2019 PA Super 319

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| VICTOR R. SAWYERS<br><br>Appellant<br><br>v. | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
| NOVELETTE DAVIS AND JOSITA DEJESUS | : | No. 1186 MDA 2018 |

Appeal from the Order Entered July 6, 2018
In the Court of Common Pleas of Dauphin County Civil Division at No(s): 2016-CV-07689-CV

BEFORE: BOWES, J., OLSON, J., and STABILE, J.

OPINION BY BOWES, J.: FILED OCTOBER 22, 2019

Victor R. Sawyers appeals from the July 6, 2018 order denying reconsideration of the June 19, 2018 order dismissing his complaint against Novelette Davis with prejudice, and expressly determining, pursuant to Pa.R.A.P. 341(c), that "an immediate appeal would facilitate resolution of the entire case."[1] We vacate the order dismissing the case and remand for further proceedings.

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[1] We *sua sponte* examined whether Pa.R.A.P. 341(c) certification was proper in this case. *See Wisniski v. Brown & Brown Ins. Co.*, 852 A.2d 1206, 1209-10 (Pa.Super. 2004), *vacated on other grounds*, 887 A.2d 1238 (Pa. 2005) (relying on *F.D.P. ex rel. S.M.P. v. Ferrara*, 804 A.2d 1221, 1227 n.6 (Pa.Super. 2002)) ("This Court may review the merits of the trial court's certification decision, even if the parties do not challenge that decision.").

We considered the same factors the trial court considered in making its Rule 341(c) certification decision, which were identified in *Pullman Power*

This lawsuit arises from a head-on collision on October 20, 2014, on State Route 322 in Dauphin County, Pennsylvania. Appellant was a passenger

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*Products of Can. Ltd. v. Basic* ***Eng'rs,*** *Inc.*, 713 A.2d 1169, 1173-74 (Pa.Super. 1998):

> (1) whether there is a significant relationship between adjudicated and unadjudicated claims;
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> (2) whether there is a possibility that an appeal would be mooted by further developments;
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> (3) whether there is a possibility that resolution of legal issues by this Court will aid the trial court in resolving the same issue in this case or in other cases; and
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> (4) whether an immediate appeal will enhance the prospects for settlement.

*Id*. We also considered the purpose of Rule 341(c): "to allow for an immediate appeal of a 'final' order relating to [fewer] than all the parties or [fewer] than all claims[,]" *i.e*. "orders dismissing parties and dismissing claims." *See F.D.P.*, *supra* at 1227. We concluded that all four factors weighed in favor of allowing the appeal.

The Dissent reaches a contrary result. Initially, the Dissent focuses on the fact that the trial court did not set forth its analysis of the *Pullman* factors in its order or opinion. It goes so far as to assume that the court did not weigh the factors. Similarly, it faults Appellant for failing to anticipate that we would *sua sponte* question the propriety of certification and discuss it in his brief. We find the assumption and criticism unwarranted in the absence of a rule or judicial authority requiring trial courts and appellants to defend the certification decision on appeal.

After conducting an independent analysis of the certification decision, our esteemed Colleague concluded that the third and fourth factors disfavored certification, and that the appeal should be quashed for lack of jurisdiction. We disagree with the narrow view of the service of process issue taken by the Dissent. Since service of process potentially implicates the larger issues of comparative negligence and joint tortfeasor liability, we find that an immediate appeal may avoid a second trial and promote settlement. For those reasons, we conclude that the third and fourth *Pullman* factors, as well as the first two factors, support Rule 341(c) certification.

in a vehicle driven by his cousin Ms. Davis, which collided head-on with a vehicle operated by Josita DeJesus. Appellant filed a complaint against both Ms. Davis and Ms. DeJesus on October 12, 2016, alleging that their negligence caused his injuries. Specifically, Appellant pled that Ms. Davis was driving the wrong way on a one-way road while legally intoxicated at the time of the accident. Complaint, 10/12/16, at ¶13. He also alleged that Ms. DeJesus was driving negligently and recklessly and that she was operating her vehicle while under the influence of illegal drugs.

