;
b. Rule 11 Certification; and
c. Certificate of Mailing

to the undersigned counsel for Plaintiff at his address of record, with sufficient postage attached thereto, as follows:

FILED
HORRY COUNTY
2017 JAN 17 PM 3:04
JULIE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

eric@akimlawfirm.com
Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
Attorney for the Plaintiff

Neicey Smith

Neicey Smith
neicey@thompsonlaw.com

ELECTRONICALLY FILED - 2017 Mar 31 2:52 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2015-CP-26-5633
Bobby Foster, Plaintiff, vs. Julian Neil Armstrong, Defendant.	**MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM**

TO: THE PLAINTIFF AND MATTHEW L. NALL, ATTORNEY FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendant through his undersigned attorney will move before the Presiding Judge of the Court of Common Pleas at the Horry County Courthouse in Conway, South Carolina on the tenth day of service hereof or as soon thereafter as counsel might be heard for an Order Granting Summary Judgment. The basis for this motion is that the Statute of Limitations bars this action because the Plaintiff failed to timely serve the Summons and Complaint in the above-captioned action. The automobile accident which is the subject of this action occurred on April 8, 2013 (See paragraphs 5, 6, 7 and 8 of the Plaintiff's Complaint). The Plaintiff filed the Complaint on July 27, 2015. Thereafter, the Plaintiff attempted to serve the Defendant with the Summons and Complaint through the sheriff's department but the Defendant had moved. (See Affidavit of Non Service of the Sheriff). Thereafter, Plaintiff's counsel obtained an Order for Publication. The Plaintiff published the Summons in the North Myrtle Beach Times. No Answer was filed by the Defendant. An Order for Entry of Default was obtained by Plaintiff's counsel. Thereafter, Defendant's counsel moved to set aside the Order for Publication and the Order for Entry of Default. The Order for Entry of Default and the Order for Publication were set aside by Order dated October 21, 2016 and filed October 26, 2016 in the

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Office of the Clerk of Court for Horry County. The basis for setting aside these Orders was fourfold; The Summons was insufficient. It did not comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*. The Summons did not notify the Defendant that if he fails to appear and defend, a judgment by default would be rendered against him. The failure of the Summons to comply with the provisions of Rule 4(b) of the *South Carolina Rules of Civil Procedure* results in the Court having no personal jurisdiction over the Defendant. Furthermore, the Summons published in the newspaper did not comply with S. C. Code Ann. §15-9-740 which requires that the information which is published must state the time and place of filing of the Summons and Complaint. The publication of the Summons in this case did not state the date of filing of the Summons in the Court of Common Pleas for Horry County. Furthermore, the Order of Publication signed by the Clerk of Court and dated November 24, 2015 required that the Defendant be served "via publication in a daily newspaper of the Defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Summons was published in a North Myrtle Beach Times which is not a newspaper of general circulation in Horry County. It is not a daily newspaper and the Defendant never lived in North Myrtle Beach. The publication was not as ordered. Finally, the Court found that the Plaintiff did not use due diligence in locating the Defendant. The Defendant's correct cell phone number was contained in the accident report so that his location could have easily been determined by calling the cell phone number. S.C. Code Ann. §15-9-740 requires that reasonable diligence be used to ascertain the residence of the Defendant. The Court found that the Plaintiff did not use reasonable diligence as required by S.C. Code Ann. §15-9-740. Based on the failure of the original Summons filed with the Court to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*, the failure of the publication to include the date of the filing of the Summons and Complaint as required by S.C. Code Ann. §15-9-740, the failure to

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publish the Summons in a daily newspaper of general circulation in Horry County, and the failure of the Plaintiff to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740, the Court found that it had no personal jurisdiction over the Defendant and that the service of the Summons and Complaint was not properly perfected on the Defendant. The Court ordered that the Order for Publication and the Order for Entry of Default and Referral for Hearing on Damages be set aside and declared null and void and of no force and effect. At the time of the hearing to set aside the Orders on October 21, 2016, the Court asked whether or not defense counsel would accept service of the Summons and Complaint and file an Answer within thirty days from the date of receipt of the Order. The Court also required the Plaintiff to amend the Summons to comply with Rule 4(b). The Summons to date has never been amended. No Acceptance of Service was ever provided to the Defendant's attorney. Defendant filed an Answer on October 26, 2016. That Answer raised the issue of the Statute of Limitations. Clearly the Statute of Limitations ran prior to service being perfected on the Defendant.

The Defendant certifies that his argument has been fully set forth above and a Memorandum would serve no purpose.

Conway, South Carolina

March 30, 2017

THOMPSON & HENRY, P.A.

s/Linda Weeks Gangi
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IN THE STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE 15TH JUDICIAL CIRCUIT CASE NO. 2015-CP-26-5633
BOBBY FOSTER, Plaintiff, v. JULIAN NEIL ARMSTRONG, Defendant.	)	**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

TO: THIS HONORABLE COURT AND ALL COUNSEL OF RECORD

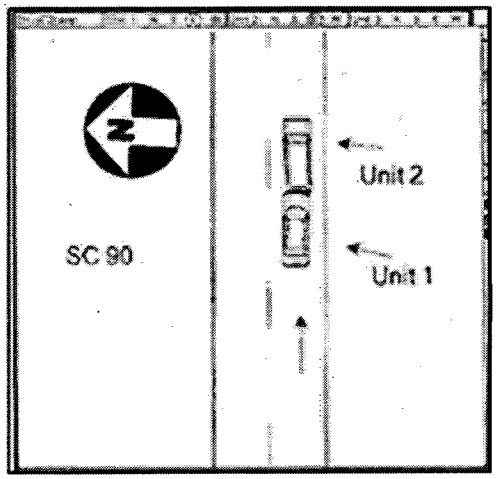
COMES NOW Plaintiff, by and through his undersigned counsel, who submits this Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment in the above-referenced matter. Defendant's motion is based upon his belief that the statute of limitations bars this action due to Plaintiff's purported failure to timely serve his Summons and Complaint in this case. As is set forth more fully herein, Plaintiff did, in fact, timely serve his Summons and Complaint, and Defendant's motion should be denied. Plaintiff's Memorandum in Opposition is supported by the applicable statutes, rules of court, pleadings, any preceding and subsequent memoranda, and any oral arguments presented by counsel at a hearing on this matter.

STATEMENT OF FACTS

This case arises from an April 8, 2013, motor vehicle collision in Horry County wherein Plaintiff was lawfully traveling east on S.C. 90 when he came to a lawful stop for traffic. At that

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same time, Defendant (Unit 1) was also traveling east on S.C. 90 and was following too closely, travelling too fast for conditions, failed to stop, and consequently struck Plaintiff's vehicle (Unit 2) from behind. (*See* Ex. 1; S.C. Traffic Collision Rpt.) The collision caused Plaintiff to suffer significant personal injuries and property damage.



On July 27, 2015, Plaintiff timely filed his Summons and Complaint with the Horry County Clerk of Court, and therein alleged that Defendant's negligence, gross negligence, negligence *per se*, careless, reckless, willful, wanton, and/or unlawful acts and/or omissions directly and proximately caused Plaintiff's injuries and damages. (*See* Ex. 2; Summons and Compl.) Upon receipt of the clocked copy of Plaintiff's Summons and Complaint from the Clerk of Court, Plaintiff attempted service of Defendant via certified mail, restricted delivery through the United States Postal Service ("USPS"). (*See* Ex. 3; Aug. 13, 2015, USPS Serv. Ltr.) Plaintiff's August 13, 2015, letter was sent to 186 Williamsburg Road, Little River, South Carolina, 29566, which is the address identified as Defendant's residence in the South Carolina Collision Report. (*See* Ex. 1.) Plaintiff's letter was assigned a tracking number of 70150640000579463544 by the USPS, and, on August 15, 2015, the USPS left notice at 186 Williamsburg Road that certified, restricted correspondence had been sent to Defendant at that address. (*See* Ex 4; USPS Tracking Rpt.) Despite the notice left by the USPS, Plaintiff's service letter was unclaimed, and by August 31, 2015, the maximum hold time for Plaintiff's service letter had expired. (*See* Ex. 4.)

Upon learning of the expiration of the maximum USPS hold time, Plaintiff employed the Horry County Sheriff's Department to serve Defendant at his residence identified in the collision

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report. The Summons and Complaint was received by the sheriff's department on September 24, 2015. (*See* Ex. 5; Oct. 26, 2015, Non-Service Aff.) Despite a diligent search, the sheriff's department was unable to locate Defendant. (*See* Ex. 5.) On November 19, 2015, Plaintiff petitioned the Horry County Clerk of Court for an order allowing Defendant to be served via publication. (*See* Ex. 6; Nov. 19, 2015, Pet. for Pub.) On November 23, 2015, Plaintiff's counsel's Affidavit for Publication was filed with the Clerk of Court advising that counsel had attempted to serve Defendant through the sheriff's department, that Defendant had moved and left no forwarding address, and that Defendant's whereabouts were unknown. (*See* Ex. 7; Nov. 23, 2015, Aff. for Pub.) Thereafter, the Clerk of Court granted Plaintiff's petition, thus finding it "appropriate and necessary to serve Defendant via publication in the daily newspaper of Defendant's last known residence, 186 Williamsburg Road, Little River, South Carolina. (*See* Ex. 8; Nov. 24, 2015, Order for Pub.)

All information then known indicated that Defendant lived in the small town of Little River, South Carolina. According to the town's website, "Little River, South Carolina is the oldest -- and one of the most unique -- towns along the greater Grand Strand." (*See* Ex. 9; Little River, South Carolina Website, http://www.littleriversc.com.) Plaintiff published his notice in the *North Myrtle Beach Times*, which was and continues to be a well-known newspaper serving the Grand Strand, including Little River South Carolina, for four decades. (*See* Ex. 10; *North Myrtle Beach*

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Times Website, http://www.nmbtimes.com.) Plaintiff's notice, pictured below and attached hereto as Exhibit 11, ran during the weeks of December 24 and 31, 2015, and January 7, 2016. After three consecutive weeks of publication, on March 2, 2016, Plaintiff moved the Clerk of Court to enter default against Defendant (*see* Ex. 12), which the Clerk of Court ordered on March 8, 2016, finding that Defendant "was properly served with notice via publication and failed to file and/or serve a responsive pleading within 30 days after the least date of publication and Plaintiff properly moved for entry of default on March 2, 2016." (*See* Ex. 13; Mar. 8, 2016, Order for Entry of Default.)

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2015-CP-26-5633
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT
SUMMONS
TO THE DEFENDANT NAMED ABOVE: YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina
NOTICE

In July 2016, Defendant's counsel appeared in this matter. (*See* Ex. 14; Notice of Appearance.) In August 2016, Plaintiff's damages hearing, which had been previously set, was scheduled for the second time. Shortly thereafter, Defendant's counsel requested a continuance, which the Court granted. In September 2016, Defendant filed a Motion to Set Aside Order for Entry of Default and Order for Publication, nine months after the publication had run and more than a month after counsel had appeared on Defendant's behalf. Defendant's motion claimed that Plaintiff's Summons, attached to his Complaint, was insufficient because it did not "notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him." (*See* Ex. 15; Def. Mot. to Set Aside.) Defendant's motion further argued that the Summons, which was published in the newspaper and which had been deemed sufficient by the Clerk of Court, was statutorily incompliant because it lacked the Complaint's filing location and

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date despite the Horry County Court of Common Pleas appearing on the notice along with the filed case number. (*See* Ex. 15.) Defendant also took issue with publication in the *North Myrtle Beach Times*, despite Defendant's residence in Little River. (*See* Ex. 15.) Defendant claimed that Plaintiff did not use "reasonable diligence" because he did not call Defendant's cell phone number to ascertain his whereabouts. (*See* Ex. 15.)

On Monday, October 17, 2016, the Court heard arguments on Defendant's Motion to Set Aside. Both parties argued the issues as laid out in their respective memoranda. Ultimately, the Court determined that it would not address issues of personal jurisdiction, but stated that, because the published Summons lacked a filing date, it would remove the default. Correspondingly, the Court asked Defendant's counsel to accept service on behalf of Defendant and provide a written order. Later, Defendant circulated his proposed order which substantially repeated the same issues in his Motion to Set Aside. The proposed order stated that the Court is without personal jurisdiction over Defendant and that the previous orders as to publication and default are void. Plaintiff's counsel promptly notified the Court and Defendant's counsel stating Plaintiff's objection to the findings of no jurisdiction and voiding the orders previously in force. (*See* Ex. 16; Oct. 21, 2016, Pl.'s E-Mail to the Hon. Benjamin Culbertson.) Notably, Plaintiff's counsel stated his concern that, should Defendant's proposed order be signed by the Court, Defendant would effectively be able to allege noncompliance with the statute of limitations, since the collision occurred in April 2013. (*See* Ex. 16.)

The Court signed Defendant's proposed order on October 21, 2016, stating that Defendant's counsel "has agreed to accept service of the Summons and Complaint ... and will file an Answer within thirty (30) days from the date of receipt of this Order." (*See* Ex. 17; Oct. 21, 2016, Order.) Without objection, Defendant's counsel accepted service, and thereafter Defendant

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filed his Answer to Plaintiff's Complaint wherein he raised the statute of limitations as an affirmative defense. (*See* Ex. 18; Def.'s Answer at 13.)

On November 10, 2016, Plaintiff filed his Motion to Reconsider pursuant to Rule 59, SCRCP, requesting that the Court reconsider its October 21, 2016, ruling so as to not preclude Plaintiff's cause of action on the basis of the statute of limitations. (*See* Ex. 19; Nov. 10, 2016, Motion to Reconsider.) The Court denied Plaintiff's motion by order dated March 16, 2017. (*See* Ex. 20; Mar. 16, 2017, Order.) Prior to the March 16, 2017, Order, Defendant's counsel emailed the Court wherein she reiterated that she had accepted service on behalf of Defendant, and wherein she admits that the Court had jurisdiction over Defendant *vis-à-vis* said acceptance. (*See* Ex. 21; Mar. 7, 2017, Def.'s Email to the Hon. Benjamin Culbertson.) Defendant filed his Motion for Summary Judgment on March 31, 2017, based upon his belief that the statute of limitations bars this action due to Plaintiff's purported failure to timely serve his Summons and Complaint in this case. (*See* Ex. 22; Motion for Summ. J.)

LEGAL STANDARD

Pursuant to Rule 56, "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Rule 56(b), SCRCP. Furthermore, "[t]he judgment sought shall be rendered forthwith if ... there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law and should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. *Holmes v. East Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014).

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In ruling on a motion for summary judgment, evidence and inferences which can be drawn therefrom should be viewed in light most favorable to non-moving party. *Manji v. Blackwell*, 323 S.C. 91, 473 S.E.2d 837 (Ct. App. 1996). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Fountain v. First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (2012). Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Murphy v. Tyndall*, 384 S.C. 50, 681 S.E.2d 28 (Ct. App. 2009).

ARGUMENT

Defendant's Motion for Summary Judgment is based upon his belief that Plaintiff's claim is barred by the statute of limitations due to Plaintiff's purported failure to timely serve his Summons and Complaint. This is despite the Clerk of Court's finding that Defendant was properly served by publication, that Defendant was in default, the fact that Defendant has voluntarily submitted himself to the personal jurisdiction of this Court, and the fact that Defendant has admitted that the Court had jurisdiction over him at the time his counsel accepted service of Plaintiff's Complaint.

Prior to Defendant's Motion for Summary Judgment, the parties presented their respective arguments to the Court as to Defendant's service and default as set forth more fully above. In short, the Court set aside the Clerk of Court's determination that Plaintiff had satisfied the requirements of service by publication and that Defendant was in default. However, as was argued by Plaintiff, the Court's October 21, 2016, Order and March 23, 2013, Order are overly broad in stating that the Court has no personal jurisdiction over Defendant, and that service was not properly perfected on Defendant. As was brought before the Court in Plaintiff's arguments, the Court's

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respective orders appear to contradict the Court's request that Defendant's counsel accept service on behalf of Defendant and that Defendant file an Answer to Plaintiff's Complaint. Without objection, Defendant's counsel accepted service and Defendant filed his Answer to Plaintiff's Complaint, thereby submitting Defendant to the personal jurisdiction of the Court and effecting service of Plaintiff's Summons and Complaint. As to the latter, Plaintiff contends that, irrespective of Defendant's counsel's accepting service, Defendant was previously (and properly) served by publication in March 2016 within the statute of limitations period. Defendant's counsel even admits that the Court, at least as of the time of her acceptance, has jurisdiction over Defendant. To that end, where Defendant raises the statute of limitations as an affirmative defense in his Answer as well as the basis for his Motion for Summary Judgment, the Court should deny Defendant's motion due to the fact that this action was properly commenced within the statute of limitations period, and this Court has jurisdiction over Defendant.

I. Plaintiff's Cause of Action was Properly and Timely Commenced in Accordance with Rule 3(a)(1)-(2), SCRCP, and S.C. Code Ann. § 15–3–20.

In South Carolina, "a civil 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." Rule 3(a)(1)-(2), SCRCP. For the purpose of tolling any statute of limitations, an attempt to commence an action is equivalent to the commencement thereof when the summons and complaint are filed with the clerk of court and delivered for service to the sheriff of the county in which the defendant usually or last resided. *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1511 (D.S.C. 1989). In 2002, the South Carolina legislature amended section 15-3-20 of the South Carolina Code to provide that a civil action commences as of the date of filing if actual service is

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accomplished within 120 days after filing, and became effective on May 24, 2002. S.C. Code Ann. § 15–3–20.

A party can waive a statute of limitations defense. *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 234, 599 S.E.2d 462, 466 (Ct. App. 2004) (citing *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 525-26, 443 S.E.2d 539, 540 (1994). Waiver is a question of fact for the finder of fact. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). Furthermore, waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Id.* at 342-44, 415 S.E.2d at 387. A party's waiver may be expressed or implied by a party's conduct, and it may be applied to bar a party from relying on a statute of limitations defense in a dispositive motion. *See Mende v. Conway Hosp.*, Inc., 304 S.C. 313, 404 S.E.2d 33 (1991) ("[w]aiver of [the statute of] limitations may be shown by words or conduct. Thus, waiver may result from express agreement, ... from failure to claim the defense, *or by any action or inaction manifestly inconsistent with an intention to insist on the statute*." *Id.* at 315, 404 S.E.2d at 34 (quoting 54 C.J.S. Limitation of Actions § 22 at 52 (1987)) (emphasis in original). The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide. *Brown v. Finger*, 240 S.C. 102, 124 S.E.2d 781 (1962).

Here, Plaintiff stands by his assertion that Defendant was properly served by publication and his cause of action was properly commenced within the statute of limitation period, as is more fully set forth in this memorandum. Irrespective of that assertion, Defendant's appearance and untimely conduct in this case rises to the level of waiver. Defendant's counsel first appeared in July 2016 and appeared at Defendant's damages hearing in August 2016. Shortly thereafter, Defendant's counsel requested a continuance, which the Court granted. In September 2016,

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Defendant filed a Motion to Set Aside Order for Entry of Default and Order for Publication, nine months after the publication had run and more than a month after counsel had appeared on Defendant's behalf. It was ultimately determined by the Court that Plaintiff's published Summons lacked a filing date and that Defendant's default was removed; however, Defendant's counsel did accept service on behalf of Defendant and thereafter Defendant filed his Answer. Moreover, Defendant's counsel expressly admitted to the Court that it had jurisdiction over Defendant. Certainly, such conduct rises to the level of waiver and Defendant should be barred from relying on a statute of limitations defense in this instance. As such, Defendant's Motion for Summary Judgment should be denied.

II. Plaintiff's Service of Defendant by Publication Was Proper and Effective, Rendering Plaintiff's Cause of Action Timely Under Applicable Law.

The service of the summons and complaint, as well as notice of the pendency of a cause action, is based upon statutory law and has constitutional implications. To that end, both the United States Constitution and the South Carolina Constitution mandate that persons who may lose their rights should be informed of the risk of such loss. The United States Constitution provides that a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Similarly, the South Carolina Constitution provides that "[n]o person shall be finally bound by a judicial or quasi judicial decision affecting private rights except on due notice and an opportunity to be heard." S.C. Const. art. I, § 22. It has been recognized that, where a person upon whom service is sought, "employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Caldwell v. Wiquist*, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).

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What constitutes proper service is governed by statute, and by the South Carolina Rules of Civil Procedure. Specifically, Rule 4(d)(1), SCRCP, requires that, in those instances in which the defendant in an action is an individual, service shall be made "by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein...." Rule 4 of the South Carolina Rules of Civil Procedure, as well as Title 15, Chapter 9 of the South Carolina Code of Laws, provides for alternative means of service in the event personal service cannot be had on an individual. First, Rule 4(d)(8) allows for service to be made by the USPS, certified mail restricted delivery with return receipt requested Rule 4(e) provides further that "[w]henever a statute or an order of court provides for service of a summons and complaint or of a notice ... service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order." Thus, effective service may be accomplished under S.C. Code § 15-9-710 *et seq.*, which allows for service to be made by publication, providing certain criteria have been met. By statute, service of the summons and complaint may be had by publication "[w]hen the person on whom the service of the summons cannot, after due diligence, be found within the State..." S.C. Code § 15-9-710.

Here, Plaintiff followed the necessary procedures for serving Defendant by publication after a thorough, diligent effort to serve Defendant at his last known address by both certified, restricted mail and the Horry County Sheriff's Department. This was sufficiently shown to the Clerk of Court of Horry County whose decision to grant service of Defendant by publication was both just and proper under the laws of the State of South Carolina, and should not be disturbed. Accordingly, Defendant's Motion for Summary Judgment should be denied.

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A. Plaintiff Met His Burden to the Clerk of Court of Horry County in Establishing the Appropriateness of Defendant's Service by Publication, and the Clerk of Court's Decision is Unreviewable Absent Evidence of Fraud or Collusion.

When the person on whom the service of the summons is to be made cannot be found within the state after due diligence to locate him has occurred, and where the clerk of court for common pleas is satisfied that the person cannot be found, and where it appears to the clerk of court that a cause of action exists against the person on whom service is to be made, the clerk of court may grant an order that the service be made by publication. S.C. Code § 15-9-710. The existence of the factual basis necessary to satisfy the requirements of S.C. Code § 15-9-710 make an order for service by publication unreviewable absent fraud or collusion. *Caldwell*, 402 S.C. at 574, 741 S.E.2d at 588. In *Caldwell*, the judgment debtor moved to set aside two default judgments that arose out of personal injury complaints filed by two individuals whose vehicles were struck by a vehicle operated by the judgment debtor. *Id.* The Beaufort County Court of Common Pleas denied the judgment debtor's motions, and the South Carolina Court of Appeals held that the affidavits requesting service of process by publication were deficient on their face. *Id.*

As stated, the clerk of court, or other issuing officer, may authorize publication when, upon reviewing the petition and supporting affidavit, the clerk is satisfied that a cause of action exists against the defendant and that the defendant cannot be located after due diligence. South Carolina courts have routinely noted that service by publication is in derogation of the common law and the statutes allowing it must consequently be strictly construed. *See, e.g., Brown v. Malloy*, 345 S.C. 113, 546 S.E.2d 195 (Ct. App. 2001); *Tenney v. Am. Pipe Mfg. Co.*, 96 F. 919 (D.S.C. 1899). Consequently, the decision of the officer ordering service by publication is final in the absence of a showing of fraud or collusion. *Yarbrough v. Collins*, 293 S.C. 290, 292-93, 360 S.E.2d 300, 301 (1987) (citing *Yates v. Gridley*, 16 S.C. 496 (1882)). In the absence of such a showing of fraud or

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collusion, the trial court is without authority to overrule the findings of a clerk of court regarding due diligence. *Montgumary v. Mullins*, 325 S.C. 500, 506, 480 S.E.2d 467, 470 (Ct. App. 1997). When neither allegations nor proof of fraud or collusion are presented to the trial court, it must correctly refuse to set aside service. *Wachovia Bank of S.C. v. Player*, 341 S.C. 424, 429, 535 S.E.2d 128, 130 (2000). It is difficult to challenge the validity of an order granting leave to effectuate service via publication, as an affidavit in support of a petition for publication is, under most circumstances, unassailable; however, it can be effectively challenged if the moving party can demonstrate that the order was procured through fraud or collusion. *See, e.g.*, *Montgomery*, 325 S.C. 500, 480 S.E.2d 467; *Wachovia*, 341 S.C. 424, 535 S.E.2d 128. Neither fraud nor collusion can, however, be proven without having the opportunity to present evidence. *Id.*

In *Montgomery*, an issue before our State's Court of Appeals was the determination of whether the order of publication was valid based on Montgomery's lack of diligence in attempting to locate the Mullinses. The *Montgomery* Court held that the trial court was "*without authority* to overrule the finding of the clerk of court that the Mullinses could not, after due diligence, be found in the County and State of their last known residence." *Montgomery*, 325 S.C. at 505-06, 480 S.E.2d at 470 (emphasis added). In reaching its conclusion, the *Montgomery* Court looked to the then decade old precedent set by the South Carolina Supreme Court that, in the absence of fraud or collusion, the decision of the officer ordering service by publication is final. *Id.* (citing *Yarbrough* at 293 S.C. 292-293, 360 S.E.2d at 301).

Here, Defendant has neither alleged nor proved fraud or collusion, therefore the Order of Publication should is final and fatal to Defendant's Motion for Summary Judgment. The signed Order on Defendant's Motion to Set Aside states that Defendant did not use "reasonable diligence" to locate Defendant because he did not call Defendant's cell phone. Such argument exceedingly

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fails to rise to the level of fraud of collusion. As set forth in *Montgumary*, the law on this issue is clear that, in the absence of fraud or collusion, the decision of the officer ordering service by publication is final and unassailable. Plaintiff rightfully and lawfully employed the Horry County Sheriff's Department to locate and serve Defendant at his last known address after certified, restricted delivery at Defendant's 186 Williamsburg Road failed. Ultimately, the sheriff's department, the law enforcement authority for Horry County, returned an affidavit of non-service despite their respective due diligence to locate and serve Defendant. The use of the sheriff's department was sufficient for the Clerk of Court to order service by publication.

Still, the Court's Order on Defendant's Motion to Set Aside states that Plaintiff could have obtained his address by simply calling Defendant's cell phone. But, it is unlikely that an individual would be forthcoming with his current or even accurate address knowing that a law firm is attempting to track him down for the purpose of bringing a cause of action against him. The record is devoid of <u>any</u> evidence of fraud or collusion, and, to wit, there is no law, statutory or otherwise, which provides that not calling a defendant's cell phone to obtain his address rises to the level of fraud or collusion, or that such falls short of due diligence. As to the latter, Plaintiff employed two proper avenues of service prior to publication (certified mail and the sheriff's department), and nowhere in the rules does it require a plaintiff to call a cell phone to ascertain the whereabouts of a defendant. Defendant's argument is also puzzling on this issue, as he simultaneously argues that it was somehow improper for Plaintiff to look to the collision report for the Defendant's correct address for service, but proper to look to the same report to easily determine Defendant's by calling the number listed as Defendant's cell phone. Thus, Plaintiff used reasonable due diligence, the Clerk of Court's determination as to service by publication was proper and final on the issue of service, and Defendant's Motion for Summary Judgment should be denied.

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B. Plaintiff's Publication in the *North Myrtle Beach Times* Met the Requirements of the Clerk of Court's Order and the Requirements of S.C. Code Ann. § 15-9-740.

Service by publication is generally governed by South Carolina Code Sections 15-9-710, *et seq*. The South Carolina Supreme Court has ruled with certainty that the service by publication statutes may be applied to actions *in personam* so long as the due process minimum contacts requirement is satisfied. *Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (approving *in personam* jurisdiction over nonresidents who maintain minimum contacts within the forum state)). Moreover, any service of process must be "reasonably calculated to reach interested parties." *Aetna Cas. and Surety Co. v. Jenkins*, 282 S.C. 107, 112, 317 S.E.2d 460, 464 (Ct. App. 1984) (quoting *Mullane*, 339 U.S. 306).

Section 15-9-740 of the South Carolina Code sets forth the requirements for service by publication as follows:

> The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. The court, judge, clerk, master or judge of probate shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his place of residence, unless it appears that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him. In case of minors, persons imprisoned outside of this State, lunatics confined outside of this State or in like cases, a similar order shall be made and like proceedings be had as in case of adults not under disabilities.
>
> In all cases in which publication is made the complaint must first be filed and the summons, as published, must state the time and place of such filing. When service is made by publication the ten days' notice of application for judgment to be made at chambers as required in contested cases of certain kinds as provided by law may be inserted in the first or any subsequent publication mailed to the last known residence of the defendant....

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S.C. Code Ann. § 15-9-740.

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). In order to be a "newspaper of general circulation within a community," a newspaper should contain news of general interest to the community and it must reach a diverse readership. *Moore v. State*. 553 P.2d 8, 21 (Alaska 1976). Additionally, a newspaper of general circulation has been defined as one that has a content appealing to the general public and having more than a *de minimis* number of actual paid subscribers. *Great Southern Media v. McDowell Cty.*, 304 N.C. 427, 284 S.E.2d 457 (1981).

In *Brown v. Malloy*, 345 S.C.113, 546 S.E.2d 195 (Ct. App. 2001), the Court of Appeals addressed the question of the sufficiency of notice pursuant to publication in a case involving termination of parental rights and adoption. The *Brown* Court referenced an order of publication which required that notice be published in a newspaper of general circulation in the county where the minor defendant was conceived and where the biological father is last known to reside. 345 S.C. at 126, 546 S.E.2d at 201-02 (noting that the requirements of the order of publication is the mandate of section 15-9-740, which requires publication in a newspaper "most likely to give notice to the person to be served").

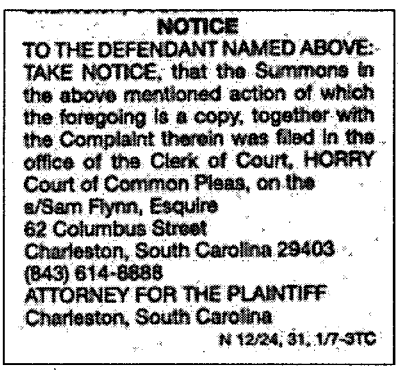
Precise compliance "with the rules is not required to effect service of process." *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010). Instead, a court reviewing notice compliance must analyze "whether the plaintiff has *sufficiently complied with the rules* such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *Id.* (internal citations omitted) (emphasis added). The Supreme Court of the United States has routinely held that "notice [must be] reasonably calculated, under all the

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circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

South Carolina courts have never required exacting compliance with the rules to effect service of process. *See Foster v. Crawford*, 57 S.C. 551, 36 S.E. 5 (1900) (noting that when an officer's return is defective as to time and place of service, such defective return can be amended to state facts); *see also Saunders v. Bobo*, 2 Bailey 492 (1831) (sheriff's incomplete, unsworn return may be amended). Rather, the courts of this state are to inquire 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. *Roche v. Young Bros., Inc., of Florence*, 318 S.C. 207, 209 (1995).

Here, Plaintiff's notice in the *North Myrtle Beach Times* stated that Plaintiff's Complaint was "filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the [sic]". (*See* Ex. 11.) Clearly, this is a scrivener's error in Plaintiff's notice, as it did not include the date of filing. Yet, and most notably, this error is *not* fatal to the information conveyed by Plaintiff's Notice. The notice very clearly informed readers that a Summons and Complaint had been filed against Defendant, and provided the name, address, and telephone number of Plaintiff's counsel. Paramount in Plaintiff's notice is the inclusion of, and direction to, the Horry County Court of Common Pleas where a copy of Plaintiff's Summons and Complaint could be easily accessed via the filed case number present at the top of the notice. Such reference implicitly provided all readers the precise office at which the public filing could be accessed, and conferred upon readers the information necessary to obtain the date and time of Plaintiff's filing although



NOTICE
TO THE DEFENDANT NAMED ABOVE:
TAKE NOTICE, that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina
N 12/24, 31, 1/7-3TC

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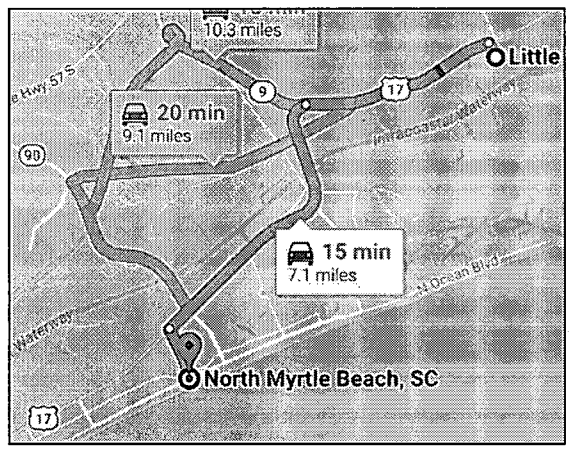
the same is extraneous as Defendant's Answer would be due 30 days after service - the running of the publication, not filing. The Clerk of Court for Horry County has long since provided information on filing not only at its physical office, but also via its website which was and is publically accessible at all times relevant to this cause of action.

Accordingly, the date of filing, or lack thereof, is implicitly contained in Plaintiff's notice and in any event is inconsequential to this matter. 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. Defendant, 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 Defendant to respond to Plaintiff's Complaint began running on January 7, 2016, the last day of publication.

Plaintiff sufficiently complied with the statute controlling notice via publication. Yet, the Court decided that, after the appearance of Defendant's counsel, the case would be best served by allowing Defendant's counsel to accept service, which Defendant's did without objection, and to submit an Answer because the notice did not, on its face contain the Complaint's filing date. Plaintiff's notice must only *substantially* comply with the statute, and the lack of filing date on the

face of the notice does not deprive the court of jurisdiction over Defendant even though the Court found it appropriate to let the Defendant out of default.

As to Plaintiff's use of the *North Myrtle Beach Times*, the signed Order on Defendant's Motion to Set Aside cites S.C. Code Ann. § 15-9-740 for the proposition that notice by publication must be made in "the one newspaper . . . most likely to give notice to the person to be served" and that "the summons, as published, must state the time and place of such filing." The Order provides that Plaintiff's publication in the *North Myrtle Beach Times* was improper because it is not a paper of "general circulation in Horry County" and because Defendant lived in Little River, not North Myrtle Beach. However, Little River is a community in Horry County, South Carolina with a population of nearly 9,000. Little River is approximately seven miles from North Myrtle Beach and is considered to be among the communities in Horry County's Grand Strand. The *North Myrtle Beach Times* is a weekly news publication that is distributed to Little River and Loris, South Carolina, which has been the case for four decades. (*See* Ex. 10.) Contrary to Defendant's assertion, the *North Myrtle Beach Times* is, in fact, the newspaper published closest to Little River. Therefore, the *North Myrtle Beach Times* was the only realistic option for publication given its proximity to Little River, which Defendant admits is the community in which he lived before, at the time of, and after the subject collision. Furthermore, the weekly nature of publication, and the information provided within the *North Myrtle Beach Times* make it the most likely newspaper to provide notice to Defendant. Given that Plaintiff's notice in the *North Myrtle Beach Times* contained the necessary information



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under the law, and that the *North Myrtle Beach Times* is a statutorily compliant "newspaper," this Court should find that Plaintiff's notice was proper, thus precluding Defendant's argument that this cause of action was not commenced and served within the statute of limitations period. Consequently, Defendant's Motion for Summary Judgment should be denied.

C. Plaintiff's Filed and Published Summons Complied with Rule 4, SCRCP, Because Both Provided Defendant Must Respond Within Thirty Days.

Rule 4 of the South Carolina Rules of Civil Procedure requires that the summons in a civil matter contain a statement detailing the "time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint." Rule 4(b), SCRCP.

Here, the signed Order on Defendant's Motion to Set Aside provides that "the Summons filed in this action does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him." This statement is factually incorrect because Plaintiff's filed Summons explicitly states that the Defendant must answer Plaintiff's Complaint within thirty days or Plaintiff will apply for the relief demanded in his Complaint. Specifically, Plaintiff's Summons (filed with his Complaint and excerpted below) clearly indicates that Defendant is "required to Answer the Complaint . . . within 30 days . . . and if you fail to Answer the Complaint . . . Plaintiff will apply to the court for the relief demanded. . . . " (*See* Ex. 2 and excerpted below.)

> **YOU ARE HEREBY SUMMONED** and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or his attorney, Sam Flynn, at his office, 62 Columbus Street Charleston, South Carolina, 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.
>
> Dated at Charleston, South Carolina on the 22nd day of July, 2015.

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It is very evident that Plaintiff's filed Summons complies with Rule 4(b) because it notifies the Defendant that he must respond within thirty days and that failure to do so will have consequences. The filed Summons is not ambiguous and conforms with Rule 4(b).

Likewise, Plaintiff's published Summons (excerpted right) states that Defendant must respond within thirty days, or Plaintiff will "apply to the Court for judgment by default for the relief demanded in the Complaint." (*See* Ex.11.) In both the filed Summons and the published Summons, Plaintiff fully complied with Rule 4(b) because he notified Defendant that he would apply for relief in thirty days absent Defendant's Answer. Both the filed and published Summons warn Defendant about the consequences of his failure to appear, namely judgment by default; however, the signed Order on this issue states that the Summons, presumably the filed Summons, does not comply with Rule 4(b). On this basis, Court's respective rulings on October 21, 2016, and March 16, 2017, are overly broad in stating that the Court has no personal jurisdiction over Defendant. As was previously argued to before the Court, and germane to Defendant's Motion for Summary Judgment, Plaintiff's Summons does, in fact, satisfy the requirements of Rule 4, SCRCP, which precludes Defendant's assertion of the statute of limitations as an affirmative defense here. This is underlined by Defendant's acceptance of service and admission that the Court has jurisdiction over Defendant. Thus, Defendant's Motion for Summary Judgment should be denied.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2015-CP-26-5633
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT

SUMMONS

TO THE DEFENDANT NAMED ABOVE: YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

NOTICE

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II. Defendant Has Submitted Himself to the Personal Jurisdiction of the Court.

Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance. *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007) (noting that, under Rule 4(d), SCRCP, voluntary appearance by a defendant is equivalent to personal service, and that it is immaterial whether the defendant invokes the term "appearance" to demonstrate sufficient intent to submit to the court's jurisdiction). The *Stearns* Court additionally set forth that, although Rule 5(b), SCRCP, generally provides less stringent standards for serving pleadings subsequent to the original summons and complaint, Rule 5(a), SCRCP, requires service pursuant to Rule 4, SCRCP, when a party makes new or additional claims against another party that has been held in default for failure to appear. *Id.* at n. 2.

Long-standing precedent sets forth that a defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case. *State v. Dudley*, 354 S.C. 514, 542, 581 S.E.2d 171, 186 (Ct. App. 2003); *see also Cheraw Motor Sales Co. v. Rainwater*, 125 S.C. 509, 513 119 S.E. 237, 239 (1923). An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction." *Dudley*, 354 S.C. at 542, 581 S.E.2d at 186. No specific act constitutes an appearance, as "a defendant may choose to come into court with trumpets, or quietly by the back door." *Stephens v. Ringling*, 102 S.C. 333, 342, 86 S.E. 683, 685 (1915). Accordingly, courts decide on a case-by-case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction. On many occasions, the South Carolina Supreme Court has found that a party can make a voluntary appearance without formally announcing same. *See, e.g., Triangle Auto*

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Spring Co. v. Gromlovitz, 270 S.C. 386, 389–90, 242 S.E.2d 430, 431 (1978) (holding that consenting to a confession of judgment constitutes a voluntary appearance); *Connell v. Connell*, 249 S.C. 162, 167, 153 S.E.2d 396, 399 (1967) (holding that raising the defense of *res judicata* constitutes a voluntary appearance); *Southeastern Equip. Co. v. One 1954 Autocar Diesel Tractor*, 234 S.C. 213, 218, 107 S.E.2d 340, 342 (1959) (holding that filing a motion to set aside an attachment constitutes a voluntary appearance).

Here, even if Defendant was not properly served with Plaintiff's Summons and Complaint, Defendant waived any objection to personal jurisdiction by appearing and defending this matter, as is also set forth and discussed in Section I of this memorandum. In particular, Defendant's counsel, in her Notice of Appearance on behalf of Defendant, states that that she "hereby provides the Court and counsel of notice that she is representing the Defendant in the above-captioned action." Additionally, Defendant's counsel states in her March 7, 2017, email that "[the Court] asked if I would accept service of the Summons and Complaint and I indicated that I would" and that "

III. Plaintiff's Cause of Action Against Defendant Should Be Heard on Its Merits.

Public policy supports the overall premise that a lawsuit should be resolved on its merits. To avoid resolving litigation by default, strict compliance with the publication statutes is appropriate. *See Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 152, 169 S.E.2d 387, 390 (1969) (noting that the statute applicable to vacating a default judgment "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits" (citation omitted)). Federal courts recognize the same policy. *See Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 417 (4th Cir. 2010) ("[w]e have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed

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of on their merits."); *see also Tazco, Inc. v. Dir., Office of Workers Comp. Programs, U.S. Dep't of Labor*, 895 F.2d 949, 950 (4th Cir. 1990) (noting "[t]he law disfavors default judgments as a general matter....")

Here, given that the action was properly commenced and served within the statute of limitations, and it would be against public policy to deny Plaintiff's cause of action to be properly presented before the trier of fact. To grant summary judgment in favor of Defendant based on the facts presented here would effectively dispose of a case which presents questions of material fact which only a jury can properly decide. Thus, Defendant's Motion for Summary Judgment should be denied, and Plaintiff's case should be allowed to proceed before the trier of fact.

CONCLUSION

In determining whether any triable issues of fact exist, the Court must view the evidence, and all reasonable inferences that may be drawn from the evidence, in the light most favorable to the non-moving party. The non-moving party is only required to submit a scintilla of evidence in order to withstand a motion for summary judgment. Plaintiff in this case has not only presented a mere scintilla of evidence, but has established that Defendant was properly served, that Plaintiff's cause of action was properly commenced, and that, notably, that Defendant breached his duty of care to Plaintiff. For the reasons set forth herein, Defendant's Motion for Summary Judgment should be denied. The applicable standard of care to be decided by the Court as a matter of law, but the burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide. Therefore, summary judgment is not appropriate.

