CONSTRUCTIVE SERVICE VIA STATUTORY AGENT: PLEASE (STRICTLY) COMPLY!

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On January 21, 2021, City of Richmond Circuit Court Judge Bradley B. Cavedo vacated three default judgments totaling $1.63 million against a closely held, nonresident trucking company arising out of a contested liability, double-fatality motor vehicle collision.[1] In all three suits, defense counsel contested the purported constructive service on the Florida-based limited liability company. That company was no longer a going concern and had not received actual notice that any litigation had commenced before entry of the default judgments. In its decision, the court confirmed that plaintiffs' counsel's investigation into two potential mailing addresses for the defendant was a prerequisite to seeking substituted service via certified mail and that plaintiffs could not avail themselves of a statutory presumption that they had the defendant's correct address. This opinion reaffirms the long-standing principle in Virginia that if a statute provides for constructive service, the terms authorizing it must be strictly followed; otherwise, the service will be invalid, and any default judgment based upon it will be void.[2]

I. Background

In July 2018, a professional driver was operating a tractor-trailer loaded with tomatoes on Virginia's Eastern Shore. Just fifteen minutes from his intended destination, he entered an intersection at the same time as a midsized SUV carrying a family of four. The father and mother in the SUV's front seats were killed on impact, and their two daughters in the back seats suffered critical injuries.

The investigating state trooper obtained accounts from several independent witnesses, which rendered liability questionable. The Virginia State Police's

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[1] E. Wayne Powell, Administrator of the Estate of Cristina Garcia Lopez, deceased v. JP Transworld Transport, LLC, CL20-1849; Jacqueline Enriquez Garcia, an infant, who sues by her guardian and next friend, Ernest W. Powell, CL20-1850; Elizabeth Areli Enriquez Garcia, an infant, who sues by her guardian and next friend, Ernest W. Powell, CL20-1851.

[2] Khatchi v. Landmark Restaurant Assocs., Inc., 237 Va. 139, 375 S.E.2d 743 (1989).

(VSP's) initial handwritten police crash report created at the scene listed the address for the defendant company as being on Okeechobee Road in Hialeah Gardens, Florida.

However, the Okeechobee address was not only an incorrect address for the defendant company, but it was also an invalid postal address in general. It belonged to a twelve-unit, two-story office/retail building in an industrial complex, and no unit or suite number was listed on the handwritten police report. Nor had the defendant company ever owned, operated, or controlled any property or building suite located at that address.

Instead, the correct address for the defendant company was on Northwest 112th Terrace in Hialeah, Florida. A revised, typewritten Virginia State Police crash report listed this correct address, as did the VSP's post-crash investigation report and its driver/vehicle examination report, both of which were contained in its investigative file available to the public via the Freedom of Information Act. The State of Florida's Division of Corporations web site and the U.S. Department of Transportation Federal Motor Carrier Safety Administration's web site also list the correct address for the company. Finally, the sole owner/operator of the defendant company has been receiving mail at this address for over a decade.

Before filing suit, counsel for the plaintiffs wrote a letter to the defendant company at its correct address requesting that it preserve evidence from the crash. Yet when wrongful death and personal injury lawsuits were later filed alleging that the tractor-trailer driver was responsible, service was attempted on the defendant company at the incorrect Okeechobee address via certified mail. The certified mail addressed to the company at the Okeechobee address was sent back to the Virginia Department of Motor Vehicles as undeliverable and was marked "RETURN TO SENDER; INSUFFICIENT ADDRESS; UNABLE TO FORWARD."

Upon certifying that the Okeechobee address was the "last known address" for the defendant company, the plaintiffs filed motions for default judgment after the defendant did not file responsive pleadings. The three cases were consolidated, default judgments were entered, and damages were subsequently fixed in each case. The total award against the defendant was more than $1.63 million.

The defendant later learned of the suit filings through on-line court records and filed a motion to set aside the default judgments on the grounds that, inter alia, they were void due to lack of jurisdiction as the defendant was never served with process.