Appellant made several unsuccessful attempts through the Sheriff's office to personally serve the defendants. With respect to Ms. Davis specifically, the Sheriff's November 9, 2016 return of service reported that Ms. Davis was not found at the address listed in the police report. The return further indicated that Ms. Davis called and advised the Sheriff on November 9, 2016, that she lived out of town, and noted that she refused to provide a current address.

Appellant filed a *praecipe* to reinstate the complaint on November 25, 2016, and again tried to effect personal service upon Ms. Davis at a different address on Lexington Street in Harrisburg. The Sheriff filed a return indicating that Ms. Davis was not found at that address on December 1, 2016, and that the current resident stated that Ms. Davis did not live at that address. On January 27, 2017, Appellant filed another *praecipe* to reinstate the complaint. On February 1, 2017, the Sheriff attempted to serve Ms. Davis at an address

on South 13th Street in Harrisburg. The return of service indicated that Ms. Davis did not live there and was unknown to the person residing there.

On February 27, 2017, Appellant filed a petition for alternative service upon Ms. Davis. In it, Appellant described the multiple attempts to serve Ms. Davis at addresses gleaned from the police report, four internet database searches, and a deed search. Counsel for Appellant appended to the petition his own affidavit attesting to the facts in the petition, a memorandum of law, the police report, copies of the service returns, the internet results summaries for the database searches, and deed search results. The trial court denied the petition because it was not a proper application for the relief sought under Local Rule 206.1, and the pleading did not contain a proposed order and rule to show cause or a distribution legend reflecting the persons to be served. The court directed Appellant to read the local rules, to resubmit a conforming filing, and to conduct a good faith investigation and internet search to locate Ms. Davis.[2]

Thereafter, according to counsel for Appellant, he spoke to Ms. Davis and learned that she was living in Brooklyn, New York. He hired a search

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[2] Appellant was making similar efforts to serve Ms. DeJesus throughout this same period. On April 17, 2017, Appellant filed a motion for alternative service with regard to that defendant, and the court directed Appellant to serve Ms. DeJesus by regular mail and certified mail, return receipt requested, at her last four known addresses, and to post property located at 2364 Berryhill Street. Counsel filed an affidavit attesting that he had complied with the court's order, and ten days later, counsel entered an appearance on behalf of Ms. DeJesus.

service to locate Ms. Davis's address. Counsel then sent a copy of the complaint by certified mail, return receipt requested, to Ms. Davis at that address in compliance with the rules for service of out-of-state defendants, and filed an affidavit of service detailing those steps. *See* Affidavit, 3/24/17, at 1; *see also* Pa.R.C.P. 404 and 403. Counsel for Appellant attached thereto a USPS sender's receipt, and the information from the search service showing that Ms. Davis lived at that Brooklyn address.

Counsel for Appellant filed yet another *praecipe* to reinstate the complaint on May 9, 2017, and a second affidavit on June 8, 2017, appended to which were "USPS Tracking Results" indicating service was made by certified mail to an individual at 2822 Beverley Road, Brooklyn, New York 11226 on March 27, 2017.

The record reveals that counsel for Appellant notified Ms. Davis's insurer that service had been effectuated and provided a courtesy copy of the complaint. The insurer requested and was granted a short extension in which to file an answer on behalf of its insured. When no answer was forthcoming almost one year later, Appellant filed a ten-day notice of default. Just a few days later, on April 20, 2018, counsel for Ms. Davis filed preliminary objections endorsed with a notice to plead, alleging that service of process was improper as it was not sent certified mail, return receipt requested. Appellant filed preliminary objections to Ms. Davis's preliminary objections challenging their

timeliness, and appended thereto additional documentation obtained from the USPS.

The trial court heard oral argument on the preliminary objections on June 19, 2018. In support of the preliminary objections, counsel for Ms. Davis argued that service had to be effected by certified mail, return receipt requested, and that it required the return receipt bearing the signature of the defendant or her authorized agent. Counsel for Appellant countered that the complaint was sent certified mail, return receipt requested, as he had attested in his affidavits filed with the court. However, he represented that the green return receipt card was lost by the USPS. Counsel supplied tracking documentation from the USPS showing that the complaint was delivered at the Brooklyn address, and the scanned signature of the individual who accepted it. Moreover, counsel for Appellant orally represented to the court that Ms. Davis had contacted him and was aware of the lawsuit and the earlier attempts to serve her.