[Signature Block on Following Page]

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

/s/ Matthew L. Nall
Roy T. Willey, IV, Esquire
S.C. Bar Number: 101010
Eric M. Poulin, Esquire
S.C. Bar Number: 100209
Matthew L. Nall, Esquire
S.C. Bar Number: 102329
62 Columbus Street
Charleston, S.C. 29403
(843) 614-8888

Charleston, South Carolina
Dated: April 11, 2017

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ORIGINAL

SOUTH CAROLINA OPSCRS & DMV USE ONLY

Page # 1 Of 1

SOUTH CAROLINA TRAFFIC COLLISION REPORT FORM TR-310 (Rev. 7/2010)

of Units: 02

Agency Case # / Original Report: Corrected

Notified: 1645

Arrived: 1645

2013522953

Date	Time of Collision	Items	Collision Location (Rt. # / Name)	Miles	Dir.	In (Near) City or Town of:
04-08-2013	1600	26	1- Interstate 4- Secondary 2- US Primary 5- County (3) SC Primary 6- PP; (1) Main 5- Connector 2- Alternate 7- Business 9- Other; 5 00 /	.08	N E S (W)	NORTH MYRTLE BEACH

Lane #	Of	Dir.	Distance Offset	Direction	From: Base Intersection (Rt. # / Name)	GPS COORDINATES 00 00 00.00
1	2	N (E) S W	(Miles) .05 Feet	N (E) S W	1- Interstate 4- Secondary 2- US Primary (5) County 3- SC Primary 6- Other; / PINNACLE PL; (1) Main 5- Connector 2- Alternate 7- Business 9- Other	DEGREES MINUTES SECONDS
R.R. Id.			From: Ramp Only To: N E S W 1- Entrance 2- Exit		To: 1- Interstate 4- Secondary 2- US Primary (5) County 3- SC Primary 6- Other; Second Intersection (Rt. # / Name) / GOLF AVE; (1) Main 5- Connector 2- Alternate 7- Business 9- Other	Latitude: 33 51 46.78
						Longitude: 78 38 53.50

E-460503

Driver/Pedestrian's Full Name: ARMSTRONG JULIAN NEIL

Unit #	Sex	Race	Street/R.F.D.
01	M	B	186 WILLIAMSBURG RD

# Occ.	Birth Date	City, State, & Zip
1	08-05-1995	LITTLE RIVER SC 295667812

State	Driver's License #	Class	Insurance Company
SC	102586964	D	STATE FARM

Year	Body	Vehicle Make	VIN #
1995	4S	LEXS	JT8GK13T5S0090073

State	Year	License Plate #	Owner's D.L. #
SC	2015	DWP624	UNKNOWN

Home Telephone	Owner's Full Name
(843) 5040638	ARMSTRONG FRANCIS NEIL

Bus. Telephone	Street/R.F.D.
( )	186 WILLIAMSBURG RD

Contributed To Collision	City, State, & Zip
(Yes) No	LITTLE RIVER SC 295667812

Estimated Speed	Speed Limit	C.D.L. Req.: Yes (No)	T/S 9 Req.: Yes (No)	Alc/Drg Info (see back): Yes (No)
20	40			

Summons #	Code	Summons #	Code	Towed
G323075	21			Yes (No)

Driver/Pedestrian's Full Name

Unit #	Sex	Race	Street/R.F.D.

# Occ.	Birth Date	City, State, & Zip

State	Driver's License #	Class	Insurance Company

Year	Body	Vehicle Make	VIN #

Dir. of Travel	Unit 1: N S E W	Unit 2: N S E W	Unit 3: N S E W

E-460787

Driver/Pedestrian's Full Name: FOSTER BOBBY

Unit #	Sex	Race	Street/R.F.D.
02	M	W	3315 DREW ST

# Occ.	Birth Date	City, State, & Zip
1	09-25-1950	ASH NC 28420-3025

State	Driver's License #	Class	Insurance Company
NC	23836037	C	NATIONWIDE

Year	Body	Vehicle Make	VIN #
2000	VN	DODG	2B4GP44G0YR523493

State	Year	License Plate #	Owner's D.L. #
NC	2013	YPM6186	23836037

Home Telephone	Owner's Full Name
(910) 3837403	FOSTER BOBBY

Bus. Telephone	Street/R.F.D.
( )	3315 DREW ST

Contributed To Collision	City, State, & Zip
Yes (No)	ASH NC 28420-3025

Estimated Speed	Speed Limit	C.D.L. Req.: Yes (No)	T/S 9 Req.: Yes (No)	Alc/Drg Info (see back): Yes (No)
0	40			

Summons #	Code	Summons #	Code	Towed
				Yes (No)

State	Year	License Plate #	Owner's D.L. #

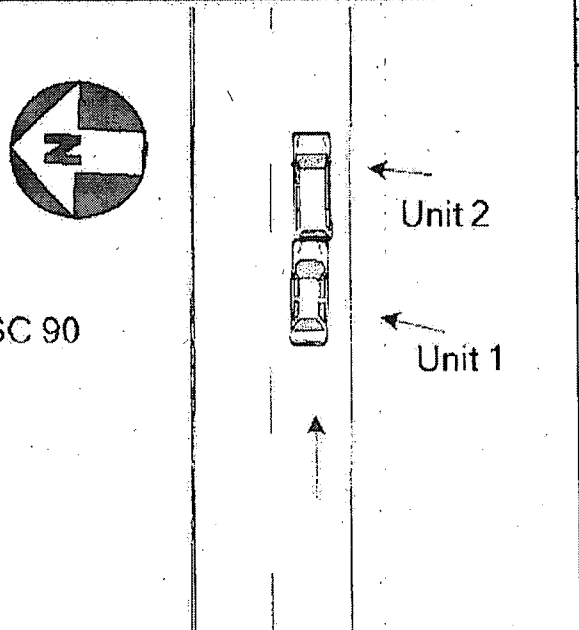
Home Telephone	Owner's Full Name
( )	

Bus. Telephone	Street/R.F.D.
( )	

Contributed To Collision	City, State, & Zip
Yes No	

Estimated Speed	Speed Limit	C.D.L. Req.: Yes No	T/S 9 Req.: Yes No	Alc/Drg Info (see back): Yes No

Summons #	Code	Summons #	Code	Towed
				Yes No



Unit 1 Dam.	Unit 2 Dam.	Unit 3 Dam.	Prop. Dam. 1	Prop. Dam. 2
$2000	$2000	$	$	$

Property Owner/Witness	Address	City	State	Zip	Phone

Property Owner/Witness	Address	City	State	Zip	Phone

Private Y (N)	Describe What Happened (Refer to Units by Number)
	UNIT 1 AND UNIT 2 WERE TRAVELING EAST ON SC 90. UNIT 2 STOPPED FOR TRAFFIC. UNIT 1 STRUCK UNIT 2. UNIT 1 WAS DRIVING TOO FAST FOR CONDITIONS.

NOTICE - THE TR-310 IS FOR STATISTICAL REPORTING PURPOSES ONLY AND IS A REFLECTION OF THE OFFICER'S BEST KNOWLEDGE, OPINION AND BELIEF COVERING THE COLLISION BUT NO WARRANT IS MADE AS TO THE FACTUAL ACCURACY THEREOF.

Investigating Officer's Name	Rank	Badge #	Jurisdiction Code	Review Date	Reviewer's Name	Rank	Internal Agency Code
FROST - M K	LCPL	T 4 2 5	H P 0 5	04-09-2013	C F Costa	CPL	13FL043454

EXHIBIT 1

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

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2013522953

Unit	Date of Birth	Sex	Race	INJ	Seat	R/SD	Age	Ejct	LAI	Tran	Name	Street Address			Zip Code
01	08-05-1995	M	B	0	01	13	4	1	1	1	2	ARMSTRON JULIAN NEIL	186 WILLIAMSBURG RD	LITTLE	SC	295667812
02	09-25-1950	M	W	1	01	13	4	1	1	1	1	8 FOSTER BOBBY	3315 DREW ST	ASH	NC	28420-3025

Race: A-Asian/Pacific Islander; B-Black/African American; I-Native Native or American Indian; W-Caucasian; H-Hispanic; O-Other; U-Unk.

a) Injury Status: 1-Not Injured; 2-Non-incapacitating; 3-Incapacitating; 4-Fatal

Seating Loc.: 01 02 03 / 04 05 06 / 07 08 09; 20-Pedestrian; 30-Trailing Unit; 40-Bus or Van (24 Person or Higher); 50-Other Enclosed Area (non-trailing); 51-Other Unenclosed Area (non-trailing); 60-Sleeper of Cab; 70-Riding on Unit Exterior; 80-Unk; 99-Unk /NA

Restraint/Safety Device: 00-None Used; 11-Shoulder belt Only; 12-Lap Belt Only; 13-Shoulder & Lap Belt; 21-Child Safety Seat; 88-Other; 99-Unk.

Air Bag Deployment / Switch: a) 1-Deployed Front; 2-Deployed Side; 3-Deployed Both; 4-Not Deployed; 7-Not Applicable; 9-Deployment Unk. b) 1-Switch On Position; 2-Switch Off Position; 3-No Switch; 9-Unknown

Ejection: 1-Not Ejected; 2-Part. Ejected; 3-Tot. Ejected; 7-Not Appl.; 9-Unk.

b) 2 or 3 Wheel Motorized Vehicle: Head Injury: 1-Yes; 2-No

Location After Impact: 1-Not Tripped; 2-Extricated (Mechanical Means); 3-Freed (non-mech.); 4-Not Applicable; 9-Unknown

a) Transported to Medical Facility: 1-Yes; 2-No; 3-Unknown

b) By: 1-EMS; 2-Police; 8-Other; 9-Unk.

Pedestrian, Motor Pedalcycle Only: 31-Helmet; 51-Reflective Clothing; 41-Protective Pads; 61-Lighting

Sequence of Events

Non-Collision: 04-Equipment Failure; 05-Fire/Explosion; 06-Overturn Rollover; 09-Ran off Road Left; 10-Ran off Road Right; 11-Separation of Units; 12-Jack-Knife (Articulated); 16-Other Non-Collision; 19-Unk. Non-Collision

Collision, Not Fixed: 20-Animal (Deer Only); 21-Animal (All Other); 22-Motor Veh. in Transport; 23-Motor Veh. Stopped; 24-Motor Veh. Other Roadway; 25-Motor Veh. Parked; 26-Pedalcyclist; 27-Pedestrian; 28-Railway Veh.; 29-Work Zone Maint. Equip.; 30-Other Movable Object; 39-Unk. Movable Object

Collision, Fixed Object: 40-Bridge Overhead Structure; 41-Bridge Pier or Support; 42-Bridge Parapet; 43-Bridge Rail; 44-Culvert; 45-Curb; 46-Ditch; 47-Embankment; 48-Guardrail; 49-Fence; 50-Guardrail End; 51-Guardrail Face; 52-Highway Traffic Sign Post; 53-Impact Attenuator/Crash Cushion; 54-Light Support; 55-Mail Box; 56-Median Barrier; 57-Overhead Sign Support; 58-Other Post, Pole, Support; 59-Other Wall, Building, Tunnel; 60-Tree; 61-Utility Pole; 62-Work Zone Maint. Equipment; 99-Other

Event 1	Event 2	Event 3	Event 4	Most Harmful	1st Harmful
23				23	23
22				22	

Manner of Collision / Struck Veh.: 00-Not Collision With Motor Veh.; 10-Rear-to-Rear; 20-Rear End; 30-Rear-to-Side; 40-Head On; 41-Angle; 42-Angle; 43-Angle; 50-Sideswipe Same Dir.; 60-Sideswipe Opposite Dir.; 70-Backed Into; 99-Unknown

1st / Most Deformed Area: 1st Deformed: 11 27; Most Deformed: 11 27

21-Pedestrian; 81-None; 82-Rollover; 83-Total; 84-Under Carriage; 98-Other; 99-Unk.

Vehicle Type: 01-Automobile; 02-Passenger Bus; 03-Truck Tractor; 04-Other Trucks; 15-Full Size Van; 16-Mini Van; 17-Sport Utility; 25-Motorcycle; 26-Other Motorcycle; 27-Pedalcycle; 28-Animal Drawn Veh.; 29-Animal (Ridden); 41-Pedestrian; 51-Train; 88-Other; 99-Unk. (Hit and Run Only)

Vehicle Use Code: 01-Personal; 02-Driver Training; 03-Construction/Maint.; 04-Ambulance; 05-Military; 06-Transport Passengers; 07-Transport Property; 08-Farm Use; 09-Wrecker or Tow; 10-Police; 11-Government; 12-Fire Fighting; 13-Logging; 41-Pedestrian

Vehicle Attachment: 1-None; 2-Mobile Home; 3-Semi-Trailer; 4-Utility Trailer; 5-Farm Trailer; 6-Trailer w/Boat; 7-Camper Trailer; 8-Towed Motor Vehicle; 9-Petroleum Tanker; A-Livestock Trailer; B-Pole Trailer; C-Other Trailer; D-Not Rpt; E-Two Trailers; F-Other

Action Prior to Impact (Vehicle): 01-Backing; 02-Changing Lanes; 03-Entering Traffic Lane; 04-Leaving Traffic Lane; 05-Making U-Turn; 06-Movements Essentially Straight Ahead; 07-Overtaking/Passing; 08-Parked; 09-Slowing or Stopped in Traffic; 10-Turning left; 11-Turning right; 85-Other; 99-Unk.

(Non-motorist): 21-Approaching/Leaving Vehicle; 22-Entering/Crossing Location; 23-Playing/Working on Vehicle; 24-Pushing Vehicle; 25-Standing; 26-Walking, Playing, Cycling; 27-Working

Alc Test Results: A1-; A2-; A3-

Alcohol/ Drug Test Given: 1-Given - Known Results; 2-Given - Unavailable; 3-Given - Pending; 4-None; 5-Refused

Test Type: 1-Breath (Alc Only); 2-Blood; 3-Urine; 8-Other

Drug Results: 1-Amphetamines; 2-Cocaine; 3-Marijuana; 4-Opiates; 5-PCP; 8-Other; 0-None/Mine

Special Use Only

Underride/Override: 6

Extent of Deformity: 2

Trafficway: 1-Two-way, Not Divided; 2-Two-way, Divided, Unprotected Median; 3-Two-way, Divided, Barrier; 4-One-Way; 8-Other

1st Harmful Event Loc.: 5 2

Road Character: 1-Straight - Level; 2-Straight - On grade; 3-Straight - Hillcrest; 4-Curve - Level; 5-Curve - On grade; 6-Curve - Hillcrest

Road Surface Condition: 1-Dry; 2-Wet; 3-Snow; 4-Slush; 5-Ice; 6-Contaminate; 7-Water (Standing, etc); 8-Other; 9-Unk.

Traffic Control Type: 98; 01-Stop and Go Light; 02-Flashing Traffic Signal; 11-RR (X-bucks, Lights & Gates); 12-RR (X-bucks & Lights); 13-RR (X-bucks Only); 21-Officer or Flagman; 22-Oncoming Emergency Vehicle; 31-Pavement Markings (only); 41-Stop Sign; 42-School Zone Sign; 43-Yield Sign; 45-Other Warning Signs; 51-Flashing Beacon; 98-None; 99-Unk.

School Bus Involved: 1-Yes, Directly; 2-Yes, Indirectly; 3-No; 9-Unk.

Work Zone: 1-Before 1st Sign; 2-Advanced Warning Area; 3-Transition Area; 4-Activity Area; 5-Termination Area; 1-Yes 2-No

Work Zone Location: 1-Shoulder/Median Work; 2-Lane Shift/Crossover; 3-Intermittent/Moving Work; 4-Lane Closure; 8-Other; 9-Unk.

Work Zone Type

1-Yes 2-No Workers Present:

Weather Condition: 1-Clear (no adverse conditions); 2-Rain; 3-Cloudy; 4-Sleet, Hail; 5-Snow; 6-Fog, Smog, Smoke; 7-Blowing Sand, Soil, Dirt; 8-Severe Crosswinds; 9-Unk.

Light Condition: 1-Daylight; 2-Dawn; 3-Dusk; 4-Dark (Lighting Unspecified); 5-Dark (Street Lamps On); 6-Dark (Street Lamps Not On); 7-Dark (No lights)

Junction Type: 01-Crossover; 02-Driveway; 03-Five/More Points; 04-Four-way Intersection; 05-Railway Grade Crossing; 07-Shared Use Paths or Trail; 08-T-Intersection; 09-Traffic Circle; 12-Y-Intersection; 13-Roundabout; 99-Unk.

Primary: 03

Contributing Factors — Driver: 01-Disregarded Signs, Signals, Etc; 02-Distracted/Inattention; 03-Driving Too Fast for Conditions; 04-Exceeded Authorized Speed Limit; 05-Failed to Yield Right-of-Way; 06-Ran off Road; 07-Fatigued/Asleep; 08-Followed Too Closely; 09-Made an Improper Turn; 10-Medical Related; 11-Aggressive Operation of Vehicle; 12-Over-correcting/Over-steering; 13-Swerving to Avoiding Object; 14-Wrong Side or Wrong Way; 15-Under the Influence; 16-Under Influence; 17-Vision Obscured (Within Unit); 18-Improper Lane Usage/Change; 19-Cell Phone; 20-Texting; 28-Other Improper Action; 29-Unk.

Roadway: 30-Debris; 31-Non-Highway Work; 32-Obstruction in Roadway; 33-Road Surface Condition (Ice, Wet); 34-Rut, Holes, Bumps; 35-Shoulders (None, Low, Soft, High); 36-Traffic Control Device (Ie., Missing); 37-Work Zone (Const./Maint./Utility); 38-Worn, Travel-Polished Surface; 48-Other; 49-Unk.

Non-Motorist: 50-Inattentive; 51-Lying &/or Illegally in Roadway; 52-Failure to Yield R. of W.; 53-Not Visible (Dark Clothing); 54-Disregard Signs, Signals, Etc; 55-Improper Crossing; 56-Darting; 57-Wrong Side of Road; 58-Other; 59-Unk.; 65-Under the Influence; 67-Other Person Under Influence

Environmental: 60-Animal in Road; 61-Glare; 62-Obstruction; 63-Weather Cond.; 68-Other; 69-Unk.

Vehicle Defect: 70-Brakes; 71-Steering; 72-Power Plant; 73-Tires/Wheel; 74-Lights; 75-Signals; 76-Windows/Shield; 77-Restraint System; 78-Truck Coupling; 79-Cargo; 80-Fuel System; 88-Other; 89-Unk.

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

BOBBY FOSTER)
Plaintiff(s))

vs.

JULIAN NEIL ARMSTRONG)
Defendant(s))

CIVIL ACTION COVERSHEET

2015-CP-26- 5633

(Please Print)
Submitted By: Eric Poulin/Roy Willey/Sam Flynn
Address: 62 Columbus Street, Charleston, SC 29403

SC Bar #: 100209/101010/101729
Telephone #: (843)614-8888
Fax #: (843)853-2291
Other:
E-mail: eric@akimlawfirm.com
roy@akimlawfirm.com
sam@akimlawfirm.com

2015 JUL 21 PM 2:12
HORRY COUNTY
CLERK OF COURT

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply)*

***If Action is Judgment/Settlement do not complete*

☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION *(Check One Box Below)*

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-CP-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☒ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: Date: 7/17/2015

COPY

EXHIBIT 2

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

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FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

HORRY COUNTY
2015 JUL 27 PM 2:12
CLERK OF COURT

SUMMONS
(Jury Trial Demanded)

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or his attorney, Sam Flynn, at his office, 62 Columbus Street Charleston, South Carolina, 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.

Dated at Charleston, South Carolina on the 22nd day of July, 2015.

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
S.C. Bar No.: 101729
Roy T. Willey, IV, Esquire
S.C. Bar No.: 101010
Eric M. Poulin, Esquire
S.C. Bar No.: 100209
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

COMPLAINT
(Jury Trial Demanded)

HORRY COUNTY
2015 JUL 27 PM 2:12
CLERK OF COURT

The Plaintiff, complaining of the Defendant, alleges and says as follows:

1. That the Plaintiff, Bobby Foster, (herein referred to as "Plaintiff") is a citizen and resident of the city of Ash, State of North Carolina.
2. That upon information and belief, Defendant Julian Neil Armstrong, (herein referred to as "Defendant") is a citizen and resident of Horry County, State of South Carolina.
3. That the motor vehicle collision that is the subject of this action occurred in Horry County, State of South Carolina.
4. That this Court has jurisdiction over the parties and the subject matter of this action.
5. That on or about April 8, 2013, Plaintiff was lawfully traveling east on SC 90 in a 2000 Dodge Van license plate YPM6186, VIN number 2B4GP44G0YR523493.
6. That on or about April 8, 2013, Defendant was traveling east on SC 90 in a 1995 Lexus license plate DWP624, VIN number JT8GK13T5S0090073.
7. That on or about April 8, 2013, Plaintiff came to a lawful stop for traffic.
8. That on or about April 8, 2013 Defendant was following too closely, travelling too fast for conditions, failed to stop, and violently struck Plaintiff's vehicle from behind.
9. That at all times material hereto, Defendant had a duty to operate his vehicle in a safe and prudent manner and to avoid injuring other motorists.

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10. That the collision and the resulting injuries and damages to Plaintiff were caused directly and proximately by one or more of the following negligent, grossly negligent, negligent *per* se, careless, reckless, willful, wanton and unlawful acts, and/or omissions of the Defendant in any one or more of the following respects:

a. In failing to keep a proper lookout while operating the vehicle;

b. In failing to maintain control of the vehicle;

c. In failing to stay in his lane of traffic;

d. In failing to slow down to a controllable speed to stay in his lane of traffic;

e. In failing to keep a safe distance from Plaintiff;

f. In failing to use due care;

g. In failing to properly observe the road and traffic conditions;

h. In failing to obey traffic laws and/or signs;

i. In failing to use his horn, if he had any;

j. In traveling too fast for conditions;

k. In failing to properly maintain the vehicle;

l. In failing to yield the right of way;

m. In failing to apply his brakes or use his steering mechanism to avoid the collision;

n. In negligently and carelessly operating the vehicle in a high and excessive rate of speed under the circumstances then and there existing;

o. In operating the vehicle at a high rate of speed and far in excess of the reasonable and prudent speed under the circumstances and conditions then and there existing;

p. In operating the vehicle without using due care and without regard for safety and rights of Plaintiff;

q. In operating the vehicle in a negligent, grossly negligent, careless, reckless,

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willful, wanton and unlawful manner so as to create a dangerous situation;

r. In failing to exercise the degree of care and caution that a reasonable and prudent person would have exercised under the circumstances then and there prevailing;

s. In negligently and carelessly operating the vehicle in such a manner to cause the vehicle to strike Plaintiff and cause personal injuries;

t. In driving while distracted;

u. In failing to immediately report an accident involving personal injury;

v. In any other acts that represent a breach of the statutory or common laws of the State of South Carolina; and

w. In any other such manner that Plaintiff may become aware of through discovery and/or at trial.

11. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff was injured, has endured pain and suffering, has suffered mentally and emotionally, and has incurred, and will incur, various medical expenses, and has otherwise been damaged and injured.

12. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff was jerked, thrown and slammed within the interior of his vehicle by the force of the Defendant's vehicle, causing him to sustain serious and painful personal injuries including, but not limited to, pain and suffering, and injuries to his back and shoulder.

13. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff has been damaged and injured in the following respects:

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

a) Plaintiff has been required to expend a significant amount of money for his medical care, treatment and attendant services;

b) Upon information and belief, the nature of Plaintiff's injuries will require him to expend a significant amount of money for his medical care, treatment and attendant services in the future;

c) Plaintiff has been unable to work and has been deprived of his income;

d) Upon information and belief, the nature of Plaintiff's injuries will deprive him of employment opportunity and income in the future;

e) The pain of his injuries has resulted in his loss of enjoyment of life and change in his personality, all to permanent detriment to his health and physical well-being; and

f) Upon information and belief, the Plaintiff was required to expend significant amounts of money to replace and repair property damage caused in the accident.

14. That Defendant's acts and omissions, as is set forth more fully above, show willful misconduct, malice, wantonness and an entire want of care, raising a presumption of the Defendant's conscious indifference to the consequences of such acts and omissions.

15. That because of the Defendant's acts and omissions and the proximate harm resulting to Plaintiff, Plaintiff should be awarded punitive damages in an amount to be determined by the trier of fact, in order to punish and penalize the Defendant and to deter the Defendant and others from similar behavior.

16. That upon information and belief, Plaintiff is entitled to judgment against the Defendant for actual, compensatory and exemplary or punitive damages for his personal injuries and property damages set forth herein in an amount that is fair, just and reasonable under the circumstances, plus whatever costs, interest and attorney fees that she may be entitled, to be determined by a jury.

WHEREFORE, the Plaintiff prays for judgment against the Defendant for an amount to be ascertained by the jury at the trial of this action, for all damages, punitive and actual, for the cost and disbursements of this action, and both prejudgment and post judgment interest, and for such other and further relief, in law or in equity, as this court may deem just and proper.

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
S.C. Bar No.: 101729
Roy T. Willey, IV, Esquire
S.C. Bar No.: 101010
Eric M. Poulin, Esquire
S.C. Bar No.: 100209
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

Dated at Charleston, SC
This 22nd day of July, 2015.

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Akim A. Anastopoulo (SC)
Kate L. Bostrom (NC)
Samuel R. Flynn (SC)
Marianthe L. Kolokithas (SC)
Eric M. Poulin (GA)(NC)(SC)(CA)
Casey Van Valkenburgh (SC)(IL)
P. Heath Ward (SC)
Katie M. Wilensky (SC)
Roy T. Willey, IV (SC)
Evan P. Williams (SC)

ANASTOPOULO LAW FIRM

Toll Free: 1 (800) 313-2546
Facsimile: (843) 494-5536

Reply to Columbus Street Office
www.AkimLawFirm.com

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Thursday, August 13, 2015

Sent Via Certified Mail, Restricted Delivery
7015 0640 0005 7946 3544

Julian Neil Armstrong
186 Williamsburg Road
Little River, SC 29566

RE: *Bobby Foster v. Julian Neil Armstrong*
Case No.: 2015-CP-26-5633

Dear Mr. Armstrong:

Enclosed for service upon you, and pursuant to Rule 5 of the S.C.R.C.P., please find a copy of the Summons & Complaint that has been filed in the above referenced action.

Upon receipt, please forward this letter and these important legal papers to your insurance company **immediately**. These documents are time sensitive.

Sincerely,

Peggy Teasley
Litigation Manager

Enclosure

Cc: Bobby Foster

EXHIBIT 3

USPS.COM

USPS Tracking®

Customer Service ›
Have questions? We're here to help.

Get Easy Tracking Updates ›
Sign up for My USPS.

Tracking Number: 70150640000579463544

Product & Tracking Information

Postal Product:
First-Class Mail®

Features:
Certified Mail Restricted Delivery Return Receipt

See tracking for related item: 9590952106150123692623

DATE & TIME	STATUS OF ITEM	LOCATION
September 4, 2015 , 12:52 am	Departed USPS Facility	CHARLESTON, SC 29423
Your item departed our USPS facility in CHARLESTON, SC 29423 on September 4, 2015 at 12:52 am. The item is currently in transit to the destination.		
September 3, 2015 , 1:37 pm	Arrived at USPS Facility	CHARLESTON, SC 29423
September 2, 2015 , 3:42 pm	Departed USPS Facility	COLUMBIA, SC 29201
August 31, 2015 , 9:05 am	Unclaimed/Max Hold Time Expired	LITTLE RIVER, SC 29566
August 15, 2015 , 1:13 pm	Notice Left	LITTLE RIVER, SC 29566
August 14, 2015 , 8:55 am	Arrived at USPS Facility	COLUMBIA, SC 29201
August 14, 2015 , 6:26 am	Departed USPS Facility	CHARLESTON, SC 29423
August 13, 2015 , 10:45 pm	Arrived at USPS Facility	CHARLESTON, SC 29423
August 13, 2015 , 4:30 pm	Acceptance	CHARLESTON, SC 29403

Available Actions

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS WARD
CLERK OF COURT

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EXHIBIT
4

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Akim A. Anastopoulo (SC)
Kate L. Bostrom (NC)
Samuel R. Flynn (SC)
Marianthe L. Kolokithas (SC)
Eric M. Poulin (GA)(NC)(SC)(CA)
Casey Van Valkenburgh (SC)(IL)
P. Heath Ward (SC)
Katie M. Wilensky (SC)
Roy T. Willey, IV (SC)
Evan P. Williams (SC)

ANASTOPOULO
LAW FIRM

Toll Free: 1 (800) 313-2546
Facsimile: (843) 494-5536

Reply to Columbus Street Office
www.AkimLawFirm.com

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Tuesday, September 15, 2015

Horry County Sheriff's Office
Attn: Civil Process
P. O. Box 380
Conway, SC 29526

RE: *Bobby Foster v. Julian Neil Armstrong*
Case No.: 2015-CP-26-5633

Dear Sir/Madam:

Enclosed please find the Summons and Complaint in the above referenced matter to be served upon **Julian Neil Armstrong, 186 Williamsburg Road, Little River, SC.** Also enclosed is our firm's check in the amount of $15 in payment for this service.

If you have any questions, please do not hesitate to contact me at 1-800-313-2546.

Sincerely,

Peggy Teasley
Litigation Manager
Enclosure

Cc: Bobby Foster

Mailing: 62 Columbus Street, Charleston, South Carolina 29403
North Charleston: 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418
Pee Dee: 150 W. Evans Street, Florence, South Carolina 29501
Columbia: 1201 Main Street, Suite 1901, Columbia, South Carolina 29201

Appointment Only: Myrtle Beach * Wilmington, North Carolina



IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE HORRY JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

ORDER FOR PUBLICATION

FILED
HORRY COUNTY
2015 NOV 23 PM 12:13
MELANIE HOGGAN-WARD
CLERK OF COURT

THIS MATTER comes before the Court pursuant to the Plaintiff's petition requesting an Order of Publication authorizing the service of the Defendant via publication.

Having reviewed the Plaintiff's Petition, and Affidavit, the Court finds that after due diligence, the Defendant cannot be found in this state, or at Defendant's last known residence. The Court finds that it is appropriate and necessary to serve the Defendant via publication in the daily newspaper of Defendant's last known residence, 186 Williamsburg Road, Little River, South Carolina.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED, that service upon the Defendant shall be effectuated by publishing the Summons, and notice of filing of the Complaint in the above referenced case in local newspaper, once weekly for three (3) consecutive weeks, and by forwarding a copy of the pleadings to the Defendant at Defendant's last known address.

IT IS SO ORDERED.

Melanie Hoggan-Ward
Clerk of Court PRESIDING JUDGE COURT OF COMMON PLEAS
HORRY JUDICIAL CIRCUIT

DATED: 11/24/15

EXHIBIT 6

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

AFFIDAVIT OF PUBLICATION

FILED
HORRY COUNTY
2016 JAN 20 AM 10:46
MELANIE [illegible] BOARD
CLERK OF COURT

State of South Carolina

County of Horry

Pauline L. Lowman

Personally appears before me,

and after being duly sworn,

That she is the Publisher of

the North Myrtle Beach Times

a newspaper published at

North Myrtle Beach in

the County and State aforesaid;

that the Legal Notice

was printed and published in said newspaper

for and during the weekly publication,

and appeared in the issues of the

North Myrtle Beach Times December 24th, 31st

and January 7th A.D. 2016

Pauline L. Lowman

Sworn to and subscribed before me

this 7th day of January

A.D. 2016

Henry C Hucks, Sr

Notary Public for South Carolina

Commission Expires May 26, 2020.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2016-CP-26-5633
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT

SUMMONS

TO THE DEFENDANT NAMED ABOVE: YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

NOTICE

TO THE DEFENDANT NAMED ABOVE: TAKE NOTICE, that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the

s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina

N 12/24, 31, 1/7-3TC

EXHIBIT
tabbies
7

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IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE HORRY JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

ORDER FOR PUBLICATION

FILED
HORRY COUNTY
15 JUL 23 PM 12:13
BETTY [illegible]-WARD
CLERK OF COURT

THIS MATTER comes before the Court pursuant to the Plaintiff's petition requesting an Order of Publication authorizing the service of the Defendant via publication.

Having reviewed the Plaintiff's Petition, and Affidavit, the Court finds that after due diligence, the Defendant cannot be found in this state, or at Defendant's last known residence. The Court finds that it is appropriate and necessary to serve the Defendant via publication in the daily newspaper of Defendant's last known residence, 186 Williamsburg Road, Little River, South Carolina.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED, that service upon the Defendant shall be effectuated by publishing the Summons, and notice of filing of the Complaint in the above referenced case in local newspaper, once weekly for three (3) consecutive weeks, and by forwarding a copy of the pleadings to the Defendant at Defendant's last known address.

IT IS SO ORDERED.

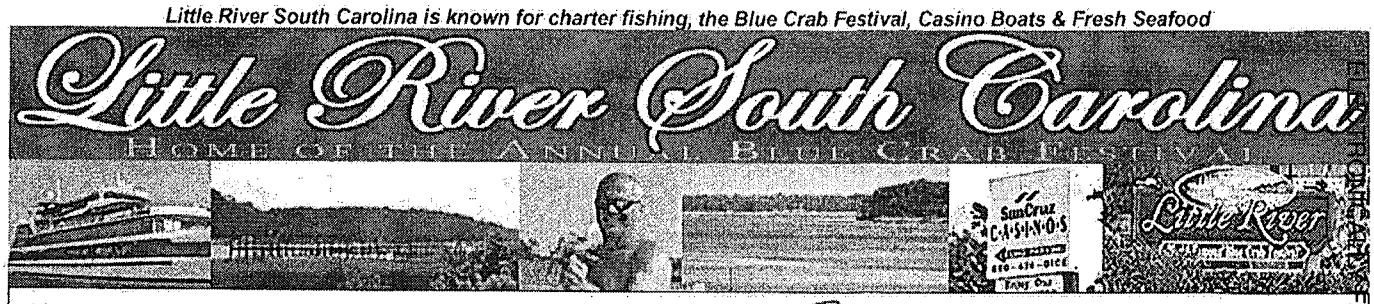
Clerk of Court Melanie Huggins-Ward
PRESIDING JUDGE COURT OF COMMON PLEAS
HORRY JUDICIAL CIRCUIT

DATED: 11/24/15

EXHIBIT
8

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP260633

Little River South Carolina is known for charter fishing, the Blue Crab Festival, Casino Boats & Fresh Seafood



FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Little River SC
News & Events
Photos
Fishing
Casino Boats
Hotels & Motels
Restaurants
Marinas
Golf
Real Estate
Souvenirs
Fresh Seafood
Fun Stuff to Do
Locals
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Welcome...
LITTLE RIVER SOUTH CAROLINA

Little River South Carolina is the oldest -- and one of the most unique -- towns along the greater Grand Strand.

Known for its fresh seafood, fishing charters, annual blue crab festival, and historic centuries-old live oak trees, it is one of the last communities on the Grand Strand where a slower pace of life still exists.

Little River is about 20 miles to the north of the hustle and bustle of Myrtle Beach, so residents and visitors alike share more peaceful days in this quaint fishing village.

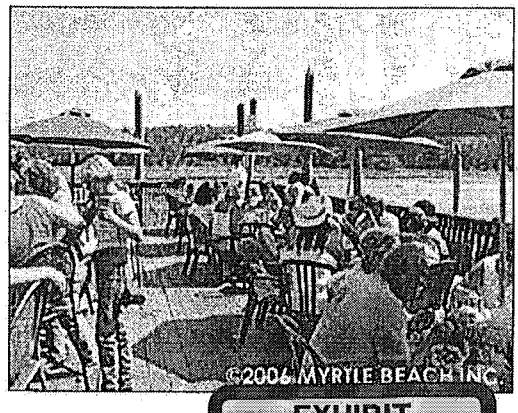
Yet Little River is just a short drive to all the Grand Strand's famous attractions, signature golf courses, unique variety shows, shopping outlets and world-class entertainment.

Enter your starting location
Enter your destination
Start Now!

And with two Las-Vegas-style casino gambling boats now docked in Little River, locals and tourists flock to the waterfront twice a day, every day, for world-class casino gambling excursions into international waters where gambling is legal.

Little River is also home to generations of charter and commercial fishermen and shrimpers. Here you can choose between short party-boat fishing trips near the shore, or spend an entire day fishing in the deep waters of the Gulf Stream.

For those who love to play in the waterway instead of fish, there are jet ski rentals at the waterfront as well as dock space and pontoon boat rentals at Crickett Cove and Coquina Harbor marinas.



It's no secret that property values and real estate in Little River are rapidly rising in value since almost every one who visits wants to move or have a second home here.

There's a quality of life that residents cherish and visitors admire in our beautiful town on the north end of the Grand Strand.

Webmaster's Note: As readers may or may not know, Little River is an historic fis[illegible] Intracoastal Waterway, unincorporated, in Horry County, South Carolina.



In viewing online descriptions of Little River, most notably at Wikipedia, we've read definitions stating that Little River is merely a CDP, or zip code designation. **Nothing could be further from the truth.**

Little River is the oldest settlement in Horry County, as well as one of the oldest villages in the state, and is mentioned by name in civil war records and other documents preserved from the 1700s, 1800s, and 1900s. In contrast, **zip codes were implemented in 1963.**

The video at the top of this page highlights several pictoresque spots in our beautiful town of Little River.

The photo above is taken on the deck of Crab Catchers Restaurant on Water Front Avenue, a locals' favorite spot for fresh fish, oysters, shrimp, or for watching the fisherman coming in with their catches and the gambling boats load and unload their passengers.

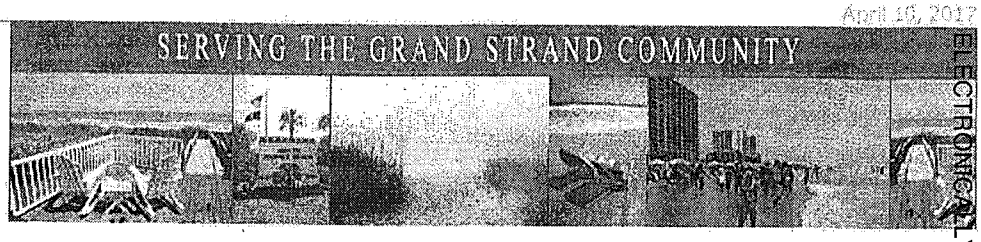
PROTECTED BY COPYSCAPE DO NOT COPY

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April 16, 2017
ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

North Myrtle Beach Times



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North Myrtle Beach Times

Welcome to North Myrtle Beach and the newspaper serving our community and the Grand Strand for 38 years, the *North Myrtle Beach Times*.

Top News Stories

& Current Events

Chamber of Commerce membership awards gala Saturday hono businesses - Apr 6, 2017
The North Myrtle Beach Chamber of Commerce, CVB 2017 Membership Award held on Saturday, March 25, at The

Hatley takes part in beach renourishment, preservation hearing 2017
North Myrtle Beach Mayor Marilyn Hatley, acting in her role as vice chairperson South Carolina Beach Advocates

Dockside Village coming to Barefoot Landing - Mar 30, 2017
Burroughs & Chapin is planning a major transformation of Barefoot Landing ove few years, starting with the

ALDI opens with huge crowd - Mar 30, 2017
Last Thursday morning at approximately 8:30 a.m. ALDI Food Store held its gra in the Surfwood Shopping Center

Fire department to install free smoke alarms - Mar 23, 2017
North Myrtle Beach firefighters and members of participating organizations will Myrtle Beach residents on

City receives funding for beach project - Mar 23, 2017

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NORTH MYRTLE BEACH

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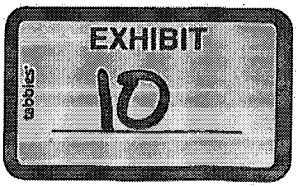


NORTH MYRTLE BEACH CHAMBER OF COMMERCE

Myrtle Beach Area Chamber of Commerce

LITTLE RIVER CHAMBER OF COMMERCE

Horry County



North Myrtle Beach Times
PO Box 725
North Myrtle Beach,
S.C. 29597

Phone: 843-249-3525
Send Email:
nmbtimes@sc.rr.com



Send in your Church Calendar to
North Myrtle Beach Times/Loris Times
P.O. Box 725, North Myrtle Beach, S.C. 29597
or email: nmbtimes@sc.rr.com

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AFFIDAVIT OF PUBLICATION

FILED
HORRY COUNTY
2016 JAN 20 AM 10:46
MELANIE E. BARNHARD
CLERK OF COURT

State of South Carolina

County of Horry

Pauline L. Lowman

Personally appears before me,

and after being duly sworn,

That she is the Publisher of

the North Myrtle Beach Times

a newspaper published at

North Myrtle Beach in

the County and State aforesaid;

that the Legal Notice

was printed and published in said newspaper

for and during the weekly publication,

and appeared in the issues of the

North Myrtle Beach Times December 24th, 31st

and January 7th A.D. 2016

Pauline L. Lowman

Sworn to and subscribed before me

this 7th day of January

A.D. 2016

Henry C. Hooker, Sr.

Notary Public for South Carolina

Commission Expires May 26, 2020.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2016-CP-26-0033
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT

SUMMONS

TO THE DEFENDANT NAMED ABOVE:
YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

NOTICE

TO THE DEFENDANT NAMED ABOVE:
TAKE NOTICE, that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina

N 12/24, 31, 1/7-3TC

EXHIBIT
11

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

CASE NO.: 2015-CP-26-5633

MOTION AND ORDER
INFORMATION FORM AND COVER SHEET

FILED
HORRY COUNTY
2016 MAR -8 PM 3:25
MELANIE HUGGINS-WARD
CLERK OF COURT

Plaintiff's Attorney: Matthew Nall, Eric Poulin, Roy Willey Bar Number: 102329, 100209, 101010 Address: 62 Columbus St., Charleston SC 29403 Phone: 843-614-8888 Fax: 843-853-2291 E-Mail: matt@akimlawfirm.com, eric@akimlawfirm.com, roy@akimlawfirm.com	Defendant's Attorney: Bar Number: Address: Phone: E-Mail:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTINONS III and III)**
☐ **PROPOSED ORDER / CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Entry of Default – Request for Damages Hearing
Estimated Time Needed: 15 Min. Court Reporter Need: ☒ YES / ☐ NO

SECTION II: Motion / Order Type

☐ Written motion attached
☒ Form Motion / Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

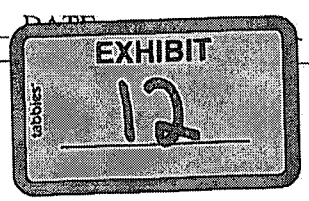
Signature of Attorney for ☒ Plaintiff / ☐ Defendants — Wednesday, February 10, 2016 Date Submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposal order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

Copy

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ DATE



ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

CLERK'S SECTION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 14TH JUDICIAL CIRCUIT CASE NO: 2015-CP-26-5633
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	**PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT AND REQUEST FOR HEARING ON DAMAGES**

FILED
HORRY COUNTY
2016 MAR 18 PM 3:25
MELANIE JENKINS WARD
CLERK OF COURT

COMES NOW the Plaintiff, by and through undersigned counsel, who asks the Clerk of Court to enter default against the Defendant Julien Neil Armstrong and schedule a hearing to determine damages.

INTRODUCTION

1. Plaintiff brought this action against Defendant Julian Neil Armstrong as a result of injuries suffered in an automobile accident that occurred on April 8, 2013. After an unsuccessful attempt to serve the Defendant personally through certified mail and the Horry County Sheriff, Plaintiff published Notice of the Summons and Complaint in The North Myrtle Beach Times. Defendant Julien Neil Armstrong did not file a responsive pleading or otherwise defend the suit.

2. Plaintiff is, therefore, entitled to entry of default and a hearing on damages.

ARGUMENT AND AUTHORITIES

3. Rule 55(a) directs the Clerk of the Court to enter default against a party who has not filed a responsive pleading or otherwise defended the suit. SCRCP 55(a).