In opposition, the plaintiffs relied on the initial police report's inclusion of the Okeechobee address, which was supposedly reported by the driver to the investigating state trooper at the scene (though the reason that the incorrect Okeechobee address made it onto the police report remains unknown). The plaintiffs argued that the address was therefore "conclusively presumed to be a valid address" for the defendant pursuant to Virginia Code section 8.01-313(A)(2).

After extensive briefing and an evidentiary hearing, the court granted the defendant's motion and vacated the judgments.

II. How Is Constructive Service Obtained . . . or Botched?

A. Service of Process on a Nonresident via Statutory Agent

The Code of Virginia sets forth procedures for serving a nonresident via its statutory agent. A nonresident motorist may be served via the commissioner of the Department of Motor Vehicles, who is the statutory agent of the motorist for service of process.[3] In its capacity as statutory agent, the commissioner has a duty to send by registered or certified mail, with return receipt requested, a copy of the process to the motorist.[4]

Virginia Code section 8.01-313 provides for specific addresses for mailing by this statutory agent:

> A. (January 1, 2021) For the statutory agent appointed pursuant to §§ 8.01-308 and 8.01-309, *the address for the mailing of the process as required by § 8.01-312 shall be the last known address of the nonresident* . . . . However, upon the filing of an affidavit by the plaintiff that he does not know and is unable with due diligence to ascertain any post-office address of such nonresident, service of process on the statutory agent shall be sufficient without the mailing otherwise required by this section. Provided further that:
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> 2. In the case of a nonresident defendant not licensed by the Commonwealth to operate a motor vehicle, the address shown on the copy of the report of accident required by § 46.2-372 filed by or for him with the Department, and on file at the office of the Department, or the address reported by such a defendant to any state or local police officer, or sheriff investigating the accident sued on, *if no other address is known*, shall be conclusively presumed to be a valid address of such defendant for the purpose of the mailing provided for in this section, and his so reporting of an incorrect address, or his moving from the address so reported without making provision for forwarding to him of mail directed thereto, shall be deemed to be a waiver of notice and a consent to and acceptance of service of process served upon the Commissioner of the Department of Motor Vehicles as provided in this section.[5]

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[3] Va. Code § 8.01-308.

[4] Va. Code § 8.01-312.

[5] Va. Code § 8.01-313 (emphasis added).

As further discussed in Section C, *infra*, Virginia courts have held that the last known address for service of process is "the address at which a person would reasonably expect the addressee to actually receive mail, based upon all information then known or reasonably available to the addressor."[6]

Virginia's general long-arm statute also allows a nonresident to be served with process via the secretary of the Commonwealth.[7] When that office receives process as a statutory agent under section 8.01-329, the secretary is to mail such process to the defendant. The party seeking service must file an affidavit with the court "stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served."[8]

Per section 8.01-329, the secretary is required to mail notice of such service, a copy of the process or notice, and a copy of the affidavit to the nonresident—a provision intended to satisfy due process. Interestingly, the statutes for service specifically on a nonresident motorist (sections 8.01-308 through 8.01-313) merely require that a copy of the process itself be mailed to the nonresident motorist.[9]

If process that was improperly served reaches a defendant anyway, it is generally \ deemed sufficient.[10] However, this assumes that the process itself is not defective, as discussed *infra*.

B. JUDGMENTS OBTAINED WITHOUT VALID SERVICE OF PROCESS ARE VOID AND SUBJECT TO ATTACK AT ANY TIME

A final and conclusive judgment that is void may be attacked in any court, at any time, directly or collaterally.[11] A void judgment is one that has been obtained by extrinsic or collateral fraud—or one that was entered by a court that did not have jurisdiction over the subject matter or the parties.[12] Judgments without personal service of process or with service of process in a manner not authorized by law are void judgments.[13] As the Supreme Court of Virginia noted in 2018:

> "It is elementary that one is not bound by a judgment *in personam* resulting from litigation . . . to which he has not been made a party by

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6 Cordova v. Alper, 64 Va. Cir. 87 (Fairfax 2004); Fadel v. El-Khoury, 65 Va. Cir. 201 (Arlington 2004) (adopting the *Cordova* analysis).