The trial court subsequently ruled that Appellant did not achieve service on Ms. Davis by certified mail, return receipt requested in accordance with Pa.R.C.P. 404 and 403. In support of its finding, the court pointed to the lack of a green return receipt card, a notation on the tracking documents that said merely "certified mail," and the absence of a USPS letterhead on the correspondence containing the scanned signature. Trial Court Opinion, 9/21/18, at 9. It discounted counsel's representation that he spoke to Ms.

Davis over the telephone as "he offers no proof thereof." *Id*. Moreover, it found that the scribbled signature could not be determined to belong to Ms. Davis. The court concluded that the record was "devoid of any evidence that Ms. Davis had actual notice of the commencement of the litigation." *Id*. at 7. Hence, the court sustained Ms. Davis's preliminary objections to service of process, and dismissed the case against her with prejudice.

Appellant filed a motion for reconsideration on June 29, 2018, to which he appended USPS correspondence containing a copy of the signature from the certified mail return receipt, the internal delivery signature record called "the pink sheet." Motion for Reconsideration, 6/29/18, at ¶10, Exhibit H. Reconsideration was denied by order entered July 6, 2018, which contained the trial court's express determination "that an immediate appeal of this Order would facilitate resolution of the entire case." Order, 7/6/18, at 1. Appellant timely appealed and he presents one question for this Court's review:

> Pa.R.Civ.P. 404 permits service of process outside the Commonwealth by mail, consistent with Pa.R.Civ.P. 403. Under Pa.R.Civ.P. 403, service is complete upon delivery of mail requiring a receipt to a defendant or his authorized agent. Therefore, did the trial court err by dismissing the complaint when Plaintiff (1) served the complaint by certified mail return receipt requested at defendant's New York residence and (2) the U.S. Postal Service confirmed delivery of the complaint and provided a receipt containing the signature of the individual who accepted the mailed complaint at defendant's residence?

Appellant's brief at 4 (unnecessary capitalization omitted).

We are reviewing an order that sustained preliminary objections to service of process and dismissed the action. In conducting such review, "our

standard of review is *de novo* and our scope of review is plenary. We must determine whether the trial court committed an error of law." *Trexler v. McDonald's Corp.*, 118 A.3d 408, 412 (Pa.Super. 2015) (internal citations and quotation marks omitted).

When we review the trial court's ruling on preliminary objections, we apply the same standard as the trial court. *Id*. In deciding a preliminary objection for lack of personal jurisdiction that, if sustained, would result in dismissal, the court must consider the evidence in the light most favorable to the nonmoving party. *Hall-Woolford Tank Co., Inc. v. R.F. Kilns, Inc.*, 698 A.2d 80 (Pa.Super. 1997). Where upholding the sustaining of preliminary objections results in dismissal of the action, we may do so only in cases that are clear and free from doubt. *Baker v. Cambridge Chase, Inc.*, 725 A.2d 757, 764 (Pa.Super. 1999).

A mere allegation that the court lacks jurisdiction does not automatically place the burden on the plaintiff to prove that the court has jurisdiction. A defendant challenging personal jurisdiction by preliminary objection bears the burden of supporting such objections by presenting evidence. *Trexler*, *supra* at 412 (citing *De Lage Landen Fin. Servs., Inc. v. Urban P'ship, LLC*, 903 A.2d 586, 590 (Pa.Super. 2006)) ("The burden of proof only shifts to the plaintiff after the defendant has presented affidavits or other evidence in support of its preliminary objections challenging jurisdiction."). When the plaintiff introduces such evidence, defendant must come forward and rebut it.

Service of original process upon an out-of-state defendant is governed by Pa.R.C.P. 403-405. Rule 404 provides in pertinent part: "Original process shall be served outside the Commonwealth within ninety days of the issuance of the writ or the filing of the complaint or the reissuance or the reinstatement thereof. . . (2) by mail in the manner provided by Rule 403." Pa.R.C.P. 404. Rule 405(c) provides that service of process by mail under Rule 403 "shall include a signed return receipt signed by the defendant." Pa.R.C.P. 405. Rule 403 directs that "a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent. Service is complete upon delivery of the mail." Pa.R.C.P. 403. Nonetheless, Pa.R.C.P. 126 provides that the Rules of Civil Procedure "shall be liberally construed" and that courts "at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." Pa.R.C.P. 126.