4. Rule 55(b) permits the court to enter default judgment against a party against whom

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

default has been entered. SCRCP 55(b)(1).

5. Plaintiff meets the procedural requirements for obtaining an entry of default as demonstrated by attorney Matthew Nall's sworn affidavit, attached as Exhibit A.

6. Plaintiff does not seek affirmative relief against an infant, an incompetent person, or the State of South Carolina.

Upon information and belief, Defendant Julien Neil Armstrong is not in the Military Service of the United States and is not entitled to the protection of the Civil Relief Act of 1940 and Amendments thereto. [Exhibit B].

7. Plaintiff attempted to serve Defendant Armstrong via USPS Certified Mail Restricted Delivery, the package was returned unclaimed after the maximum holding time expired on August 31, 2015. [Exhibit C].

8. Plaintiff attempted to serve the Summons and Complaint upon Defendant Armstrong through the Horry County Sheriff's Office, and was given an Affidavit of Non-Service on September 24, 2015. [Exhibit D].

9. Plaintiff then petitioned the Court to published Notice of the Summons and Complaint in The North Myrtle Beach Times. After approval, The North Myrtle Beach Times published the Notice on December 24, 31, and January 7. [Exhibit E].

10. Under SCRCP 12(a), the time for Defendant to respond is thirty (30) days after being served with process.

11. Because Defendant Julien Neil Armstrong did not file a responsive pleading or otherwise defend, Plaintiff is entitled to Entry of Default.

12. Plaintiff's damages are unliquidated and a hearing is requested to receive evidence of Plaintiff's damages.

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PRAYER

13. For these reasons, Plaintiff asks the Court to enter a Default against Defendant Julien Neil Armstrong and to schedule an evidentiary hearing to determine Plaintiff's damages.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

Matthew L. Nall, Esquire
SC Bar Number: 102329
Eric M. Poulin, Esquire
SC Bar Number: 100209
Roy T. Willey, IV, Esquire
SC Bar Number: 101010
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

Charleston, South Carolina
March 2, 2016

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 14TH JUDICIAL CIRCUIT CASE NO: 2015-CP-26-5633
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	**AFFIDAVIT OF MATTHEW NALL**

FILED
HORRY COUNTY
2016 MAR -8 PM 3:25
MELANIE HUGGINS-WARD
CLERK OF COURT

COMES NOW, the affiant, Matthew Nall, and first being duly sworn upon his oath under the pains and penalties of perjury now states the following:

1. I am the above named affiant, Matthew Nall.

2. I, Matthew Nall, am an attorney with Anastopoulo Law Firm, LLC.

3. Plaintiff attempted to serve Defendant Armstrong via USPS Certified Mail Restricted Delivery, the package was returned unclaimed after the maximum holding time expired on August 31, 2015. The package was sent to Defendant's last known address:

Julian Neil Armstrong
186 Williamsburg Road
Little River, SC 29566

4. Plaintiff attempted to serve the Summons and Complaint upon Defendant Armstrong through the Horry County Sheriff's Office, and was given an Affidavit of Non-Service on September 24, 2015.

5. Plaintiff then petitioned the Court to published Notice of the Summons and Complaint in The North Myrtle Beach Times. After approval, The North Myrtle Beach Times published the Notice on December 24, 31, and January 7.

6. Upon information and belief, Defendant Julian Neil Armstrong is neither an infant nor incompetent adult.

7. As of today's date, March 2, 2016, Defendant Julian Neil Armstrong has failed to file a responsive pleading.

SIGNATURE ON FOLLOWING PAGE

Signature of Affiant

Matthew Nall, ESQ.

SWORN BEFORE ME THIS 2nd day of March 2016.

NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA
My commission expires: 12-4-2017

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

EXHIBIT B
(Affidavit of Non-Military Service)

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 14TH JUDICIAL CIRCUIT CASE NO: 2015-CP-26-5633
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	**AFFIDAVIT OF NON-MILITARY SERVICE**

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

Personally appeared before me the undersigned attorney, who first being duly sworn, deposes and says:

That he is familiar with the provisions of 50 App. Section 520, Civil Relief Act of 1940, and to induce the Court to enter a default judgment against Defendant Julian Neil Armstrong, represents to the Court that from his file in this matter, and on information and belief based on the hereinafter enumerated facts, Defendant Julian Neil Armstrong is/are not in the Military Service of the United States and is/are not entitled to the protection of the Civil Relief Act of 1940 and Amendments thereto. The source of information on which he bases his belief is as follows: Research made by the Anastopoulo Law Firm, LLC and Bobby Foster, Plaintiff herein.

Signature of Affiant:

Matthew Nall, ESQ.

SWORN BEFORE ME THIS 2nd day of March 2016.

NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA
My commission expires: 12-4-2017

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

EXHIBIT C
(Proof of Service)

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ANASTOPOULO
LAW FIRM

Akim A. Anastopoulo (SC)
Kate L. Bostrom (NC)
Samuel R. Flynn (SC)
Marianthe L. Kolokithas (SC)
Eric M. Poulin (GA)(NC)(SC)(CA)
Casey Van Valkenburgh (SC)(IL)
P. Heath Ward (SC)
Katie M. Wilensky (SC)
Roy T. Willey, IV (SC)
Evan P. Williams (SC)

Toll Free: 1 (800) 313-2546
Facsimile: (843) 494-5536

Reply to Columbus Street Office
www.AkimLawFirm.com

Thursday, August 13, 2015

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS WARD
CLERK OF COURT

Sent Via Certified Mail, Restricted Delivery
7015 0640 0005 7946 3544

Julian Neil Armstrong
186 Williamsburg Road
Little River, SC 29566

RE: *Bobby Foster v. Julian Neil Armstrong*
Case No.: 2015-CP-26-5633

Dear Mr. Armstrong:

Enclosed for service upon you, and pursuant to Rule 5 of the S.C.R.C.P., please find a copy of the Summons & Complaint that has been filed in the above referenced action.

Upon receipt, please forward this letter and these important legal papers to your insurance company **immediately**. These documents are time sensitive.

Sincerely,

Peggy Teasley
Litigation Manager

Enclosure

Cc: Bobby Foster

Mailing: 62 Columbus Street, Charleston, South Carolina 29403
North Charleston: 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418
Pee Dee: 150 W. Evans Street, Florence, South Carolina 29501
Columbia: 1201 Main Street, Suite 1901, Columbia, South Carolina 29201

Appointment Only: Myrtle Beach * Wilmington, North Carolina

PLAINTIFF'S EXHIBIT C

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DATE & TIME	STATUS OF ITEM	LOCATION
September 4, 2015 , 12:52 am	**Departed USPS Facility**	**CHARLESTON, SC 29423**
Your item departed our USPS facility in CHARLESTON, SC 29423 on September 4, 2015 at 12:52 am. The item is currently in transit to the destination.		
September 3, 2015 , 1:37 pm	Arrived at USPS Facility	CHARLESTON, SC 29423
September 2, 2015 , 3:42 pm	Departed USPS Facility	COLUMBIA, SC 29201
August 31, 2015 , 9:05 am	Unclaimed/Max Hold Time Expired	LITTLE RIVER, SC 29566
August 15, 2015 , 1:13 pm	Notice Left	LITTLE RIVER, SC 29566
August 14, 2015 , 8:55 am	Arrived at USPS Facility	COLUMBIA, SC 29201
August 14, 2015 , 6:26 am	Departed USPS Facility	CHARLESTON, SC 29423
August 13, 2015 , 10:45 pm	Arrived at USPS Facility	CHARLESTON, SC 29423
August 13, 2015 , 4:30 pm	Acceptance	CHARLESTON, SC 29403

Available Actions

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HORRY COUNT
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

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ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA,)
)
COUNTY OF HORRY)

CASE NUMBER:# 2015CP265633

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD who being duly sworn states that he/she is a Deputy Sheriff for Horry County, South Carolina and that the SUMMONS AND COMPLAINT, COVER SHEET on behalf of BOBBY FOSTER VS JULIAN NEIL ARMSTRONG was delivered to the Sheriff of Horry County on the 24th day of SEPTEMBER 2015, for service on the Defendant at 186 WILLIAMSBURG ROAD LITTLE RIVER, SC

South Carolina; and that Deponent made a diligent search, but was unable to locate JULIAN NEIL ARMSTRONG

Sworn to before me this 26th day of OCTOBER , 2015.

Phillip F. Thompson
Sheriff of Horry County

NOTARY PUBLIC FOR SOUTH CAROLINA

DAVID FLOYD
Deputy Sheriff

MY COMMISSION EXPIRES: 9-15-2016

UNABLE TO LOCATE. NEIGHBOR ADVISED THAT SUBJECT HAS MOVED.

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS WARD
CLERK OF COURT

PLAINTIFF'S EXHIBIT D

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP260633

AFFIDAVIT OF PUBLICATION

FILED
HORRY COUNTY
2016 JAN 20 AM 10:16

State of South Carolina

County of Horry

Pauline L. Lowman

Personally appears before me,

and after being duly sworn,

That she is the Publisher of

the North Myrtle Beach Times

a newspaper published at

North Myrtle Beach in

the County and State aforesaid;

that the Legal Notice

was printed and published in said newspaper

for and during the weekly publication,

and appeared in the issues of the

North Myrtle Beach Times December 24th 31st

and January 7th A.D. 2016

Pauline L. Lowman

Sworn to and subscribed before me

this 7th day of January

A.D. 2016

Henry C Hester, Sr

Notary Public for South Carolina

Commission Expires May 26, 2020.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2015-CP-26-5639
BOBBY FOSTER,
PLAINTIFF,
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT.

SUMMONS

TO THE DEFENDANT NAMED ABOVE:
YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Fiynn, at their office located at 2587 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Sam Fiynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

NOTICE

TO THE DEFENDANT NAMED ABOVE:
TAKE NOTICE that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the

s/Sam Fiynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina

N 12/24 31 1/7-STC

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

PLAINTIFF'S EXHIBIT E

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

ORDER FOR ENTRY OF DEFAULT AND REFERRAL FOR HEARING ON DAMAGES

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

The Notice of Summons and Complaint in this matter was published in The North Myrtle Beach Times published the Notice on December 24, 31, and January 7. Defendant Julien Neil Armstrong failed to submit a responsive pleading or defend the suit and on March 2, 2016, Plaintiff filed a Motion for Entry of Default and Request for a Hearing on Damages.

THE COURT HEREBY FINDS Defendant Julien Neil Armstrong was properly served with notice via publication and failed to file and/or serve a responsive pleading within 30 days after the last day of publication and Plaintiff properly moved for entry of default on March 2, 2016.

IT ORDERED that Defendant Julien Neil Armstrong, is in Default and this Entry of Default is considered effective as of March 2, 2016, the date the Court was first notified of Defendant Julien Neil Armstrong's default through Plaintiff's Motion For Entry of Default.

IT SO FURTHER ORDERED that this matter is to be set on the Court's docket for a hearing on damages pursuant to Plaintiff's request.

Dated: 3/8/16

Melanie Huggins-Ward

Clerk of Court
Horry County Court of Common Pleas



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STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**NOTICE OF APPEARANCE**
)	(Jury Trial Requested)
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

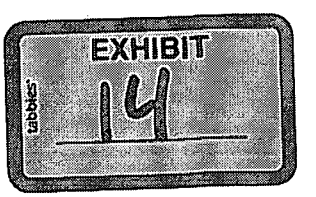
The undersigned hereby provides the Court and counsel of notice that she is representing the Defendant in the above-captioned action. All notices concerning this matter including, but not limited to, notice of a damages hearing should be sent to the undersigned.

THOMPSON & HENRY, P.A.

Conway, South Carolina

July 18, 2016.

Linda Weeks Gangi - SC Bar #: 002365
Attorney for the Defendant
Post Office Box 1740
Conway, South Carolina 29528
Telephone: (843) 248-5741
Fax: (843) 248-5112
lgangi@thompsonlaw.com



STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**CERTIFICATE OF MAILING**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

I, Ann Shearin, an employee for Thompson & Henry, P.A., attorneys for the Defendant in the above-captioned action, certify that I have this 19th day of July 2016 mailed a copy of the **Notice of Appearance and Certificate of Mailing** to the undersigned counsel for Plaintiff at his/her/their address of record, with sufficient postage attached thereto, as follows:

eric@anastapoulolawfirm.com
Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403

Ann Shearin

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

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STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

Bobby Foster,
☐ Plaintiff

v.

Julian Neil Armstrong,
☒ Defendant.

CASE NO.
2015--CP-26-5633

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
Eric Poulin, Bar No. 100209 Address: 62 Columbus St, Charleston, SC 29403 phone: 843-614-8888 fax: 843-853-229 e-mail: eric@akimlawfirm.com other:	Linda Weeks Gangi, Bar No. 002365 Address: POB 1740, Conway, SC 29528-1740 phone: 843-248-5741 fax: 843-248-5112 e-mail: lgangi@thompsonlaw.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Set Aside Default
Estimated Time Needed: 15 Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

September 26, 2016
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

EXHIBIT 15

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**MOTION TO SET ASIDE ORDER FOR ENTRY OF DEFAULT AND ORDER FOR PUBLICATION**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

TO: THE PLAINTIFF AND ERIC POULIN, ATTORNEY FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendant through his undersigned attorney will move before the Presiding Judge of the Court of Common Pleas at the Horry County Courthouse in Conway, South Carolina on the tenth (10th) day after service hereof or as soon as counsel might be heard for an Order setting aside the Order for Entry of Default and Referral for Hearing on Damages as well as the Order for Publication.

The basis for this Motion is that the Plaintiff's Summons is insufficient. Rule 4(b) of the *South Carolina Rules of Civil Procedure* specifically requires the following:

> "The Summons shall . . . contain . . . the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint."

The Summons filed in this action does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him. The failure of the Summons to comply with the provisions of Rule 4(b) of the *South Carolina Rules of Civil Procedure* results in the court having no personal jurisdiction over the defendant and the judgment is void. Ex parte *South Carolina Dept.*

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

of Revenue, 350 S.C. 404, 566 S.E.2d 196 (S.C. App. 2001) and *State Board of Medical Examiners vs. Finwick Hall, Inc.*, 387 S.E.2d 458 (1990). Furthermore, the Summons published in the newspaper does not comply with S.C. Code Ann. §15-9-740 which requires that the information which is published must state the time and place of filing the Summons and Complaint. The publication of the Summons in this case does not state the date of the filing of the Summons in the Court of Common Pleas for Horry County, South Carolina. Furthermore, the Order for Publication signed by the Clerk of Court and dated November 24, 2015 required that the Defendant be served "via publication in the daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Summons was published in the North Myrtle Beach Times. The Defendant did not live in North Myrtle Beach at the time of the accident or at any time subsequent thereto. The Defendant never received notice of this lawsuit until August of 2016. The Defendant moved from 186 Williamsburg Road, Little River, South Carolina to 4153 Horseshoe Road, Little River, South Carolina in August of 2015. The Defendant's cellphone number is reflected on the Accident Report. That cellphone number is still the Defendant's cellphone number so his location could have easily been determined had Plaintiff's counsel called Defendant's cellphone number. If the Plaintiff had used reasonable diligence as required by S. C. Code Ann. §15-9-740, the Defendant's whereabouts could easily have been obtained Therefore, the Defendant requests that this Court set aside the Order for Entry of Default and Referral for Hearing on Damages, allow the Defendant to answer and allow the Defendant to fully defend this action before a jury. The Defendant has a meritorious defense.

The undersigned asserts that this Motion completely sets forth the Defendant's position and the filing of a Memorandum would serve no purpose.

Conway, South Carolina

September 20, 2016.

THOMPSON & HENRY, P.A.

Linda Weeks Gangi - SC Bar #: 002365
Attorney for the Defendant
Post Office Box 1740
Conway, SC 29528-1740
(843) 248-5741 (p)
(843) 248-5112 (f)
lgangi@thompsonlaw.com

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STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**CERTIFICATE OF MAILING**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	

I, Ann Shearin, an employee for Thompson & Henry, P.A., attorneys for the Defendant in the above-captioned action, certify that I have this 21st day of September 2016 mailed a copy of the **Motion to Set Aside Order for Entry of Default and Order for Publication and Certificate of Mailing** to the undersigned counsel for Plaintiff at his address of record, with sufficient postage attached thereto, as follows:

eric@akimlawfirm.com
Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403

Ann Shearin

Gmail by Google

Michael Close <michael@akimlawfirm.com>

Bobby Foster vs. Julian Neil Armstrong

Matthew Nall <matt@akimlawfirm.com> Fri, Oct 21, 2016 at 2:39 PM
To: "bculbertsonj@sccourts.org" <bculbertsonj@sccourts.org>, "bculbertsonlc@sccourts.org" <bculbertsonlc@sccourts.org>
Cc: Ann Shearin <Ann@thompsonlaw.com>, lgangi@thompsonlaw.com, Eric Poulin <eric@akimlawfirm.com>, "Katie Eri, Roy, Peggy, Sue Sam" <ziptrial@googlegroups.com>

Judge Culbertson,

Plaintiff disagrees with the findings of fact and conclusions of law in Defendant's Proposed Order Setting Aside Order of Publication and Setting Aside Order for Entry of Default and Referral for Hearing on Damages.

To my recollection, the Court vacated the Order of Default and requested that Mrs. Gangi accept service. The ultimate finding was that service via publication was proper, but that the publication's language lacked the date of the Complaint's filing. As such, good cause existed to remove the default. The Court did not rule on issues of personal jurisdiction and did not rule to set aside the Order for Publication.

As I mentioned in the hearing, this case arose from an April 2013 vehicular collision. My concern is that if Defendant's Proposed Order becomes the law of this case, Defendant will be able to claim the Statute of Limitations has passed.

Accordingly, I would propose that the portions of the Proposed Order stating that "this Court finds that this Court has no personal jurisdiction over the Defendant" be struck and any portion stating service was improper also be struck. The Court allowed the default to be lifted. Therefore, this case should be allowed to move forward on its merits rather than a technicality.

Thank you for your attention to this matter and please let me know if you have any questions or concerns.
[Quoted text hidden]
--
Regards,

Matthew Nall

Anastopoulo Law Firm LLC
62 Columbus Street | Charleston, SC 29403
Tel: 843-614-8888 | Fax: 843-853-2291
www.akimlawfirm.com | matt@akimlawfirm.com
Office Locations: N. Charleston | Florence
By Appointment Only: Myrtle Beach | Columbia | Orangeburg | Wilmington, NC

NOTICE: This email contains information belonging to Anastopoulo Law Firm, LLC.
This message is intended solely for the use of the individual to whom it is addressed and may contain information that is privileged, confidential or otherwise exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately reply to this message or notify us by telephone at 800-313-2546 and delete the message.

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To view this discussion on the web visit https://groups.google.com/d/msgid/ziptrial/CAA-6g%3Dyx_5h05gg%2B0J0sT1Sq9NtN%2BuANmv%3Dxw%3D4yP96%3DDrGypg%40mail.gmail.com.
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EXHIBIT 16

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STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**ORDER SETTING ASIDE ORDER FOR PUBLICATION AND SETTING ASIDE ORDER FOR ENTRY OF DEFAULT AND REFERRAL FOR HEARING ON DAMAGES**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	

FILED
HORRY COUNTY
2016 OCT 26 PM 3:05
CLERK OF COURT

PLAINTIFF'S ATTORNEY:	MATTHEW NALL, ESQ.
DEFENDANT'S ATTORNEY:	LINDA WEEKS GANGI, ESQ.
HEARING DATE:	OCTOBER 17, 2016
PRESIDING JUDGE:	BENJAMIN H. CULBERTSON

The Defendant filed a Motion to Set Aside Order for Entry of Default and Order for Publication on September 21, 2016. Thereafter, that Motion came to be heard before the undersigned on October 17, 2016. The Plaintiff was represented by Matthew Nall, Esq. of Anastapoulo Law Firm, LLC and the Defendant was represented by Linda Weeks Gangi, Esq. of Thompson & Henry, P.A. at the time of the hearing. This Court heard such arguments of counsel and reviewed all documents filed with the Court in this action.

One basis for the Defendant's Motion is that the Plaintiff's Summons is insufficient. Rule 4(b) of the *South Carolina Rules of Civil Procedure* specifically requires the following:

> "The Summons shall . . . contain . . . the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint."

The Summons filed in this action does not notify the Defendant that if he fails to appear and defend

MHC

COPY

EXHIBIT tabbies 17

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a judgment by default will be rendered against him. The failure of the Summons to comply with the provisions of Rule 4(b) of the *South Carolina Rules of Civil Procedure* results in the court having no personal jurisdiction over the defendant; thus, the Orders issued in this case are void. Ex parte *South Carolina Dept. of Revenue*, 350 S.C. 404, 566 S.E.2d 196 (S.C. App. 2001) and *State Board of Medical Examiners vs. Finwick Hall, Inc.*, 387 S.E.2d 458 (1990). Furthermore, the Summons published in the newspaper does not comply with S.C. Code Ann. §15-9-740 which requires that the information which is published must state the time and place of filing the Summons and Complaint. The publication of the Summons in this case does not state the date of the filing of the Summons in the Court of Common Pleas for Horry County, South Carolina. Failure to comply with S.C. Code Ann. §15-9-740 results in this Court having no personal jurisdiction over the Defendant.

The Order for Publication signed by the Clerk of Court and dated November 24, 2015 required that the Defendant be served "via publication in the daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Summons was published in the North Myrtle Beach Times. The Defendant did not live in North Myrtle Beach at the time of the accident or at any time subsequent thereto. The North Myrtle Beach Times is not a newspaper of general circulation in Horry County. Publication of the Summons in the North Myrtle Beach Times is not proper service and does not meet the requirements of S.C. Code Ann. §15-9-740.

The Defendant never received notice of this lawsuit until August of 2016. The Defendant moved from 186 Williamsburg Road, Little River, South Carolina to 4153 Horseshoe Road, Little River, South Carolina in August of 2015. The Affidavit signed by the Sheriff's deputy who attempted service of the Summons and Complaint on the Defendant at 186 Williamsburg Road, Little River, South Carolina indicated that the Defendant had moved. The Defendant's cellphone

MHC

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number is reflected on the Accident Report. That cellphone number is still the Defendant's cellphone number so his location could have easily been determined by calling the Defendant's cellphone number. S.C. Code Ann. §15-9-740 requires that reasonable diligence be used to ascertain the residence of the Defendant. If the Plaintiff had used reasonable diligence as required by S.C. Code Ann. §15-9-740, the Defendant's whereabouts could easily have been ascertained and proper service effected.

Based on the failure of the original Summons filed with the Court to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*, the failure of the publication to include the date of filing of the Summons and Complaint as required by S.C. Code Ann. §15-9-740, the failure to publish the Summons in a newspaper of general circulation in Horry County, and the failure of the Plaintiff to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740, this Court finds that this Court has no personal jurisdiction over the Defendant and that service of the Summons and Complaint was not properly perfected on the Defendant. The Order for Publication and the Order for Entry of Default and Referral for Hearing on Damages are hereby set aside and declared null and void and of no force and effect. The Plaintiff shall amend the Summons to comply with Rule 4(b). The Defendant through his attorney, Linda Weeks Gangi, Esq., has agreed to accept service of the Summons and Complaint in the above-captioned action and will file an Answer within thirty (30) days from the date of receipt of this Order.

AND IT IS SO ORDERED this the 21st day of October, 2016.

In Chambers

Benjamin H. Culbertson

The Honorable Benjamin H. Culbertson
Presiding Judge of the Fifteenth Judicial Circuit

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STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**CERTIFICATE OF MAILING**
)	
JULIAN NEIL ARMSTRONG,)	
)	
Defendant.)	
)	

I, Ann Shearin, an employee for Thompson & Henry, P.A., attorneys for the Defendant in the above-captioned action, certify that I have this 26th day of October 2016 mailed copies of the following documents:

a. Order Setting Aside Order for Publication and Setting Aside Order for Entry of Default and Referral for Hearing on Damages; and
b. Certificate of Mailing

to the undersigned counsel for Plaintiff at his address of record, with sufficient postage attached thereto, as follows:

eric@akimlawfirm.com
Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
Attorney for the Plaintiff

Ann Shearin
ann@thompsonlaw.com

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
Bobby Foster, ☐ Plaintiff	)	CASE NO. 2015--CP-26-5633
v.	)	MOTION AND ORDER INFORMATION FORM AND COVER SHEET
Julian Neil Armstrong, ☒ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
Matthew Nall, Bar No. Address: 62 Columbus St, Charleston, SC 29403 phone: 843-614-8888 fax: 843-853-229 e-mail: matt@akimlawfirm.com other:	Linda Weeks Gangi, Bar No. 002365 Address: POB 1740, Conway, SC 29528-1740 phone: 843-248-5741 fax: 843-248-5112 e-mail: lgangi@thompsonlaw.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Order Setting Aside Order for Publication, Default & Referral for Hearing on Damages
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — October 26, 2016 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☒ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

HORRY COUNTY
2016 OCT 26 PM 3:05
MELANIE [illegible]
CLERK OF COURT

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:
Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

COPY

SCCA/233 (11-03)

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY)	**CIVIL ACTION NO: 2015-CP-26-5633**
BOBBY FOSTER,)	
)	
Plaintiff,)	
)	
vs.)	**ANSWER ON BEHALF OF**
)	**THE DEFENDANT**
JULIAN NEIL ARMSTRONG,)	(Jury Trial Requested)
)	
Defendant.)	
)	

The Defendant answering the Plaintiff's Complaint would respectfully show unto this Court:

1. Each and every allegation of the Plaintiff's Complaint which is not hereafter specifically admitted, modified or explained is denied and strict proof demanded thereof.

FOR A FIRST DEFENSE:

2. The Defendant does not have sufficient information to form a belief as to the allegations contained in paragraph 1 and therefore denies same and demands strict proof thereof.

3. The Defendant admits the allegations contained in paragraphs 2, 3 and 4.

4. The Defendant admits so much of the allegations of paragraphs 5, 6, 7 and 8 as they state that on or about April 8, 2013 a collision occurred between a vehicle driven by the Plaintiff and a vehicle driven by the Defendant. The Defendant denies the remaining allegations contained in paragraphs 5, 6, 7 and 8 and demands strict proof thereof.

5. The Defendant admits so much of the allegations of paragraph 9 as they are consistent with Title 56 of the South Carolina Code and the Rules of the Road as set forth in South Carolina



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case law. The Defendant denies any allegations contained in paragraph 9 that are inconsistent therewith.

6. The Defendant denies the allegations contained in paragraphs 10, 11, 12, 13, 14, 15 and 16 and demands strict proof thereof.

FOR A SECOND DEFENSE:

7. Each and every allegation of the first defense is incorporated herein when not inconsistent herewith.

8. The accident referred to in the Plaintiff's Complaint and the Plaintiff's alleged injuries and damages, if any, were due to and caused by the negligence, gross negligence, recklessness, willfulness and wantonness of the Plaintiff combining and concurring with any and all acts of the Defendant as a direct and proximate cause thereof, and without which the same would not have occurred.

9. Therefore, the Plaintiff's alleged injuries and damages were caused in whole or in part, or were contributed to by the Plaintiff's own negligence and recklessness, and not by any negligence on the part of the Defendant.

10. Therefore, the Defendant pleads the Plaintiff's sole negligence or negligence equal to or greater than that of the Defendant, and contributory recklessness of the Plaintiff as a complete defense to this action; and pleads overall the South Carolina doctrine of comparative negligence as a defense to this action and any amount of recovery available to the Plaintiff herein.

FOR A THIRD DEFENSE:

11. Each and every allegation of the first and second defenses is incorporated herein when not inconsistent herewith.

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12. Plaintiff's seeking punitive damages violates Defendant's rights under Article I, §10 of the United States Constitution, as well as the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the similar provisions of the Constitution of South Carolina including but not limited to Article I, §3 and Article I, §15 of the Constitution of South Carolina for the following reasons:

(a) The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because the jury or fact finder has total discretionary power to award punitive damages, and adequate objective legal standards do not exist to guide and limit the jury's or fact finder's discretion, thus allowing an award of punitive damages to be irrational, arbitrary and capricious and based upon vague, unpredictable, conflicting and purely subjective standards;

(b) The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because the vague and inconsistent legal standards for the imposition of punitive damages deprive these defendants of sufficient notice of the type of conduct and mental state upon which a punitive damage award could result from alleged misconduct;

(c) The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because the guidelines, standards, procedures and instructions for the imposition of punitive damages are ambiguous, indefinite, vague, uncertain, conflicting, purely subjective, and fundamentally unfair;

(d) The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, §3 and Article I, §15 of the South Carolina Constitution are violated because no objective limitations are established concerning the amount or severity of punitive damages awards;

(e) The Eighth Amendment of the United States Constitution and the same or similar provisions of the South Carolina Constitution

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including, but not limited to, Article I, §15 of the South Carolina Constitution are violated because punitive damages constitute penal damages and amount to an unconstitutional criminal and excessive fine or punishment in a civil proceeding;

(f) The Fifth and Sixth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution including, but not limited to, Article I, §12, Article I, §14 and Article I, §23 of the South Carolina Constitution are violated because Defendant is not allowed to exercise in this case all the constitutional and statutory rights which must be accorded to a party which is subject to the imposition of a criminal penalty in the form of punitive damages;

(g) The equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution including, but not limited to, Article I, §3 of the South Carolina Constitution are violated because the imposition of punitive damages discriminates against Defendants on the basis of wealth and greater amounts of punitive damages for the identical claims may be awarded against some Defendants who have more economic wealth than other Defendants;

(h) The First Amendment of the United States Constitution and the same or similar provisions of the South Carolina Constitution including, but not limited to, Article I, §2 of the South Carolina Constitution are violated because the imposition of punitive damages is based upon vague, conflicting, uncertain, and purely subjective standards, without adequate notice to Defendant, and thereby create a chilling effect on speech and expression;

(i) The due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the same or similar provisions of the South Carolina Constitution including, but not limited to, Article I, §3 of the South Carolina Constitution are violated because the imposition of punitive damages impairs Defendant's right of access to the courts to adjudicate civil disputes;

(j) Article I, §10 of the United States Constitution and the same or similar provision of the South Carolina Constitution including, but not limited to, Article I, §4 are violated because the imposition of punitive damages impairs Defendant's right to contract.

(k) Further, this answering Defendant asserts that should the jury award punitive damages, the Court determine that the punitive damages do not violate procedural due process or substantive due process, then this answering Defendant would assert that punitive damages should be limited as provided by S. C. Code Ann. §15-32-530(A).

FOR A FOURTH DEFENSE:

13. Each and every allegation of the first, second and third defenses is incorporated herein when not inconsistent herewith.

14. The Defendant would assert that the Plaintiff failed to timely serve the Defendant within the statute of limitations and thus, pleads the statute of limitations as a complete defense.

WHEREFORE, having fully answered the Plaintiff's Complaint, the Defendant prays that same be dismissed, for the cost of this action and for such other and further relief as this Court may deem just and proper

Conway, South Carolina
October 26, 2016.

THOMPSON & HENRY, P.A.

Linda Weeks Gangi
Attorney for the Defendant
Post Office Box 1740
Conway, South Carolina 29528
Telephone: (843) 248-5741
Fax: (843) 248-5112
lgangi@thompsonlaw.com
SC Bar #: 002365

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IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	CASE NO.: 2015-CP-26-5633 **MOTION AND ORDER INFORMATION FORM AND COVER SHEET**

Plaintiff's Attorney: Eric Poulin, Roy Willey Matthew Nall Bar Number: 100209, 101010, 102329 Address: 62 Columbus Street, Charleston, SC 29403 Phone: 843-614-8888 Fax: 843-494-5536 E-Mail: eric@akimlawfirm.com, roy@akimlawfirm.com, matt@akimlawfirm.com	Defendant's Attorney: Linda Weeks Gangi Bar Number: Address: Post Office Box 1740 Conway, SC 29528 Phone: (843) 248-5741 E-Mail: lgangi@thompsonlaw.com

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTINONS III and III)**
☐ **PROPOSED ORDER / CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider
Estimated Time Needed: 15 minutesCourt Reporter Need: ☒ YES / ☐ NO

SECTION II: Motion / Order Type

☒Written motion attached
☐Form Motion / Order

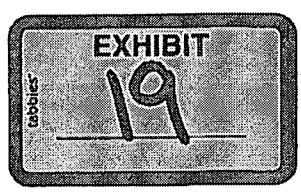
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendants — November 02, 2016 Date Submitted

SECTION III: Motion Fee

☒PAID – AMOUNT: $25.00
☐EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposal order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

COPY



JUDGE'S SECTION	
☐Motion Fee to be paid upon filing of the attached order. ☐Other:	_____ JUDGE CODE: _____ DATE: _____

CLERK'S SECTION

Date Filed:

Collected by: _____

☐MOTION FEE COLLECTED: _____
☐CONTESTED – AMOUNT DUE:_____

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IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 15TH JUDICIAL CIRCUIT CASE NO: 2015-CP-26-5633
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	**PLAINTIFF'S MOTION TO RECONSDIER**

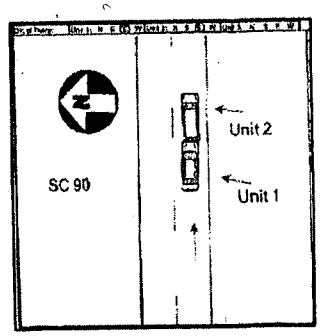
TO: THE HONORABLE JUDGE CULBERTSON AND ALL COUNSEL OF RECORD

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, Plaintiff Bobby Foster ("Plaintiff") submits this Motion to Reconsider this Court's Judgment on Defendant Julian Armstrong's ("Defendant") Motion to Set Aside Order for Publication and to Set Aside Order for Entry of Default and Referral for Hearing on Damages. The grounds for Plaintiff's Motion are as follows:

- The Court removed Defendant's default in order for the case to move forward on its merits. Therefore the Court should reconsider its Order to clarify that it has personal jurisdiction over the Defendant and the suit is not barred by the statute of limitations.

Therefore, Plaintiff respectfully requests this Court reconsider its October 21, 2016 Order on Defendant's Motion so that litigation is not precluded by the statute of limitations. This Motion is supported by the applicable statutes, rules of court, pleadings, memoranda, and any oral arguments presented by counsel at a hearing on this matter.

STATEMENT OF FACTS



This case arose from an April 2013 rear-end collision in Horry County in. Plaintiff and Defendant were eastbound on SC-90. Exhibit 1: Police Report. Defendant ("Unit 1") struck Plaintiff ("Unit 2") from

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behind as Plaintiff was stopped for traffic. Plaintiff was injured as a result.

Plaintiff filed suit against Defendant in July 2015. Exhibit 2: Compl. Plaintiff employed the Horry County Sheriff's Department to serve Defendant. Exhibit 3: Cert. of Service. Despite a diligent search, the Sheriff's Deputies were unable to serve Defendant. Id. Thereafter, this Court approved service via publication. Exhibit 4: Order Approving Pub. All information indicated that Defendant lived in the small community of Little River, South Carolina, so Plaintiff published notice in the North Myrtle Beach Times. Exhibit 5: Aff. of Pub. The Notice ran during the weeks of December 24 and 31, 2015, and January 7, 2016. Id. After three consecutive weeks of publication, Plaintiff moved this Court for an Order of Default on March 2, 2016. Exhibit 6: Mot. for Default. Default was entered on March 8, 2016.

In July 2016, Defendant's Counsel appeared. In August 2016, Plaintiff's damages hearing was scheduled for the second time. Shortly after, Defendant's Counsel requested a continuance, which was granted. In September 2016, Defendant filed a Motion to Set Aside Default, nine months after the publication had run and more than a month after Counsel had appeared.

Defendant's Motion claimed that Plaintiff's Summons, attached to his Complaint, was insufficient because it did not "notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him." Def. Mot. to Set Aside Default 2. Defendant's Motion further argued that the Summons, which was published in the newspaper, was statutorily incompliant because it lacked the Complaint's filing location and date. Id. Defendant also took issue with publication in the North Myrtle Beach Times, despite Defendant's residence in Little River. Id. Defendant claimed that Plaintiff did not use reasonable diligence because he did not call Defendant's cell phone number to ascertain his whereabouts. Id.

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On Monday, October 17, 2016, the Court heard arguments on Defendant's Motion to Set Aside Order of Publication and to Set Aside the Entry of Default and Referral for Damages Hearing. Both parties argued the issues as laid out in their respective memoranda. Ultimately, the Court stated it would not address issues of personal jurisdiction, but stated that because the published summons lacked a filing date, it would remove the default. Correspondingly, the Court asked Defense Counsel to accept service on behalf of the Defendant and provide a written order.

Later, Defendant circulated his Proposed Order which substantially repeated the same issues in his Motion to Set Aside Order of Publication and to Set Aside the Entry of Default and Referral for Damages. The Proposed Order stated that the Court is without personal jurisdiction over Defendant and the Orders of Publication and Default were void. Plaintiff emailed the Court and Defense Counsel stating his objection to the findings of no jurisdiction and voiding the order of publication. Exhibit 7. Plaintiff stated his concern that should Defendant's Proposed Order be signed by the Court, Defendant would be able to allege noncompliance with the statute of limitations, since the wreck occurred in April 2013. Id. The Court signed Defendant's Proposed Order.

As a result, Defendant filed his Answer with the Court and raised the statute of limitations as an affirmative defense. Def. Answer ∏ 13. Concurrent with Defendant's Answer, he also served initial discovery requests and noticed Plaintiff's deposition. Exhibit 8.

LEGAL STANDARD

Rule 59(e) allows a party to file a motion to reconsider a judgment for two specific reasons. SCRCP 59; Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). First, a motion to reconsider is appropriate when a party "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes

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for the court to reconsider or rule on it." Elam, 361 S.C. at 24, 602 S.E.2d at 780. Second, "a party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Id.

ARGUMENT

This Court should reconsider its Order on Defendant's Motion to Set Aside Order of Publication and Order of Default and Request for Damages Hearing because the current Order does not accurately reflect the outcome of the hearing. The Court granted Defendant's Motion to Set Aside Default due to a typographical error in the published Summons and requested Defense Counsel accept service of the Complaint. However, the Order states that the Court has no jurisdiction over the Defendant. Defendant's Default was vacated by a technicality; likewise, Plaintiff should not be prohibited from litigating his claim due to a technicality.

I. THE COURT REMOVED DEFENDANT'S DEFAULT IN ORDER FOR THE CASE TO MOVE FORWARD ON ITS MERITS. THEREFORE, THE COURT SHOULD RECONSIDER ITS OPINION TO CLARIFY THAT IT HAS PERSONAL JURISDICTION OVER THE DEFENDANT AND THE SUIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

At the hearing on this matter, the Court decided to allow the Defendant out of Default because Plaintiff's published Notice did not contain the Complaint filing date. However, the signed Order is overly broad and does not accurately reflect the results of the hearing. The Order states that "The Court has no personal jurisdiction over the Defendant and that service of the Summons and Complaint was not properly perfected on the Defendant." This statement seems to contradict the Court's request that Defense Counsel accept service on behalf of Defendant and allow the case to move forward. Based on this Order, Defendant is out of default and has filed his Answer stating that this case is barred by the statute of limitations. However, this suit has been filed since July 2015 and Plaintiff used reasonable diligence to prosecute his case. In the

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interest of justice, the Court should reconsider its Motion to bar Defendant from claiming the statute of limitations as an affirmative defense.

A. Plaintiff's filed and published Summons complied with Rule 4 because both stated Defendant must respond within thirty days.

Rule 4(b) of the South Carolina Rules of Civil Procedure requires that the summons in a civil matter contain a statement detailing the "time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint." SCRCP 4(b). The signed Order states, "The Summons filed in this action does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him." This statement is incorrect because Plaintiff's filed Summons states that the Defendant must answer within thirty days or Plaintiff will apply for the relief demanded in the Complaint.

Specifically, Plaintiff's Summons (filed with the Complaint and excerpted, below) clearly states that Defendant is "required to Answer the Complaint . . . within 30 days . . . and if you fail to Answer the Complaint . . . Plaintiff will apply to the court for the relief demanded . . . . " Exhibit 2.

> **YOU ARE HEREBY SUMMONED** and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or his attorney, Sam Flynn, at his office, 62 Columbus Street Charleston, South Carolina, 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.
>
> Dated at Charleston, South Carolina on the 22nd day of July, 2015.

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Clearly, the filed Summons complies with Rule 4(b) because it notifies the Defendant that he must respond within thirty days and that failure to do so will have consequences. The filed Summons is not ambiguous and conforms with Rule 4(b).

Likewise, Plaintiff's published Summons (excerpted, right) states that Defendant must respond within thirty days, or Plaintiff will "apply to the Court for judgment by default for the relief demanded in the Complaint." Ex. 5.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2015-CP-26-5633
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT
SUMMONS
TO THE DEFENDANT NAMED ABOVE:
YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-6688
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

In both the filed Summons and the published Summons, Plaintiff fully complied with Rule 4(b) because he notified Defendant that he will apply for relief in thirty days absent Defendant's Answer. Both the filed and published Summons warn Defendant about the consequences of his failure to appear.

However, the signed Order on this issue states that the Summons, presumably the filed Summons, does not comply with Rule 4(b). On this basis, the Order states that there is no personal jurisdiction over the Defendant. This portion contradicts the Court's statement that it would not address issues of personal jurisdiction. The Court should reconsider this issue because both Summons satisfy Rule 4's requirements. Furthermore, this issue is deserving of reconsideration because the signed Order voids the Court's jurisdiction over Defendant and creates a statute of limitations issue.

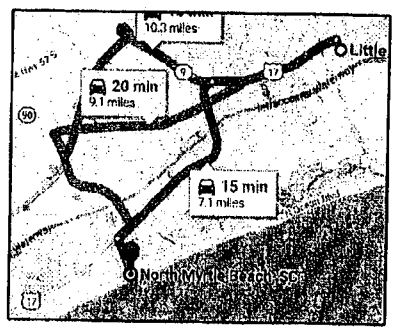
B. Publication in the North Myrtle Beach Times was proper.

The signed Order on Defendant's Motion cites S.C. Code Ann. § 15-9-740 for the proposition that notice by publication must be made in "the one newspaper . . . most likely to give notice to the person to be served" and that "the summons, as published, must state the time

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and place of such filing." S.C. Code Ann. § 15-9-740. The Order states Plaintiff's publication in the North Myrtle Beach Times was improper because it is not a paper of "general circulation in Horry County" and because Defendant lived in Little River, not North Myrtle Beach.

Little River is a community in Horry County, South Carolina with a population of nearly 9,000. Little River is approximately seven miles from North Myrtle Beach. The North Myrtle Beach Times is a weekly news publication that is distributed to Little River and Loris, South Carolina. Exhibit 9: North Myrtle Beach Times Website. The North Myrtle Beach Times is the newspaper published closest to Little River. Therefore, the North Myrtle Beach is the only realistic option for publication given its proximity to Little River. Furthermore, the weekly nature of publication, and the information provided within the paper make it the most likely newspaper to provide notice to Defendant.