7 VA. CODE § 8.01-329.

8 VA. CODE § 8.01-329(B).

9 VA. CODE § 8.01-312(A)(2).

10 VA. CODE § 8.01-288.

11 Ellett v. Ellett, 35 Va. App. 97, 100, 542 S.E.2d 816, 818 (2001) (citing Rook v. Rook, 233 Va. 92, 95, 353 S.E.2d 756, 758 (1987)).

12 *Id.* at 100, 542 S.E.2d at 818 (citing *Rook*, at 95, 353 S.E.2d at 758).

13 VA. CODE ANN. § 8.01-428; Garritty v. Virginia Dept. of Soc. Servs., 11 Va. App. 39, 396 S.E.2d 150 (1990); Khatchi v. Landmark Restaurant Assocs., Inc., 237 Va. 139, 375 S.E.2d 743 (1989).

> service of process." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). "The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." *Id*. Consequently, "a judgment against a party not before the court in any way will be as utterly void as though the court had undertaken to act when the subject-matter was not within its cognizance . . . ." *Blanton v. Carroll*, 86 Va. 539, 541 (1889) . . . . In this context, we mean *void ab initio* and thus '*ex vi termini*, a nullity,' *Ferguson's Adm'r v. Teel*, 82 Va. 690, 696 (1886), *not merely voidable*, *see Singh v. Mooney*, 261 Va. 48, 51–52, 541 (2001) (distinguishing between judgments that are void ab initio and those that are merely voidable) . . . .[14]

A Virginia court may set aside a void judgment pursuant to either Virginia Supreme Court Rule 3:19(d)(1) or Virginia Code section 8.01-428(A) depending on the amount of time that has elapsed. After a judgment by default has been entered, the court determines whether the order granting judgment by default is still within the breast of the court. If so, then Virginia Supreme Court Rule 3:19(d)(1) governs and provides as follows:

> During the period provided by Rule 1:1 for the modification, vacation or suspension of a judgment, the court may by written order relieve a defendant of a default judgment after consideration of the extent and causes of the defendant's delay in tendering a responsive pleading, whether service of process and actual notice of the claim were timely provided to the defendant, and the effect of the delay upon the plaintiff.

But if the twenty-one-day period provided by Rule 1:1 for the modification, vacation, or suspension of a judgment has passed, Virginia Code section 8.01-428(A) applies:

> Upon motion of the plaintiff or judgment debtor and after reasonable notice to the opposite party, his attorney of record or other agent, the court may set aside a judgment by default or a decree pro confesso upon the following grounds: (i) fraud on the court, (ii) a void judgment, (iii) on proof of an accord and satisfaction, or (iv) on proof that the defendant was, at the time of service of process or entry of judgment, a servicemember . . . . Such motion on the ground of fraud on the court shall be made within two years from the date of the judgment or decree.

[14] McCulley v. Brooks & Co. Gen. Contractors, Inc., 295 Va. 583, 589, 816 S.E.2d 270, 272 (2018) (certain internal citations and quotations omitted, and emphasis added).

It should be noted that Virginia law does not favor default judgments. Rather, Virginia courts prefer to set aside default judgments to decide underlying issues on the merits.[15]

C. NUANCES OF CONSTRUCTIVE SERVICE REQUIREMENTS: "DUE DILIGENCE," "LAST KNOWN POST OFFICE ADDRESS," AND DEFECTS IN PROCESS ITSELF

Virginia case law contains more interpretation of its general long arm statute, section 8.01-329 (allowing for service on nonresidents via the secretary of the Commonwealth), than of the closely related statute authorizing service on the DMV Commissioner specifically for nonresident motorists (section 8.01-312). Thus, a discussion of constructive service in the context of both statutes and notable case law—addressed in chronological order—follows.

The Supreme Court of Virginia has "repeatedly held that any material failure to comply with the terms of the statute authorizing constructive service invalidates the service and that any default judgment based upon such service is void."[16] The Court explained the constitutional validity of this requirement in *Virginia Polytechnic Institute & State University v. Prosper Financial, Inc.*:[17]

> In the context of substituted service, the due process principles of fair play and substantial justice concern the likelihood that the method chosen will inform the party to be served of the pending litigation . . . . "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice 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 . . . . [I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied . . . . The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . or . . . that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."

