"You've Been Served?": Private Process Servers in North Carolina

According to Hollywood, court process is served by guys wearing backward baseball caps pretending to deliver pizzas. They roll up, toss a summons-stuffed cardboard box at an unsuspecting defendant-to-be, then ride away proclaiming, “You’ve been served, dude!” (Remember Seth Rogan practicing for the gig in Pineapple Express? Oh, wait. I mean, no, I haven’t watched that movie either.)

Of course this isn’t how private process servers *really* do things. Even in states where private process servers are authorized to do this work, they typically have to follow a tighter set of rules. But in North Carolina, things are even stricter—the use of private process servers is very limited in the first place. In most cases, the sheriff is the proper service agent for personal service of summonses, and the sheriff must refuse or neglect to serve, or must actually try and fail to effectuate service, before private process servers come into play. Locklear v. Cummings, 822 S.E.2d 587, 593 (N.C. Ct. App. 2018); N. Carolina State Bar v. Hunter, 217 N.C. App. 216, 224 (2011).

If you are accustomed to civil practice in North Carolina, this is probably old news. But my colleagues and I regularly hear from new or out-of-state practitioners, self-represented folks, and even new court staff who are surprised to learn that summonses can seldom be served by private process servers. And this week the Court of Appeals served up (sorry) another reminder in Stewart v. Shipley that using a private process server when it’s not authorized could be a big problem—especially when a statute of limitations is at issue. So I’ll close the week with a quick summary of the governing rules:

In North Carolina, proper service is governed by North Carolina Rule of Civil Procedure 4, which states:

Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons.

It’s clear, then, that the relevant county sheriff is the “proper person” for service. (Under G.S. 162-5, the County coroner is authorized to serve when the sheriff’s office is vacant, but this is rarely invoked.) But what about that “some other person duly authorized to serve summons” language? As our Court of Appeals made clear last year, “private process service is not always ‘authorized under law.’” *Locklear*, 822 S.E.2d at 593. Rules 4(h) and 4(h1) go on to specify when someone other than the sheriff can serve:

- **Officer not available/refuses/neglects.** Rule 4(h) states that when there is no proper officer (sheriff/coroner) in the county to receive the service; or the officer "refuses or neglects" to serve it; or the officer is "otherwise interested" in the proceeding (has a conflict), *then* the clerk of court, after receiving a proper affidavit about the problem, shall appoint "some suitable person" to effectuate service. This "suitable person" may, but does not *have to* be, a private process server. And the appointee must follow the same rules and be subject to the same liabilities as the sheriff would have been. We also know from case law that "refuses or neglects" in this context does not mean a mere failure to get the job done, but instead means to "leave undone through carelessness." *Williams v. Williams*, 113 N.C. App. 226, 229–31, (1994), *aff'd*, 339 N.C. 608 (1995); *see also B. Kelley Enters., Inc. v. Vitacost.com, Inc.,* 211 N.C. App. 592, 598 (2011).

- **Officer returns process unexecuted.** Rule 4(h1)—a much newer rule, enacted in 1995—allows personal service of a summons to be performed by someone other than the sheriff once the sheriff tries and fails to execute service and then returns the process unexecuted. At that point the plaintiff can "cause service to be made by" anyone 21 or over, not a party to the action, and not related to a party. As with Rule 4(h), this person may, but does not have to be, a private process server. (Note: Rule 4(h1) does not apply to certain summary ejectment actions nor to civil judgment executions under Chapter 1, Art. 28.)

In sum, if neither Rule 4(h) nor Rule 4(h1) applies, a party is not allowed to use a private process server to serve the initial process in a case. There are other methods of serving process that do not require a process agent—registered or certified mail, designated delivery service, postal service signature confirmation, acceptance of service, but that's not what this blog post is about. As with most things in Rule 4, those methods give rise to lots of questions as well. But that just ensures we'll always have more to blog about.