Accordingly, the Court should reconsider this issue to the extent that the Order states service was not proper because notice was not published in a paper of general circulation in Horry County. The North Myrtle Beach Times is the closest publication to Defendant's last known address and most reasonably targeted to give him notice of suit.

C. Defendant neither alleged nor proved fraud or collusion, therefore the Order of Publication is final.

The signed Order on Defendant's Motion states Defendant did not use "reasonable diligence" to locate Defendant because he did not call Defendant's cell phone. However, the law on this issue is clear: "in the absence of fraud or collusion, the decision of the officer ordering service by publication is final." Montgomery v. Mullins, 325 S.C. 500, 506, 480 S.E.2d 467, 470

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(Ct. App. 1997). Plaintiff used the Horry County Sheriff's Department to locate and serve Defendant. Ultimately, the Sheriff's Department – the law enforcement authority for Horry County – returned an affidavit of non-service despite their due diligence. Ex. 3. The use of the Sheriff's Department was sufficient for the Court to order service by publication.

Still, the Order states Plaintiff could have obtained his address by simply calling Defendant's cell phone. But, it is unlikely that an individual would be forthcoming with their current address knowing that a law firm is attempting to track them down to sue them. The Court should reconsider this portion of the Order insofar as an Order of Publication is final absent fraud or collusion and Plaintiff did use reasonable diligence. Defendant did not present any evidence of fraud or collusion. Defendant's only argument is that Plaintiff did not call Defendant on his cell phone.

D. Plaintiff's Notice substantially complied with the statutes on service and the lack of filing date is not fatal to proper service.

Precise compliance "with the rules is not required to effect service of process." Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010). Instead, a court reviewing Notice compliance must analyze "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. (internal citations omitted)(emphasis added). "In all cases in which publication is made the complaint must first be filed and the summons, as published, must state the time and place of such filing." S.C. Code Ann. § 15-9-740. However, the Supreme Court has routinely held "notice [must be] reasonably calculated, under all the circumstances, to apprise interested

NOTICE
TO THE DEFENDANT NAMED ABOVE:
TAKE NOTICE, that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-9888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina
N 12/24, 31, 1/7-STC

parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950).

Plaintiff's Notice stated that the Complaint was "filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the [sic]". Ex. 5. Clearly, this is a scrivener's error in the Notice, as it did not include the date of filing. Yet, this error is not fatal to the information conveyed by the Notice. The Notice informed readers that:

1) A Summons & Complaint were filed against Defendant;
2) In the Horry County Court of Common Pleas;
3) The name, address, and telephone number of the filing attorney and law firm.

Ex. 5. The Notice provided information that there was a suit filed against Defendant, where it could be obtained, and who he could contact if he had any questions. The date of filing, or lack there of is inconsequential to this matter. To be sure, there are circumstances where a suit's filing date 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.

This case is different. In a personal injury civil suit, based on a motor vehicle accident, the date of filing is irrelevant to a defendant being served via publication. The defendant, who was unable to be located, does not lose any constitutional right to object by being unaware of the suit'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 local newspaper. Here, the Notice ran December 24 and 31, 2015, and January 7, 2016. Ex. 5. Therefore, the thirty days for Armstrong to respond to the Complaint began running on January 7, 2016, the last day of publication.

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ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Plaintiff sufficiently complied with the statute controlling notice via publication. Yet, the Court decided that after the appearance of Defense Counsel, the case would be best served by allowing the defendant to submit an Answer because the Notice did not contain the Complaint's filing date. Therefore, the Court should reconsider its Order on this issue to the extent that the Order states the Notice was not statutorily compliant. The notice must only *substantially* comply with the statute, and the lack of filing date does not deprive the court of jurisdiction over Defendant.

CONCLUSION

At the hearing Defendant's Motion, the Court decided that good cause was shown to remove the default and allow Defendant to answer because there was no date on the Notice. Tellingly, the Court asked Defense Counsel if she would be willing to accept service of the Complaint. Defense Counsel agreed to accept service. It is apparent that the Court thought this matter should move forward on its merits in the interest of justice. Unfortunately, this case arose from an April 2013 car wreck. The Court's Order states that it has no personal jurisdiction over the Defendant, the Notice of Publication was in error and now void, and vacated the entry of default. Based on the Order, Defendant filed an Answer claiming the statute of limitations as a total defense. Therefore, Plaintiff respectfully requests that the Court clarify its opinion on this matter to address the issue of the statute of limitations. Plaintiff has used reasonable diligence to move his case forward and should not be blocked out from justice on a technicality.

SIGNATURE ON FOLLOWING PAGE

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

Eric M. Poulin, Esquire
SC Bar Number: 100209
Roy T. Willey, IV, Esquire
SC Bar Number: 101010
Matthew L. Nall, Esquire
SC Bar Number: 102329
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888

ATTORNEYS FOR THE PLAINTIFF

Charleston, South Carolina
November 2, 2016

CERTIFICATE OF SERVICE
THE UNDERSIGNED HEREBY CERTIFIES THAT (S)HE SERVED A COPY OF THE PLEADING OR FOREGOING PAPERS ON ALL COUNSEL OF RECORD THIS 2nd DAY OF November, 2016

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2013522953

SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY USE ONLY

Page # 1 Of 1

Of Units: 02

Arrived - Assisting Copy of Owners Report: Collision

Notified: 1645

Arrived: 1645

SOUTH CAROLINA TRAFFIC COLLISION REPORT FORM

TR - 310 (Rev. 7/2010)

Date	Time of Collision	Area	Collision Location (Rt. # / Name)	Miles	Dir.	In (Near) City or Town of:
04-08-2013	1600	26	1- Interstate 2- US Primary (5)SC Primary 4- Secondary 5- County 6- PP / 90 /	.08	N E S (W)	NORTH MYRTLE BEACH

Lane # / Dir.: # 1, Of 2, N (E) S W

Distance Offset: .05 (Miles) Feet; Direction: N (E) S W

Base Intersection (Rt # / Name): From / PINNACLE PL

Second Intersection (Rt. # / Name): Toward / GOLF AVE

R.R. Id.

Ramp Only: From N E 1 - Entrance S W 2 - Exit; To N E 1- Interstate 2- US Primary 3- SC Primary 4- Secondary (5) County 6 - Other S W

(1) Main 2-Alternate 3-Bypur 4-Secondary 5-Connector 6-Business 7-Ramp 8-Other

GPS COORDINATES 00 00 00.00 DEGREES MINUTES SECONDS

Latitude: 33 51 46.78

Longitude: 78 38 53.50

Driver/Pedestrian's Full Name

E-460503 — ARMSTRONG JULIAN NEIL

Unit #	Sex	Race	Street/R.F.D.
01	M	B	186 WILLIAMSBURG RD

# Occ	Birth Date	City, State, & Zip
1	09-05-1995	LITTLE RIVER SC 295667812

State	Driver's License #	Class	Insurance Company
SC	102586664	D	STATE FARM

Year	Body	Vehicle Make	VIN #
1995	4S	LEXS	JT8GK13T5S0090073

State	Year	License Plate #	Owner's D.L. #
SC	2015	DWP924	UNKNOWN

Home Telephone	Owner's Full Name
(843) 5040638	ARMSTRONG FRANCIS NEIL

Bus. Telephone	Street/R.F.D.
( )	186 WILLIAMSBURG RD

Contributed To Collision	City, State, & Zip
(Yes) No	LITTLE RIVER SC 295667812

Estimated Speed	Speed Limit	C.D.L. Req. Yes (No)	T/B 5 Req. Yes (No)	Alc/Drg Info (see back) Yes (No)
20	40	Summons # Q323875	Code 21	Summons # / Code / Towed Yes (No)

Driver/Pedestrian's Full Name

E-460787 — FOSTER BOBBY

Unit #	Sex	Race	Street/R.F.D.
02	M	W	3315 DREW ST

# Occ	Birth Date	City, State, & Zip
1	09-25-1950	ASH NC 28420-3025

State	Driver's License #	Class	Insurance Company
NC	23836037	C	NATIONWIDE

Year	Body	Vehicle Make	VIN #
2000	VN	DODG	2B4GP44G0YR523483

State	Year	License Plate #	Owner's D.L. #
NC	2013	YPM8186	23836037

Home Telephone	Owner's Full Name
(910) 3837403	FOSTER BOBBY

Bus. Telephone	Street/R.F.D.
( )	3315 DREW ST

Contributed To Collision	City, State, & Zip
Yes (No)	ASH NC 28420-3025

Estimated Speed	Speed Limit	C.D.L. Req. Yes (No)	T/B 5 Req. Yes (No)	Alc/Drg Info (see back) Yes (No)
0	40	Summons # / Code / Summons # / Code / Towed Yes (No)		

Driver/Pedestrian's Full Name

Unit #	Sex	Race	Street/R.F.D.

# Occ	Birth Date	City, State, & Zip

State	Driver's License #	Class	Insurance Company

Year	Body	Vehicle Make	VIN #

Dir. of Travel:	Unit 1: N S (E) W	Unit 2: N S (E) W	Unit 3: N S E W

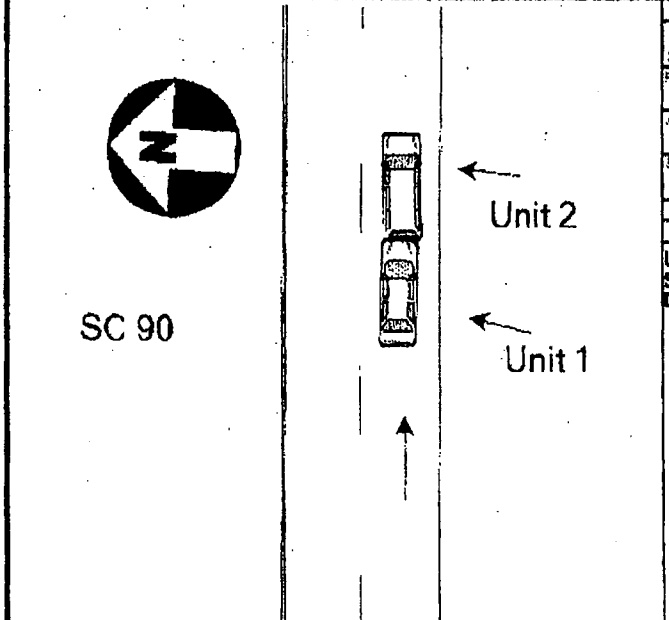
State	Year	License Plate #	Owner's D.L. #

Home Telephone	Owner's Full Name
( )	

Bus. Telephone	Street/R.F.D.
( )	

Contributed To Collision	City, State, & Zip
Yes No	

Estimated Speed	Speed Limit	C.D.L. Req. Yes No	T/B 5 Req. Yes No	Alc/Drg Info (see back) Yes No
		Summons # / Code / Summons # / Code / Towed Yes No		



Unit 1 Dam.	Unit 2 Dam.	Unit 3 Dam.	Prop. Dam. 1	Prop. Dam. 2
$2000	$2000	$	$	$

Property Owner/Witness	Address / City	Property Owner/Witness	Address / City

State	Zip	Phone	State	Zip	Phone

Photo: Y (N)

Describe What Happened (Refer to Units by Number)

UNIT 1 AND UNIT 2 WERE TRAVELING EAST ON SC 90. UNIT 2 STOPPED FOR TRAFFIC. UNIT 1 STRUCK UNIT 2. UNIT 1 WAS DRIVING TOO FAST FOR CONDITIONS.

PLAINTIFF'S EXHIBIT 1

NOTICE - THE TR-310 IS FOR STATISTICAL REPORTING PURPOSES ONLY AND IS A REFLECTION OF THE OFFICER'S BEST KNOWLEDGE, OPINION AND BELIEF COVERING THE COLLISION BUT NO WARRANT IS MADE AS TO THE FACTUAL ACCURACY THEREOF.

Investigating Officer's Name	Rank	Badge #	Jurisdiction Code	Review Date	Reviewer's Name	Rank	Internal Agency Code
FROST - M K	LCPL	T 4 2 5	H P 0 5	04-09-2013	C F Costa	CPL	13FL043454

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ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

2013522953

Unit	Date of Birth	Sex	Race	INJ	Seat	R/SD	Age	Eject	LAI	Tran	Name	Street Address			Zip Code
01	08-05-1995	M	B	0	01	13	4	1	1	2	ARMSTRON JULIAN NEIL	186 WILLIAMSBURG RD	LITTLE	SC	295667812
02	09-25-1950	M	W	1	01	13	4	1	1	1	8 FOSTER BOBBY	3315 DREW ST	ASH	NC	28420-3025

Race: A - Asian/Pacific Islander; B - Black/African American; I - Amer. Indian or Alaskan Native; O - Other; U - Unk.; W - Caucasian/White

a) Injury Status: 0-Not Injured; 1-Possible Injury; 2-Non-incapacitating; 3-Incapacitating; 4-Fatal

Seating Loc.: 01 02 03 / 04 05 06 / 07 08 09; 20-Pedestrian; 30-Trailing Unit; 40-Bus or Van (9-15 Occupants Only); 50-Other Enclosed Area (non-trailing); 51-Other Unenclosed Area (non-trailing); 60-Sleeper of Cab; 70-Riding on Unit Exterior; 80-Unk; 99-Unk./NA

Restraint/Safety Device: 00-None Used; 11-Shoulder belt; 12-Lap Belt Only; 13-Shoulder & Lap Belt; 21-Child; Safety Seat; 30-Other; 99-Unk.; Pedestrian, Motor Pedalcycle Only: 31-Helmet; 51-Reflective Clothing; 41-Protective Pads; 61-Lighting

Air Bag Deployment / Switch: a) 1-Deployed Front & Not Deployed; 2-Deployed Side; 3-Deployed Both; 7-Not Applicable; 8-Deployment Unk.; b) 1-Switch On Position; 2-Switch Off Position; 3-No Switch; 9-Unknown

Ejection: 1-Not Ejected; 2-Part. Ejected; 3-Tot. Ejected; 7-Not Appl.; 9-Unk.

b) 2 or 3 Wheel Motorized Vehicle: Head Injury: 1-Yes; 2-No

Location After Impact: 1-Not Trapped; 2-Extricated (Mechanical Means); 3-Freed (Non-mech.); 4-Not Applicable; 9-Unknown

a) Transported to Medical Facility: 1-Yes; 2-No; 3-Unknown

b) By: 1-EMS; 2-Police; 8-Other; 9-Unk.

Sequence of Events

Event 1	Event 2	Event 3	Event 4	Most Harmful	1st Harmful
23				23	23
22				22	

Non-Collision: 01-Cargo Loss or Shift; 02-Down Grade; 03-Downhill Runaway; 04-Separation of Units; 05-Jackknife; 06-Fire/Explosion; 07-Ran off Road Left; 08-Ran off Road Right; 09-Rollover/Overturn; 10-Other Non-Collision; 99-Unk. Non-Collision

Collision, Not Fixed: 20-Pedalcycle; 21-Animal (Not Other); 22-Pedestrian; 23-Railway Veh.; 24-Motor Veh. in Transport; 25-Work Zone Maint. Equip.; 26-Motor Veh. Stopped; 27-Other Moveable Object; 28-Motor Veh. (Other Roadway); 29-Motor Veh. Parked; 30-Unk. Moveable Object

Collision, Fixed Object: 40-Embankment; 41-Bridge Parapet End; 42-Bridge Pier or Abutment; 43-Bridge Rail; 44-Culvert; 45-Curb; 46-Ditch; 47-Fence/Wall; 48-Guardrail Face; 49-Guardrail End; 50-Impact Attenuator/Crash Cushion; 51-Concrete Barrier; 52-Other Post, Pole; 53-Sign; 54-Tree; 55-Utility Pole; 56-Work Zone Maint. Equipment; 57-Wall; 58-Building; 59-Other Fixed Object

Manner of Collision / Struck Veh.: 00-Not Coll. w/ Motor Veh.; 10-Rear-to-Rear; 20-Head On; 30-Rear-to-Side; 40-Angle; 50-Sideswipe Same Dir.; 60-Sideswipe Opposite Dir.; 70-Backed Into; 99-Unknown

1st / Most Deformed Area; Deformed; Most Deformed

21-Pedestrian; 81-None; 82-Rollover; 83-Total; 98-Under Carriage; 99-Other; 99-Unk.

Vehicle Type: 01-Automobile; 02-Pickup Truck; 03-Truck Tractor; 04-Other Truck; 15-Full Size Van; 16-Mini Van; 17-Sport Utility; 25-Motorcycle; 26-Other Motorcycle; 27-Pedalcycle; 28-Animal (Ridden); 41-Pedestrian; 51-Train; 61-School Bus; 62-Passenger Bus; 98-Other; 99-Unk. (Hit and Run Only)

Vehicle Use Code: 01-Personal; 02-Driver Training; 03-Construction/Maint.; 04-Ambulance; 05-Military; 06-Transport Passengers; 07-Transport Property; 08-Farm Use; 09-Wrecker or Tow; 10-Police; 11-Government; 12-Fire Fighting; 13-Logging; 14-Other; 41-Pedestrian

Vehicle Attachment: 1-None; 2-Vehicle towing; 3-Semi-Trailer; 4-Utility Trailer; 5-Farm Trailer; 6-Trailer w/Boat; 7-Camper Trailer; 8-Towed Motor Vehicle; 9-Petroleum Tanker; A-Livestock Trailer; B-Auto/Boat Trailer; C-Other Tanker; D-Flat Bed; E-Twin Trailers; F-Other

Alcohol / Drug Test Given: 1-Given - Known Results; 2-Given - Unusable; 3-Given - Pending; 4-None; 5-Refused

Test Type: 1-Breath (No Only); 2-Blood; 3-Urine; 8-Other

Drug Results: 1-Amphetamines; 2-Cocaine; 3-Marijuana; 4-Opiates; 5-PCP; 8-Other

Alc Test Results: A1-; A2-; A3-

Special Use Only

Underride/Override: 0-None; 1-Under-Compartment Intrusion; 2-Under-No Intrusion; 3-Under-Unknown; 4-Over-MV in Transport; 5-Over-Other Vehicle; 6-None; 9-Unk.

Extent of Deformity: 1-Side; 2-Front; 3-Rear(ry); 4-Roof; 5-All; 6-Undercarriage; 7-Side, Front; 8-Side, Rear; 9-Unk.

1-Functional Damage; 2-Functional Damage; 3-Disabling Damage; 4-Severe/Totaled; 9-Not Applicable; 9-Unk.

Action Prior to Impact (Vehicle): 01-Backing; 02-Changing lanes; 03-Entering Traffic lane; 04-Leaving Traffic lane; 05-Making U-turn; 06-Movements Essentially Straight Ahead; 07-Overtaking/passing; 08-Parked; 09-Slowing or Stopped in Traffic; 10-Turning left; 11-Turning right; 88-Other; 99-Unk.

Action Prior to Impact (Non-motorist): 21-Approaching/Leaving Vehicle; 22-Entering/Crossing Location; 23-Playing/Working on Vehicle; 24-Pushing Vehicle; 25-Standing; 26-Walking, Playing, Cycling; 27-Working

Trafficway: 1-Two-way, Not Divided; 2-Two-way, Divided, Unprotected Median; 3-Two-way, Divided, Barrier; 4-One-Way; 8-Other

1st Harmful Event: 1-Side; 2-Front; 3-Rear(ry); 4-Roof; 5-All; 6-Undercarriage; 7-Side, Front; 8-Side, Rear; 9-Unk.; B-X-walk; Y-Y or V-U

Road Character: 1-Straight - Level; 2-Straight - On grade; 3-Straight - Hillcrest; 4-Curve - Level; 5-Curve - On grade; 6-Curve - Hillcrest

Road Surface Condition: 1-Dry; 2-Wet; 3-Snow; 4-Slush; 5-Ice; 6-Contaminate; 7-Water (Standing, etc.); 8-Other; 9-Unk.

Traffic Control Type: 01-Stop and Go Light; 02-Flashing Traffic Signal; 11-RR (X-buck, Lights & Gates); 12-RR (X-bucks & Lights); 13-RR (X-bucks Only); 21-Officer or Flagman; 22-Obeying Emergency Vehicle; 31-Pavement Markings (only); 41-Stop Sign; 42-School Zone Sign; 43-Yield Sign; 44-Work Zone; 45-Other Warning Sign; 51-Flashing Beacon; 98-None; 99-Unk.

Weather Condition: 1-Clear (no adverse conditions); 2-Rain; 3-Cloudy; 4-Sleet, Hail; 5-Snow; 6-Fog, Smog, Smoke; 7-Blowing Sand, Oil, Dirt or Snow; 8-Severe Crosswinds; 9-Unk.

Light Condition: 1-Daylight; 2-Dawn; 3-Dusk; 4-Dark (Lighting Unspecified); 5-Dark (Street Lamps Lit); 6-Dark (Street Lamps Not Lit); 7-Dark (No lights); 9-Unk.

1-Yes, Directly; 2-Yes, Indirectly; 3-No; 9-Unk. — School Bus Involved:

1-Before 1st Sign; 2-Advanced Warning Area; 3-Transition Area; 4-Activity Area; 5-Termination Area; 1-Yes 2-No Work Zone:

Work Zone Location

Work Zone Type

1-Yes 2-No Workers Present:

Junction Type: 01-Crossover; 02-Driveway; 03-Five/More Points; 04-Four-way Intersection; 05-Railway Grade Crossing; 07-Shared Use Paths or Trail; 08-T-Intersection; 09-Traffic Circle; 12-Y-Intersection; 13-Ramp/Junction; 99-Unk.

Primary: 03

Contributing Factors — Driver: 01-Disregarded Signs, Signals, Etc.; 02-Distracted/Inattention; 03-Driving Too Fast for Conditions; 04-Exceeded Authorized Speed Limit; 05-Failed to Yield Right-of-Way; 06-Ran off Road; 07-Fatigued/Asleep; 08-Followed Too Closely; 09-Made an Improper Turn; 10-Medical Related; 11-Operating Vehicle in Manner Reckless; 12-Aggressive Operation of Vehicle; 13-Over-correcting/Over-steering; 14-Swerving to Avoiding Object; 15-Wrong Side or Wrong Way; 16-Under the Influence; 17-Vision Obscured (Within Unit); 18-Improper Lane Usage/Change; 19-Cell Phone; 20-Texting; 28-Other Improper Action; 29-Unk.

Roadway: 30-Debris; 31-Non-highway Work; 32-Obstruction in Roadway; 33-Road Surface Condition (i.e., Wet); 34-Rut, Hollow, Bumps; 35-Shoulders (Low, Soft, High); 36-Traffic Control Device (i.e., Missing); 37-Work Zone (Const./Maint./Utility); 38-Worn, Travel-Polished Surface; 49-Other; 49-Unk.

Non-Motorist: 50-Inattentive; 51-Lying &/or Illegally in Roadway; 52-Failure to Yield R. of W.; 53-Not Visible (Dark Clothing); 54-Improper Crossing; 55-Darting; 57-Wrong Side of Road; 58-Other; 59-Unk.; 66-Under the Influence; 67-Other Person Under Influence

Environmental: 60-Animal in Road; 61-Glare; 62-Obstruction; 63-Weather Cond.; 68-Other; 69-Unk.

Vehicle Defect: 70-Brakes; 71-Steering; 72-Power Plant; 73-Tires/Wheel; 74-Lights; 75-Windows/Shield; 77-Restraint System; 78-Truck Coupling; 79-Cargo; 80-Fuel System; 88-Other; 89-Unk.

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

BOBBY FOSTER)
Plaintiff(s))

vs.)

JULIAN NEIL ARMSTRONG)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015-CP-26- 5633

(Please Print)
Submitted By: Eric Poulin/Roy Willey/Sam Flynn
Address: 62 Columbus Street, Charleston, SC 29403

SC Bar #: 100209/101010/101729
Telephone #: (843)614-8888
Fax #: (843)853-2291
Other:
E-mail: eric@akimlawfirm.com
roy@akimlawfirm.com
sam@akimlawfirm.com

2015 JUL 17 PM 2:13
HORRY COUNTY
CLERK OF COURT

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
  Previous Notice of Intent Case # 20____-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☒ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** 7/17/15

PLAINTIFF'S EXHIBIT 2

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Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

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FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FOR THE FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

HORRY COUNTY
2015 JUL 27 PM 2:12
MELANIE [illegible]
CLERK OF COURT

SUMMONS
(Jury Trial Demanded)

TO: THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or his attorney, Sam Flynn, at his office, 62 Columbus Street Charleston, South Carolina, 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.

Dated at Charleston, South Carolina on the 22nd day of July, 2015.

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
S.C. Bar No.: 101729
Roy T. Willey, IV, Esquire
S.C. Bar No.: 101010
Eric M. Poulin, Esquire
S.C. Bar No.: 100209
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

COMPLAINT
(Jury Trial Demanded)

HORRY COUNTY
2015 JUL 27 PM 2:12
CLERK OF COURT

The Plaintiff, complaining of the Defendant, alleges and says as follows:

1. That the Plaintiff, Bobby Foster, (herein referred to as "Plaintiff") is a citizen and resident of the city of Ash, State of North Carolina.
2. That upon information and belief, Defendant Julian Neil Armstrong, (herein referred to as "Defendant") is a citizen and resident of Horry County, State of South Carolina.
3. That the motor vehicle collision that is the subject of this action occurred in Horry County, State of South Carolina.
4. That this Court has jurisdiction over the parties and the subject matter of this action.
5. That on or about April 8, 2013, Plaintiff was lawfully traveling east on SC 90 in a 2000 Dodge Van license plate YPM6186, VIN number 2B4GP44G0YR523493.
6. That on or about April 8, 2013, Defendant was traveling east on SC 90 in a 1995 Lexus license plate DWP624, VIN number JT8GK13T5S0090073.
7. That on or about April 8, 2013, Plaintiff came to a lawful stop for traffic.
8. That on or about April 8, 2013 Defendant was following too closely, travelling too fast for conditions, failed to stop, and violently struck Plaintiff's vehicle from behind.
9. That at all times material hereto, Defendant had a duty to operate his vehicle in a safe and prudent manner and to avoid injuring other motorists.

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

10. That the collision and the resulting injuries and damages to Plaintiff were caused directly and proximately by one or more of the following negligent, grossly negligent, negligent *per* se, careless, reckless, willful, wanton and unlawful acts, and/or omissions of the Defendant in any one or more of the following respects:

a. In failing to keep a proper lookout while operating the vehicle;

b. In failing to maintain control of the vehicle;

c. In failing to stay in his lane of traffic;

d. In failing to slow down to a controllable speed to stay in his lane of traffic;

e. In failing to keep a safe distance from Plaintiff;

f. In failing to use due care;

g. In failing to properly observe the road and traffic conditions;

h. In failing to obey traffic laws and/or signs;

i. In failing to use his horn, if he had any;

j. In traveling too fast for conditions;

k. In failing to properly maintain the vehicle;

l. In failing to yield the right of way;

m. In failing to apply his brakes or use his steering mechanism to avoid the collision;

n. In negligently and carelessly operating the vehicle in a high and excessive rate of speed under the circumstances then and there existing;

o. In operating the vehicle at a high rate of speed and far in excess of the reasonable and prudent speed under the circumstances and conditions then and there existing;

p. In operating the vehicle without using due care and without regard for safety and rights of Plaintiff;

q. In operating the vehicle in a negligent, grossly negligent, careless, reckless,

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

willful, wanton and unlawful manner so as to create a dangerous situation;

r. In failing to exercise the degree of care and caution that a reasonable and prudent person would have exercised under the circumstances then and there prevailing;

s. In negligently and carelessly operating the vehicle in such a manner to cause the vehicle to strike Plaintiff and cause personal injuries;

t. In driving while distracted;

u. In failing to immediately report an accident involving personal injury;

v. In any other acts that represent a breach of the statutory or common laws of the State of South Carolina; and

w. In any other such manner that Plaintiff may become aware of through discovery and/or at trial.

11. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff was injured, has endured pain and suffering, has suffered mentally and emotionally, and has incurred, and will incur, various medical expenses, and has otherwise been damaged and injured.

12. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff was jerked, thrown and slammed within the interior of his vehicle by the force of the Defendant's vehicle, causing him to sustain serious and painful personal injuries including, but not limited to, pain and suffering, and injuries to his back and shoulder.

13. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Plaintiff has been damaged and injured in the following respects:

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

a) Plaintiff has been required to expend a significant amount of money for his medical care, treatment and attendant services;

b) Upon information and belief, the nature of Plaintiff's injuries will require him to expend a significant amount of money for his medical care, treatment and attendant services in the future;

c) Plaintiff has been unable to work and has been deprived of his income;

d) Upon information and belief, the nature of Plaintiff's injuries will deprive him of employment opportunity and income in the future;

e) The pain of his injuries has resulted in his loss of enjoyment of life and change in his personality, all to permanent detriment to his health and physical well-being; and

f) Upon information and belief, the Plaintiff was required to expend significant amounts of money to replace and repair property damage caused in the accident.

14. That Defendant's acts and omissions, as is set forth more fully above, show willful misconduct, malice, wantonness and an entire want of care, raising a presumption of the Defendant's conscious indifference to the consequences of such acts and omissions.

15. That because of the Defendant's acts and omissions and the proximate harm resulting to Plaintiff, Plaintiff should be awarded punitive damages in an amount to be determined by the trier of fact, in order to punish and penalize the Defendant and to deter the Defendant and others from similar behavior.

16. That upon information and belief, Plaintiff is entitled to judgment against the Defendant for actual, compensatory and exemplary or punitive damages for his personal injuries and property damages set forth herein in an amount that is fair, just and reasonable under the circumstances, plus whatever costs, interest and attorney fees that she may be entitled, to be determined by a jury.

WHEREFORE, the Plaintiff prays for judgment against the Defendant for an amount to be ascertained by the jury at the trial of this action, for all damages, punitive and actual, for the cost and disbursements of this action, and both prejudgment and post judgment interest, and for such other and further relief, in law or in equity, as this court may deem just and proper.

ANASTOPOULO LAW FIRM, LLC

Sam Flynn, Esquire
S.C. Bar No.: 101729
Roy T. Willey, IV, Esquire
S.C. Bar No.: 101010
Eric M. Poulin, Esquire
S.C. Bar No.: 100209
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

Dated at Charleston, SC
This 22nd day of July, 2015.

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA,)
)
COUNTY OF HORRY)

CASE NUMBER:# 2015CP265633

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD who being duly sworn states that he/she is a Deputy Sheriff for Horry County, South Carolina and that the SUMMONS AND COMPLAINT, COVER SHEET on behalf of BOBBY FOSTER VS JULIAN NEIL ARMSTRONG was delivered to the Sheriff of Horry County on the 24th day of SEPTEMBER 2015, for service on the Defendant at 186 WILLIAMSBURG ROAD LITTLE RIVER,SC

South Carolina; and that Deponent made a diligent search, but was unable to locate JULIAN NEIL ARMSTRONG

Sworn to before me this 26th day of OCTOBER , 2015.

Phillip E. Thompson
Sheriff of Horry County

NOTARY PUBLIC FOR SOUTH CAROLINA

DAVID FLOYD
Deputy Sheriff

MY COMMISSION EXPIRES: 9-15-2016

UNABLE TO LOCATE. NEIGHBOR ADVISED THAT SUBJECT HAS MOVED.

PLAINTIFF'S EXHIBIT 3

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP265633

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE HORRY JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

ORDER FOR PUBLICATION

FILED
HORRY COUNTY
2015 NOV 23 PM 1:13
JIMMY RICHARDSON-WARD
CLERK OF COURT

THIS MATTER comes before the Court pursuant to the Plaintiff's petition requesting an Order of Publication authorizing the service of the Defendant via publication.

Having reviewed the Plaintiff's Petition, and Affidavit, the Court finds that after due diligence, the Defendant cannot be found in this state, or at Defendant's last known residence. The Court finds that it is appropriate and necessary to serve the Defendant via publication in the daily newspaper of Defendant's last known residence, 186 Williamsburg Road, Little River, South Carolina.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED, that service upon the Defendant shall be effectuated by publishing the Summons, and notice of filing of the Complaint in the above referenced case in local newspaper, once weekly for three (3) consecutive weeks, and by forwarding a copy of the pleadings to the Defendant at Defendant's last known address.

IT IS SO ORDERED.

Melanie Huggins-Ward
PRESIDING JUDGE COURT OF COMMON PLEAS
HORRY JUDICIAL CIRCUIT

Clerk of Court

DATED: 11/24/15



ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP260633

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

AFFIDAVIT OF PUBLICATION

State of South Carolina

County of Horry

Pauline L. Lowman

Personally appears before me,

and after being duly sworn,

That she is the Publisher of

the North Myrtle Beach Times

a newspaper published at

North Myrtle Beach in

the County and State aforesaid;

that the Legal Notice

was printed and published in said newspaper

for and during the weekly publication,

and appeared in the issues of the

North Myrtle Beach Times December 24th 31st

and January 7th A.D. 2016

Pauline L. Lowman

Sworn to and subscribed before me

this 7th day of January

A.D. 2016

Henry C Hasty, Sr

Notary Public for South Carolina

Commission Expires May 26, 2020.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2015-CP-26-5633
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT

SUMMONS

TO THE DEFENDANT NAMED ABOVE: YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

NOTICE

TO THE DEFENDANT NAMED ABOVE: TAKE NOTICE, that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the

s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina

N 12/24, 31; 1/7-3TC

PLAINTIFF'S EXHIBIT 5

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

FILED
HORRY COUNTY, S.C.
2016 MAR 28 PM 3:25
MELANIE DUBINS-WARD
CLERK OF COURT

PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT AND REQUEST FOR HEARING ON DAMAGES

COMES NOW the Plaintiff, by and through undersigned counsel, who asks the Clerk of Court to enter default against the Defendant Julien Neil Armstrong and schedule a hearing to determine damages.

INTRODUCTION

1. Plaintiff brought this action against Defendant Julian Neil Armstrong as a result of injuries suffered in an automobile accident that occurred on April 8, 2013. After an unsuccessful attempt to serve the Defendant personally through certified mail and the Horry County Sheriff, Plaintiff published Notice of the Summons and Complaint in The North Myrtle Beach Times. Defendant Julien Neil Armstrong did not file a responsive pleading or otherwise defend the suit.

2. Plaintiff is, therefore, entitled to entry of default and a hearing on damages.

ARGUMENT AND AUTHORITIES

3. Rule 55(a) directs the Clerk of the Court to enter default against a party who has not filed a responsive pleading or otherwise defended the suit. SCRCP 55(a).

4. Rule 55(b) permits the court to enter default judgment against a party against whom



ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

default has been entered. SCRCP 55(b)(1).

5. Plaintiff meets the procedural requirements for obtaining an entry of default as demonstrated by attorney Matthew Nall's sworn affidavit, attached as Exhibit A.

6. Plaintiff does not seek affirmative relief against an infant, an incompetent person, or the State of South Carolina.

Upon information and belief, Defendant Julien Neil Armstrong is not in the Military Service of the United States and is not entitled to the protection of the Civil Relief Act of 1940 and Amendments thereto. [Exhibit B].

7. Plaintiff attempted to serve Defendant Armstrong via USPS Certified Mail Restricted Delivery, the package was returned unclaimed after the maximum holding time expired on August 31, 2015. [Exhibit C].

8. Plaintiff attempted to serve the Summons and Complaint upon Defendant Armstrong through the Horry County Sheriff's Office, and was given an Affidavit of Non-Service on September 24, 2015. [Exhibit D].

9. Plaintiff then petitioned the Court to published Notice of the Summons and Complaint in The North Myrtle Beach Times. After approval, The North Myrtle Beach Times published the Notice on December 24, 31, and January 7. [Exhibit E].

10. Under SCRCP 12(a), the time for Defendant to respond is thirty (30) days after being served with process.

11. Because Defendant Julien Neil Armstrong did not file a responsive pleading or otherwise defend, Plaintiff is entitled to Entry of Default.

12. Plaintiff's damages are unliquidated and a hearing is requested to receive evidence of Plaintiff's damages.

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

PRAYER

13. For these reasons, Plaintiff asks the Court to enter a Default against Defendant Julien Neil Armstrong and to schedule an evidentiary hearing to determine Plaintiff's damages.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

Matthew L. Nall, Esquire
SC Bar Number: 102329
Eric M. Poulin, Esquire
SC Bar Number: 100209
Roy T. Willey, IV, Esquire
SC Bar Number: 101010
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403
(843) 614-8888

Charleston, South Carolina
March 2, 2016

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

AFFIDAVIT OF MATTHEW NALL

FILED
HORRY COUNTY
2016 MAR -8 PM 3:25
MELANIE HUGGINS-WARD
CLERK OF COURT

COMES NOW, the affiant, Matthew Nall, and first being duly sworn upon his oath under the pains and penalties of perjury now states the following:

1. I am the above named affiant, Matthew Nall.

2. I, Matthew Nall, am an attorney with Anastopoulo Law Firm, LLC.

3. Plaintiff attempted to serve Defendant Armstrong via USPS Certified Mail Restricted Delivery, the package was returned unclaimed after the maximum holding time expired on August 31, 2015. The package was sent to Defendant's last known address:

Julian Neil Armstrong
186 Williamsburg Road
Little River, SC 29566

4. Plaintiff attempted to serve the Summons and Complaint upon Defendant Armstrong through the Horry County Sheriff's Office, and was given an Affidavit of Non-Service on September 24, 2015.

5. Plaintiff then petitioned the Court to published Notice of the Summons and Complaint in The North Myrtle Beach Times. After approval, The North Myrtle Beach Times published the Notice on December 24, 31, and January 7.

6. Upon information and belief, Defendant Julian Neil Armstrong is neither an infant nor incompetent adult.

7. As of today's date, March 2, 2016, Defendant Julian Neil Armstrong has failed to file a responsive pleading.

SIGNATURE ON FOLLOWING PAGE

Signature of Affiant

Matthew Nall, ESQ.

SWORN BEFORE ME THIS 2nd day of March 2016.

NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA
My commission expires: 12-4-2017

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

EXHIBIT B
(Affidavit of Non-Military Service)

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 14TH JUDICIAL CIRCUIT CASE NO: 2015-CP-26-5633
BOBBY FOSTER, Plaintiff(s), v. JULIAN NEIL ARMSTRONG, Defendant(s).	**AFFIDAVIT OF NON-MILITARY SERVICE**

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

Personally appeared before me the undersigned attorney, who first being duly sworn, deposes and says:

That he is familiar with the provisions of 50 App. Section 520, Civil Relief Act of 1940, and to induce the Court to enter a default judgment against Defendant Julian Neil Armstrong, represents to the Court that from his file in this matter, and on information and belief based on the hereinafter enumerated facts, Defendant Julian Neil Armstrong is/are not in the Military Service of the United States and is/are not entitled to the protection of the Civil Relief Act of 1940 and Amendments thereto. The source of information on which he bases his belief is as follows: Research made by the Anastopoulo Law Firm, LLC and Bobby Foster, Plaintiff herein.

Signature of Affiant:

Matthew Nall, ESQ.

SWORN BEFORE ME THIS 2nd day of March 2016.

Margaret A Stanley

NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA
My commission expires: 12-4-2017

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

EXHIBIT C
(Proof of Service)

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Akim A. Anastopoulo (SC)
Kate L. Bostrom (NC)
Samuel R. Flynn (SC)
Marianthe L. Kolokithas (SC)
Eric M. Poulin (GA)(NC)(SC)(CA)
Casey Van Valkenburgh (SC)(IL)
P. Heath Ward (SC)
Katie M. Wilensky (SC)
Roy T. Willey, IV (SC)
Evan P. Williams (SC)

ANASTOPOULO
LAW FIRM

Toll Free: 1 (800) 313-2546
Facsimile: (843) 494-5536

Reply to Columbus Street Office
www.AkimLawFirm.com

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

Thursday, August 13, 2015

Sent Via Certified Mail, Restricted Delivery
7015 0640 0005 7946 3544

Julian Neil Armstrong
186 Williamsburg Road
Little River, SC 29566

RE: *Bobby Foster v. Julian Neil Armstrong*
Case No.: 2015-CP-26-5633

Dear Mr. Armstrong:

Enclosed for service upon you, and pursuant to Rule 5 of the S.C.R.C.P., please find a copy of the Summons & Complaint that has been filed in the above referenced action.

Upon receipt, please forward this letter and these important legal papers to your insurance company **immediately**. These documents are time sensitive.

Sincerely,

Peggy Teasley
Litigation Manager

Enclosure

Cc: Bobby Foster

Mailing: 62 Columbus Street, Charleston, South Carolina 29403
North Charleston: 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418
Pee Dee: 150 W. Evans Street, Florence, South Carolina 29501
Columbia: 1201 Main Street, Suite 1901, Columbia, South Carolina 29201

Appointment Only: Myrtle Beach * Wilmington, North Carolina

PLAINTIFF'S EXHIBIT
C

English Customer Service USPS Mobile Register / Sign In

USPS.COM

USPS Tracking®

Customer Service ›
Have questions? We're here to help.

Get Easy Tracking Updates ›
Sign up for My USPS.

Tracking Number: 70160640000579463544

Product & Tracking Information

Postal Product:
First-Class Mail®

Features:
Certified Mail Restricted Delivery Return Receipt

See tracking for related item: 9590952106150123692623

DATE & TIME	STATUS OF ITEM	LOCATION
September 4, 2015 , 12:52 am	Departed USPS Facility	CHARLESTON, SC 29423
Your item departed our USPS facility in CHARLESTON, SC 29423 on September 4, 2015 at 12:52 am. The item is currently in transit to the destination.		
September 3, 2015 , 1:37 pm	Arrived at USPS Facility	CHARLESTON, SC 29423
September 2, 2015 , 3:42 pm	Departed USPS Facility	COLUMBIA, SC 29201
August 31, 2015 , 9:05 am	Unclaimed/Max Hold Time Expired	LITTLE RIVER, SC 29566
August 15, 2015 , 1:13 pm	Notice Left	LITTLE RIVER, SC 29566
August 14, 2015 , 8:55 am	Arrived at USPS Facility	COLUMBIA, SC 29201
August 14, 2015 , 6:26 am	Departed USPS Facility	CHARLESTON, SC 29423
August 13, 2015 , 10:45 pm	Arrived at USPS Facility	CHARLESTON, SC 29423
August 13, 2015 , 4:30 pm	Acceptance	CHARLESTON, SC 29403

Available Actions

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

Track Another Package

Tracking (or receipt) number

Track It

Manage Incoming Packages

Track all your packages from a dashboard.
No tracking numbers necessary.

Sign up for My USPS ›

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA,)
)
COUNTY OF HORRY)

CASE NUMBER:# 2015CP265633

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD

who being duly sworn states that he/she is a Deputy Sheriff for Horry County, South Carolina and that the SUMMONS AND COMPLAINT, COVER SHEET on behalf of BOBBY FOSTER was delivered to the

VS

JULIAN NEIL ARMSTRONG

Sheriff of Horry County on the 24th day of SEPTEMBER 2015, for service on the Defendant at 186 WILLIAMSBURG ROAD
LITTLE RIVER,SC

South Carolina; and that Deponent made a diligent search, but was unable to locate JULIAN NEIL ARMSTRONG

Sworn to before me this 26th
day of OCTOBER , 2015.