The Virginia court elaborated on the dissimilar treatment of personal service and of constructive service in *Staunton Perpetual Building & Loan Co. v. Haden* in 1895. It held, "Where there has been personal service upon a defendant, mere

[15] *See* Brown's Buck, Inc. v. Granite State Ins. Co., 78 Va. Cir. 22, 24 (Alexandria 2008) (citing Grant v. Doe, 31 Va. Cir. 254, 255 (Louisa 1993)).

[16] Virginia Polytechnic Inst. & State Univ. v. Prosper Fin., Inc., 284 Va. 474, 480, 732 S.E.2d 246, 249 (2012).

[17] *Id.* at 482, 732 S.E.2d at 250 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–15, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (citations omitted)); *see also* Virginia Lime Co. v. Craigsville Distrib. Co., 670 F.2d 1366, 1368 (4th Cir.1982).

irregularity is not sufficient to defeat the jurisdiction of the court, but where the service is wholly dependent upon a statute for its efficacy, it has no validity unless the terms of the statute by which it is authorized and prescribed are strictly followed."[18] Virginia's strict compliance requirement for constructive service has operated to the detriment of both plaintiffs and defendants.

In the 1986 case of *Basile v. American Filter Service, Inc*.,[19] the Supreme Court of Virginia, interpreting section 8.01-329, reinstated a default judgment rendered against a defendant who was constructively served with process, even though it did not have actual notice of the suit. The Court held that the plaintiff's failure to include the corporate defendant's zip code did not invalidate service of process on the defendant's statutory agent where omission of the zip code could not have resulted in delivery to any location other than the corporation's correct address.[20]

The mailing of process by the statutory agent went to the defendant's correct address by certified mail, with return receipt requested, but the documents were returned unclaimed.[21]

As the Court in *Basile* put it, "If these [constructive service] requirements are met, as they were in this case, service is complete and conclusive," and "there is no basis under § 8.01-329 for invalidating service on the statutory agent because of the defendant's failure to receive actual notice of the suit."[22]

The defendant also sought to vacate the default judgment on equity grounds, to which the Court responded that such a request "is properly exercised only in an independent proceeding initiated by a party seeking relief from a judgment."[23]

In *Khatchi v. Landmark Restaurant Associates*, the Supreme Court of Virginia affirmed the trial court's decision that a deviation from the due diligence language, which is required to be included in plaintiff's counsel affidavit per Code section 8.01-329, warranted setting aside a default judgment.[24] In that case, the attorney seeking service affirmed that "petitioner in this cause has been unable to obtain service against the above named defendant." However, section 8.01-329 requires an affirmation "that after exercising due diligence, the party seeking service has been *unable to locate* the person to be served."[25] The Supreme Court reasoned that "if a statute provides for constructive service, the terms

18 Staunton Perpetual Bldg. & Loan Co. v. Haden, 92 Va. 201, 204, 23 S.E. 285, 286 (1895)

19 Basile v. American Filter Serv., Inc., 231 Va. 34, 340 S.E.2d 800 (1986).

20 *Id.* at 38, 340 S.E.2d at 802.

21 *Id.* at 37, 340 S.E.2d at 801.

22 *Id.* at 38, 340 S.E.2d at 802.

23 *Id.*

24 Khatchi v. Landmark Restaurant Assocs., Inc., 237 Va. 139, 375 S.E.2d 743 (1989).

25 *Id.* at 142, 375 S.E.2d at 745 (emphasis added).

authorizing it must be strictly followed or the service will be invalid and any default judgment based upon it will be void."[26]

The Supreme Court of Virginia also discussed due diligence in setting aside a default judgment in the 1990 case of *Dennis v. Jones*.[27] The plaintiff's attorney there affirmed that "the plaintiff does not know and is unable with due diligence to ascertain any post office address of the nonresident defendant."[28] However, the extent of plaintiff's efforts to locate the defendant consisted of nothing more than "'informal contacts' by plaintiff's counsel with certain unnamed acquaintances employed by the [Department of Motor Vehicles] and the 'state police' to obtain an address for the defendant."[29]