In support of her claim that service of process was defective, Ms. Davis relies solely upon a technical defect in the service of process: the lack of a return receipt card. She maintained below, and renews the argument herein, that absent a return of service bearing her signature, original service of process was not effectuated. Davis's brief at 12-13 (citing *ANS Assocs. v. Gotham Ins Co.*, 42 A.3d 1074 (Pa.Super. 2012)).

Appellant offered evidence in the form of an affidavit that the complaint was mailed by certified mail, return receipt requested as provided in the rules.

Appellant contended below, and again on appeal, that counsel complied with the Rules, but that the green return receipt card was lost by the USPS. In lieu of a return receipt, Appellant provided USPS tracking documentation confirming that the complaint was sent by certified mail and that it was delivered to an individual who signed for it at the Brooklyn address where the search service had located Ms. Davis. The USPS also furnished a scanned copy of the signature of the recipient, although it was not clear that the signature belonged to Ms. Davis.

Ms. Davis offered no countervailing evidence, not even an affidavit. Furthermore, she did not dispute that the Brooklyn address was a valid address for her, deny receiving the certified mail, disavow the signature on the return receipt, or allege that the person who signed the receipt was not authorized to do so. Despite the total absence of countervailing proof, the trial court focused on purported inadequacies in Appellant's proof. It noted that the certified mail sender's receipt was not post-marked; the USPS tracking document indicated that it was sent "certified," but did not denote return receipt requested; and that the "unsigned letter from the USPS, not on letterhead" provided only "a scanned image of an illegible scribble and no printed version of the name." Trial Court Opinion, 9/21/18, at 7. The trial court concluded that, despite the additional documentation from the USPS, "[t]echnical non-compliance with the service of process rules was never properly cured." *Id*.at 9. "Based upon this evidence," the court reasoned, "it

cannot be concluded that service was properly effectuated on Novelette Davis." *Id*. at 7.

We find the trial court's ruling flawed in many respects. First, the trial court did not view the evidence in the light most favorable to Appellant as the non-moving party, as it was required to do. The certified mail sender's receipt, although not postmarked, contains the name of the intended recipient, Novelette Davis, at 2822 Beverley Road, Brooklyn, New York, 11226. It bears a twenty-digit number, which is the same number that is referenced on the USPS tracking results. The tracking results confirm that the mail associated with that sender's receipt arrived at the United States Post Office in Brooklyn on March 25, 2017 at 2:00 p.m., and was delivered to an individual at the address noted on March 27, 2017, at 10:59 a.m. The recipient signed for it. Further inquiry from Appellant's counsel yielded correspondence from the USPS showing a scanned copy of the signature of the recipient and the address.

Moreover, in our review of the record, we observed the following. Service was attempted upon Ms. DeJesus by certified mail, return receipt requested, as evidenced by a green return receipt card in the file. Notably, the USPS tracking information for that attempted service described the product merely as "certified mail," the same notation as the one appearing on the tracking documents for Ms. Davis. Thus, the "certified mail" notation on

the USPS tracking documents was apparently the designation used by the USPS for certified mail, return receipt requested.

The trial court makes much of the fact that the USPS correspondence is not on USPS letterhead and that the name of the recipient is illegible. However, Ms. Davis did not challenge the authenticity of the USPS documents. Nor did she deny, let alone offer any evidence, refuting that delivery was made at her address, or that she signed for it.[3]

We find that Appellant offered sufficient evidence that he had complied with the manner of service designated in Rules 403, 404, and 405 to shift the burden back to Ms. Davis. Ms. Davis offered no evidence refuting Appellant's evidence that service complied with the Rule. Glaringly absent was any allegation or proof that she did not reside at 2822 Beverley Road, Brooklyn, New York, that delivery was not made, or that it was not her signature on the USPC pink sheet.