Phillip A. Thompson
Sheriff of Horry County

NOTARY PUBLIC FOR SOUTH CAROLINA

DAVID FLOYD
Deputy Sheriff

MY COMMISSION EXPIRES: 9-15-2016

UNABLE TO LOCATE. NEIGHBOR ADVISED THAT SUBJECT HAS MOVED.

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

PLAINTIFF'S EXHIBIT D

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP260633

AFFIDAVIT OF PUBLICATION

FILED
HORRY COUNTY
2016 JAN 20 AM 10:46

State of South Carolina

County of Horry

Pauline L. Lowman

Personally appears before me,

and after being duly sworn,

That she is the Publisher of

the North Myrtle Beach Times

a newspaper published at

North Myrtle Beach in

the County and State aforesaid;

that the Legal Notice

was printed and published in said newspaper

for and during the weekly publication,

and appeared in the issues of the

North Myrtle Beach Times December 24th 31st

and January 7th A.D. 2016

Pauline L. Lowman

Sworn to and subscribed before me

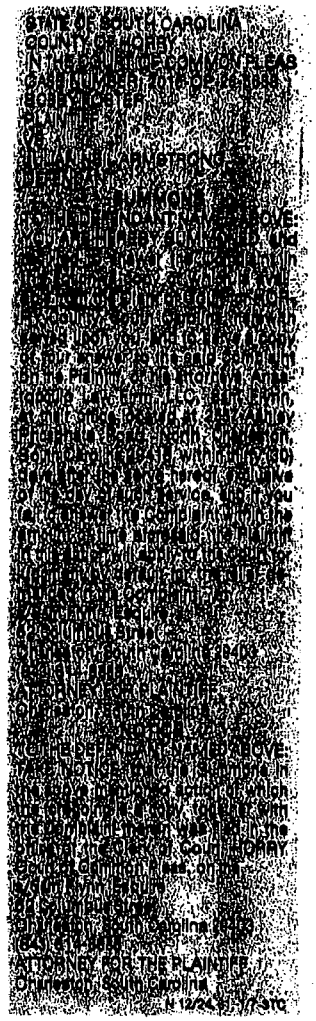
this 7th day of January

A.D. 2016

Henry C Hester, Sr

Notary Public for South Carolina

Commission Expires May 26, 2020.


STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NO: 2015-CP-26-05633
VS
ALAN ARMSTRONG
SUMMONS
TO THE ABOVE
ATTORNEY FOR PLAINTIFF
Charleston, South Carolina

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

PLAINTIFF'S EXHIBIT 1 E

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE 14TH JUDICIAL CIRCUIT
CASE NO: 2015-CP-26-5633

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

ORDER FOR ENTRY OF DEFAULT AND REFERRAL FOR HEARING ON DAMAGES

FILED
HORRY COUNTY
2016 MAR -8 PM 3:26
MELANIE HUGGINS-WARD
CLERK OF COURT

The Notice of Summons and Complaint in this matter was published in The North Myrtle Beach Times published the Notice on December 24, 31, and January 7. Defendant Julien Neil Armstrong failed to submit a responsive pleading or defend the suit and on March 2, 2016, Plaintiff filed a Motion for Entry of Default and Request for a Hearing on Damages.

THE COURT HEREBY FINDS Defendant Julien Neil Armstrong was properly served with notice via publication and failed to file and/or serve a responsive pleading within 30 days after the last day of publication and Plaintiff properly moved for entry of default on March 2, 2016.

IT ORDERED that Defendant Julien Neil Armstrong, is in Default and this Entry of Default is considered effective as of March 2, 2016, the date the Court was first notified of Defendant Julien Neil Armstrong's default through Plaintiff's Motion For Entry of Default.

IT SO FURTHER ORDERED that this matter is to be set on the Court's docket for a hearing on damages pursuant to Plaintiff's request.

Dated: 3/8/16

Melanie Huggins-Ward

Clerk of Court
Horry County Court of Common Pleas

IN THE STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

BOBBY FOSTER,

Plaintiff(s),

v.

JULIAN NEIL ARMSTRONG,

Defendant(s).

CASE NO.: 2015-CP-26-5633

MOTION AND ORDER
INFORMATION FORM AND COVER SHEET

FILED
HORRY COUNTY
2016 MAR -8 PM 3:25
MELANIE HUGGINS-WARD
CLERK OF COURT

Plaintiff's Attorney: Matthew Nall, Eric Poulin, Roy Willey Bar Number: 102329, 100209, 101010 Address: 62 Columbus St., Charleston SC 29403 Phone: 843-614-8888 Fax: 843-853-2291 E-Mail: matt@akimlawfirm.com, eric@akimlawfirm.com, roy@akimlawfirm.com	Defendant's Attorney: Bar Number: Address: Phone: E-Mail:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTINONS III and III)**
☐ **PROPOSED ORDER / CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Entry of Default – Request for Damages Hearing
Estimated Time Needed: 15 Min. Court Reporter Need: ☒ YES / ☐ NO

SECTION II: Motion / Order Type

☐ Written motion attached
☒ Form Motion / Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendants — Wednesday, February 10, 2016 Date Submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT:
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposal order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

Copy

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE
CODE: _____ DATE: _____

ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP260633

CLERK'S SECTION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

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Gmail by Google

Matthew Nall <matt@akimlawfirm.com>

Bobby Foster vs. Julian Neil Armstrong

Matthew Nall <matt@akimlawfirm.com> Fri, Oct 21, 2016 at 12:47 PM
To: Eric Poulin <eric@akimlawfirm.com>
Cc: "ziptrial@googlegroups.com" <ziptrial@googlegroups.com>

Roy is out currently, but let me know if this is ok:

Judge Culbertson,

Plaintiff disagrees with the findings of fact and conclusions of law in Defendant's Proposed Order Setting Aside Order of Publication and Setting Aside Order for Entry of Default and Referral for Hearing on Damages.

To my recollection, the Court vacated the Order of Default and requested that Mrs. Gangi accept service of the Complaint on behalf of Defendant Armstrong. The ultimate decision was that Plaintiff's Notice did not contain a date of filing and therefore was defective. The Court did not rule on issues of personal jurisdiction and did not rule on setting aside the Order for Publication.

As I mentioned in the hearing, this case arose from an April 2013 vehicular collision. My concern is that if Defendant's Proposed Order becomes the law of this case, Defendant will be able to claim the Statute of Limitations has passed.

Accordingly, I would propose that the portions of the Proposed Order stating that "this Court finds that this Court has no personal jurisdiction over the Defendant" be struck. The Court allowed the default to be lifted. Therefore, this case should be allowed to move forward on its merits rather than a technicality.

Thank you for your attention to this matter. I have copied Mrs. Gangi to this email as well. Please let me know if you have any questions or concerns.

[Quoted text hidden]

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THOMPSON & HENRY, P.A.
ATTORNEYS AT LAW
1300 SECOND AVENUE, THIRD FLOOR
POST OFFICE BOX 1740
CONWAY, SOUTH CAROLINA 29528

LINDA WEEKS GANGI
lgangi@thompsonlaw.com

TELEPHONE
(843) 248-5741
FAX
(843) 248-5112

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October 26, 2016

eric@akimlawfirm.com
Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
62 Columbus Street
Charleston, SC 29403

Re: *Bobby Foster vs. Julian Neil Armstrong*
Civil Action No.: 2015–CP-26-5633
Claim No.: 40-2K34-502
SF Ins: Deloria G. Armstrong
DOL: April 8, 2013

Dear Eric:

Please find enclosed herewith copies of the following documents with regard to the above-captioned action:

a. Answer on Behalf of the Defendant;
b. Defendant's Interrogatories to the Plaintiff;
c. Defendant's First Request for Production of Documents to the Plaintiff;
d. Notice of Taking Deposition of the Plaintiff; and
e. Certificate of Mailing.

Please note that I have scheduled the Plaintiff's deposition for a date far enough in advance for you to timely provide me with your client's written discovery answers; however, if the date and time are not convenient with you and/or your client, please do not hesitate to contact my office to reschedule same for a mutually convenient date and time.

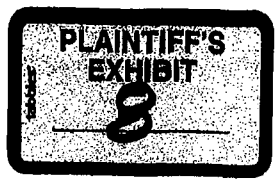
With kindest personal regards, I remain

Yours very truly,

THOMPSON & HENRY, P.A.

Linda Weeks Gangi

LWG/avs
Enclosures



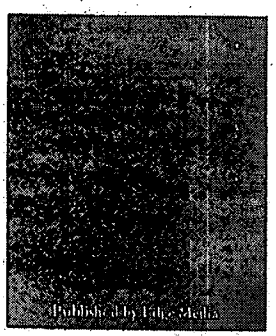
Oct 12, 2016

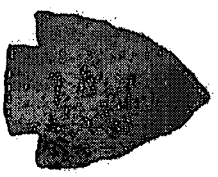
North Myrtle Beach Times













North Myrtle Beach Times

Welcome to North Myrtle Beach and the newspaper serving our community and the Grand Strand for 45 years, the *North Myrtle Beach Times*.

Little River Chamber reinvests in community - Sep 8, 2016
The Little River Chamber of Commerce & Visitors Center formally thanked the L Volunteer Firefighters

Fire truck Push-In event held on Wednesday - Sep 1, 2016
The North Myrtle Beach Public Safety Department held a fire truck Push-In ever Wednesday following City Council's

Public Safety Department will hold test on Monday - Aug 25, 2016
On Monday, Aug. 29, between 1 and 2 p.m., the North Myrtle Beach Public Safe Department will conduct a test of an

Cherry Grove dredging project continues moving forward by bui disposal basin - Aug 25, 2016
The Cherry Grove Dredging Project in North Myrtle Beach continues to move fo initial dredge is projected

Nine veterans presented with Quilts of Valor - Aug 18, 2016
On Monday, Aug. 15, representatives of the local chapter of the Quilts of Valor F presented nine veterans with

Employees receive recognition during NMB City Council meetin - Aug 18, 2016
During the Aug. 15 North Myrtle Beach City Council meeting, Zoning Enforceme Dorian Dixon was named Employee

Joe Hill named Horry County's Police Chief - Aug 12, 2016
After a national search, Joseph Hill has been named the new Chief of Police for County.



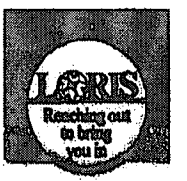


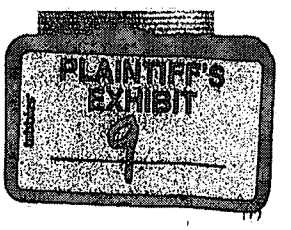












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ELECTRONICALLY FILED - 2017 Apr 11 10:05 AM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO.: 2015-CP-26-5633

Bobby Foster,

Plaintiff,

vs.

Julian Neil Armstrong,

Defendant.

ORDER

2017 MAR 23 PM 3:48

PLAINTIFF'S ATTORNEY: MATTHEW NALL, ESQUIRE
DEFENDANT'S ATTORNEY: LINDA WEEKS GANGI, ESQUIRE
HEARING DATE: FEBRUARY 27, 2016
PRESIDING JUDGE: BENJAMIN H. CULBERTSON

The Plaintiff filed a Motion to Reconsider this Court's Order dated October 21, 2016 and filed October 26, 2016 setting aside the Order for Publication and setting aside the Order for Entry of Default and Referral for Hearing on Damages. Plaintiff's counsel seeks to have this Court reconsider its October 21, 2016 Order so that this litigation is not precluded by the Statute of Limitations. The issue of the Statute of Limitations is not properly before this Court.

Based on the failure of the original Summons filed with the Court to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*, the failure of the publication to include the date of filing of the Summons and Complaint as required by S.C. Code Ann. §15-9-740, the failure to properly publish the Summons, and the failure of the Plaintiff to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740, this Court found in its October 21, 2016 Order that the Summons is defective and that service of the Summons and Complaint was not properly perfected on the Defendant. Thus, this Court has no personal jurisdiction over the Defendant. The Order for Publication and the Order for Entry of Default and Referral for



Hearing on Damages were properly set aside and declared null and void and of no force and effect in this Court's Order of October 21, 2016.

This Court having reviewed all information provided to it by the parties and heard both parties' arguments on the issues raised in the Plaintiff's Motion to Reconsider, the Plaintiff's Motion to Reconsider is hereby denied.

AND IT IS SO ORDERED this the 16 day of March, 2017.

In Chambers

Benjamin H. Culbertson

The Honorable Benjamin H. Culbertson
Chief Administrative Judge of the Fifteenth Judicial Circuit

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Gmail by Google

Ben Lee <ben@akimlawfirm.com>

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Fwd: Foster vs. Armstrong

Matthew Nall <matt@akimlawfirm.com> Tue, Mar 7, 2017 at 10:51 AM
To: "Katie Eri, Roy, Peggy, Sue Sam" <ziptrial@googlegroups.com>

---------- Forwarded message ----------
From: **Linda Gangi** <LGangi@thompsonlaw.com>
Date: Tue, Mar 7, 2017 at 10:48 AM
Subject: RE: Foster vs. Armstrong
To: "bculbertsonj@sccourts.org" <bculbertsonj@sccourts.org>, "bculbertsonlc@sccourts.org" <bculbertsonlc@sccourts.org>
Cc: Matthew Nall <matt@akimlawfirm.com>

Dear Judge Culbertson: At the original hearing on my Motion to Set Aside Order for Entry of Default and the Order for Publication, you asked if I would accept service of the Summons and Complaint and I indicated that I would. Based on your honor's request at the original motion hearing in October, I filed an answer on October 28,2016. I did not raise any jurisdictional objections in the answer. The issues of proper service and personal jurisdiction had already been ruled on by your honor. Your honor ruled that the court had no personal jurisdiction over the defendant because the summons was defective and service was not made in accordance with the order for publication and applicable statutes. Service was not effected on my client until I agreed to accept service in October of 2016. The court had jurisdiction at the point in time when I accepted service but not before that. The fact that I did not raise an issue of personal jurisdiction in my answer has no bearing on the fact that the Summons is defective and there was never proper service on my client until I accepted service and filed the answer. As your honor stated in court at the time of the hearing on the Plaintiff's Motion for Reconsideration, the issue of the statute of limitations is not before the court. I believe that the Order I prepared and forwarded to the court fairly captures your honor's ruling on the Plaintiff's Motion for Reconsideration.

Linda Weeks Gangi

THOMPSON & HENRY, P.A.

1300 Second Avenue, 3rd Floor

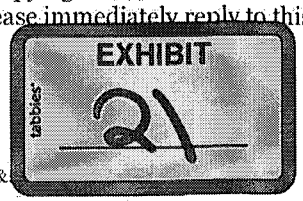
Conway, SC 29526

Phone (843) 248-5741

Fax (843) 248-5112

lgangi@thompsonlaw.com

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This message is intended solely for the use of the individual to whom it is addressed and may contain information that is privileged, confidential or otherwise exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately reply to this message or notify me by telephone at 843-248-5741, and delete the message.



From: Matthew Nall [mailto:matt@akimlawfirm.com]
Sent: Tuesday, March 07, 2017 9:40 AM
To: bculbertson@sccourts.org; bculbertsonj@sccourts.org; bculbertsonlc@sccourts.org
Cc: Neicey Smith <neicey@thompsonlaw.com>; Katie Eri, Roy, Peggy, Sue Sam <ziptrial@googlegroups.com>; Linda Gangi <LGangi@thompsonlaw.com>
Subject: Re: Foster vs. Armstrong

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To view this discussion on the web visit https://groups.google.com/d/msgid/ziptrial/CAA-6g%3DwYcDrGAgjhvSt_jrreg0c1BvVtTKsddcngw-nCF3McZw%40mail.gmail.com.
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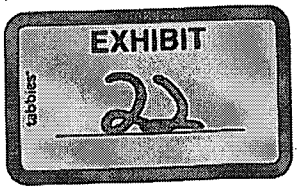
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ELECTRONICALLY FILED - 2017 Mar 31 2:52 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2015-CP-26-5633
Bobby Foster, Plaintiff, vs. Julian Neil Armstrong, Defendant.	**MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM**

TO: THE PLAINTIFF AND MATTHEW L. NALL, ATTORNEY FOR THE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendant through his undersigned attorney will move before the Presiding Judge of the Court of Common Pleas at the Horry County Courthouse in Conway, South Carolina on the tenth day of service hereof or as soon thereafter as counsel might be heard for an Order Granting Summary Judgment. The basis for this motion is that the Statute of Limitations bars this action because the Plaintiff failed to timely serve the Summons and Complaint in the above-captioned action. The automobile accident which is the subject of this action occurred on April 8, 2013 (See paragraphs 5, 6, 7 and 8 of the Plaintiff's Complaint). The Plaintiff filed the Complaint on July 27, 2015. Thereafter, the Plaintiff attempted to serve the Defendant with the Summons and Complaint through the sheriff's department but the Defendant had moved. (See Affidavit of Non Service of the Sheriff). Thereafter, Plaintiff's counsel obtained an Order for Publication. The Plaintiff published the Summons in the North Myrtle Beach Times. No Answer was filed by the Defendant. An Order for Entry of Default was obtained by Plaintiff's counsel. Thereafter, Defendant's counsel moved to set aside the Order for Publication and the Order for Entry of Default. The Order for Entry of Default and the Order for Publication were set aside by Order dated October 21, 2016 and filed October 26, 2016 in the



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ELECTRONICALLY FILED - 2017 Mar 31 2:52 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Office of the Clerk of Court for Horry County. The basis for setting aside these Orders was fourfold; The Summons was insufficient. It did not comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*. The Summons did not notify the Defendant that if he fails to appear and defend, a judgment by default would be rendered against him. The failure of the Summons to comply with the provisions of Rule 4(b) of the *South Carolina Rules of Civil Procedure* results in the Court having no personal jurisdiction over the Defendant. Furthermore, the Summons published in the newspaper did not comply with S. C. Code Ann. §15-9-740 which requires that the information which is published must state the time and place of filing of the Summons and Complaint. The publication of the Summons in this case did not state the date of filing of the Summons in the Court of Common Pleas for Horry County. Furthermore, the Order of Publication signed by the Clerk of Court and dated November 24, 2015 required that the Defendant be served "via publication in a daily newspaper of the Defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Summons was published in a North Myrtle Beach Times which is not a newspaper of general circulation in Horry County. It is not a daily newspaper and the Defendant never lived in North Myrtle Beach. The publication was not as ordered. Finally, the Court found that the Plaintiff did not use due diligence in locating the Defendant. The Defendant's correct cell phone number was contained in the accident report so that his location could have easily been determined by calling the cell phone number. S.C. Code Ann. §15-9-740 requires that reasonable diligence be used to ascertain the residence of the Defendant. The Court found that the Plaintiff did not use reasonable diligence as required by S.C. Code Ann. §15-9-740. Based on the failure of the original Summons filed with the Court to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*, the failure of the publication to include the date of the filing of the Summons and Complaint as required by S.C. Code Ann. §15-9-740, the failure to

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ELECTRONICALLY FILED - 2017 Mar 31 2:52 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

publish the Summons in a daily newspaper of general circulation in Horry County, and the failure of the Plaintiff to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740, the Court found that it had no personal jurisdiction over the Defendant and that the service of the Summons and Complaint was not properly perfected on the Defendant. The Court ordered that the Order for Publication and the Order for Entry of Default and Referral for Hearing on Damages be set aside and declared null and void and of no force and effect. At the time of the hearing to set aside the Orders on October 21, 2016, the Court asked whether or not defense counsel would accept service of the Summons and Complaint and file an Answer within thirty days from the date of receipt of the Order. The Court also required the Plaintiff to amend the Summons to comply with Rule 4(b). The Summons to date has never been amended. No Acceptance of Service was ever provided to the Defendant's attorney. Defendant filed an Answer on October 26, 2016. That Answer raised the issue of the Statute of Limitations. Clearly the Statute of Limitations ran prior to service being perfected on the Defendant.

The Defendant certifies that his argument has been fully set forth above and a Memorandum would serve no purpose.

Conway, South Carolina

March 30, 2017

THOMPSON & HENRY, P.A.

s/Linda Weeks Gangi
Linda Weeks Gangi
Attorney for the Defendant
PO Box 1740
Conway, SC 29528-1740
(843) 248-5741 (p)
lgangi@thompsonlaw.com
SC Bar No. 2365

IN THE STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS
BOBBY FOSTER, Plaintiff, v. JULIAN NEIL ARMSTRONG, Defendant.		CASE NO.: 2015-CP-26-5633 **MOTION AND ORDER INFORMATION FORM AND COVER SHEET**

Plaintiff's Attorney: Matthew L. Nall; Roy T. Willey, IV; Eric M. Poulin Bar Number: 102329; 101010; 100209 Address: 62 Columbus Street, Charleston, SC 29403 Phone: 843-614-8888 Fax: 843-853-2291 E-Mail: matt@akimlawfirm.com; roy@akimlawfirm.com; eric@akimlawfirm.com	Defendant's Attorney: Linda Weeks Gangi Bar Number: Address: P.O. Box 1740, Conway, SC 29528 Phone: (843) 248-5741 E-Mail: lgangi@thompsonlaw.com

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTINONS III and III)**
☐ **PROPOSED ORDER / CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment
Estimated Time Needed: 15 Minutes Court Reporter Need: ☒ YES / ☐ NO

SECTION II: Motion / Order Type

☒ Written motion attached
☐ Form Motion / Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

/s Matthew L. Nall — Signature of Attorney for ☒ Plaintiff / ☐ Defendants
April 27, 2017 — Date Submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: **$25.00**
☐ EXEMPT:
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposal order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ DATE: _____

CLERK'S SECTION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

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ELECTRONICALLY FILED - 2017 Jul 07 4:37 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

IN THE STATE OF SOUTH CAROLINA) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FOR THE 15TH JUDICIAL CIRCUIT CASE NO: 2015-CP-26-5633
BOBBY FOSTER, Plaintiff, v. JULIAN NEIL ARMSTRONG, Defendant.	**PLAINTIFF'S MOTION TO RECONSIDER**

TO: THIS HONORABLE COURT AND ALL COUNSEL OF RECORD

Pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, Plaintiff Bobby Foster ("Plaintiff") submits this Motion to Reconsider this Court's Order granting summary judgment in favor of Defendant Julian Neil Armstrong ("Defendant"). The grounds for Plaintiff's Motion are as follows:

- The Court determined that Defendant was entitled to summary judgment as a matter of law based upon Plaintiff's purported failure to sufficiently and timely serve Defendant with Plaintiff's Summons and Complaint via publication within the statute of limitations despite the Horry County Clerk of Court's correct and unassailable determination that Defendant had, in fact, been served with Plaintiff's properly filed Summons and Complaint via publication within the statute of limitations period.

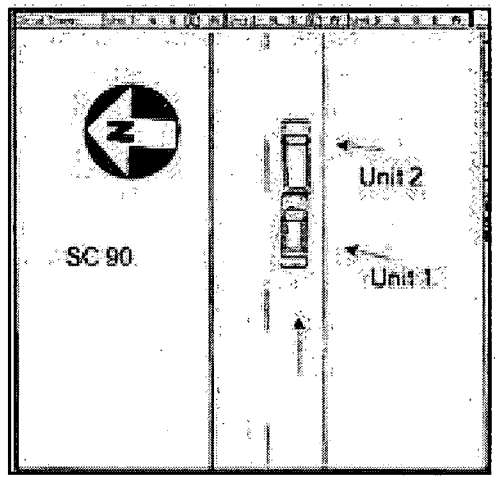
- The Court determined that Defendant was entitled to summary judgment as a matter of law as to service despite the fact Defendant admits that the Court had personal jurisdiction over him, and despite the fact that Defendant, without objection, voluntarily appeared to defendant this case and filed his Answer to Plaintiff's Complaint.

In light of the foregoing and based on the reasoning set forth more fully herein, Plaintiff respectfully requests this Court to reconsider its April 19, 2017, Order on Defendant's Motion for Summary Judgment so that litigation is not precluded by the statute of limitations. As is set

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forth more fully herein, Plaintiff did, in fact, timely serve his Summons and Complaint as determined by the Horry County Clerk of Court, and the Court's granting of summary judgment in favor of Defendant should be reconsidered. Plaintiff's motion is supported by all applicable statutes, rules of court, pleadings, memoranda, and any oral arguments presented by counsel at a hearing on this matter.

STATEMENT OF FACTS



This case arises from an April 8, 2013, motor vehicle collision in Horry County wherein Plaintiff was lawfully traveling east on S.C. 90 when he came to a lawful stop for traffic. At that same time, Defendant (Unit 1) was also traveling east on S.C. 90 and was following too closely, travelling too fast for conditions, failed to stop, and consequently struck Plaintiff's vehicle (Unit 2) from behind. (*See* Ex. 1; S.C. Traffic Collision Rpt.) The collision caused Plaintiff to suffer significant personal injuries and property damage.

On July 27, 2015, Plaintiff timely filed his Summons and Complaint with the Horry County Clerk of Court, and therein alleged that Defendant's negligence, gross negligence, negligence *per se*, careless, reckless, willful, wanton, and/or unlawful acts and/or omissions directly and proximately caused Plaintiff's injuries and damages. (*See* Ex. 2; Summons and Compl.) Upon receipt of the clocked copy of Plaintiff's Summons and Complaint from the Clerk of Court, Plaintiff attempted service of Defendant via certified mail, restricted delivery through the United States Postal Service ("USPS"). (*See* Ex. 3; Aug. 13, 2015, USPS Serv. Ltr.) Plaintiff's August 13, 2015, letter was sent to 186 Williamsburg Road, Little River, South

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Carolina, 29566, which is the address identified as Defendant's residence in the South Carolina Collision Report. (*See* Ex. 1.) Plaintiff's letter was assigned a tracking number of 70150640000579463544 by the USPS, and, on August 15, 2015, the USPS left notice at 186 Williamsburg Road that certified, restricted correspondence had been sent to Defendant at that address. (*See* Ex 4; USPS Tracking Rpt.) Despite the notice left by the USPS, Plaintiff's service letter was unclaimed, and by August 31, 2015, the maximum hold time for Plaintiff's service letter had expired. (*See* Ex. 4.)

Upon learning of the expiration of the maximum USPS hold time, Plaintiff employed the Horry County Sheriff's Department to serve Defendant at his residence identified in the collision report. The Summons and Complaint was received by the sheriff's department on September 24, 2015. (*See* Ex. 5; Oct. 26, 2015, Non-Service Aff.) Despite a diligent search, the sheriff's department was unable to locate Defendant. (*See* Ex. 5.) On November 19, 2015, Plaintiff petitioned the Horry County Clerk of Court for an order allowing Defendant to be served via publication. (*See* Ex. 6; Nov. 19, 2015, Pet. for Pub.) On November 23, 2015, Plaintiff's counsel's Affidavit for Publication was filed with the Clerk of Court advising that counsel had attempted to serve Defendant through the sheriff's department, that Defendant had moved and left no forwarding address, and that Defendant's whereabouts were unknown. (*See* Ex. 7; Nov. 23, 2015, Aff. for Pub.) Thereafter, the Clerk of Court granted Plaintiff's petition, thus finding it "appropriate and necessary to serve Defendant via publication in the daily newspaper of Defendant's last known residence, 186 Williamsburg Road, Little River, South Carolina. (*See* Ex. 8; Nov. 24, 2015, Order for Pub.)

All information then known indicated that Defendant lived in the small town of Little River, South Carolina. According to the town's website, "Little River, South Carolina is the

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oldest -- and one of the most unique -- towns along the greater Grand Strand." (*See* Ex. 9; Little River, South Carolina Website, http://www.littleriversc.com.) Plaintiff published his notice in the *North Myrtle Beach Times*, which was and continues to be a well-known newspaper serving the Grand Strand, including Little River South Carolina, for four decades. (*See* Ex. 10; *North Myrtle Beach Times* Website, http://www.nmbtimes.com.) Plaintiff's notice, pictured below and attached hereto as Exhibit 11, ran during the weeks of December 24 and 31, 2015, and January 7, 2016. After three consecutive weeks of publication, on March 2, 2016, Plaintiff moved the Clerk of Court to enter default against Defendant (*see* Ex. 12), which the Clerk of Court ordered on March 8, 2016, finding that Defendant "was properly served with notice via publication and failed to file and/or serve a responsive pleading within 30 days after the least date of publication and Plaintiff properly moved for entry of default on March 2, 2016." (*See* Ex. 13; Mar. 8, 2016, Order for Entry of Default.)

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS
CASE NUMBER: 2015-CP-26-5633
BOBBY FOSTER,
PLAINTIFF
VS.
JULIAN NEIL ARMSTRONG,
DEFENDANT

SUMMONS

TO THE DEFENDANT NAMED ABOVE: YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.

s/Sam Flynn, Esquire
62 Columbus Street
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NOTICE

In July 2016, Defendant's counsel appeared in this matter. (*See* Ex. 14; Notice of Appearance.) In August 2016, Plaintiff's damages hearing, which had been previously set, was scheduled for the second time. Shortly thereafter, Defendant's counsel requested a continuance, which the Court granted. In September 2016, Defendant filed a Motion to Set Aside Order for Entry of Default and Order for Publication, nine months after the publication had run and more

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than a month after counsel had appeared on Defendant's behalf. Defendant's motion claimed that Plaintiff's Summons, attached to his Complaint, was insufficient because it did not "notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him." (*See* Ex. 15; Def. Mot. to Set Aside.) Defendant's motion further argued that the Summons, which was published in the newspaper and which had been deemed sufficient by the Clerk of Court, was statutorily incompliant because it lacked the Complaint's filing location and date despite the Horry County Court of Common Pleas appearing on the notice along with the filed case number. (*See* Ex. 15.) Defendant also took issue with publication in the *North Myrtle Beach Times*, despite Defendant's residence in Little River. (*See* Ex. 15.) Defendant claimed that Plaintiff did not use "reasonable diligence" because he did not call Defendant's cell phone number to ascertain his whereabouts. (*See* Ex. 15.)

On Monday, October 17, 2016, the Court heard arguments on Defendant's Motion to Set Aside. Both parties argued the issues as laid out in their respective memoranda. Ultimately, the Court determined that it would not address issues of personal jurisdiction, but stated that, because the published Summons lacked a filing date, it would remove the default. Correspondingly, the Court asked Defendant's counsel to accept service on behalf of Defendant and provide a written order. Later, Defendant circulated his proposed order which substantially repeated the same issues in his Motion to Set Aside. The proposed order stated that the Court is without personal jurisdiction over Defendant and that the previous orders as to publication and default are void. Plaintiff's counsel promptly notified the Court and Defendant's counsel stating Plaintiff's objection to the findings of no jurisdiction and voiding the orders previously in force. (*See* Ex. 16; Oct. 21, 2016, Pl.'s E-Mail to the Hon. Benjamin Culbertson.) Notably, Plaintiff's counsel stated his concern that, should Defendant's proposed order be signed by the Court,

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Defendant would effectively be able to allege noncompliance with the statute of limitations, since the collision occurred in April 2013. (*See* Ex. 16.)

The Court signed Defendant's proposed order on October 21, 2016, stating that Defendant's counsel "has agreed to accept service of the Summons and Complaint ... and will file an Answer within thirty (30) days from the date of receipt of this Order." (*See* Ex. 17; Oct. 21, 2016, Order.) Without objection, Defendant's counsel accepted service, and thereafter Defendant filed his Answer to Plaintiff's Complaint wherein he raised the statute of limitations as an affirmative defense. (*See* Ex. 18; Def.'s Answer at 13.)

On November 10, 2016, Plaintiff filed his Motion to Reconsider pursuant to Rule 59, SCRCP, requesting that the Court reconsider its October 21, 2016, ruling so as to not preclude Plaintiff's cause of action on the basis of the statute of limitations. (*See* Ex. 19; Nov. 10, 2016, Motion to Reconsider.) The Court denied Plaintiff's motion by order dated March 16, 2017. (*See* Ex. 20; Mar. 16, 2017, Order.) Prior to the March 16, 2017, Order, Defendant's counsel emailed the Court wherein she reiterated that she had accepted service on behalf of Defendant, and wherein she admits that the Court had jurisdiction over Defendant *vis-à-vis* said acceptance. (*See* Ex. 21; Mar. 7, 2017, Def.'s Email to the Hon. Benjamin Culbertson.) Defendant filed his Motion for Summary Judgment on March 31, 2017, based upon his belief that the statute of limitations bars this action due to Plaintiff's purported failure to timely serve his Summons and Complaint in this case. (*See* Ex. 22; Motion for Summ. J.)

Defendant's Motion for Summary Judgment was unexpectedly heard on April 17, 2017, by The Honorable Larry Hyman immediately following a previously scheduled roster meeting. Plaintiff's counsel of record was not present at that roster meeting due to scheduling conflicts, nor was Plaintiff for that matter. However, an associate of the Plaintiff's counsel was briefed as

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to the roster meeting and attended the roster meeting for that limited purpose, of which Defense counsel and the Court was made aware. To be clear, the hearing on Defendant's Motion for Summary Judgment was already scheduled to be heard on and not until May 17, 2017, and was to be heard The Honorable Benjamin Culbertson who had already presided over numerous motion hearings on the issues of default and service in this case. Nonetheless, the hearing on Defendant's Motion for Summary Judgment was allowed to proceed with, at most, instantaneous notice without Plaintiff's counsel of record or the Plaintiff himself present.

Moreover, Plaintiff had only days before (on April 11, 2017) filed his Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment wherein he very clearly sets forth the reasons why Defendant's motion should be denied. Plaintiff's memorandum was neither addressed nor discussed at the April 19, 2017, hearing of Defendant's Motion for Summary Judgment. A copy of Plaintiff's memorandum is attached hereto as Exhibit A, and the numbered exhibits previously identified herein are the exhibits as referenced and numbered in that memorandum. The Court's Form 4 Order granting Defendant's Motion for Summary Judgment, attached hereto as Exhibit B, was signed by the Court on April 19, 2017, and was received by Plaintiff's counsel on April 24, 2017, via the Clerk of Court's electronic filing system.

LEGAL STANDARD

Rule 59 of the South Carolina Rules of Civil Procedure allows a party to file a motion to reconsider a judgment for two specific reasons. Rule 59(e), SCRCP; *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). First, a motion to reconsider is appropriate when a party "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it."

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Elam, 361 S.C. at 24, 602 S.E.2d at 780. Second, "a party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.*

ARGUMENT

Defendant's Motion for Summary Judgment is based upon his belief that Plaintiff's claim is barred by the statute of limitations due to Plaintiff's purported failure to timely serve his Summons and Complaint. This is despite the Clerk of Court's finding that Defendant was properly served by publication, that Defendant was in default, the fact that Defendant has voluntarily submitted himself to the personal jurisdiction of this Court, and the fact that Defendant has admitted that the Court had jurisdiction over him at the time his counsel accepted service of Plaintiff's Complaint.

Prior to Defendant's Motion for Summary Judgment, the parties presented their respective arguments to the Court as to Defendant's service and default as set forth more fully above. In short, the Court set aside the Clerk of Court's determination that Plaintiff had satisfied the requirements of service by publication and that Defendant was in default. However, as was argued by Plaintiff, the Court's October 21, 2016, Order and March 23, 2013, Order are overly broad in stating that the Court has no personal jurisdiction over Defendant, and that service was not properly perfected on Defendant. As was brought before the Court in Plaintiff's arguments, the Court's respective orders appear to contradict the Court's request that Defendant's counsel accept service on behalf of Defendant and that Defendant file an Answer to Plaintiff's Complaint. Without objection, Defendant's counsel accepted service and Defendant filed his Answer to Plaintiff's Complaint, thereby submitting Defendant to the personal jurisdiction of the Court and effecting service of Plaintiff's Summons and Complaint. As to the latter, Plaintiff contends that, irrespective of Defendant's counsel's accepting service, Defendant was previously

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(and properly) served by publication in March 2016 within the statute of limitations period. Defendant's counsel even admits that the Court, at least as of the time of her acceptance, has jurisdiction over Defendant. To that end, where Defendant raises the statute of limitations as an affirmative defense in his Answer as well as the basis for his Motion for Summary Judgment, the Court should reconsider its April 19, 2017, Order granting summary judgment in favor of Defendant and thereby deny Defendant's motion due to the fact that this action was properly commenced within the statute of limitations period, and this Court has jurisdiction over Defendant.

I. Plaintiff's Cause of Action was Properly and Timely Commenced in Accordance with Rule 3(a)(1)-(2), SCRCP, and S.C. Code Ann. § 15–3–20.

In South Carolina, "a civil 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." Rule 3(a)(1)-(2), SCRCP. For the purpose of tolling any statute of limitations, an attempt to commence an action is equivalent to the commencement thereof when the summons and complaint are filed with the clerk of court and delivered for service to the sheriff of the county in which the defendant usually or last resided. *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1511 (D.S.C. 1989). In 2002, the South Carolina legislature amended section 15-3-20 of the South Carolina Code to provide that a civil action commences as of the date of filing if actual service is accomplished within 120 days after filing, and became effective on May 24, 2002. S.C. Code Ann. § 15–3–20.

A party can waive a statute of limitations defense. *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 234, 599 S.E.2d 462, 466 (Ct. App. 2004) (citing *McLendon v. S.C. Dep't*

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of Highways & Pub. Transp., 313 S.C. 525, 525-26, 443 S.E.2d 539, 540 (1994). Waiver is a question of fact for the finder of fact. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992). Furthermore, waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Id.* at 342-44, 415 S.E.2d at 387. A party's waiver may be expressed or implied by a party's conduct, and it may be applied to bar a party from relying on a statute of limitations defense in a dispositive motion. *See Mende v. Conway Hosp.*, Inc., 304 S.C. 313, 404 S.E.2d 33 (1991) ("[w]aiver of [the statute of] limitations may be shown by words or conduct. Thus, waiver may result from express agreement, ... from failure to claim the defense, *or by any action or inaction manifestly inconsistent with an intention to insist on the statute*." *Id.* at 315, 404 S.E.2d at 34 (quoting 54 C.J.S. Limitation of Actions § 22 at 52 (1987)) (emphasis in original). The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide. *Brown v. Finger*, 240 S.C. 102, 124 S.E.2d 781 (1962).

Here, Plaintiff stands by his assertion that Defendant was properly served by publication and his cause of action was properly commenced within the statute of limitation period, as is more fully set forth in this memorandum. Irrespective of that assertion, Defendant's appearance and untimely conduct in this case rises to the level of waiver. Defendant's counsel first appeared in July 2016 and appeared at Defendant's damages hearing in August 2016. Shortly thereafter, Defendant's counsel requested a continuance, which the Court granted. In September 2016, Defendant filed a Motion to Set Aside Order for Entry of Default and Order for Publication, nine months after the publication had run and more than a month after counsel had appeared on Defendant's behalf. It was ultimately determined by the Court that Plaintiff's published Summons lacked a filing date and that Defendant's default was removed; however, Defendant's

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counsel did accept service on behalf of Defendant and thereafter Defendant filed his Answer. Moreover, Defendant's counsel expressly admitted to the Court that it had jurisdiction over Defendant. Certainly, such conduct rises to the level of waiver and Defendant should be barred from relying on a statute of limitations defense in this instance. As such, this Court should reconsider its April 19, 2017, ruling on Defendant's Motion for Summary Judgment, and allow this case to proceed to trial.

II. Plaintiff's Service of Defendant by Publication Was Proper and Effective, Rendering Plaintiff's Cause of Action Timely Under Applicable Law.

The service of the summons and complaint, as well as notice of the pendency of a cause action, is based upon statutory law and has constitutional implications. To that end, both the United States Constitution and the South Carolina Constitution mandate that persons who may lose their rights should be informed of the risk of such loss. The United States Constitution provides that a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Similarly, the South Carolina Constitution provides that "[n]o person shall be finally bound by a judicial or quasi judicial decision affecting private rights except on due notice and an opportunity to be heard." S.C. Const. art. I, § 22. It has been recognized that, where a person upon whom service is sought, "employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Caldwell v. Wiquist*, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).

What constitutes proper service is governed by statute, and by the South Carolina Rules of Civil Procedure. Specifically, Rule 4(d)(1), SCRCP, requires that, in those instances in which the defendant in an action is an individual, service shall be made "by delivering a copy of the

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summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein...." Rule 4 of the South Carolina Rules of Civil Procedure, as well as Title 15, Chapter 9 of the South Carolina Code of Laws, provides for alternative means of service in the event personal service cannot be had on an individual. First, Rule 4(d)(8) allows for service to be made by the USPS, certified mail restricted delivery with return receipt requested Rule 4(e) provides further that "[w]henever a statute or an order of court provides for service of a summons and complaint or of a notice ... service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order." Thus, effective service may be accomplished under S.C. Code § 15-9-710 *et seq.*, which allows for service to be made by publication, providing certain criteria have been met. By statute, service of the summons and complaint may be had by publication "[w]hen the person on whom the service of the summons cannot, after due diligence, be found within the State..." S.C. Code § 15-9-710.

Here, Plaintiff followed the necessary procedures for serving Defendant by publication after a thorough, diligent effort to serve Defendant at his last known address by both certified, restricted mail and the Horry County Sheriff's Department. This was sufficiently shown to the Clerk of Court of Horry County whose decision to grant service of Defendant by publication was both just and proper under the laws of the State of South Carolina, and should not be disturbed. Consequently, summary judgment is not proper in this case and this Court should reconsider its April 19, 2017, ruling and allow this case to proceed to trial on its merits.

A. Plaintiff Met His Burden to the Clerk of Court of Horry County in Establishing the Appropriateness of Defendant's Service by Publication, and the Clerk of Court's Decision is Unreviewable Absent Evidence of Fraud or Collusion.