The Court held that counsel's efforts did not constitute due diligence. It went on to explain that "'diligence' means 'devoted and painstaking application to accomplish an undertaking,'"[30] and noted:

> Mere "informal contacts" with unnamed friends at two governmental agencies, made only prior to the sheriff's effort to serve process, do not demonstrate "devoted and painstaking" efforts to locate defendant, especially where, as here, the evidence establishes without conflict that routine methods were readily available to plaintiff. Prior to the . . . execution of the affidavit, defendant had a listed telephone number, her mailing address had been changed officially by the U.S. Postal Service, her new address had been serviced by the local electric utility, and the [Department of Motor Vehicles] had recorded her new address. Plaintiff could have located defendant either by a simple telephone call, by paying a small fee to the DMV, or by employing a subpoena for records, as he did in seeking his own employment records.

The Court in *Dennis* further noted that under Virginia law, when an affidavit in support of constructive service of process is submitted, "the grounds so stated must, in fact, be true, and not merely idle declarations having no factual basis."[31]

In another defense victory, the Supreme Court of Virginia in *O'Connell v. Bean*[32] overturned a default judgment after finding that plaintiff failed to strictly comply with the affidavit requirements for service on the secretary of the Commonwealth. There, plaintiff's counsel forgot to check a box on the secretary's preprinted affidavit form. Checking this box would have incorporated into the form the last known address of the defendant, which address was in fact set out

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26 *Id.* (citations omitted).

27 Dennis v. Jones, 240 Va. 12, 393 S.E.2d 390 (1990).

28 *Id.* at 16.

29 *Id.*

30 *Id.* at 19 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 633 (1981)).

31 *Id.* at 18.

32 O'Connell v. Bean, 263 Va. 176, 556 S.E.2d 741 (2002).

in the caption of the same document. As a result of this fatal error, the defendant was not served, and the Court held that the judgment was void.

The Circuit Court of Fairfax County has analyzed the requirements for constructive service in several cases. In 2004, that court noted in *Cordova v. Alper*[33] that the Supreme Court of Virginia had not yet interpreted the phrase *last known post office address of such person* as prescribed in section 8.01-329. The court relied upon a Fourth Circuit decision[34] in interpreting that phrase to mean "the address at which a person would reasonably expect the addressee to actually receive mail, based upon all information then known or reasonably available to the addressor." The court in *Cordova* held that plaintiff's counsel's mailing of process to the defendant at an address he had not used for years constituted a "failure to take steps to uncover information that was reasonably available" to determine whether process was "reasonably calculated to reach" him. It noted that counsel's actions were "entirely consistent with the almost complete lack of any real effort" made to provide any notice of the pendency of litigation.

The court in *Cordova* also emphasized that section 8.01-329 requires that service be supplemented by other written communication to the defendant "so as to make it reasonably probable that he will receive actual notice" to satisfy due process requirements.[35] Importantly, the defendant *need not receive actual notice* to have been constructively served.[36]

The Arlington Circuit Court adopted the *Cordova* analysis later that year in *Fadel v. El-Khoury*.[37] There, the court held that constructive service upon the secretary of the Commonwealth failed because plaintiff's affidavit indicated an incorrect last known address at which service was "even less likely to actually reach [the defendant] than the address in *Cordova*."[38] The court cited two letters returned to plaintiff's counsel from that address as either unclaimed or with the explicit notation "moved, left no address."[39] It admonished counsel for failing to follow up with phone calls to persons and entities that would have had the correct information.[40] Instead, counsel "simply listed an address that he knew to be incorrect, *even after successfully sending a demand letter*" to a valid address for the defendant.[41] The circuit court held that "this haphazard 'affirmation' of

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33 Cordova v. Alper, 64 Va. Cir. 87, 22 (Fairfax 2004).

34 Virginia Lime Co. v. Craigsville Distrib. Co., 670 F.2d 1366, 1368 (4th Cir. 1982).

35 *Cordova*, 64 Va. Cir. at 21 (citing Wuchter v. Pizzutti, 276 U.S. 13, 72 L. Ed. 446, 48 S. Ct. 259 (1928)).