When the person on whom the service of the summons is to be made cannot be found

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within the state after due diligence to locate him has occurred, and where the clerk of court for common pleas is satisfied that the person cannot be found, and where it appears to the clerk of court that a cause of action exists against the person on whom service is to be made, the clerk of court may grant an order that the service be made by publication. S.C. Code § 15-9-710. The existence of the factual basis necessary to satisfy the requirements of S.C. Code § 15-9-710 make an order for service by publication unreviewable absent fraud or collusion. *Caldwell*, 402 S.C. at 574, 741 S.E.2d at 588. In *Caldwell*, the judgment debtor moved to set aside two default judgments that arose out of personal injury complaints filed by two individuals whose vehicles were struck by a vehicle operated by the judgment debtor. *Id.* The Beaufort County Court of Common Pleas denied the judgment debtor's motions, and the South Carolina Court of Appeals held that the affidavits requesting service of process by publication were deficient on their face. *Id.*

As stated, the clerk of court, or other issuing officer, may authorize publication when, upon reviewing the petition and supporting affidavit, the clerk is satisfied that a cause of action exists against the defendant and that the defendant cannot be located after due diligence. South Carolina courts have routinely noted that service by publication is in derogation of the common law and the statutes allowing it must consequently be strictly construed. *See, e.g., Brown v. Malloy*, 345 S.C. 113, 546 S.E.2d 195 (Ct. App. 2001); *Tenney v. Am. Pipe Mfg. Co.*, 96 F. 919 (D.S.C. 1899). Consequently, the decision of the officer ordering service by publication is final in the absence of a showing of fraud or collusion. *Yarbrough v. Collins*, 293 S.C. 290, 292-93, 360 S.E.2d 300, 301 (1987) (citing *Yates v. Gridley*, 16 S.C. 496 (1882)). In the absence of such a showing of fraud or collusion, the trial court is without authority to overrule the findings of a clerk of court regarding due diligence. *Montgumary v. Mullins*, 325 S.C. 500, 506, 480 S.E.2d

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467, 470 (Ct. App. 1997). When neither allegations nor proof of fraud or collusion are presented to the trial court, it must correctly refuse to set aside service. *Wachovia Bank of S.C. v. Player*, 341 S.C. 424, 429, 535 S.E.2d 128, 130 (2000). It is difficult to challenge the validity of an order granting leave to effectuate service via publication, as an affidavit in support of a petition for publication is, under most circumstances, unassailable; however, it can be effectively challenged if the moving party can demonstrate that the order was procured through fraud or collusion. *See, e.g.*, *Montgomery*, 325 S.C. 500, 480 S.E.2d 467; *Wachovia*, 341 S.C. 424, 535 S.E.2d 128. Neither fraud nor collusion can, however, be proven without having the opportunity to present evidence. *Id.*

In *Montgomery*, an issue before our State's Court of Appeals was the determination of whether the order of publication was valid based on Montgomery's lack of diligence in attempting to locate the Mullinses. The *Montgomery* Court held that the trial court was "*without authority* to overrule the finding of the clerk of court that the Mullinses could not, after due diligence, be found in the County and State of their last known residence." *Montgomery*, 325 S.C. at 505-06, 480 S.E.2d at 470 (emphasis added). In reaching its conclusion, the *Montgomery* Court looked to the then decade old precedent set by the South Carolina Supreme Court that, in the absence of fraud or collusion, the decision of the officer ordering service by publication is final. *Id.* (citing *Yarbrough* at 293 S.C. 292-293, 360 S.E.2d at 301).

Here, Defendant has neither alleged nor proved fraud or collusion, therefore the Order of Publication should is final and fatal to Defendant's Motion for Summary Judgment. The signed Order on Defendant's Motion to Set Aside states that Defendant did not use "reasonable diligence" to locate Defendant because he did not call Defendant's cell phone. Such argument exceedingly fails to rise to the level of fraud of collusion. As set forth in *Montgumary*, the law

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on this issue is clear that, in the absence of fraud or collusion, the decision of the officer ordering service by publication is final and unassailable. Plaintiff rightfully and lawfully employed the Horry County Sheriff's Department to locate and serve Defendant at his last known address after certified, restricted delivery at Defendant's 186 Williamsburg Road failed. Ultimately, the sheriff's department, the law enforcement authority for Horry County, returned an affidavit of non-service despite their respective due diligence to locate and serve Defendant. The use of the sheriff's department was sufficient for the Clerk of Court to order service by publication.

Still, the Court's Order on Defendant's Motion to Set Aside states that Plaintiff could have obtained his address by simply calling Defendant's cell phone. But, it is unlikely that an individual would be forthcoming with his current or even accurate address knowing that a law firm is attempting to track him down for the purpose of bringing a cause of action against him. The record is devoid of <u>any</u> evidence of fraud or collusion, and, to wit, there is no law, statutory or otherwise, which provides that not calling a defendant's cell phone to obtain his address rises to the level of fraud or collusion, or that such falls short of due diligence. As to the latter, Plaintiff employed two proper avenues of service prior to publication (certified mail and the sheriff's department), and nowhere in the rules does it require a plaintiff to call a cell phone to ascertain the whereabouts of a defendant. Defendant's argument is also puzzling on this issue, as he simultaneously argues that it was somehow improper for Plaintiff to look to the collision report for the Defendant's correct address for service, but proper to look to the same report to easily determine Defendant's by calling the number listed as Defendant's cell phone. Thus, Plaintiff used reasonable due diligence, the Clerk of Court's determination as to service by publication was proper and final on the issue of service. For this reason, the Court should

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reconsider its granting of summary judgment and allow this properly-commenced case to proceed to a trial by jury.

B. Plaintiff's Publication in the *North Myrtle Beach Times* Met the Requirements of the Clerk of Court's Order and the Requirements of S.C. Code Ann. § 15-9-740.

Service by publication is generally governed by South Carolina Code Sections 15-9-710, *et seq.* The South Carolina Supreme Court has ruled with certainty that the service by publication statutes may be applied to actions *in personam* so long as the due process minimum contacts requirement is satisfied. *Hendrix v. Hendrix*, 296 S.C. 200, 371 S.E.2d 528 (1988) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (approving *in personam* jurisdiction over nonresidents who maintain minimum contacts within the forum state)). Moreover, any service of process must be "reasonably calculated to reach interested parties." *Aetna Cas. and Surety Co. v. Jenkins*, 282 S.C. 107, 112, 317 S.E.2d 460, 464 (Ct. App. 1984) (quoting *Mullane*, 339 U.S. 306).

Section 15-9-740 of the South Carolina Code sets forth the requirements for service by publication as follows:

> The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. The court, judge, clerk, master or judge of probate shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his place of residence, unless it appears that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him. In case of minors, persons imprisoned outside of this State, lunatics confined outside of this State or in like cases, a similar order shall be made and like proceedings be had as in case of adults not under disabilities.
>
> In all cases in which publication is made the complaint must first

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> be filed and the summons, as published, must state the time and place of such filing. When service is made by publication the ten days' notice of application for judgment to be made at chambers as required in contested cases of certain kinds as provided by law may be inserted in the first or any subsequent publication mailed to the last known residence of the defendant....
>
> S.C. Code Ann. § 15-9-740.

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). In order to be a "newspaper of general circulation within a community," a newspaper should contain news of general interest to the community and it must reach a diverse readership. *Moore v. State*. 553 P.2d 8, 21 (Alaska 1976). Additionally, a newspaper of general circulation has been defined as one that has a content appealing to the general public and having more than a *de minimis* number of actual paid subscribers. *Great Southern Media v. McDowell Cty.*, 304 N.C. 427, 284 S.E.2d 457 (1981).

In *Brown v. Malloy*, 345 S.C.113, 546 S.E.2d 195 (Ct. App. 2001), the Court of Appeals addressed the question of the sufficiency of notice pursuant to publication in a case involving termination of parental rights and adoption. The *Brown* Court referenced an order of publication which required that notice be published in a newspaper of general circulation in the county where the minor defendant was conceived and where the biological father is last known to reside. 345 S.C. at 126, 546 S.E.2d at 201-02 (noting that the requirements of the order of publication is the mandate of section 15-9-740, which requires publication in a newspaper "most likely to give notice to the person to be served").

Precise compliance "with the rules is not required to effect service of process." *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010). Instead, a court reviewing notice compliance must analyze "whether the plaintiff has *sufficiently complied with*

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the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *Id.* (internal citations omitted) (emphasis added). The Supreme Court of the United States has routinely held that "notice [must be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314.

South Carolina courts have never required exacting compliance with the rules to effect service of process. *See Foster v. Crawford*, 57 S.C. 551, 36 S.E. 5 (1900) (noting that when an officer's return is defective as to time and place of service, such defective return can be amended to state facts); *see also Saunders v. Bobo*, 2 Bailey 492 (1831) (sheriff's incomplete, unsworn return may be amended). Rather, the courts of this state are to inquire 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. *Roche v. Young Bros., Inc., of Florence*, 318 S.C. 207, 209 (1995).

Here, Plaintiff's notice in the *North Myrtle Beach Times* stated that Plaintiff's Complaint was "filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the [sic]". (*See* Ex. 11.) Clearly, this is a scrivener's error in Plaintiff's notice, as it did not include the date of filing. Yet, and most notably, this error is *not* fatal to the information conveyed by Plaintiff's Notice. The notice very clearly informed readers that a Summons and Complaint had been filed against Defendant, and provided the name, address, and telephone number of Plaintiff's counsel. Paramount in Plaintiff's notice is the inclusion of, and direction to, the Horry County Court of Common Pleas where a copy of Plaintiff's Summons and

NOTICE
TO THE DEFENDANT NAMED ABOVE:
TAKE NOTICE, that the Summons in the above mentioned action of which the foregoing is a copy, together with the Complaint therein was filed in the office of the Clerk of Court, HORRY Court of Common Pleas, on the
s/Sam Flynn, Esquire
62 Columbus Street
Charleston, South Carolina 29403
(843) 614-8888
ATTORNEY FOR THE PLAINTIFF
Charleston, South Carolina
N 12/24, 31, 1/7-3TC

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Complaint could be easily accessed via the filed case number present at the top of the notice. Such reference implicitly provided all readers the precise office at which the public filing could be accessed, and conferred upon readers the information necessary to obtain the date and time of Plaintiff's filing although the same is extraneous as Defendant's Answer would be due 30 days after service - the running of the publication, not filing. The Clerk of Court for Horry County has long since provided information on filing not only at its physical office, but also via its website which was and is publically accessible at all times relevant to this cause of action.

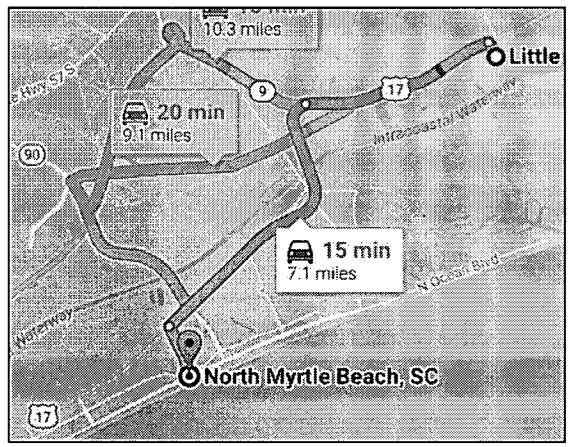
Accordingly, the date of filing, or lack thereof, is implicitly contained in Plaintiff's notice and in any event is inconsequential to this matter. To be sure, there are circumstances where a lawsuit's date of filing is relevant to due process notice requirements. Dates of filing are relevant in divorce 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. Defendant, 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 Defendant to respond to Plaintiff's Complaint began running on January 7, 2016, the last day of publication.

Plaintiff sufficiently complied with the statute controlling notice via publication. Yet, the Court decided that, after the appearance of Defendant's counsel, the case would be best served by allowing Defendant's counsel to accept service, which Defendant's did without objection, and

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to submit an Answer because the notice did not, on its face contain the Complaint's filing date. Plaintiff's notice must only *substantially* comply with the statute, and the lack of filing date on the face of the notice does not deprive the court of jurisdiction over Defendant even though the Court found it appropriate to let the Defendant out of default.

As to Plaintiff's use of the *North Myrtle Beach Times*, the signed Order on Defendant's Motion to Set Aside cites S.C. Code Ann. § 15-9-740 for the proposition that notice by publication must be made in "the one newspaper . . . most likely to give notice to the person to be served" and that "the summons, as published, must state the time and place of such filing." The Order provides that Plaintiff's publication in the *North Myrtle Beach Times* was improper because it is not a paper of "general circulation in Horry County" and because Defendant lived in Little River, not North Myrtle Beach. However, Little River is a community in Horry County, South Carolina with a population of nearly 9,000. Little River is approximately seven miles from North Myrtle Beach and is considered to be among the communities in Horry County's Grand Strand. The *North Myrtle Beach Times* is a weekly news publication that is distributed to Little River and Loris, South Carolina, which has been the case for four decades. (*See* Ex. 10.) Contrary to Defendant's assertion, the *North Myrtle Beach Times* is, in fact, the newspaper published closest to Little River. Therefore, the *North Myrtle Beach Times* was the only realistic option for publication given its proximity to Little River, which Defendant admits is the community in which he lived before, at the time of, and after the subject collision.



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Furthermore, the weekly nature of publication, and the information provided within the *North Myrtle Beach Times* make it the most likely newspaper to provide notice to Defendant. Given that Plaintiff's notice in the *North Myrtle Beach Times* contained the necessary information under the law, and that the *North Myrtle Beach Times* is a statutorily compliant "newspaper," this Court should find that Plaintiff's notice was proper, thus precluding Defendant's argument that this cause of action was not commenced and served within the statute of limitations period. Consequently, the Court should reconsider its grant of summary judgment in favor of Defendant and find that Plaintiff's service by publication was proper, thus allowing Plaintiff's case to proceed to trial on its merits.

C. Plaintiff's Filed and Published Summons Complied with Rule 4, SCRCP, Because Both Provided Defendant Must Respond Within Thirty Days.

Rule 4 of the South Carolina Rules of Civil Procedure requires that the summons in a civil matter contain a statement detailing the "time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint." Rule 4(b), SCRCP. Here, the signed Order on Defendant's Motion to Set Aside provides that "the Summons filed in this action does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him." This statement is factually incorrect because Plaintiff's filed Summons explicitly states that the Defendant must answer Plaintiff's Complaint within thirty days or Plaintiff will apply for the relief demanded in his Complaint. Specifically, Plaintiff's Summons (filed with his Complaint and excerpted below) clearly indicates that Defendant is "required to Answer the Complaint . . . within 30 days . . . and if you fail to Answer

the Complaint . . . Plaintiff will apply to the court for the relief demanded. . . . " (*See* Ex. 2 and excerpted below.)

> **YOU ARE HEREBY SUMMONED** and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or his attorney, Sam Flynn, at his office, 62 Columbus Street Charleston, South Carolina, 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.
>
> Dated at Charleston, South Carolina on the 22nd day of July, 2015.

It is very evident that Plaintiff's filed Summons complies with Rule 4(b) because it notifies the Defendant that he must respond within thirty days and that failure to do so will have consequences. The filed Summons is not ambiguous and conforms with Rule 4(b).

Likewise, Plaintiff's published Summons (excerpted right) states that Defendant must respond within thirty days, or Plaintiff will "apply to the Court for judgment by default for the relief demanded in the Complaint." (*See* Ex.11.) In both the filed Summons and the published Summons, Plaintiff fully complied with Rule 4(b) because he notified Defendant that he would apply for relief in thirty days absent Defendant's Answer. Both the filed and published Summons warn Defendant about the consequences of his failure to appear, namely judgment by default; however, the signed Order on this issue states that the Summons, presumably the filed

> STATE OF SOUTH CAROLINA
> COUNTY OF HORRY
> IN THE COURT OF COMMON PLEAS
> CASE NUMBER: 2015-CP-26-5633
> BOBBY FOSTER,
> PLAINTIFF
> VS.
> JULIAN NEIL ARMSTRONG,
> DEFENDANT
>
> **SUMMONS**
>
> TO THE DEFENDANT NAMED ABOVE: YOU ARE HEREBY SUMMONED, and required to answer the Complaint in this action, a copy of which is available from the Clerk of Court for HORRY County, South Carolina, herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiff, or his attorneys, Anastopoulo Law Firm, LLC, Sam Flynn, at their office located at 2557 Ashley Phosphate Road, North Charleston, South Carolina 29418, within thirty (30) days after the serve hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the amount of time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default for the relief demanded in the Complaint.
> s/Sam Flynn, Esquire
> 62 Columbus Street
> Charleston, South Carolina 29403
> (843) 614-8888
> ATTORNEY FOR PLAINTIFF
> Charleston, South Carolina
> NOTICE

ELECTRONICALLY FILED - 2017 Jul 07 4:37 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ELECTRONICALLY FILED - 2017 Jul 07 4:37 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

Summons, does not comply with Rule 4(b). On this basis, Court's respective rulings on October 21, 2016, and March 16, 2017, are overly broad in stating that the Court has no personal jurisdiction over Defendant. As was previously argued to before the Court, and germane to Defendant's Motion for Summary Judgment, Plaintiff's Summons does, in fact, satisfy the requirements of Rule 4, SCRCP, which precludes Defendant's assertion of the statute of limitations as an affirmative defense here. This is underlined by Defendant's acceptance of service and admission that the Court has jurisdiction over Defendant. Thus, Defendant's Motion for Summary Judgment should have been denied, and this Court should revise its April 19, 2017, ruling accordingly.

II. Defendant Has Submitted Himself to the Personal Jurisdiction of the Court.

Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance. *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007) (noting that, under Rule 4(d), SCRCP, voluntary appearance by a defendant is equivalent to personal service, and that it is immaterial whether the defendant invokes the term "appearance" to demonstrate sufficient intent to submit to the court's jurisdiction). The *Stearns* Court additionally set forth that, although Rule 5(b), SCRCP, generally provides less stringent standards for serving pleadings subsequent to the original summons and complaint, Rule 5(a), SCRCP, requires service pursuant to Rule 4, SCRCP, when a party makes new or additional claims against another party that has been held in default for failure to appear. *Id.* at n. 2.

Long-standing precedent sets forth that a defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case. *State v. Dudley*, 354 S.C. 514, 542, 581 S.E.2d 171, 186 (Ct.

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App. 2003); *see also Cheraw Motor Sales Co. v. Rainwater*, 125 S.C. 509, 513 119 S.E. 237, 239 (1923). An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction." *Dudley*, 354 S.C. at 542, 581 S.E.2d at 186. No specific act constitutes an appearance, as "a defendant may choose to come into court with trumpets, or quietly by the back door." *Stephens v. Ringling*, 102 S.C. 333, 342, 86 S.E. 683, 685 (1915). Accordingly, courts decide on a case-by-case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction. On many occasions, the South Carolina Supreme Court has found that a party can make a voluntary appearance without formally announcing same. *See, e.g., Triangle Auto Spring Co. v. Gromlovitz,* 270 S.C. 386, 389–90, 242 S.E.2d 430, 431 (1978) (holding that consenting to a confession of judgment constitutes a voluntary appearance); *Connell v. Connell*, 249 S.C. 162, 167, 153 S.E.2d 396, 399 (1967) (holding that raising the defense of *res judicata* constitutes a voluntary appearance); *Southeastern Equip. Co. v. One 1954 Autocar Diesel Tractor*, 234 S.C. 213, 218, 107 S.E.2d 340, 342 (1959) (holding that filing a motion to set aside an attachment constitutes a voluntary appearance).

Here, even if Defendant was not properly served with Plaintiff's Summons and Complaint, Defendant waived any objection to personal jurisdiction by appearing and defending this matter, as is also set forth and discussed in Section I of Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment attached hereto as Exhibit A. memorandum. In particular, Defendant's counsel, in her Notice of Appearance on behalf of Defendant, states that that she "hereby provides the Court and counsel of notice that she is representing the Defendant in the above-captioned action." Additionally, Defendant's counsel states in her March 7, 2017, email that "[the Court] asked if I would accept service of the

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Summons and Complaint and I indicated that I would." Thus, summary judgment was not proper here, and this Court should reconsider its prior ruling, thereby allowing this case to proceed to trial.

III. Plaintiff's Cause of Action Against Defendant Should Be Heard on Its Merits.

Public policy supports the overall premise that a lawsuit should be resolved on its merits. To avoid resolving litigation by default, strict compliance with the publication statutes is appropriate. *See Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 152, 169 S.E.2d 387, 390 (1969) (noting that the statute applicable to vacating a default judgment "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits" (citation omitted)). Federal courts recognize the same policy. *See Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 417 (4th Cir. 2010) ("[w]e have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits."); *see also Tazco, Inc. v. Dir., Office of Workers Comp. Programs, U.S. Dep't of Labor*, 895 F.2d 949, 950 (4th Cir. 1990) (noting "[t]he law disfavors default judgments as a general matter....")

Here, given that the action was properly commenced and served within the statute of limitations, and it would be against public policy to deny Plaintiff's cause of action to be properly presented before the trier of fact. To grant summary judgment in favor of Defendant based on the facts presented here would effectively dispose of a case which presents questions of material fact which only a jury can properly decide. Thus, Defendant's Motion for Summary Judgment should not have been granted, and Plaintiff's case should be allowed to proceed before the trier of fact.

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CONCLUSION

In determining whether any triable issues of fact exist, the Court must view the evidence, and all reasonable inferences that may be drawn from the evidence, in the light most favorable to the non-moving party. The non-moving party is only required to submit a scintilla of evidence in order to withstand a motion for summary judgment. Plaintiff in this case has not only presented a mere scintilla of evidence, but has established that Defendant was properly served, that Plaintiff's cause of action was properly commenced, and that, notably, that Defendant breached his duty of care to Plaintiff. For the reasons set forth herein, Defendant's Motion for Summary Judgment should have been denied, and this Court should reconsider its ruling accordingly. The applicable standard of care to be decided by the Court as a matter of law, but the burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide. Therefore, summary judgment is not appropriate and this case should be allowed to proceed to trial.

Respectfully Submitted,

ANASTOPOULO LAW FIRM, LLC

/s/ Matthew L. Nall
Roy T. Willey, IV, Esquire
S.C. Bar Number: 101010
Eric M. Poulin, Esquire
S.C. Bar Number: 100209
Matthew L. Nall, Esquire
S.C. Bar Number: 102329
62 Columbus Street
Charleston, S.C. 29403
(843) 614-8888

ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
Dated: July 7, 2017

ELECTRONICALLY FILED - 2018 Apr 03 3:29 PM - HORRY - COMMON PLEAS - CASE#2015CP260563

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2015-CP-26-05633

Bobby Foster,

Appellant,

v.

Julian Neil Armstrong, Respondent.

NOTICE OF APPEAL

Plaintiff/Appellant, Bobby Foster, appeals the March 27, 2018, Order of The Honorable Larry B. Hyman, Jr., denying Plaintiff/Appellant's Motion to Reconsider the April 24, 2017, Order of The Honorable Larry B. Hyman, Jr., Granting Defendant/Respondent, Julian Neil Armstrong's, Motion for Summary Judgment. Plaintiff/Appellant received written notice of said Order on March 27, 2018.

[signature block on following page]

April 3, 2018

s/ Benjamin W. Lee
Benjamin W. Lee, Esquire
S.C. Bar No.: 103213
Eric M. Poulin, Esquire
S.C. Bar No.: 100209
Roy T. Willey, IV, Esquire
S.C. Bar No.: 101010
Anastopoulo Law Frim, LLC
32 Ann Street
Charleston, S.C. 29403
(843) 614-8888

Attorneys for Appellant

Other Counsel of Record:
Linda Weeks Gangi, Esquire
Thompson & Henry, P.A.
P.O. Box 1740
Conway, SC 29528
(843) 248-5741

Attorneys for Respondent

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Certificate of Electronic Notification

Recipients

Samuel Flynn - Notification transmitted on 04-03-2018 03:29:57 PM.

Linda Gangi - Notification transmitted on 04-03-2018 03:29:57 PM.

Benjamin Lee - Notification transmitted on 04-03-2018 03:29:58 PM.

Eric Poulin - Notification transmitted on 04-03-2018 03:29:57 PM.

Matthew Nall - Notification transmitted on 04-03-2018 03:29:57 PM.

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****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2015CP2605633

Official File Stamp:	04-03-2018 03:29:39 PM
Court:	CIRCUIT COURT
	Common Pleas
	Horry
Case Caption:	Bobby Foster VS Julian Neil Armstrong
Document(s) Submitted:	Appeal/Notice of Appeal to Court of Appeals
Filed by or on behalf of:	Benjamin Wayne Lee

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

Matthew L. Nall for Bobby Foster

Linda Weeks Gangi for Julian Neil Armstrong

Eric Marc Poulin for Bobby Foster

Samuel R. Flynn for Bobby Foster

Benjamin Wayne Lee for Bobby Foster

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

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NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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Bobby Foster,

Appellant,

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[signature block on following page]

April 3, 2018

s/ Benjamin W. Lee
Benjamin W. Lee, Esquire
S.C. Bar No.: 103213
Eric M. Poulin, Esquire
S.C. Bar No.: 100209
Roy T. Willey, IV, Esquire
S.C. Bar No.: 101010
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32 Ann Street
Charleston, S.C. 29403
(843) 614-8888

Attorneys for Appellant

Other Counsel of Record:
Linda Weeks Gangi, Esquire
Thompson & Henry, P.A.
P.O. Box 1740
Conway, SC 29528
(843) 248-5741

Attorneys for Respondent

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO.: 2015-CP-26-05633

Bobby Foster,

Plaintiff,

vs.

Julian Neil Armstrong,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER GRANTING SUMMARY JUDGMENT AND DISMISSING THE ACTION WITH PREJUDICE

PLAINTIFF'S ATTORNEY:	BENJAMIN W. LEE, ESQUIRE
DEFENDANT'S ATTORNEY:	LINDA WEEKS GANGI, ESQUIRE
HEARING DATE:	MARCH 26, 2018
PRESIDING JUDGE:	LARRY B. HYMAN, JR.

The Plaintiff represented by Benjamin W. Lee and the Defendant represented by Linda Weeks Gangi came before this Court on the Plaintiff's Motion to Reconsider this Court's Order Granting the Defendant's Motion for Summary Judgment. The Defendant asserts that this action is precluded by the Statute of Limitations. This Court heard the arguments of counsel as it deemed appropriate.

The automobile accident which is the subject matter of this action, occurred on April 8, 2013 in Horry County (See Complaint paragraphs 3, 5 and 6). Thereafter, the Plaintiff attempted to serve the Defendant by personal service through the Sheriff's Department but was unable to do so as more clearly reflected on the Affidavit of Service filed with the Court on November 23, 2015. Thereafter, Plaintiff's counsel obtained an Order for Publication which was filed on November 23, 2015. The Order states in pertinent part "the court finds that it is appropriate and necessary to serve the defendant via publication in the daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Order of Publication goes on to state "service upon the defendant shall be effectuated by publishing the Summons, and a Notice of

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Filing the Complaint in the above-referenced case in a local newspaper, once weekly for three consecutive weeks, and by forwarding a copy of the pleading to the defendant at the defendant's last known address." The Plaintiff then filed an Affidavit of Default and obtained an Order for Entry of Default and Referral for Hearing on Damages which was filed on March 8, 2016. Defense counsel filed a Notice of Appearance after having received notice that a damages hearing was scheduled. The Notice of Appearance filed on July 19, 2016 simply gives the Court and Counsel notice that she is representing the defendant and asks that all notices concerning this matter be sent to her. Thereafter, on September 16, 2016 the defendant filed a Motion to Set Aside the Order for Entry of Default and Order for Publication. After hearing the matter, Judge Culbertson issued an Order setting aside the Order for Publication and setting aside the Order for Entry of Default and Referral for Hearing on Damages and the Order was filed with the Court on October 26, 2016. Judge Culbertson found that 1) the Summons failed to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*, 2) the Publication failed to include the date of the filing of the Summons and Complaint as required by the Order of Publication and S.C. Code Ann. §15-9-740, 3) the Plaintiff failed to properly publish the Summons in accordance with the Order for Publication which required that it be published in a daily newspaper of the defendant's last known address, and 4) the Plaintiff failed to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740. See Court Order dated October 21, 2016 and filed October 26, 2016. Judge Culbertson further found that this Court had no personal jurisdiction over the Defendant. The Plaintiff filed a Motion to Reconsider which specifically states "Plaintiff respectfully requests this Court reconsider its October 21, 2016 Order on Defendant's Motion so that litigation is not precluded by the Statute of Limitations." The Motion for Reconsideration was denied.

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The Order setting aside the Order for Publication and setting aside the Order for Entry of Default specifically required that the Plaintiff amend the Summons to comply with Rule 4(b). The Summons has never been amended. After the October 21, 2016 Order was issued by the Court, an Answer was filed on behalf of the Defendant raising the issue of the Statute of Limitations.

As stated previously, Judge Culbertson specifically found that this Court had no jurisdiction over the Defendant as of October 21, 2016, the date he issued the Order declaring the Order for Publication and the Order for Entry of Default null and void and of no force and effect. The Statute of Limitations ran on April 8, 2016, more than six months before Judge Culbertson's Order finding that the Court still had no personal jurisdiction over the Defendant as of October 21, 2016. Thus, there are no issues of facts in controversy and the Defendant is entitled to Summary Judgment on the basis that the Statute of Limitations expired prior to proper service of the Summons and Complaint on the Defendant. The Court hereby denies the Plaintiff's Motion for Reconsideration of its Order Granting Summary Judgment. This case is hereby dismissed with prejudice.

AND IT IS SO ORDERED this the _____ day of _____, 2018.

In Chambers

_____

The Honorable Larry B. Hyman, Jr.
Presiding Judge of the Fifteenth Judicial Circuit

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Horry Common Pleas

Case Caption: Bobby Foster VS Julian Neil Armstrong

Case Number: 2015CP2605633

Type: Order/Other

So Ordered

s/ Larry B. Hyman 2152

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2605633

Bobby Foster		**Julian Neil Armstrong**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by: Clerk Of Court		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Plaintiff's Motion/Reconsideration Judge Hyman is bound by the Court's unappealed finding, the Motion is DENIED.

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	2152	3/26/2018
Circuit Court Judge	**Judge Code**	**Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

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For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Samuel R. Flynn 2375 Sir Barton Way Apt. 2320 Lexington, KY 40509
Eric Marc Poulin 32 Ann Street Charleston, SC 29403
Matthew L. Nall 32 Ann Street Charleston, SC 29403

Linda Weeks Gangi Thompson & Henry, P.A. PO Box 1740 Conway, SC 29528

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter - Teresa Bautz

Renee N. Elvis - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ELECTRONICALLY FILED - 2018 Apr 17 3:27 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633

ELECTRONICALLY FILED - 2018 Mar 27 3:20 PM - HORRY - COMMON PLEAS - CASE#2015CP2605633



Horry Common Pleas

Case Caption: Bobby Foster VS Julian Neil Armstrong

Case Number: 2015CP2605633

Type: Order/Form 4

So Ordered

s/ Larry B. Hyman 2152

STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**

COUNTY OF GEORGETOWN) CASE NO.:2016-CP-22-00909

October 17, 2016

BEFORE: The Honorable Benjamin Culbertson

BOBBY FOSTER,

Plaintiff,

vs.

JULIAN NEIL ARMSTRONG,

Defendant.



APPEARANCES:

Matthew Nall, Esq.
Attorneys for the Plaintiff.

Linda Gangi, Esq.
Attorneys for the Defendant.

P-R-O-C-E-E-D-I-N-G-S

THE COURT: This is Bobby Foster versus Julian Neil Armstrong, motion to set aside default. Give the court reporter your names and who you represent.

MR. NALL: Matthew Nall, N-A-L-L. I represent the plaintiff Bobby Foster.

MS. GANGI: I'm Linda Gangi. I represent Julian Neil Armstrong, and it is my motion to set aside order for entry of default and order for publication.

THE COURT: All right. Are there any other attorneys that need to be here?

MS. GANGI: This is everyone.

THE COURT: Ms. Gangi, this is your motion?

MS. GANGI: Yes, Your Honor. Your Honor, I appreciate you accommodating us this morning in hearing this motion. In this regard, we are attempting to set aside an order for entry of default and an order for publication. In this particular instance, if Your Honor will look at the summons that is filed in this case, you will see that the summons is defective. Rule 4(b), South Carolina Rules of Civil Procedure, requires that the summons notify the defendant that if he fails to answer, that a default will be entered against him. The summons nowhere says that. So the summons is defective that was filed with

the Court and that defect results in there being no personal jurisdiction of the defendant.

The second defect is the summons that was actually filed and published -- the summons that was published in the North Myrtle Beach Times, the rule requires, and it is SC Code Section 15-9-740 requires that in the document filed publishing the summons, that the time and place of filing the original summons and complaint be contained in that notice. The time, date of filing is -- there is actually a blank in the publication that should have been filled in, but their office didn't fill it in, whoever typed up what needed to be done. It may have been the newspaper that did it. I don't know who did it, but whoever did it, there is a place for time and date of the file of the summons and complaint that is left completely blank. Once again, that creates an issue of personal jurisdiction of my client, and on those bases it should be set aside.

In addition, my client lived at 186 Williamsburg Road in Little River, South Carolina. In August of 2015, his family moved to 4153 Horseshoe Road in Little River. This is all shown on an affidavit that I previously filed with the court. My client is a college student, a young gentleman that lives with his

family and goes to school. The accident report shows what his cell phone number is. That has been his cell phone since before the accident, and it is his cell phone number today. The reason that that is important is that the plaintiff and plaintiff's counsel have to use reasonable diligence to locate my client, and all they had to do was call him. He never received any notice of any lawsuit until I contacted him. Of course at that point in time there had been the entry of default that we are attempting to set aside.

Now, Your Honor, keep in mind that there is no default judgment entered, so I'm not trying to set aside a default judgment. There is just an entry of default and an order for publication that I'm trying to set aside. It is our position that -- my client never received notice of this lawsuit. The summons is defective that was filed with the court. The notice of publication is defective that was published in the North Myrtle Beach Times. So there is no personal jurisdiction over my client.

In addition to that, the publication was done in the North Myrtle Beach Times. My client has always lived in Little River. He got no notice of it.

THE COURT: If this was to be a service by publication, what should it have been in?

MS. GANGI: I believe the Sun News or some newspaper of general circulation. I don't believe that the North Myrtle Beach Times is a general circulation. I believe the Horry County Independent may constitute a newspaper of general circulation, but the newspaper in North Myrtle Beach did not provide with him any notice.

Above and beyond that, the notice itself is defective. In our rules, the Statute 15-9-740 and SC code -- I mean South Carolina Rules of Civil Procedure 4(b), there is two different deficiencies, so there is no personal jurisdiction. So we would ask that Your Honor, simply set it aside, you allow us to answer and allow us to do discovery and have a jury trial. In this particular instance, it is -- we're not asking for a huge amount of time, but my client did not receive notice that this suit was even filed until August of this year.

THE COURT: Okay. Can you accept service on behalf of your client?

MS. GANGI: I would be glad to.

THE COURT: I will hear from you.

MR. NALL: First of all, this suit began from an accident that was a rear-end collision in April of 2013. If I may approach, I have a couple of things.

I prepared this for the damages hearing, so I believe my response to Ms. Gangi's motion is on Tab 8. I think it is relevant to look at because one of the first arguments made was regarding the order for publication based on the summons being defective. First of all, an order for publication is only to be vacated if there is fraud or collusion. Specifically the argument was that our summons failed to notify the defendant, that if he didn't answer within 30 days, default would be rendered against him. The summons itself actually says, You are hereby summoned and required to answer this complaint of this action, a copy that is served here with -- upon you and serve a copy of your answers to said complaint upon the plaintiff or his attorney Sam Flynn at his office 62 Columbus Street, Charleston, South Carolina within 30 days after the service hereof exclusive of the day of service. If you fail to answer the complaint within the time of aforesaid, plaintiff will apply to the court for the relief demanded in the complaint.

Now, it does not use the word "default," that is true; however, it notifies the defendant if he does not answer within 30 days, we will apply for the relief in the complaint. I think that is more than enough to satisfy.

THE COURT: This is -- which one? Because what you have on the affidavit of publication says, The plaintiff in this action will apply to the court for judgment by default.

MR. NALL: Right. So there are two different summons. One was a summons that was included with the complaint, and that is what I read from.

THE COURT: That was never served?

MR. NALL: Correct. And there is also a summons contained within the newspaper that contains the summons and the notice.

THE COURT: I got you.

MR. NALL: So what I just read from was the one filed with the summons and complaint to begin with.

THE COURT: Okay.

MR. NALL: As far as the filed copy, it is more than enough to comply with the rule to give personal jurisdiction. Secondly, the notice that actually was filed and published, now that, to be sure, did contain an error because there is a blank spot where it says the copy of the complaint was filed on this date, and it says nothing. However, there is a very good case on this matter, and it is -- I included it. It is the Mull vs. Ridgeland Realty case, 387 S.C. 479, court of appeals court from 2010. That case says that

compliance with the rules is not required to effect service of the process; rather, the court must inquire whether the plaintiff sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.

Now, the statute that defense counsel cited does say that the notice must contain a statement of the date in which the complaint was filed. I can understand that in circumstances where, say, probate court or family court action where there is a hearing scheduled and somebody appeared. However, this is a civil case where, you know, the exact date of filing is really less important. It is when the defendant receives notice of it. So here --

THE COURT: Is there a distinction in the statute or the rule?

MR. NALL: The statute does not have a distinction, but the case is informative because it says exact compliance is not necessary.

THE COURT: What was the facts in that case?

MR. NALL: That was one where a gentleman purchased an RV and he put a down payment on it. The RV facility came in and said, well, you put a down payment on it and we're going to enforce the sale. So

the gentleman ended up suing them to get out of the sale.

THE COURT: I mean, was there a challenge as to the effectiveness of the notice or failure to --

MR. NALL: In that case -- I'm sorry to interrupt.

THE COURT: That's all right.

MR. NALL: It was an issue of the corporation was actually -- the secretary of state said their address as the registered agent was here in South Carolina, but the individual actually lived in New York, and the plaintiff was served in both locations and they said it was defective for that reason.

THE COURT: Okay. Go ahead.

MR. NALL: With that in mind, I think the summons and notice provided was sufficient to meet the rule and the statute. I think something Your Honor hinted on, they take issue with us publishing in the North Myrtle Beach times because he lives in Little River, and that is seven miles away. In my response, there is an attorney general's opinion that really states that in order to comply with whether or not a newspaper is sufficient, it has to be published at regular and short intervals, must contain intelligent and current events, must be intended for general

circulation, but circulation to a limited specific geographical area as well and it must be either sold or distributed for free. North Myrtle Beach Times was acceptable because it is only 7 miles away and distributed to that area; in fact, I think it was one of my exhibits. I looked at the website and they have a Little River City of Commerce badge on there as well, so they serve that area obviously.

I believe the only thing I haven't addressed yet is whether or not we use reasonable diligence in trying to find the defendant. His cell phone was listed on the police report and, no, we did not call it, but what we did do is we enlisted the services of the Horry County Sheriff's Department to serve the summons and complaint. They sent us an affidavit that said after due diligence they weren't able to find him and presumably they had his cell phone, and I think they could have called him. I think they are in a better position to do. I don't think that as a plaintiff's firm they should call somebody up and say, hey, your number appears on a police department and we're trying to sue you. I don't think they would be forthcoming with their address. So I don't know how much help that would be in this matter.

With all of those considerations in mind, I think

that, you know, there is no fraud, no collusion and the order of publication must stand and it is appropriate and cannot be overturned. I also think we used reasonable diligence by publishing in a paper for three weeks as the statute requires. I believe it was the last two weeks in December and first week of January of this year. So for all of those reasons, I think the order to vacate publication and default should be denied.

THE COURT: All right. Anything in reply?

MS. GANGI: Your Honor, I would point out a couple of things. The case that he referred to, Mull versus Ridgeland Realty, in that case the LLC actually received the summons and complaint in the mail by service, so there was receipt of the summons and complaint by service in that particular case, and then there was a judgment entered before they collaterally attacked it. So it was a totally different situation.

Also, Your Honor, they argue that they sent the sheriff's department out. If Your Honor will look at the affidavit, the last line of the affidavit says, Unable to locate. Neighbor advised that subject has moved. So they knew at the time that they sent the sheriff out that he didn't live at that house, and all they had to do was call him.

Above and beyond all of that, there is no jurisdiction here. Rule 4 of the South Carolina Rules of Civil Procedure and the statute that I cited to Your Honor both indicate that there is no jurisdiction, that is 15-9-740. If you don't meticulously follow the rules, the summons that was filed with the court does not follow Rule 4(b) as it is required to and notify them of default.

THE COURT: So the summons run in the newspaper was not filed with the clerk of court?

MS. GANGI: It was filed with the clerk of court after it ran, but that is defective because 15-9-740 requires that if -- notify in the publication the date, time and place that the summons was originally filed and it --

THE COURT: Excuse me for interrupting. I understand that on the notice, but I'm talking about the summons portion. If I understand the argument, the one that was filed with the complaint does not state that a judgment by default will be obtained or requested.

MS. GANGI: Correct.

THE COURT: But the one that ran in the publication does say they will seek a judgment by default?

MS. GANGI: Correct.

THE COURT: Was that ever filed with the clerk of court, other than in the affidavit of publication?

MS. GANGI: It was filed in the affidavit of publication.

THE COURT: But not -- the original summons to the pleadings was never amended; is that correct?

MS. GANGI: That's correct. And that filing is incorrect, just like there is a mistake on a mistake, but that mistake creates a personal jurisdiction issue in addition to the fact that they just didn't use due diligence when they had his cell phone number.

THE COURT: Anything else?

MS. GANGI: That's it. Thank you, Your Honor.

THE COURT: Thank you. I'm not so sure about the personal jurisdiction, but it is obvious that the notice didn't contain -- and I think they may have corrected the defect on the summons because the one in the newspaper did say default would be -- judgment of default would be obtained if not answered within 30 days; however, the notice does not give the date, time of the filing. As to whether it was the newspaper's fault or whose fault, I don't know. I'll allow them to set aside default since judgment has not been entered, but if you will prepare an order, Ms. Gangi,

that grants the motion to set aside default, but in there say that you are representing the defendant -- and I'm assuming you will be representing the defendant in the action?

MS. GANGI: Yes, Your Honor.

THE COURT: And that you have agreed to accept service and you are authorized to accept service on behalf of the defendant.

MS. GANGI: I'll do that. Thank you.

THE COURT: Thank you.

(The proceedings concluded.)