36 *Id.* at 20 (citing Dusenbery v. United States, 534 U.S. 161, 151 L. Ed. 2d 597, 122 S. Ct. 694 (2002) (reaffirming that actual notice need not occur provided the method chosen to give notice was reasonably certain to inform those affected).

37 Fadel v. El-Khoury, 65 Va. Cir. 201 (Arlington 2004).

38 *Id.* at 205.

39 *Id.*

40 *Id.*

41 *Id.*

an incorrect address 'neither comports with due process nor supports the granting of judgment by default.'"[42]

As noted in Section II.A. of this article, *supra*, if process that was improperly served reaches a defendant anyway, it is nonetheless deemed sufficient under the savings statute (except in divorce actions[43])—but this is assuming that the process *itself* is not defective. The Supreme Court of Virginia held in *Lifestar Response of Maryland, Inc. v. Vegosen* that the defendant was not "served with process" when it was served with a motion for judgment, but not a *notice* of the motion for judgment as required by former Rule 3:3 of the Rules of the Supreme Court of Virginia.[44] The Court held that because the process itself was defective, the trial court lacked jurisdiction over the entity purported to have been served, and the default judgment entered by the trial court was therefore void.[45]

The Court in *Lifestar* held that the saving provision of Virginia Code section 8.01-288, which was "designed to cure defects in the *manner* in which 'process' is served . . . applies only when 'process' has reached 'the person to whom it is directed' . . . but [the saving provision] cannot cure defects in the 'process' itself."[46] Since Lifestar never received "process," section 8.01-288 did not apply. The Court also noted that "because Lifestar did not receive a notice of motion for judgment, it therefore could not have been in default."[47] Accordingly—even despite service of the motion for judgment itself, and despite Lifestar's actual notice of the lawsuit—the trial court was without jurisdiction over Lifestar and vacated the default judgment.

The Fairfax Circuit Court again interpreted the phrase *last known post office address* in *Direct Connect, UDCC Div. v. Medra Sys., LLC*[48] in 2010. Using the *Cordova* analysis, the court reached a result opposite to that in *Cordova* and upheld constructive service on the defendant—even though certified mailings came back "unclaimed." The court distinguished the facts from those in *Cordova* on three bases. First, unlike in *Cordova*, the plaintiff had mailed process to the actual business address of the defendant, and it had a good faith basis for believing that the defendant would receive mail at that address.[49] Second, while the plaintiff in *Cordova* had never previously sent anything to the address it had given to the secretary of the Commonwealth, counsel in *Direct Connect* had previously corresponded with the defendant via the address used for service re-

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[42] *Id.*

[43] VA. CODE § 8.01-288.

[44] Lifestar Response of Md., Inc. v. Vegosen, 267 Va. 720, 594 S.E.2d 589 (2004).

[45] *Id.* at 725, 594 S.E.2d at 591–92.

[46] *Id.* at 725, 594 S.E.2d at 591.

[47] *Id.* at 725, 594 S.E.2d at 592.

[48] Direct Connect, UDCC Div. v. Medra Sys., LLC, 80 Va. Cir. 637 (Fairfax 2010).

[49] *Id.* at 645.

garding the parties' business dealings.[50] Finally, the defendant in *Direct Connect* had received other mailings at that address within the time frame of the constructive service.[51]

In 2012, the Supreme Court of Virginia, citing its prior ruling in *Basile*, affirmed a default judgment—again, despite lack of actual notice—in *Specialty Hospitals of Washington, LLC v. Rappahannock Goodwill Industries* because the requirements in section 8.01-329 for service on the secretary of the Commonwealth were met and "service was therefore 'complete and conclusive.'"[52] In that case, although the defaulting party sought relief from default judgment under Rule 3:19(d)(1) (as opposed to Code section 8.01-428), the Court concluded that a trial court is likewise not required to find "actual notice" to a defendant (just as in *Basile*) under Rule 3:19(d)(1).[53] The facts of this case were particularly unfortunate because the plaintiff had served an incorrect, apparently unrelated entity, yet the default judgment was nonetheless upheld against that entity because the statutory agent had forwarded the process to the entity's registered agent. (Evidence presented on which company employee should have received and dealt with the process forwarded from the company's own registered agent "was a little sketchy."[54])