CERTIFICATE OF REPORTER

State of South Carolina)
County of Georgetown)

I, Natalie Dahl, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the evidence introduced in the hearing of the above-captioned case, relative to appeal, in the Court of Common Pleas for Georgetown County, South Carolina, on the 17th day of October, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 13, 2018

Natalie Dahl, RPR

Natalie Dahl, RPR
Court Reporter

ORIGINAL

2013522953

SOUTH CAROLINA TRAFFIC COLLISION REPORT FORM
TR-310 (Rev. 7/2010)

SOUTH CAROLINA DPS/HP/S & DMV USE ONLY | Page # 1 of 1 | # Of Units 02 | Amended / Attach Copy of Original Report | Notified 1645 | Arrived 1645

Date	Time of Collision	County	Collision Location (Rt. # / Name)	Miles	Dir.	In (Near) City or Town of:
04-08-2013	1600	26	1-Interstate 2-US Primary 3-SC Primary 4-Secondary 5-County 6-PP; 5 90 / ; 1-Main 2-Alternate 5-Spur 6-Connector 7-Business	.08	N E S W	NORTH MYRTLE BEACH

Lane # / Dir.	Distance Offset	Direction	Base Intersection (Rt # / Name)	GPS COORDINATES 00 00 00.00
# 1 Of 2 N E S W	Miles .05 Feet	N E S W	From / PINNACLE PL; Toward / GOLF AVE; 1-Interstate 2-US Primary 3-SC Primary 4-Secondary 5-County 6-Other; 1-Main 2-Alternate 5-Spur 6-Connector 7-Business 9-Other	DEGREES MINUTES SECONDS; Latitude 33 51 46.78; Longitude 78 38 53.50

R.R. Id.	From	Ramp Only	To
	N E S W	1 - Entrance 2 - Exit	N E S W; 1-Interstate 2-US Primary 3-SC Primary 4-Secondary 5-County 6-Other

Unit 1

E-460503 — Driver/Pedestrian's Full Name: ARMSTRONG JULIAN NEIL

Unit #	Sex	Race	Street/R.F.D.
01	M	B	186 WILLIAMSBURG RD
# Occ. 1	Birth Date	City, State, & Zip	
	08-05-1995	LITTLE RIVER SC 295667812	

State	Driver's License #	Class	Insurance Company
SC	102586664	D	STATE FARM

Year	Body	Vehicle Make	VIN #
1995	4S	LEXS	JT8GK13T5S0090073

State	Year	License Plate #	Owner's D.L. #
SC	2015	DWP624	UNKNOWN

Home Telephone	Owner's Full Name
(843) 5040638	ARMSTRONG FRANCIS NEIL
Bus. Telephone	Street/R.F.D.
( )	186 WILLIAMSBURG RD
Contributed To Collision: Yes	City, State, & Zip: LITTLE RIVER SC 295667812

Estimated Speed	Posted Speed Limit	C.D.L. Req. Yes (No)	T/B S Req. Yes (No)	Alc/Drg Info (see back) Yes (No)
20	40	Summons # G323875	Code 21	Summons # / Code / Towed Yes (No)

Unit 2

E-460787 — Driver/Pedestrian's Full Name: FOSTER BOBBY

Unit #	Sex	Race	Street/R.F.D.
02	M	W	3315 DREW ST
# Occ. 1	Birth Date	City, State, & Zip	
	09-25-1950	ASH NC 28420-3025	

State	Driver's License #	Class	Insurance Company
NC	23836037	C	NATIONWIDE

Year	Body	Vehicle Make	VIN #
2000	VN	DODG	2B4GP44G0YR523493

State	Year	License Plate #	Owner's D.L. #
NC	2013	YPM5186	23836037

Home Telephone	Owner's Full Name
(910) 3837403	FOSTER BOBBY
Bus. Telephone	Street/R.F.D.
( )	3315 DREW ST
Contributed To Collision: No	City, State, & Zip: ASH NC 28420-3025

Estimated Speed	Posted Speed Limit	C.D.L. Req. Yes (No)	T/B S Req. Yes (No)	Alc/Drg Info (see back) Yes (No)
0	40	Summons #	Code	Summons # / Code / Towed Yes (No)

Unit 3

Driver/Pedestrian's Full Name

Unit #	Sex	Race	Street/R.F.D.
# Occ.	Birth Date	City, State, & Zip	

State	Driver's License #	Class	Insurance Company

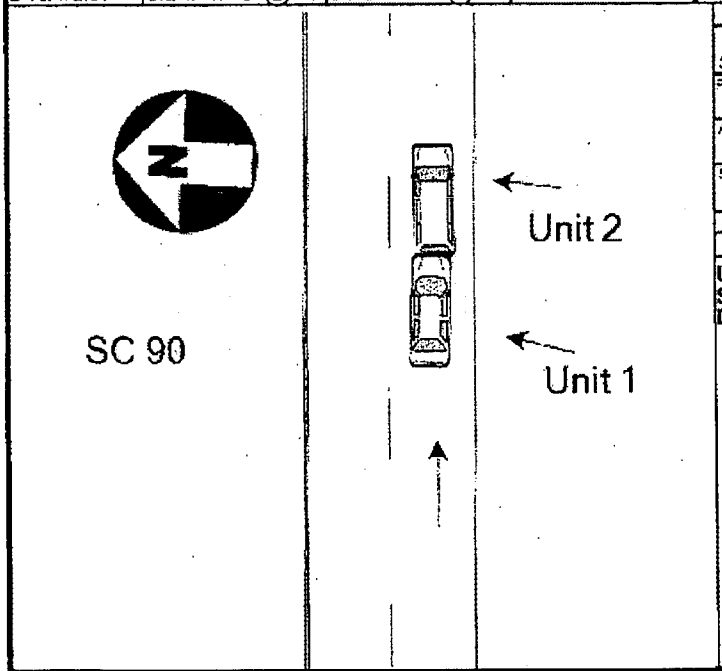
Year	Body	Vehicle Make	VIN #

State	Year	License Plate #	Owner's D.L. #

Home Telephone	Owner's Full Name
( )	
Bus. Telephone	Street/R.F.D.
( )	
Contributed To Collision: Yes No	City, State, & Zip

Estimated Speed	Posted Speed Limit	C.D.L. Req. Yes No	T/B S Req. Yes No	Alc/Drg Info (see back) Yes No
		Summons # / Code / Summons # / Code / Towed Yes No		

Dir. of Travel: Unit 1: N S (E) W | Unit 2: N S (E) W | Unit 3: N S E W



Unit 1 Dam.	Unit 2 Dam.	Unit 3 Dam.	Prop. Dam. 1	Prop. Dam. 2
$2000	$2000	$	$	$

Property Owner/Witness	Property Owner/Witness
Address / City	Address / City
State / Zip / Phone	State / Zip / Phone

Photo Y (N) — Describe What Happened (Refer to Unit by Number)

UNIT 1 AND UNIT 2 WERE TRAVELING EAST ON SC 90. UNIT 2 STOPPED FOR TRAFFIC. UNIT 1 STRUCK UNIT 2. UNIT 1 WAS DRIVING TOO FAST FOR CONDITIONS.

NOTICE - THE TR-310 IS FOR STATISTICAL REPORTING PURPOSES ONLY AND IS A REFLECTION OF THE OFFICER'S BEST KNOWLEDGE, OPINION AND BELIEF COVERING THE COLLISION BUT NO WARRANT IS MADE AS TO THE FACTUAL ACCURACY THEREOF.

Investigating Officer's Name	Rank	Badge #	Jurisdiction Code	Review Date	Reviewer's Name	Rank	Internal Agency Code
FROST - M K	UCPL	T 4 2 5	H P 0 5	04-09-2013	C F Costa	CPL	13FL043454

2013522953

Unit	Date of Birth	Sex	Race	INJ	Seat	R/SD	Age	Ejct	LAI	Tran	Name	Street Address		Zip Code
01	08-05-1995	M	B	0	01	13	4	1	1	2	ARMSTRON JULIAN NEIL	186 WILLIAMSBURG RD	LITTLE SC	295667812
02	09-25-1950	M	W	1	01	13	4	1	1	1	8 FOSTER BOBBY	3315 DREW ST	ASH NC	28420-3025

Race: A - Asian/Pacific Islander; B - Black/African American; I - Indian/Native American or American Indian; O - Other; U - Unk.; W - Caucasian/White

a) Injury Status: 0-Not Injured; 1-Possible Injury; 2-Non-incapacitating; 3-Incapacitating; 4-Fatal

b) 2 or 3 Wheel Motorized Vehicle

Head Injury: 1-Yes; 2-No

Seating Loc.: 01 02 03 / 04 05 06 / 07 08 09; 20-Pedestrian; 30-Trailing Unit; 40-Bus or Van (4th row or higher); 50-Other Enclosed Area (non-trailing); 51-Other Unenclosed Area (non-trailing); 60-Sleeper of Cab; 70-Riding on Unit Exterior; 80-Taxi; 99-Unk./NA

Restraint/Safety Device: 00-None Used; 11-Shoulder belt; 12-Lap Belt Only; 13-Shoulder & Lap Belt; 21-Child Safety Seat; 88-Other; 99-Unk.; Pedestrian, Motor Pedalcycle Driv.; 31-Helmet; 41-Protective Pads; 51-Reflective Clothing; 61-Lighting

Air Bag Deployment / Switch: a) 1-Deployed Front; 2-Deployed Side; 3-Deployed Both; 4-Not Deployed; 7-Not Applicable; 9-Deployment Unk. b) 1-Switch in On Position; 2-Switch in Off Position; 3-No Switch; 9-Unknown

Ejection: 1-Not Ejected; 2-Part. Ejected; 3-Tot. Ejected; 7-Not Appl.; 9-Unk.

Location After Impact: 1-Not Trapped; 2-Extricated (Mechanical Means); 3-Freed (non mech.); 4-Not Applicable; 9-Unknown

a) Transported to Medical Facility: 1-Yes; 2-No; 3-Unknown

b) By: 1-EMS; 2-Police; 8-Other; 9-Unk.

Sequence of Events

Non-Collision: 04-Equipment Failure; 05-Fire/Explosion; 06-Overturn/Rollover; 07-Jackknife; 08-Separation of Units; 09-Ran off Road Left; 10-Ran off Road Right; 11-Downhill Runaway; 12-Ran into Water/Submersion; 13-Fell From Vehicle; 14-Other Non-Collision; 15-Unk. Non-Collision

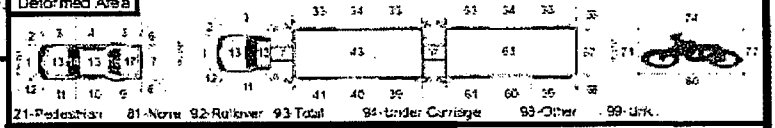
Collision, Not Fixed: 22-Pedestrian; 23-Railway Veh.; 24-Pedalcycle; 25-Work Zone Maint. Equip.; 26-Other Movable Object; 27-Animal (Not Other); 28-Motor Veh. (In Transport); 29-Motor Veh. (Parked); 30-Unk. Movable Object; 31-Animal (At Other); 32-Motor Veh. (Other Roadway)

Collision, Fixed Object: 40-Bridge Overhead Structure; 41-Bridge Pier or Abutment; 42-Bridge Rail; 43-Culvert; 44-Curb; 45-Ditch; 46-Embankment; 47-Guardrail Face; 48-Guardrail End; 49-Impact Attenuator/Crash Cushion; 50-Concrete Traffic Barrier; 51-Other Traffic Barrier; 52-Other Post, Pole or Support; 53-Traffic Sign Post; 54-Tree/Luminaire Support; 55-Utility Pole; 56-Wall; 57-Building; 58-Other Fixed Object; 59-Unk. Fixed Object; 60-Boat; 61-Bridge Pier or Abutment; 62-Bridge Rail; 63-Bridge Support; 64-Culvert; 65-Ditch; 66-Embankment; 67-Fence; 68-Guardrail Face; 69-Guardrail End; 70-Impact Attenuator/Crash Cushion; 71-Concrete Traffic Barrier; 72-Other Traffic Barrier; 73-Other Post, Pole or Support; 74-Sign; 75-Tree; 76-Utility Pole; 77-Wall; 78-Building; 79-Other Fixed Object; 99-Unk.

Event 1	Event 2	Event 3	Event 4	Most Harmful	1st Harmful
23	1	1	1	1 23	23
22	2	2	2	2 22	
3	3	3	3	3	

Manner of Collision (Struck Veh.): 1-Not Collision w/ Motor Veh.; 2-Rear-End; 3-Head On; 4-Rear-to-Rear; 5-Angle; 6-Angle; 7-Angle; 8-Sideswipe Same Dir.; 9-Sideswipe Opposite Dir.; 10-Backed Into; 99-Unknown

1st / Most Deformed Area: 1st Deformed: 1 27; Most Deformed: 1 7



21-Pedestrian; 81-None; 92-Rollover; 93-Total; 94-Under Carriage; 98-Other; 99-Unk.

Vehicle Type: 01-Automobile; 12-Pickup Truck; 13-Truck Tractor; 14-Other Truck; 15-Full Size Van; 16-Mini Van; 17-Sport Utility; 25-Motorcycle; 26-Other Motorized; 27-Pedalcycle; 28-Animal Drawn Veh.; 39-Animal (Ridden); 41-Pedestrian; 51-Train; 61-School Bus; 62-Passenger Bus; 98-Other; 99-Unk. (Hit and Run Only)

Vehicle Use Code: 01-Personal; 02-Driver Training; 03-Construction/Maint.; 04-Ambulance; 05-Military; 06-Transport Passengers; 07-Transport Property; 08-Farm Use; 09-Wrecker or Tow; 10-Police; 11-Government; 12-Fire Fighting; 13-Logging; 18-Other; 41-Pedestrian

Vehicle Attachment: 1-None; 2-Wrecker Hook; 3-Semi-Trailer; 4-Utility Trailer; 5-Farm Trailer; 6-Trailer w/Boat; 7-Camper Trailer; 8-Towed Motor Vehicle; 9-Petroleum Tanker; A-Livestock Trailer; B-Autocamper Trailer; C-Other Tanker; D-Flat Bed; E-Twin Trailers; F-Other

Alcohol / Drug Test Given: 1-Given - Known Results; 2-Given - Unusable; 3-Given - Pending; 4-None; 5-Refused

Test Type: 1-Breath (Alc Only); 2-Blood; 3-Urine; 4-Serum; 8-Other

Drug Results: 1-Amphetamines; 2-Cocaine; 3-Marijuana; 4-Opiates; 5-PCP; 8-Other

Alc Test Results: A1-; A2-; A3-

Special Use Only

Underride/Override: 0-None; 1-Under-Compartment Intrusion; 2-Under-No Intrusion; 3-Under-Unknown; 4-Over-MV Intransport; 5-Over-Other Vehicle; 6-None; 9-Unk.

Extent of Deformity: 0-None/Minor; 1-Functional Damage; 2-Disabling Damage; 3-Severe/Totaled; 4-Not Applicable; 9-Unk.

Action Prior to Impact (Vehicle): 01-Backing; 02-Changing lanes; 03-Entering traffic lane; 04-Leaving traffic lane; 05-Making U-turn; 06-Movements Essentially Straight Ahead; 07-Overtaking/passing; 08-Parked; 09-Slowing or Stopped in traffic; 10-Turning left; 11-Turning right; 88-Other; 99-Unk.

Action Prior to Impact (Non-motorist): 21-Approaching/Leaving Vehicle; 22-Entering/Crossing Location; 23-Playing/Working on Vehicle; 24-Pushing Vehicle; 25-Standing; 26-Walking, Playing, Cycling; 27-Working

Trafficway: 1-Two-way, Not Divided; 2-Two-way, Divided, Unprotected Median; 3-Two-way, Divided, Barrier; 4-One-Way; 8-Other

1-Alley; 2-Drive; 3-Median; 4-Roadside; 5-Roadway; 6-Shoulder; 7-Sidewalk; 8-Outside Trafficway; 9-Unk.

B. X-walk; 1Y-2Y-9-U; 1F-Harmful Event Loc.: 5 2

Road Character: 1-Straight - Level; 2-Straight - On grade; 3-Straight - Hillcrest; 4-Curve - Level; 5-Curve - On grade; 6-Curve - Hillcrest

Road Surface Condition: 1-Dry; 2-Wet; 3-Snow; 4-Slush; 5-Ice; 6-Contaminate; 7-Water (Standing, etc.); 8-Other; 9-Unk.

Traffic Control Type: 01-Stop and Go Light; 02-Flashing Traffic Signal; 11-RR (X-bucks, Lights & Gates); 12-RR (X-bucks & Lights); 13-RR (X-bucks Only); 21-Officer or Flagman; 22-Oncoming Emergency Vehicle; 31-Pavement Markings (only); 41-Stop Sign; 42-School zone Sign; 43-Yield Sign; 44-Work Zone; 45-Other Warning Sign; 51-Flashing Beacon; 98-None; 99-Unk.

Weather Condition: 1-Clear (no adverse conditions); 2-Rain; 3-Cloudy; 4-Sleet, Hail; 5-Snow; 6-Fog, Smog, Smoke; 7-Blowing Sand, Oil, Dirt or Snow; 8-Severe Crosswinds; 9-Unk.

Light Condition: 1-Daylight; 2-Dawn; 3-Dusk; 4-Dark (Lighting Unspecified); 5-Dark (Street Lamp Lit); 6-Dark (Street Lamp Not Lit); 7-Dark (No lights)

1-Yes, Directly; 2-Yes, Indirectly; 3-No; 9-Unk. — School Bus Involved: 3

1-Before 1st Sign; 2-Advanced Warning Area; 3-Transition Area; 4-Activity Area; 5-Termination Area; 1-Yes 2-No — Work Zone: 2

Work Zone Location

Junction Type: 01-Crossover; 02-Driveway; 03-Five/More Points; 04-Four-way Intersection; 05-Railway Grade Crossing; 07-Shared Use Paths or Trail; 08-T-Intersection; 09-Traffic Circle; 12-Y-Intersection; 13-Nonjunction; 99-Unk.

1-Shoulder/Median Work; 2-Lane Shift/Crossover; 3-Intermittent/Moving Work; 4-Lane Closure; 8-Other; 9-Unk.

Work Zone Type

1-Yes 2-No Workers Present:

Primary Contributing Factors

Driver: 01-Disregarded Signs, Signals, Etc.; 02-Distracted/Inattention; 03-Driving Too Fast for Conditions; 04-Exceeded Authorized Speed Limit; 05-Failed to Yield Right of Way; 06-Ran off Road; 07-Fatigued/Asleep; 08-Followed Too Closely; 09-Made an Improper Turn; 10-Medical Related; 11-Aggressive Operation of Vehicle; 12-Over-correcting/Over-steering; 13-Swerving to Avoiding Object; 14-Wrong Side or Wrong Way; 15-Under the Influence; 16-Vision Obscured (Within Unit); 17-Vision Obscured (Outside Unit); 18-Improper lane Usage/Change; 19-Cell Phone; 20-Texting; 88-Other Improper Action; 99-Unk.

Roadway: 30-Debris; 31-Non-highway Work; 32-Obstruction in Roadway; 33-Road Surface Condition (Ice, Wet); 34-Rut, Holes, Bumps; 35-Shoulders (None, Low, Soft, High); 36-Traffic Control Device (Inop., Missing); 37-Work Zone (Const./Maint./Utility); 38-Wash, Travel-Polished Surface; 48-Other; 49-Unk.

Non-Motorist: 50-Inattentive; 51-Lying &/or Illegally in Roadway; 52-Failure to Yield R. of W.; 53-Not Visible (Dark Clothing); 54-Disregard Signs, Signals, Etc.; 55-Improper Crossing; 56-Darting; 57-Wrong Side of Road; 58-Other; 59-Unk.; 68-Under the Influence; 87-Other Person Under Influence

Environmental: 60-Animal in Road; 61-Glare; 62-Obstruction; 63-Weather Cond.; 68-Other; 69-Unk.

Vehicle Defect: 70-Brakes; 71-Steering; 72-Power Plant; 73-Tires/Wheel; 74-Lights; 75-Signals; 76-Windows/Shield; 77-Restraint System; 78-Truck Coupling; 79-Cargo; 80-Fuel System; 88-Other; 89-Unk.

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

RECEIVED
MAY 17 2019
SC Court of Appeals

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

Bobby Foster,..... Appellant,

v.

Julian Neil Armstrong,..... Respondent,

APPELLANT'S FINAL BRIEF

Eric M. Poulin
S.C. Bar No.: 100209
Roy T. Willey, IV
S.C. Bar No.: 101010
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STATEMENT OF JURISDICTION

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.

The Trial Court's final judgment was entered on July 12, 2018. Appellant received notice of Judge Hyman's Order Granting Summary Judgment on July 12, 2018. Appellant timely filed and Served a Notice of Appeal on August 13, 2018 (the 30-day deadline having fallen on the

preceding Saturday). This Court has jurisdiction to entertain the appeal and correct errors of law pursuant to S.C. Code Ann. § 14-3-330.

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit 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 Circuit Court err 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?"

III. Did the Circuit Court err 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?"

IV. Did the Circuit Court err 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?"

V. Did the Circuit Court err 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?

STATEMENT OF THE CASE

On April 8, 2013, Respondent rear-ended Appellant. Appellant suffered significant personal injury and property damage as a result. On July 27, 2015, Appellant filed a Summons and Complaint in Horry County. Appellant attempted to serve Respondent personally without success. Appellant 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, Appellant 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, Appellant filed a Motion to Reconsider pursuant to Rule 59, SCRCP (R., p. 253). The Court denied Appellant'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 Appellant 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). Appellant timely filed and served a Notice of Appeal on August 13, 2018. (R., p. 280).

STANDARD OF REVIEW

As to Issues on Appeal I through IV: "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006). Accordingly, this Court's review is limited to determining whether there was an abuse of discretion. *Id.* "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 that are without evidentiary support." *Id.*

As to Issue on Appeal V: Summary judgment is "an extreme remedy to be cautiously invoked." *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56,

SCRCP. When reviewing the grant of summary judgment, the Appellate Court applies the same standard that governs the trial court. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C 334, 340, 611 S.E.2d 485, 488 (2005). An appellate court may decide questions of law with no particular deference to the trial court. *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771 (2010). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). This Court therefore may review this question presented *de novo*.

ARGUMENT

I. 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." (R., p. 24).

The trial Court erred because (a) our courts have never required strict compliance with this portion of the statute, and (b) even if they had, the reason for doing so has long since passed.

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.

Therefore, one or the other precedent must yield. It should be the former. Here's why.

The statute that provides for service by publication 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.

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[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

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 – 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." (R., p. 24) (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).

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).

To invalidate Plaintiff's service of process because Plaintiff failed to do something that no longer serves any useful purpose impermissibly elevates form over substance.

II. The 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." (R., pp. 23-24).

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 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

[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.")

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. 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." (R., p. 24).

"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.

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 with respect to the North Myrtle Beach Times is an abuse of discretion, as it is wholly without evidentiary support.

[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.

IV. 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." (R., p. 25).

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)).

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.,*

[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)

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 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.

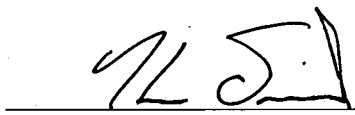
CONCLUSION

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 correct. *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 that this Court can and should correct. *Id.*

[SIGNATURE ON FOLLOWING PAGE]

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This 15TH day of May, 2019

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

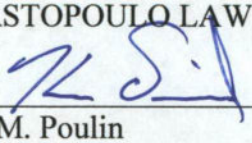
I, the undersigned, an employee of Anastopoulo Law Firm, LLC, for Appellant Bobby Foster, do hereby certify that I have this date served all counsel of records by personally depositing a copy of same in a United States Postal Service mailbox, postage prepaid, addressed to the parties below:

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ARGUMENT IN REPLY

Respondent's argument relies on purported facts for which no evidence appears in the record. Without these purported facts, Respondent cannot prevail. Specifically, the record does not contain any evidence of the following purported facts:

1. "The Defendant is a college student at Coastal Carolina University." Respondent's Initial Brief ("Brief"), p. 3 (citing Affidavit of Julian Neil Armstrong). **No such statement appears in the affidavit.** (R. pp. 82-84). The body of the affidavit is reproduced for reference below as Exhibit A.

2. Plaintiff's "location could have been determined by called the cell number." Brief, p.4 (citing Affidavit of Julian Neil Armstrong). **No such statement appears in the affidavit.** (R. pp. 82-84). Defendant says only that he would have answered his phone. He does not say that if asked "Where do you live, we'd like to come sue you?" he would have provided his location. Indeed, such a response would be against the great weight of experience of process servers.

3. "North Myrtle Beach Times . . . is not a daily newspaper of general circulation in Horry County." Brief, p. 8 (citing Affidavit of Julian Neil Armstrong). **No such statement appears in the affidavit.** (R. pp. 82-84).

4. "No effort whatsoever was made by the Plaintiff or his representatives to contact the Defendant or find out where he had moved to." Brief, p. 3 (citing Affidavit of Julian Neil Armstrong and Transcript of October 17, 2016 Hearing ("Transcript"), (R. p. 302). **No such statement appears in the affidavit.** (R. pp. 82-84). **No such statement appears in the transcript.** (R. pp. 293-307). Transcript simply says that Plaintiff's counsel did not personally call Defendant, and then describes the actions that counsel did take.

5. "The Affidavit reflects that at the time of the accident, the Defendant lived at 186 Williamsburg Road, Little River, South Carolina." Brief, p. 8 (citing Affidavit of Julian Neil Armstrong). **No such statement appears in the affidavit.** (R. pp. 82-84). Defendant gives a date on which he moved. It does not name all the places he lived before that.

6. Calling Defendant's cell phone "was never done." Brief, p. 10 (citing Transcript p. 10, lines 11-13). **No such statement appears in the transcript.** (R. pp. 293-307). Transcript simply indicates that Plaintiff's counsel did not personally call Defendant. There's no evidence that Sherriff's office or others did not call Defendant.

7. "The Plaintiff did nothing to locate the Defendant before obtaining the Order for Publication." Brief, p. 10 (citing R. p. 302, lines 11-13; Transcript p. 10, lines 11-13). **No such statement appears in the transcript.** (R. pp. 293-307). Transcript simply says that Plaintiff's counsel did not call Defendant, and then describes the actions that counsel did take.

8. "The Affidavit of Nonservice clearly reflects that the Defendant had moved". Brief, p. 9. No personal knowledge of affiant is stated as to Defendant moving. Instead, Affidavit of Nonservice merely refers to a **hearsay statement of an unidentified person** that "neighbor advised that subject has moved." (R. p. 57-58).

9. "The Defendant lives with his parents." Brief, p. 3. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

10. "North Myrtle Beach Times . . . is not a daily newspaper." Brief, p. 4. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

11. "The North Myrtle Beach Times is not a daily newspaper." Brief, pp. 8-9. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

12. The North Myrtle Beach Times "is not a newspaper of general circulation." Brief, p. 9. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

13. The North Myrtle Beach Times is "not a newspaper most likely to give notice to the Defendant at his address in Little River . . ." Brief, p. 9. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

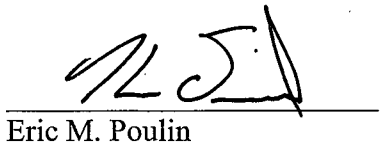
14. "The only effort necessary to locate the Defendant was calling his cell phone." Brief, p. 10. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

15. "The North Myrtle Beach Times is a weekly newspaper with a circulation of 7,300. https://nmbtimes.com." **No citation to the record provided by Respondent, and no evidence of such is apparent.**

If the above statements were made at all to the trial court, they were made only as arguments of counsel. It is axiomatic that arguments of counsel are not evidence. See McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.")

Moreover, Respondent boldly citing documents for statements that they simply and clearly do not contain (e.g. "Defendant is a college student . . .") calls the credibility and reasoning of Respondent's entire argument into question. It is like "hearing the thirteenth stroke of a clock, which not only is itself discredited but casts a shade of doubt over all previous assertions." Nestler v. Fields, 2019 WL 361651 (S.C. Ct. App. 2019), Advance Sheet No. 5, January 30, 2019 (internal quotations and citations omitted).

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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

RECEIVED
MAY 17 2019
SC Court of Appeals

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

Bobby Foster,..... Appellant,

v.

Julian Neil Armstrong,..... Respondent,

PROOF OF SERVICE

I, the undersigned employee of Anastopoulo Law Firm, LLC, do hereby certify that I have caused the below referenced documents to be served Via U.S. Mail, postage prepaid, to all parties of record at the address shown below:

Appellant's Final Reply Brief

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IN THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No.: 2015-CP-26-05633
Appellate Case No.: 2018-001497

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Bobby Foster, ... Appellant,

vs.

Julian Neil Armstrong, ... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court properly hold that service by publication was ineffective on the basis that the publication of the Summons in this case did not state the time or date of filing of the Summons in violation of S.C. Code Ann. §15-9-740?

2. Did the Trial Court properly hold that the Summons in this action was ineffective on the basis that it failed to comply with Rule 4(b) of the SCRCP in that it does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him?

3. Did the Trial Court properly hold that service by publication was ineffective on the basis that the Plaintiff failed to comply with the terms of the Order for Publication or S.C. Code Ann. §15-9-740 when he published the Notice in the North Myrtle Beach Times which is not a daily newspaper of general circulation in Horry County that would provide notice to the Defendant who resides in Little River, South Carolina?

4. Did the Trial Court properly hold that service by publication was ineffective on the basis that the Plaintiff failed to use reasonable diligence in locating the Defendant or make a diligent search for the Defendant as required by S.C. Code Ann. §15-9-710 and §15-9-740?

5. Did the Trial Court properly grant summary judgment on the basis the Statute of Limitations ran prior to the Plaintiff effecting service on the Defendant?

STATEMENT OF THE CASE

This matter arises out of an automobile accident which occurred on April 8, 2013. The Plaintiff filed a Summons and Complaint on July 27, 2015. (R. p. 45-53). Thereafter, the Plaintiff attempted to serve the Defendant with the Summons and Complaint but the Defendant had moved. (R. p. 57). Thereafter, Plaintiff's counsel obtained an Order for Publication. (R. p. 1). The Plaintiff published the Summons in the North Myrtle Beach Times. (R. p. 18, p. 71). No Answer was filed by the Defendant. An Order for Entry of Default was obtained by Plaintiff's counsel. (R. p. 19). Thereafter, Defendant's counsel moved to set aside the Order for Publication and the Order for Entry of Default. (R. p. 77-81). The Order for Entry of Default and the Order for Publication were set aside by Order dated October 21, 2016. (R. p. 23-25). Based on the failure of the original

Summons filed with the Court to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*, the failure of the publication to include the time of the filing of the Summons and Complaint as required by S.C. Code Ann. §15-9-740, the failure to publish the Summons in accordance with the Order for Publication and S. C. Code Ann. §15-9-740, and the failure of the Plaintiff to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740, the Court found that the service of the Summons and Complaint was not properly perfected on the Defendant and it had no personal jurisdiction over the Defendant. (R. p. 23-25). The Court ordered that the Order for Publication and the Order for Entry of Default and Referral for Hearing on Damages be set aside and declared null and void and of no force and effect. (R. p. 23-25). A Motion for Reconsideration was filed, heard and denied. (R. p. 101-113, 26-27).

The Defendant filed an Answer on October 26, 2016. That Answer raised the issue of the Statute of Limitations. (R. p. 99 ¶ 14). The Defendant filed a Motion for Summary Judgment based on the Statute of Limitations. (R. p. 118-120). An Order was entered granting the Defendant Summary Judgment on the basis that the Defendant was not properly served within the Statute of Limitations. (R. p. 42-44). A Motion to Reconsider was filed by the Plaintiff. (R. p. 253-279). That Motion was denied. (R. p. 38-41). This appeal followed.

STATEMENT OF FACTS

The Plaintiff and the Defendant were involved in an automobile accident which occurred on April 8, 2013 when the vehicle the Defendant was driving contacted the rear of a vehicle that the Plaintiff occupied. (R. p. 49 ¶ 5-8). This action was filed on July 27, 2015. (R. p. 48-53). The Plaintiff, through his process server, attempted to serve the Defendant at the address shown on the accident report. (R. p. 308 and 57). The Defendant is a college student at Coastal Carolina University. He lives with his parents. The Defendant and his parents moved from 186

Williamsburg Road, Little River to 4153 Horseshoe Road, Little River in August of 2015. (R. p. 82 ¶ 4). The process server attempted to serve the Defendant at 186 Williamsburg Road after he moved. The Affidavit of Nonservice clearly reflects that the process server was aware that the Defendant had moved. (R. p. 57). The phone number for the Defendant found on the accident report was the correct phone number for the Defendant at the time of the accident, at the time that the Plaintiff attempted to serve the Summons and Complaint, and at the present time. (R. p. 308 and p. 82 ¶ 5). No effort whatsoever was made by the Plaintiff or his representatives to contact the Defendant or find out where he had moved to. (R. p. 82 ¶ 3-5 and p. 302 ll 11-13).

The basis for setting aside the Order for Publication and Order for Entry of Default is fourfold: 1) The Summons was insufficient. The Summons filed with the Court did not comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure.* (R. p. 48). The Summons filed with the Court did not notify the Defendant that if he fails to appear and defend, a judgment by default would be rendered against him; 2) The Summons published in the newspaper did not comply with S. C. Code Ann. §15-9-740 which requires that the information which is published must state the time and place of filing of the Summons and Complaint. The publication of the Summons in this case did not state the date or time of filing of the Summons in the Court of Common Pleas for Horry County. (R. p. 71); 3) The Order of Publication signed by the Clerk of Court and dated November 24, 2015 required that the Defendant be served "via publication in a daily newspaper of the Defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." (R. p. 1). The Summons was published in a North Myrtle Beach Times which is not a daily newspaper and the Defendant never lived in North Myrtle Beach. (R. p. 71 and p. 82 ¶ 4). The publication was not run in accordance with the order or S.C. Code Ann. §15-9-740; and 4) The Court found that the Plaintiff did not use due diligence in locating the Defendant. The

Defendant's correct cell phone number was contained in the accident report so that his location could have been determined by calling the cell phone number. (R. p. 308 and p. 82 ¶ 5). S.C. Code Ann. §15-9-740 requires that reasonable diligence be used to ascertain the residence of the Defendant. The Court found that the Plaintiff did not use reasonable diligence as required by S.C. Code Ann. §15-9-740.

The Defendant was not properly served within the Statute of Limitations. The Court granted the Defendant's Motion for Summary Judgment on that basis.

STANDARD OF REVIEW

Whether to grant relief from Entry of Default is a decision within the sound discretion of the Circuit Court. Rule 55(c) *SCRCP*. See also *Stark Truss Co., Inc. v. Superior Construction Corp.*, 360 SC 503, 602 SE2d 99 (SC App 2004). In order for the Appellant to prevail with regard to the first four issues raised on appeal, the Appellant must show there was an abuse of discretion by the Trial Judge. An abuse of discretion arises where the Judge issuing the order is controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. *Pilgram v. Miller*, 350 SC 637, 567 SE2d 527 (SC App 2002). On appeal from a grant or denial of a motion to set aside a default, the appellate court cannot substitute its judgment for that of the trial judge and will not disturb the trial court's decision absent a clear showing of abuse of discretion. *Melton v. Olenik*, 379 SC 45, 664 SE2d 487 (SC App 2008).

The standard to be applied by the Trial Court to determine if an entry of default should be set aside is "good cause." Rule 55(c) *SCRCP*. Whether good cause to set aside entry of default is established is within the sound discretion of the court. 55(c) *SCRCP* and *Williams v. Van Volkenburg*, 312 SC 373, 440 SE2d 408 (SC App 1994). The South Carolina Court of Appeals

found that a special referee abused his discretion when he failed to set aside a default judgment against the defendant who had not been properly served. *New Hampshire Ins. Co. v. Bey Corp.*, 312 SC 47, 435 SE2d 377 (SC App 1993). The Plaintiff asserts that the controlling standard for setting aside an entry of default is 60(b) *SCRCP*. He is mistaken. Our Courts have stated that in determining whether to grant relief from an entry of default, the trial court erred in applying the more stringent standard "excusable neglect" for setting aside a default judgment under Rule 60(b) *SCRCP*, instead of the "good cause" standard under Rule 55(c) where the claimants did not have a default judgment but at most had an entry of default. *Top Value Homes, Inc. v. Hardin*, 319 SC 302, 460 SE2d 427 (SC App 1995). In the case at bar, there is an Entry of Default, not a default judgment. The entry of default may be set aside by the Trial Court for good cause shown, which is a less stringent standard than the excusable neglect standard for setting aside a **final** judgment on the basis of mistake, inadvertence, excusable neglect, newly discovered evidence or fraud. *Limehouse v. Hulsey*, 404 SC 93, 744 SE2d 566 (2013). Rule 55(c) is to be liberally construed to promote justice and dispose of cases on their merits. *Dixon v. Besco Engineering, Inc.*, 320 SC 174, 463 SE2d 636 (1995).

As to the fifth issue on appeal, in reviewing the grant of summary judgment, the Appellate Court applies the same standard that governs the Trial Court. *Helms Realty, Inc. v. Gibson, Wall Co.*, 363 SC 334, 611 SE2d 485 (2005). Summary Judgment is appropriate when there is no issue of any material fact such that the moving party must prevail as a matter of law. *Savannah Bank v. Stalliard*, 400 SC 246, 734 SE2d 161 (2012).

ARGUMENTS

I. THE TRIAL COURT PROPERLY HELD THAT SERVICE BY PUBLICATION WAS INEFFECTIVE ON THE BASIS THAT THE PUBLICATION OF THE

SUMMONS IN THIS CASE DOES NOT STATE THE TIME OR DATE OF FILING OF THE SUMMONS IN VIOLATION OF S.C. CODE ANN. §15-9-740.

S.C. Code Ann. §15-9-740 (1976 as Amended) states in pertinent part:

"In all cases in which publication is made, the Complaint must first be filed and the Summons, as published, must state the time and place of the filing."

The Summons as published in this case does not state when the Summons and Complaint were filed with the Clerk (R. p. 71). The Courts in South Carolina have required strict compliance with publication statutes. *Caldwell v. Wiquist*, 402 SC 565, 572, 741 SE2d 583, 587 (Ct App 2013). To avoid resolving litigation by default, strict compliance with the publication statutes is appropriate. *Caldwell*, Id. The Plaintiff argues the Court should ignore the publication statutes. The Appellate Courts in this state have required strict compliance with the publication statutes to avoid resolving litigation by default and should do so in this case.

II. THE TRIAL COURT PROPERLY HELD THAT THE SUMMONS IN THIS ACTION WAS INEFFECTIVE ON THE BASIS THAT IT FAILED TO COMPLY WITH RULE 4(B) OF THE SCRCP IN THAT IT DOES NOT NOTIFY THE DEFENDANT THAT IF HE FAILS TO APPEAR AND DEFEND A JUDGMENT BY DEFAULT WILL BE RENDERED AGAINST HIM.

Rule 4(b) of the *SCRCP* provides in pertinent part:

(b) The summons shall be signed by the plaintiff or his attorney, contain the name of the state and county, the name of the court, the file number of the action, and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, **and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint**. (Emphasis added)

The Appellant would once again have the Court ignore the requirements of rules and in particular Rule 4(b) of the *South Carolina Rules of Civil Procedure*. Our Courts have required strict compliance with the rules and statutes regarding service *Caldwell*, supra at 572.

The Appellant relies on *Wham v. Shearson Lehman Brothers*, 298 SC 462, 381 SE2d 499 (Ct App 1989). *Wham* is of no assistance to the Plaintiff. The language in the summons in *Wham* is different from the language contained in the summons of the case at bar. The summons in the case at bar states in pertinent part: "If you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint." (R. p. 48). Rule 4 requires that the summons "shall notify him that in case of his failure to do so, judgment by default will be rendered against him for the relief demanded in the Complaint." There is no mention in the Plaintiff's Summons of any judgment by default. The Statutes and Rules governing the content and service of the summons are based on the proposition that notice is required to be given to the defendant. No notice was given in the Summons as to any default judgment.

III. THE TRIAL COURT PROPERLY HELD THAT SERVICE BY PUBLICATION WAS INEFFECTIVE ON THE BASIS THAT THE PLAINTIFF FAILED TO COMPLY WITH THE TERMS OF THE ORDER FOR PUBLICATION OR S.C. CODE ANN. §15-9-740 WHEN HE PUBLISHED THE NOTICE IN THE NORTH MYRTLE BEACH TIMES WHICH IS NOT A DAILY NEWSPAPER OF GENERAL CIRCULATION IN HORRY COUNTY THAT WOULD PROVIDE NOTICE TO THE DEFENDANT WHO RESIDES IN LITTLE RIVER, SOUTH CAROLINA.

The Order of Publication signed by the Clerk of Court and dated November 24, 2015 required that the Defendant be served "via publication in a daily newspaper of the Defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Summons was published in the North Myrtle Beach Times which is not a daily newspaper of general circulation in Horry County. The Defendant never lived in North Myrtle Beach. (R. p. 82 ¶ 4). The Defendant filed an Affidavit with the Court in Support of the Motion to Set Aside the Order for Publication and the Order for Entry of Default. (R. p. 82-83). That Affidavit reflects that at the time of the accident, the Defendant lived at 186 Williamsburg Road, Little River, South Carolina. (R. p. 82 ¶ 4). That is the address shown on the accident report. (R. p. 308). In August of 2015, the Defendant

and his family moved to 4153 Horseshow Road, Little River, South Carolina. (R. p. 82 ¶ 4). The Plaintiff did not comply with the Order of Publication. The Order of Publication was very specific. The Summons had to be published in a daily newspaper of the Defendant's last known address and the Order actually gave the last known address of 186 Williamsburg Road, Little River, South Carolina. The North Myrtle Beach Times is not a daily newspaper. It is not a newspaper of general circulation.[1] It is not a newspaper most likely to give notice to the Defendant at his address in Little River as required by the Order for Publication and S.C. Code Ann. §15-9-740. The Plaintiff failed to comply with the Order for Publication and the statute governing service by publication; therefore, service is not valid.

IV. THE TRIAL COURT PROPERLY HELD THAT SERVICE BY PUBLICATION WAS INEFFECTIVE ON THE BASIS THAT THE PLAINTIFF FAILED TO USE REASONABLE DILIGENCE IN LOCATING THE DEFENDANT OR MAKE A DILIGENT SEARCH FOR THE DEFENDANT AS REQUIRED BY S.C. CODE ANN. §15-9-710 AND §15-9-740.

S.C. Code Ann. §15-9-710 states that service by publication is appropriate when after "due diligence" the person to be served cannot be found within the state. S.C. Code Ann. §15-9-710(3) states that an order for publication may be granted when the defendant is a resident of this state and after "diligent search" cannot be found. S.C. Code Ann. §15-9-740 requires that the Plaintiff use "reasonable diligence" to locate the defendant. The accident report in this case reflects not only the address of the Defendant; but also, his cell phone number. (R. p. 308). The Affidavit of Nonservice clearly reflects that the Defendant had moved. (R. p. 57). The Affidavit of Nonservice does not include any facts to substantiate that "due diligence" or "reasonable diligence" was used to locate the defendant or that a "diligent search" was made to determine his whereabouts. (R. p.

[1] The North Myrtle Beach Times is a weekly newspaper with a circulation of 7,300. https://nmbtimes.com

4). The Affidavit of Publication also does not state any facts to substantiate that "reasonable diligence" was used to locate the Defendant or a "diligent search" was conducted. (R. p. 3).

The Defendant filed an Affidavit in support of the Motion to Set Aside the Order for Publication and the Order for Entry of Default. (R. p. 82-83). The Affidavit reflects that the cell phone number found in the accident report was the Defendant's cell phone number at the time of the wreck, at the time of the attempted service, and at the present time. (R. p. 82 ¶ 5). No one on behalf of the Plaintiff ever contacted the Defendant to determine his address for service of process. (R. p. 82 ¶ 5). S.C. Code Ann. §15-9-710 requires the plaintiff use due diligence and make a diligent search for the defendant. S.C. Code Ann. §15-9-740 requires that the plaintiff use "reasonable diligence" in locating the defendant. The only effort necessary to locate the Defendant was calling his cell phone. That was never done. (R. p. 82 and p. 302 ll 11-13). The Plaintiff did nothing to locate the Defendant before obtaining the Order for Publication. (R. p. 82 and p. 302 ll 11-13).