And finally, in another nod to defects in the process itself, the Norfolk Circuit Court decided in *Mack v. Dunleavy* in 2012 that the plaintiffs failed to materially comply with the requirements for constructive service set forth in section 8.01-329 and found the resulting default judgment to be void for lack of jurisdiction.[55] There, the court found "no evidence [that] the plaintiffs used due diligence to locate" the defendant, who was in fact a resident of Virginia, and whose Virginia address was provided for service via the secretary of the Commonwealth.[56] Further, the court found that it was unclear whether process was actually included in the mailing as counsel "did not check the box indicating the 'Summons and Complaint' were attached."[57] The court called this omission a "far more significant failing" than the failure to check the box on the affidavit form incorporating the defendant's last known address (as in *O'Connell v. Bean*), which also resulted in invalid service.[58] The Norfolk court explained that this was even more egregious given that "the complaint informs the defendant of the allegations against him, and the summons shows the complaint has been

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50 *Id.* at 646.

51 *Id.*

52 Specialty Hosps. of Wash., LLC v. Rappahannock Goodwill Indus., Inc., 283 Va. 348, 356, 722 S.E.2d 557, 560 (2012).

53 *Id.*

54 *Id.* at 353, 722 S.E.2d at 558.

55 Mack v. Dunleavy, 86 Va. Cir. 84, 86 (Norfolk 2012).

56 *Id.* at 85.

57 *Id.* at 85–86.

58 *Id.* at 86.

filed in a court."[59] Indeed, the defendant testified that he "did not receive any notice or documents about the suit until receiving the debtor's interrogatories."[60]

III. Opinion in the *Powell v. JP Transworld* Cases

In the *Powell* cases, Judge Cavedo cited, inter alia, the cases of *Lifestar* and *Cordova* in setting aside the three default judgments. The court in *Powell* noted, as did the Supreme Court in *Lifestar*, that it had lacked jurisdiction over the defendant when the default judgments were entered. The court held:

> When Plaintiffs submitted documents to the Commissioner of the [DMV] to obtain service of process on Defendant pursuant to Virginia Code § 8.01-308, Plaintiffs listed [an address that] . . . was not the only possible address at which to obtain service of process on Defendant. Through pre-trial investigation, including the gathering of police documents regarding the underlying motor vehicle accident and [previous] communication with Defendant, Plaintiffs came to know of a second possible address for Defendant . . . .

The court held that because plaintiffs knew of two possible addresses for the Defendant, they could not avail themselves of the presumption that the address was correct pursuant to Virginia Code section 8.01-313(A)(2). Given the absence of this presumption, the Court further held:

> [T]his Court is guided by the Circuit Court of Fairfax's definition of last known post office address [as stated in *Cordova*] . . . . Based on all information that was reasonably available to Plaintiffs at the time of filing these three lawsuits and requesting service of process thereon, Plaintiffs could not have reasonably expected Defendant to actually receive mail [at the address provided] . . . . Therefore, . . . due to Plaintiffs' knowledge of a second possible address and failure to adequately investigate the validity of the [address provided to the Commissioner], the service obtained on Defendant [was] . . . ineffective which renders the Court's August 27th Order void for lack of jurisdiction.

As this holding confirms, when the General Assembly speaks, the courts will listen. Statutes allowing for constructive service have been strictly construed by Virginia courts for over a century. Where a defendant cannot reasonably expect to receive process via plaintiff's method of purported constructive service, that attempt at service will not be upheld by the courts.

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59 *Id.*

60 *Id.*

IV. Conclusion

As illustrated by the cases discussed herein and as adhered to in *Powell*, strict compliance with statutes governing constructive service wins the day. Anything less than due diligence—a painstaking effort—to locate a defendant will be rejected by the courts, and haphazard affirmations of last-known addresses are simply not enough. Although it might seem counterintuitive, while process that was improperly served on a defendant can still be upheld, actual notice of a lawsuit (without service of process) is of no consequence. Rather, plaintiffs are judged on whether their efforts to serve a defendant could reasonably be expected to reach that defendant. We can expect that Virginia statutes providing for constructive service will continue to be strictly construed.