S.C. Code Ann. §15-9-710 (1976 as Amended) requires that the plaintiff exercise "due diligence" and that the plaintiff "make a diligent search" to locate the defendant before an Order for Service by Publication is issued. Failure of the Plaintiff to use due diligence in locating the defendant or to make a diligent search for the defendant is a basis for setting aside an entry of default. *Caldwell v. Wiquist*, 402 SC 565, 741 SE2d 583 (Ct App 2013) and *Belle Hall Plantation Homeowner's Association, Inc. v. Murray*, 419 SC 605, 799 SE2d 310 (2017). The Court in *Caldwell* found affidavits requesting service by publication that are facially defective and do not comply with the publication statute will not be sustained even in the absence of fraud or collusion. *Caldwell*, supra at 571-572. The courts in South Carolina have repeatedly required strict compliance with the publication statutes to avoid resolving litigation by default. *Belle Hall*, supra

at 616 citing *Caldwell*, supra. The Court in *Caldwell* found that the affidavit must include some factual basis upon which the Court issuing the order of service by publication can find that the defendant cannot, after due diligence, be found within the state. *Caldwell*, supra at 574. It is the existence of this factual basis that our Appellate Courts have found makes the order for service of publication unreviewable absent fraud or collusion. *Caldwell*, Id at 574. No factual basis is included in the Affidavit of Nonservice or the Affidavit of Publication. Thus, the Plaintiff failed to comply with the publication statutes, the Order for Publication is subject to review without the necessity of showing fraud and collusion and the Order for Publication and the Order for Entry of Default were properly set aside.

The failure of the Plaintiff to comply with the publication statutes requiring the exercise of due diligence and filing affidavits that include facts substantiating same is a sufficient basis in and of itself for this Court to uphold the Trial Court's Order Setting Aside the Entry of Default.

V. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE BASIS THE STATUTE OF LIMITATIONS RAN PRIOR TO THE PLAINTIFF EFFECTING SERVICE ON THE DEFENDANT.

In an automobile accident case, the Statute of Limitations is three (3) years. S.C. Code Ann. §15-3-530(5). The automobile accident which is the subject matter of this action occurred on April 8, 2013. (R. p. 49 ¶ 5-8). The Summons and Complaint were filed in this case on July 27, 2015. (R. p. 48-49). The Defendant was never properly served with the Summons and Complaint prior to the three years running. The Order of Judge Culbertson setting aside the Entry of Default found that the Court had no personal jurisdiction over the Defendant as of October 21, 2016, more than six months after the Statute of Limitations ran. (R. p. 25). The Defendant filed an Answer on October 26, 2016. That Answer raised the issue of the Statute of Limitations. (R. p. 99). The Defendant filed a Motion for Summary Judgment on the basis of the Statute of Limitations. (R. p.

118-120). There being no evidence to the contrary, the Court granted the Defendant summary judgment on the issue of the Statute of Limitations. (R. p. 42-44).

CONCLUSION

The Plaintiff asserts an abuse of discretion as the basis for overturning the Order Granting the Defendant's Motion to Set Aside the Order for Entry of Default and Order for Publication. There was no abuse of discretion. The Trial Court could set aside the Order for Publication and Order for Entry of Default on the basis of any one of four issues raised regarding the Summons and its publication: 1) The Summons did not comply with Rule 4(b) of the *SCRCP* which requires that the Summons notify the Defendant that if he fails to appear and defend a judgment by default would be entered against him; 2) The Summons published in the newspaper did not comply with S.C. Code Ann. §15-9-740 which requires that the information which is published state the time and place of filing of the Summons and Complaint. The publication of the Summons did not state the time of the filing of the Summons and Complaint; 3) The Order for Publication signed by the Clerk of Court required the Defendant be served "via publication in a daily newspaper of the Defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Plaintiff did not comply with the Order of Publication. The Summons was published in the North Myrtle Beach Times which is not a daily newspaper of general circulation at the Defendant's last known address; and 4) The Plaintiff failed to comply with S.C. Code Ann §15-9-710 and S.C. Code Ann. §15-9-740 which requires that reasonable diligence be used to locate the Defendant. The Plaintiff's attorney knew the Defendant's phone number and did not call him. The Affidavit of Nonservice and the Affidavit of Publication do not set forth any facts regarding any action taken to locate the Defendant. Any one of these defects in service is sufficient to sustain the Lower Court's Order Setting Aside the Order of Publication and the Order for Entry of Default. Certainly,

the combination of all four defects supports the Court's ruling. There is no abuse of discretion. Thus, the Lower Court's Order Setting Aside the Order for Publication and the Order for Entry of Default and declaring it null and void and of no force and effect should be upheld.

Based on the failure of the Plaintiff to properly serve the Defendant, the Trial Court ruled that it had no personal jurisdiction over the Defendant as of October 21, 2016, more than three years and six months after the automobile accident. There is no issue of any material fact. The Defendant was never served during the three years following the automobile accident. The Defendant was entitled to a grant of summary judgment on the basis of the failure to timely serve the Defendant. The Order Granting Summary Judgment should be upheld.

Respectfully submitted, this the 8th day of May, 2019.

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IN THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No.: 2015-CP-26-05633
Appellate Case No.: 2018-001497

RECEIVED
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SC Court of Appeals

Bobby Foster, ... Appellant,

vs.

Julian Neil Armstrong, ... Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Respondent's Final Brief complies with Rule 211(b) of the *South Carolina Rules of Appellate Procedure*.

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THE STATE OF SOUTH CAROLINA
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JAN 04 2019
SC Court of Appeals

Bobby Foster,

Appellant,

v.

Julian Neil Armstrong,

Respondent.

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STATEMENT OF JURISDICTION

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.

The Trial Court's final judgment was entered on July 12, 2018. Appellant received notice of Judge Hyman's Order Granting Summary Judgment on July 12, 2018. Appellant timely filed and Served a Notice of Appeal on August 13, 2018 (the 30-day deadline having fallen on the preceding Saturday). This Court has jurisdiction to entertain the appeal and correct errors of law pursuant to S.C. Code Ann. § 14-3-330.

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit 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 Circuit Court err 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?"

III. Did the Circuit Court err 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?"

IV. Did the Circuit Court err 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?"

V. Did the Circuit Court err 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?

STATEMENT OF THE CASE

On April 8, 2013, Respondent rear-ended Appellant. Appellant suffered significant personal injury and property damage as a result. On July 27, 2015, Appellant filed a Summons and Complaint in Horry County. Appellant attempted to serve Respondent personally without success. Appellant then secured an Order for Publication. (*See* Nov. 24, 2015, Order for Pub.).

The publication ran during the weeks of December 24 and 31, 2015, and January 7, 2016. On March 2, 2016, Appellant moved for entry default against Respondent (*See* Appellant's Motion for Default.), which was entered on March 8, 2016. (*See* Mar. 8, 2016, Order for Entry of Default.)

In July 2016, Respondent's counsel appeared in this matter. (*See* Notice of Appearance.) In September 2016, Respondent filed a Motion to Set Aside Order for Entry of Default and

Order for Publication. (*See* Def. Mot. to Set Aside). Respondent's motion was granted on October 21, 2016. (*See* Oct. 21, 2016, Order).

On November 10, 2016, Appellant filed a Motion to Reconsider pursuant to Rule 59, SCRCP, (*See* Nov. 10, 2016, Motion to Reconsider). The Court denied Appellant's motion by order dated March 16, 2017. (*See* Mar. 16, 2017, Order.) Respondent filed a Motion for Summary Judgment on March 31, 2017 (*See* Motion for Summ. J.).

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

STANDARD OF REVIEW

As to Issues on Appeal I through IV: "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006). Accordingly, this Court's review is limited to determining whether there was an abuse of discretion. *Id.* "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 that are without evidentiary support." *Id.*

As to Issue on Appeal V: Summary judgment is "an extreme remedy to be cautiously invoked." *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56,

SCRCP. When reviewing the grant of summary judgment, the Appellate Court applies the same standard that governs the trial court. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C 334, 340, 611 S.E.2d 485, 488 (2005). An appellate court may decide questions of law with no particular deference to the trial court. *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771 (2010). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). This Court therefore may review this question presented *de novo*.

ARGUMENT

I. 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." (October 2016 ORDER, p. 2).

The trial Court erred because (a) our courts have never required strict compliance with this portion of the statute, and (b) even if they had, the reason for doing so has long since passed.

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.

Therefore, one or the other precedent must yield. It should be the former. Here's why.

The statute that provides for service by publication 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.

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[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

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 – 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).

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).

To invalidate Plaintiff's service of process because Plaintiff failed to do something that no longer serves any useful purpose impermissibly elevates form over substance.

II. The 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." (October 2016 ORDER, p. 2).

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]

[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).

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 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.

[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.")

III. 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." (October 2016 ORDER, p. 2).

"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 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 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 with respect to the North Myrtle Beach Times is an abuse of discretion, as it is wholly without evidentiary support.

[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.

IV. 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." (October 2016 ORDER, p. 3).

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)).

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.,*

[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)

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.

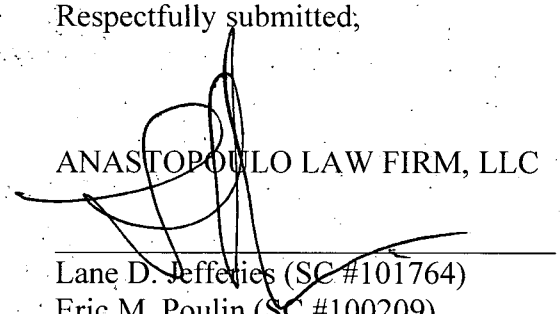
Appellant raises this issue only out of an abundance of caution. The grant of summary judgement was error insofar as its sole basis was the trial Court's prior error in invalidating Appellant's service by publication. By the time the trial Court invalidated service, the statute of limitations had already 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 correct. *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 that this Court can and should correct. *Id.*

[SIGNATURE ON FOLLOWING PAGE]

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This 2nd day of January, 2019

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

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

Bobby Foster,

Appellant,

v.

Julian Neil Armstrong,

Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief and Appellants Designation of Matter to be Included in Record on Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 2, 2019, addressed to his attorney of record, Linda Weeks Gangi, Post Office Box 1740, Conway, SC, 29528.

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*OF COUNSEL

January 2, 2019

SENT VIA U.S. MAIL

RECEIVED
JAN 04 2019
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: *Bobby Foster v. Julian Neil Armstrong*
Appellate Case No.: 2018-001497

Dear Ms. Kitchings:

Please find enclosed for filing:

1. Appellant's Initial Brief;
2. Appellant's Designation of Matter to be included in the Record on Appeal; and
3. Proof of Service.

If you should have any questions, please do not hesitate to contact us.

Sincerely,

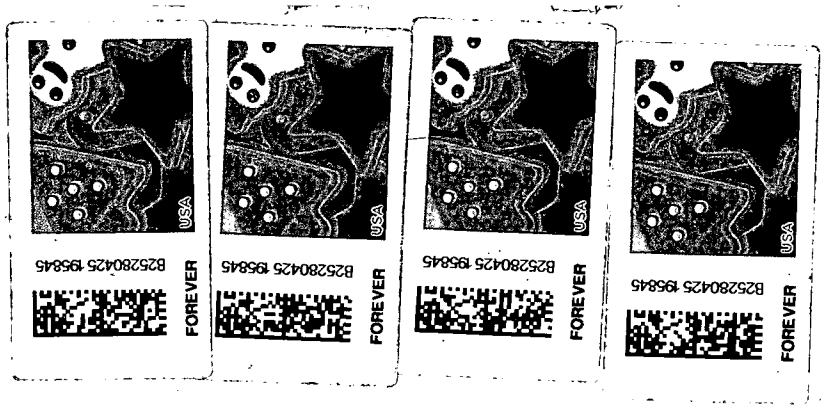
Lane D. Jefferies

Enclosures as stated

cc: Linda Weeks Gangi

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SC Court of Appeals



IN THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

Larry B. Hyman, Circuit Court Judge

RECEIVED
MAR 05 2019
SC Court of Appeals

Case No.: 2015-CP-26-05633
Appellate Case No.: 2018-001497

Bobby Foster, ... Appellant,

vs.

Julian Neil Armstrong, ... Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court properly hold that service by publication was ineffective on the basis that the publication of the Summons in this case did not state the time or date of filing of the Summons in violation of S.C. Code Ann. §15-9-740?

2. Did the Trial Court properly hold that the Summons in this action was ineffective on the basis that it failed to comply with Rule 4(b) of the SCRCP in that it does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him?

3. Did the Trial Court properly hold that service by publication was ineffective on the basis that the Plaintiff failed to comply with the terms of the Order for Publication or S.C. Code Ann. §15-9-740 when he published the Notice in the North Myrtle Beach Times which is not a daily newspaper of general circulation in Horry County that would provide notice to the Defendant who resides in Little River, South Carolina?

4. Did the Trial Court properly hold that service by publication was ineffective on the basis that the Plaintiff failed to use reasonable diligence in locating the Defendant or make a diligent search for the Defendant as required by S.C. Code Ann. §15-9-710 and §15-9-740?

5. Did the Trial Court properly grant summary judgment on the basis the Statute of Limitations ran prior to the Plaintiff effecting service on the Defendant?

STATEMENT OF THE CASE

This matter arises out of an automobile accident which occurred on April 8, 2013. The Plaintiff filed a Summons and Complaint on July 27, 2015. (Summons and Complaint). Thereafter, the Plaintiff attempted to serve the Defendant with the Summons and Complaint but the Defendant had moved. (Affidavit of Nonservice). Thereafter, Plaintiff's counsel obtained an Order for Publication. (Order for Publication). The Plaintiff published the Summons in the North Myrtle Beach Times. (Affidavit of Publication). No Answer was filed by the Defendant. An Order for Entry of Default was obtained by Plaintiff's counsel. (Order for Entry of Default and Referral for Hearing on Damages). Thereafter, Defendant's counsel moved to set aside the Order for Publication and the Order for Entry of Default. (Defendant's Motion to Set Aside Order for Entry

of Default and Order for Publication). The Order for Entry of Default and the Order for Publication were set aside by Order dated October 21, 2016. (Order Setting Aside Order for Publication and Setting Aside Order for Entry of Default and Referral for Hearing on Damages). Based on the failure of the original Summons filed with the Court to comply with Rule 4(b) of the *South Carolina Rules of Civil Procedure*, the failure of the publication to include the time of the filing of the Summons and Complaint as required by S.C. Code Ann. §15-9-740, the failure to publish the Summons in accordance with the Order for Publication and S. C. Code Ann. §15-9-740, and the failure of the Plaintiff to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. §15-9-740, the Court found that the service of the Summons and Complaint was not properly perfected on the Defendant and it had no personal jurisdiction over the Defendant. (Order Setting Aside Order for Publication and Setting Aside Order for Entry of Default and Referral for Hearing on Damages). The Court ordered that the Order for Publication and the Order for Entry of Default and Referral for Hearing on Damages be set aside and declared null and void and of no force and effect. (Order Setting Aside Order for Publication and Setting Aside Order for Entry of Default and Referral for Hearing on Damages). A Motion for Reconsideration was filed, heard and denied. (Plaintiff's Motion for Reconsideration, Order Denying Motion for Reconsideration October 21, 2016, Order Setting Aside Order of Publication and Order Setting Aside Entry of Default).

The Defendant filed an Answer on October 26, 2016. That Answer raised the issue of the Statute of Limitations. (Answer). The Defendant filed a Motion for Summary Judgment based on the Statute of Limitations. (Defendant's Motion for Summary Judgment). An Order was entered granting the Defendant Summary Judgment on the basis that the Defendant was not properly served within the Statute of Limitations. (Order Granting Summary Judgment and Dismissing

Action with Prejudice). A Motion to Reconsider was filed by the Plaintiff. (Plaintiff's Motion to Reconsider). That Motion was denied. (Order Denying Motion to Reconsider Order Granting Summary Judgment). This appeal followed.

STATEMENT OF FACTS

The Plaintiff and the Defendant were involved in an automobile accident which occurred on April 8, 2013 when the vehicle the Defendant was driving contacted the rear of a vehicle that the Plaintiff occupied. (Complaint PP 5-8) This action was filed on July 27, 2015. (Summons and Complaint). The Plaintiff, through his process server, attempted to serve the Defendant at the address shown on the accident report. (Accident Report and Affidavit of Nonservice). The Defendant is a college student at Coastal Carolina University. (Affidavit of Julian Armstrong). He lives with his parents. The Defendant and his parents moved from 186 Williamsburg Road, Little River to 4153 Horseshoe Road, Little River in August of 2015. (Affidavit of Julian Armstrong P4). The process server attempted to serve the Defendant at 186 Williamsburg Road after he moved. The Affidavit of Nonservice clearly reflects that the process server was aware that the Defendant had moved. (Affidavit of Nonservice). The phone number for the Defendant found on the accident report was the correct phone number for the Defendant at the time of the accident, at the time that the Plaintiff attempted to serve the Summons and Complaint, and at the present time. (Accident Report and Affidavit of Julian Armstrong P5). No effort whatsoever was made by the Plaintiff or his representatives to contact the Defendant or find out where he had moved to. (Affidavit of Julian Armstrong PP 4-5 and Transcript of October 17, 2016 Hearing on p. 10 ll 11-13).

The basis for setting aside the Order for Publication and Order for Entry of Default is fourfold: 1) The Summons was insufficient. The Summons run in the newspaper did not comply

with Rule 4(b) of the *South Carolina Rules of Civil Procedure.* (Affidavit of Publication). The Summons published in the newspaper did not notify the Defendant that if he fails to appear and defend, a judgment by default would be rendered against him; 2) The Summons published in the newspaper did not comply with S. C. Code Ann. §15-9-740 which requires that the information which is published must state the time and place of filing of the Summons and Complaint. The publication of the Summons in this case did not state the date or time of filing of the Summons in the Court of Common Pleas for Horry County. (Affidavit of Publication); 3) The Order of Publication signed by the Clerk of Court and dated November 24, 2015 required that the Defendant be served "via publication in a daily newspaper of the Defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." (Order for Publication). The Summons was published in a North Myrtle Beach Times which is not a daily newspaper and the Defendant never lived in North Myrtle Beach. (Affidavit of Publication and Affidavit of Julian Armstrong P4). The publication was not run in accordance with the order or S.C. Code Ann. §15-9-740; and 4) The Court found that the Plaintiff did not use due diligence in locating the Defendant. The Defendant's correct cell phone number was contained in the accident report so that his location could have been determined by calling the cell phone number. (Accident Report and Affidavit of Julian Armstrong P5). S.C. Code Ann. §15-9-740 requires that reasonable diligence be used to ascertain the residence of the Defendant. The Court found that the Plaintiff did not use reasonable diligence as required by S.C. Code Ann. §15-9-740.

The Defendant was not properly served within the Statute of Limitations. The Court granted the Defendant's Motion for Summary Judgment on that basis.

STANDARD OF REVIEW

Whether to grant relief from Entry of Default is a decision within the sound discretion of the Circuit Court. Rule 55(c) *SCRCP*. See also *Stark Truss Co., Inc. v. Superior Construction Corp.*, 360 SC 503, 602 SE2d 99 (SC App 2004). In order for the Appellant to prevail with regard to the first four issues raised on appeal, the Appellant must show there was an abuse of discretion by the Trial Judge. An abuse of discretion arises where the Judge issuing the order is controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support. *Pilgram v. Miller*, 350 SC 637, 567 SE2d 527 (SC App 2002). On appeal from a grant or denial of a motion to set aside a default, the appellate court cannot substitute its judgment for that of the trial judge and will not disturb the trial court's decision absent a clear showing of abuse of discretion. *Melton v. Olenik*, 379 SC 45, 664 SE2d 487 (SC App 2008).

The standard to be applied by the Trial Court to determine if an entry of default should be set aside is "good cause." Rule 55(c) *SCRCP*. Whether good cause to set aside entry of default is established is within the sound discretion of the court. 55(c) *SCRCP* and *Williams v. Van Volkenburg*, 312 SC 373, 440 SE2d 408 (SC App 1994). The South Carolina Court of Appeals found that a special referee abused his discretion when he failed to set aside a default judgment against the defendant who had not been properly served. *New Hampshire Ins. Co. v. Bey Corp.*, 312 SC 47, 435 SE2d 377 (SC App 1993). The Plaintiff asserts that the controlling standard for setting aside an entry of default is 60(b) *SCRCP*. He is mistaken. Our Courts have stated that in determining whether to grant relief from an entry of default, the trial court erred in applying the more stringent standard "excusable neglect" for setting aside a default judgment under Rule 60(b) *SCRCP*, instead of the "good cause" standard under Rule 55(c) where the claimants did not have a default judgment but at most had an entry of default. *Top Value Homes, Inc. v. Hardin*, 319 SC

302, 460 SE2d 427 (SC App 1995). In the case at bar, there is an Entry of Default, not a default judgment. The entry of default may be set aside by the Trial Court for good cause shown, which is a less stringent standard than the excusable neglect standard for setting aside a **final** judgment on the basis of mistake, inadvertence, excusable neglect, newly discovered evidence or fraud. *Limehouse v. Hulsey*, 404 SC 93, 744 SE2d 566 (2013). Rule 55(c) is to be liberally construed to promote justice and dispose of cases on their merits. *Dixon v. Besco Engineering, Inc.*, 320 SC 174, 177, 463 SE2d 636, 638 (1995).

As to the fifth issue on appeal, in reviewing the grant of summary judgment, the Appellate Court applies the same standard that governs the Trial Court. *Helms Realty, Inc. v. Gibson, Wall Co.*, 363 SC 334, 340, 611 SE2d 485, 488 (2005). Summary Judgment is appropriate when there is no issue of any material fact such that the moving party must prevail as a matter of law. *Savannah Bank v. Stalliard*, 400 SC 246, 734 SE2d 161 (2012).

ARGUMENTS

I. THE TRIAL COURT PROPERLY HELD THAT SERVICE BY PUBLICATION WAS INEFFECTIVE ON THE BASIS THAT THE PUBLICATION OF THE SUMMONS IN THIS CASE DOES NOT STATE THE TIME OR DATE OF FILING OF THE SUMMONS IN VIOLATION OF S.C. CODE ANN. §15-9-740.

S.C. Code Ann. §15-9-740 (1976 as Amended) states in pertinent part:

"In all cases in which publication is made, the Complaint must first be filed and the Summons, as published, must state the time and place of the filing."

The Summons as published in this case does not state when the Summons and Complaint were filed with the Clerk (Affidavit of Publication). The Courts in South Carolina have required strict compliance with publication statutes. *Caldwell v. Wiquist*, 402 SC 565, 572, 741 SE2d 583, 587 (Ct App 2013). To avoid resolving litigation by default, strict compliance with the publication statutes is appropriate. *Caldwell*, Id. The Plaintiff argues the Court should ignore the publication

statutes. The Appellate Courts in this state have required strict compliance with the publication statutes to avoid resolving litigation by default and should do so in this case.

II. THE TRIAL COURT PROPERLY HELD THAT THE SUMMONS IN THIS ACTION WAS INEFFECTIVE ON THE BASIS THAT IT FAILED TO COMPLY WITH RULE 4(B) OF THE SCRCP IN THAT IT DOES NOT NOTIFY THE DEFENDANT THAT IF HE FAILS TO APPEAR AND DEFEND A JUDGMENT BY DEFAULT WILL BE RENDERED AGAINST HIM.

Rule 4(b) of the *SCRCP* provides in pertinent part:

(b) The summons shall be signed by the plaintiff or his attorney, contain the name of the state and county, the name of the court, the file number of the action, and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, **and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.** (Emphasis added)

The Appellant would once again have the Court ignore the requirements of rules and in particular Rule 4(b) of *South Carolina Rules of Evidence*. Our Courts have required strict compliance with the rules and statutes regarding service *Caldwell*, supra at 572.

The Appellant relies on *Wham v. Shearson Lehman Brothers*, 298 SC 462, 463, 381 SE2d 499, 500-501 (Ct App 1989). *Wham* is of no assistance to the Plaintiff. The language in the summons in *Wham* is different from the language contained in the summons of the case at bar. The summons in the case at bar states in pertinent part: "If you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the Court for the relief demanded in the Complaint." (Summons). Rule 4 requires that the summons "shall notify him that in case of his failure to do so, judgment by default will be rendered against him for the relief demanded in the Complaint." There is no mention in the Plaintiff's Summons of any judgment by default. The Statutes and Rules governing the content and service of the summons are based on the proposition that notice is

required to be given to the defendant. No notice was given in the Summons as to any default judgment.

III. THE TRIAL COURT PROPERLY HELD THAT SERVICE BY PUBLICATION WAS INEFFECTIVE ON THE BASIS THAT THE PLAINTIFF FAILED TO COMPLY WITH THE TERMS OF THE ORDER FOR PUBLICATION OR S.C. CODE ANN. §15-9-740 WHEN HE PUBLISHED THE NOTICE IN THE NORTH MYRTLE BEACH TIMES WHICH IS NOT A DAILY NEWSPAPER OF GENERAL CIRCULATION IN HORRY COUNTY THAT WOULD PROVIDE NOTICE TO THE DEFENDANT WHO RESIDES IN LITTLE RIVER, SOUTH CAROLINA.

The Order of Publication signed by the Clerk of Court and dated November 24, 2015 required that the Defendant be served "via publication in a daily newspaper of the Defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Summons was published in the North Myrtle Beach Times which is not a daily newspaper of general circulation in Horry County. The Defendant never lived in North Myrtle Beach. (Affidavit of Julian Armstrong P4). The Defendant filed an Affidavit with the Court in Support of the Motion to Set Aside the Order for Publication and the Order for Entry of Default. (Affidavit of Julian Armstrong). That Affidavit reflects that at the time of the accident, the Defendant lived at 186 Williamsburg Road, Little River, South Carolina. (Affidavit of Julian Armstrong P5). That is the address shown on the accident report. (Accident Report). In August of 2015, the Defendant and his family moved to 4153 Horseshow Road, Little River, South Carolina. (Affidavit of Julian Armstrong P5). The Plaintiff did not comply with the Order of Publication. The Order of Publication was very specific. The Summons had to be published in a daily newspaper of the Defendant's last known address and the Order actually gave the last known address of 186 Williamsburg Road, Little River, South Carolina. The North Myrtle Beach Times is not a daily

newspaper. It is not a newspaper of general circulation.[1] It is not a newspaper most likely to give notice to the Defendant at his address in Little River as required by the Order for Publication and S.C. Code Ann. §15-9-740. The Plaintiff failed to comply with the Order for Publication and the statute governing service by publication; therefore, service is not valid.

IV. THE TRIAL COURT PROPERLY HELD THAT SERVICE BY PUBLICATION WAS INEFFECTIVE ON THE BASIS THAT THE PLAINTIFF FAILED TO USE REASONABLE DILIGENCE IN LOCATING THE DEFENDANT OR MAKE A DILIGENT SEARCH FOR THE DEFENDANT AS REQUIRED BY S.C. CODE ANN. §15-9-710 AND §15-9-740.

S.C. Code Ann. §15-9-710 states that service by publication is appropriate when after "due diligence" the person to be served cannot be found within the state. S.C. Code Ann. §15-9-710(3) states that an order for publication may be granted when the defendant is a resident of this state and after "diligent search" cannot be found. S.C. Code Ann. §15-9-740 requires that the Plaintiff use "reasonable diligence" to locate the defendant. The accident report in this case reflects not only the address of the Defendant; but also, his cell phone number. (Accident Report). The Affidavit of Nonservice clearly reflects that the Defendant had moved. (Affidavit of Nonservice). The Affidavit of Nonservice does not include any facts to substantiate that "due diligence" or "reasonable diligence" was used to locate the defendant or that a "diligent search" was made to determine his whereabouts. The Affidavit of Publication also does not state any facts to substantiate that "reasonable diligence" was used to locate the Defendant or a "diligent search" was conducted.

The Defendant filed an Affidavit in support of the Motion to Set Aside the Order for Publication and the Order for Entry of Default. (Affidavit of Julian Armstrong). The Affidavit

[1] The North Myrtle Beach Times is a weekly newspaper with a circulation of 7,300. https://nmbtimes.com

reflects that the cell phone number found in the accident report was the Defendant's cell phone number at the time of the wreck, at the time of the attempted service, and at the present time. (Affidavit of Julian Armstrong P5). No one on behalf of the Plaintiff ever contacted the Defendant to determine his address for service of process. (Affidavit of Julian Armstrong P5). S.C. Code Ann. §15-9-710 requires the plaintiff use due diligence and make a diligent search for the defendant. S.C. Code Ann. §15-9-740 requires that the plaintiff use "reasonable diligence" in locating the defendant. The only effort necessary to locate the Defendant was calling his cell phone. That was never done. (Affidavit of Julian Armstrong and Transcript of October 17, 2016 Hearing p. 10 at ll 11-13). The Plaintiff did nothing to locate the Defendant before obtaining the Order for Publication. (Affidavit of Julian Armstrong and Transcript of October 17, 2016 Hearing p. 10 at ll 11-13).

S.C. Code Ann. §15-9-710 (1976 as Amended) requires that the plaintiff exercise "due diligence" and that the plaintiff "make a diligent search" to locate the defendant before an Order for Service by Publication is issued. Failure of the Plaintiff to use due diligence in locating the defendant or to make a diligent search for the defendant is a basis for setting aside an entry of default. *Caldwell v. Wiquist*, 402 SC 565, 741 SE2d 583 (Ct App 2013) and *Belle Hall Plantation Homeowner's Association, Inc. v. Murray*, 419 SC 605, 799 SE2d 310 (2017). The Court in *Caldwell* found affidavits requesting service by publication that are facially defective and do not comply with the publication statute will not be sustained even in the absence of fraud or collusion. *Caldwell*, supra at 571-572. The courts in South Carolina have repeatedly required strict compliance with the publication statutes to avoid resolving litigation by default. *Belle Hall*, supra at 616 citing *Caldwell*, supra. The Court in *Caldwell* found that the affidavit must include some factual basis upon which the Court issuing the order of service by publication can find that the

defendant cannot, after due diligence, be found within the state. *Caldwell*, supra at 574. It is the existence of this factual basis that our Appellate Courts have found make the order for service of publication unreviewable absent fraud or collusion. *Caldwell*, Id at 574. No factual basis is included in the Affidavit of Nonservice or the Affidavit of Publication. Thus, the Plaintiff failed to comply with the publication statutes, the Order for Publication is subject to review without the necessity of slowing fraud and collusion and the Order for Publication and the Order for Entry of Default were properly set aside.

The failure of the Plaintiff to comply with the publication statutes requiring the exercise of due diligence and filing affidavits that include facts substantiating same is a sufficient basis in and of itself for this Court to uphold the Trial Court's Order Setting Aside the Entry of Default.

V. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE BASIS THE STATUTE OF LIMITATIONS RAN PRIOR TO THE PLAINTIFF EFFECTING SERVICE ON THE DEFENDANT.

In an automobile accident case, the Statute of Limitations is three (3) years. S.C. Code Ann. §15-3-530(5). The automobile accident which is the subject matter of this action occurred on April 8, 2013. (Complaint PP 5-8). The Summons and Complaint were filed in this case on July 27, 2015. (Summons and Complaint). The Defendant was never properly served with the Summons and Complaint prior to the three years running. The Order of Judge Culbertson setting aside the Entry of Default found that the Court had no personal jurisdiction over the Defendant as of October 21, 2016, more than six months after the Statute of Limitations ran. (Order Setting Aside Order for Publication and Setting Aside Order for Entry of Default p. 3). The Defendant filed an Answer on October 26, 2016. That Answer raised the issue of the Statute of Limitations. (Answer p. 3). The Defendant filed a Motion for Summary Judgment on the basis of the Statute of Limitations. (Defendant's Summary Judgment Motion). There being no evidence to the contrary, the Court

granted the Defendant summary judgment on the issue of the Statute of Limitations. (Order Granting Summary Judgment and Dismissing Action with Prejudice).

CONCLUSION

The Plaintiff asserts an abuse of discretion as the basis for overturning the Order Granting the Defendant's Motion to Set Aside the Order for Entry of Default and Order for Publication. There was no abuse of discretion. The Trial Court could set aside the Order for Publication and Order for Entry of Default on the basis of any one of four issues raised regarding the Summons and its publication: 1) The Summons did not comply with Rule 4(b) of the *SCRCP* which requires that the Summons notify the Defendant that if he fails to appear and defend a judgment by default would be entered against him; 2) The Summons published in the newspaper did not comply with S.C. Code Ann. §15-9-740 which requires that the information which is published state the time and place of filing of the Summons and Complaint. The publication of the Summons did not state the time of the filing of the Summons and complaint; 3) The Order for Publication signed by the Clerk of Court required the Defendant be served "via publication in a daily newspaper of the Defendant's last known address, 186 Williamsburg Road, Little River, South Carolina." The Plaintiff did not comply with the Order of Publication. The Summons was published in the North Myrtle Beach Times which is not a daily newspaper of general circulation at the Defendant's last known address; and 4) The Plaintiff failed to comply with S.C. Code Ann §15-9-710 and S.C. Code Ann. §15-9-740 which requires that reasonable diligence be used to locate the Defendant. The Plaintiff's attorney knew the Defendant's phone number and did not call him. The Affidavit of Nonservice and the Affidavit of Publication do not set forth any facts regarding any action taken to locate the Defendant. Any one of these defects in service is sufficient to sustain the Lower Court's Order Setting Aside the Order of Publication and the Order for Entry of Default. Certainly,

the combination of all four defects supports the Court's ruling. There is no abuse of discretion. Thus, the Lower Court's Order Setting Aside the Order for Publication and the Order for Entry of Default and declaring it null and void and of no force and effect should be upheld.

Based on the failure of the Plaintiff to properly serve the Defendant, the Trial Court ruled that it had no personal jurisdiction over the Defendant as of October 21, 2016, more than three years and six months after the automobile accident. There is no issue of any material fact. The Defendant was never served during the three years following the automobile accident. The Defendant was entitled to a grant of summary judgment on the basis of the failure to timely serve the Defendant. The Order Granting Summary Judgment should be upheld.

Respectfully submitted, this the 4th day of March, 2019.

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SC Bar No.: 2365
Attorney for the Respondent

IN THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court Of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No.: 2015-CP-26-05633
Appellate Case No.: 2018-001497

RECEIVED
MAR 05 2019
SC Court of Appeals

Bobby Foster, ... Appellant,

vs.

Julian Neil Armstrong, ... Respondent.

CERTIFICATE OF SERVICE

I, Neicey Smith, certify that I have served the **Respondent's Initial Brief and Designation of Matter on Appeal** on Bobby Foster by depositing a copy of it in the United States Mail, postage prepaid, as well as via email on March 4, 2019, addressed to his attorneys of record as follows:

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March 4, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
MAR 05 2019
SC Court of Appeals

RE: *Bobby Foster vs. Julian Neil Armstrong*
Appellate Case No.: 2018-000706
Civil Action No.: 2015-CP-26-5633
Date of Loss: April 8, 2013
Claim No.: 40-2K34-502
SF Insured: Deloria G. Armstrong

Dear Ms. Kitchings:

Please find enclosed herewith the original Initial Brief of the Respondent and the original Designation of Matter to be Included in the Record on Appeal in regard to the above appeal together with a Certificate of Service for same. By copy of this letter, I am hereby serving opposing counsel with a copy of same.

With kindest personal regards, I remain

Yours very truly,

THOMPSON & HENRY, P.A.

Linda Weeks Gangi

LWG/ns
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Re: Bobby Foster v. Julian Neil Armstrong (2)
Appellate Case No. 2018-001497

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,



CLERK

cc: The Honorable Larry B. Hyman, Jr.
The Honorable Benjamin H. Culbertson

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bobby Foster, Appellant,

v.

Julian Neil Armstrong, Respondent.

Appellate Case No. 2018-001497

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge
Larry B. Hyman, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-336
Heard June 7, 2021 – Filed September 22, 2021

AFFIRMED

Eric Marc Poulin, Lane Douglas Jefferies, and Matthew Thomas Foss, and Roy T. Willey, IV, all of Anastopoulo Law Firm, LLC, of Charleston; and Kenneth Thomas David, of Arlington, Virginia, for Appellant.

Linda Weeks Gangi, of Thompson & Henry, PA, of Conway, for Respondent.

PER CURIAM: Appellant Bobby Foster asks this court to reverse the circuit court's finding that Appellant's service by publication on Respondent Julian Neil Armstrong

did not give the court personal jurisdiction over Respondent. Appellant contends this led the circuit court to erroneously grant summary judgment to Respondent. We affirm.

FACTS/PROCEDURAL HISTORY

On April 8, 2013, Appellant, 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—including Respondent's cell phone number. The accident report described it this way:

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

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

On July 27, 2015, Appellant filed a summons and complaint against Respondent. On August 13, counsel for Appellant 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."

On November 23, Appellant 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, Appellant 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) Appellant should have attempted to contact Respondent by telephone.

Appellant 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, Appellant 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, Appellant 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 Appellant'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 Appellant's suit. In his memorandum of law in opposition to the motion, Appellant reiterated "his assertion that [Respondent] was properly served by publication and his cause of action was

properly commenced within the statute of limitations period[.]" Appellant 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, Appellant 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. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in holding that service by publication was ineffective based on the lack of the date of the filing of the summons?

2. Did the circuit court err in holding the summons was ineffective based on the lack of a specific warning of default?

3. Did the circuit court err in holding that the service by publication was flawed because the *North Myrtle Beach Times* was neither a daily paper nor "a newspaper of general circulation in Horry County"?

4. Did the circuit court err in finding that Appellant did not exercise sufficient diligence in attempting to personally serve Respondent?

5. Did the circuit court err in granting summary judgment because of the perceived flaws in the service by publication?

STANDARD OF REVIEW

Appellant's Issues I–IV

Appellant and Respondent disagree as to which of the Rules of Civil Procedure governs our analysis in this case. Appellant argues that the case should be considered under Rule 60(b), SCRCP. Respondent counters that the appropriate rule is Rule 55(c).

We believe Rule 55(c) is the proper basis for deciding this motion. *See Sundown Operating Co. v. Intedege Indus., Inc.*, 383 S.C. 601, 607–08, 681 S.E.2d 885, 888 (2009) (noting that "Rule 55(c) permits a party to move to set aside *the*

entry of default," while "[o]nce a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP" (emphasis added)).

Beyond that, both sides concede that in passing on the circuit court's decision in this case, our standard of review is abuse of discretion. *See Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 101 (Ct. App. 2004) ("The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. This decision will not be reversed absent an abuse of that discretion." (citations omitted)). "An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support." *Id.* at 508, 602 S.E.2d at 101–02.

Appellant's Issue V

Likewise, the parties largely agree on our standard of review in regards to the circuit court's decision on the motion for summary judgment. "In reviewing an order of summary judgment, an appellate court applies the same standard as that which the circuit court applied in determining whether to enter the order." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). Summary judgment "shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

LAW/ANALYSIS

Appellant's first four issues on appeal all concern the circuit court's ruling on the validity of the notification by publication. The fifth ground is almost entirely dependent on whether the circuit court should be reversed in its decision to grant Respondent's motion to set aside the entry of default and the order for publication. In other words, if the set-aside should have been granted, then the motion for summary judgment should also have been granted, given that the statute of limitations had expired.

Appellant contends that the trial court erred in deciding to set aside the entry of default based on errors in the order of publication and the summons itself. If we find no error in the circuit court's decision that a particular mistake in the summons warranted setting aside the entry of default, we may affirm the circuit court solely on that issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("[An] appellate court need not address remaining

issues when disposition of prior issue is dispositive[.]" (citing *Whiteside v. Cherokee Cty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993)). We find no error in the circuit court's determination to set aside the entry of default based on the omission of the filing date in the summons, and as a result, we affirm.

As a general matter, the factors for good cause under Rule 55(c) include: "(1) the timing of [the] motion for relief; (2) whether [the defendant] has a meritorious defense; and (3) the degree of prejudice to [the plaintiff] if relief is granted." *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct. App. 1989). Additionally, our supreme court has provided some guidance while discussing Rule 60, SCRCP. The court has noted "the basic legal premise that the standard for granting relief under Rule 60(b) is more rigorous than under Rule 55(c), and that an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009); *see also id.* at 608, 681 S.E.2d at 889 ("The Rule 60(b) factors are indeed relevant to a Rule 55(c) analysis, but only insomuch as proof of any one of these factors is sufficient to show 'good cause.'"). Rule 60(b) provides that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding" for one of five listed reasons. One of those reasons is that "the judgment is void." Rule 60(b)(4), SCRCP.

Next, we call attention to the statute addressing notice by publication. Section 15-9-740 of the South Carolina Code (Supp. 2020) states in relevant part:

> The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. . . .
>
> In all cases in which publication is made the complaint must first be filed and the summons, as published, *must state the time and place of such filing*.

(Emphasis added). Should the publication fail to meet the statute's requirements, the court does not obtain personal jurisdiction over the defendant. *See BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) ("A court generally obtains personal jurisdiction by the service of a summons.").

Appellant contends in part that the circuit court erred in invalidating the published summons based on the failure of that summons to include the timing of the complaint's filing. We disagree.

We are mindful that our courts have cautioned against being unduly literal in considering compliance with the publication statute. *See Du Bose v. Du Bose*, 90 S.C. 87, 89, 72 S.E. 645, 646 (1911) ("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*." (emphasis added)).

However, we cannot ignore a clear requirement of the statute—that "the summons, as published, must state the time and place of such filing"—that the summons before us just as clearly did not meet. Doing so would cross the line between interpreting the statute and rewriting it.[1]

Because the summons was not properly served by publication, the resulting lack of personal jurisdiction constitutes "a meritorious defense" for the purposes of Rule 55(c). *See Taylor*, 369 S.C. at 551, 633 S.E.2d at 503 ("A court generally obtains personal jurisdiction by the service of a summons."); *Wham*, 298 S.C. at 465, 381 S.E.2d at 501–02 (listing the following factors to consider in determining good cause under Rule 55(c): "(1) the timing of [the] motion for relief; (2) whether [the

[1] We reject out of hand Appellant's call for this court to find that because the reason for the statute's requirement to include the date of the filing no longer exists, the requirement should be disregarded. *See, e.g.*, *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."). We can find no support for the notion that this maxim should be applied to *statutes*. It is beyond question that when the courts of our state find that a judicial rule no longer serves its purpose, they have the ability to disregard it in certain cases or abolish it altogether. However, to say that a court may apply that principal to a duly enacted statute when—in its judgment alone—that statute no longer serves its purpose would mark a breathtaking expansion of judicial review that could violate the South Carolina Constitution. *See* S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."). If there are reasons to repeal the requirement that a notice by publication include the date of the filing of litigation, those reasons are appropriate for consideration by the legislature.

defendant] has a meritorious defense; and (3) the degree of prejudice to [the plaintiff] if relief is granted").

Given our decision to affirm the circuit court's ruling, we find the motion for summary judgment was properly granted. *See* Rule 56(c), SCRCP (providing that summary judgment "shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

CONCLUSION

For those reasons, the judgment of the circuit court is

AFFIRMED.

KONDUROS, GEATHERS, and MCDONALD, JJ., concur.

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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*

[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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Dated: October 5, 2021

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Oct 05 2021
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,

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

October 5, 2021

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The South Carolina Court of Appeals

Bobby Foster, Appellant,

v.

Julian Neil Armstrong, Respondent.

Appellate Case No. 2018-001497

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
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FILED
Oct 12 2021

Matthew Thomas Foss, Esquire
The Honorable Larry B. Hyman, Jr.
The Honorable Benjamin H. Culbertson