As the Supreme Court noted in *Cintas Corp. v. Lee's Cleaning Services, Inc.*, 700 A.2d 915, 917 (Pa. 1997), "the absence of or

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[3] The trial court did not hide its displeasure with Appellant's counsel for opting to serve Ms. Davis by certified mail return receipt upon learning that she was living out-of-state, rather than seeking leave of court a second time to serve Ms. Davis pursuant to a special order of court directing service by alternate means pursuant to Pa.R.C.P. 430. We find this criticism unwarranted. Pa.R.C.P. 430 provides that if alternate service is to be used "if service cannot be made under the applicable rule." The applicable rule was Pa.R.C.P. 404, which governs service outside the Commonwealth. Appellant could not make the necessary showing that he was unable to make service pursuant to that Rule until he attempted to do so, and was unsuccessful. That did not occur.

a defect in a return of service does not necessarily divest a court of jurisdiction of a defendant who was properly served." *Id*. (citation omitted; emphasis in original). The Court added that, "So long as the return of service provides sufficient facts to allow the court to determine if service was proper, technical defects in the return will not deprive the court of jurisdiction." *See id*.

We find that the evidence, viewed in the light most favorable to the non-moving party, Appellant herein, showed that service was made by certified mail return receipt requested. Thus, "Service [was] complete upon delivery of the mail." Pa.R.C.P. 403.

In addition, Appellant argues that any technical defect in service of process was excused because Ms. Davis had notice of the lawsuit. In *McCreesh v. City of Philadelphia*, 888 A.2d 664, 666 (Pa. 2005), our Supreme Court adopted the more flexible approach advocated in *Leidich v. Franklin*, 575 A.2d 914 (Pa.Super. 1990), "excusing plaintiffs' initial procedurally defective service where the defendant has actual notice of the commencement of litigation and is not otherwise prejudiced." Our High Court concluded that this view "sufficiently protects defendants from defending against stale claims without the draconian action of dismissing claims based on technical failings that do not prejudice the defendant." *Id*.

The trial court acknowledged that actual notice could excuse technical defects in service. However, the court found the record to be "devoid" of

evidence that Ms. Davis had notice of the lawsuit, and dismissed counsel's representations that he had spoken to Ms. Davis[4] and that she knew about the lawsuit, as "he offered no proof thereof."[5] Trial Court Opinion, 9/21/18, at 9.

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[4] Counsel for Appellant represented to the court that:

> Miss Davis, in fact, called my office and said I had notice from relatives that you have been trying to send me a lawsuit and I moved. I am in New York now. Thereafter we made an attempt via paid Intelius internet search and we found the Brooklyn address confirming Miss Davis'[s] date of birth and address, phone number, etc. I personally thereafter sent via certified mail, return receipt requested, to Miss Davis at that address and waited to see what the outcome would be. The complaint was sent to her. We were waiting for the return receipt which we did not receive at that point.
>
> So I effectuated a search via the U.S. Postal Service system and the tracking number that was given to us on the original green card which was included in our P[reliminary] O[bjection]'s to P[reliminary] O[bjection]'s. We got confirmation that it was served on an individual via certified mail to that address which we have confirmation of.

N.T. Argument on Preliminary Objections, 6/19/18, at R. 210a. The transcript is contained in the reproduced record, but not in the certified record. However, as there appears to be no dispute as to what was said at the argument, we may rely upon the reproduced record in this regard.

[5] The court held an argument on the preliminary objections, not an evidentiary hearing pursuant to Pa.R.C.P. 1028. Affidavits were accepted *in lieu* of testimony, as well as documents that were hearsay and not authenticated. Against this backdrop, it is somewhat incongruous that the trial court refused to consider counsel's representation in open court that Ms. Davis had telephoned him and conveyed that she was aware of the lawsuit because "he offered no proof thereof." Trial Court Opinion, 9/21/18, at 9.

The record refutes the trial court's assessment of the evidence. Counsel's representations were not the only indication that Ms. Davis had notice of the lawsuit. The November 9, 2016 Sheriff's return bore a notation that Ms. Davis called and advised the Sheriff on that date that she lived out of town. It stated further that Ms. Davis refused to provide a current address. One can reasonably infer from the fact that Ms. Davis initiated contact with the Sheriff's office that she knew that service had been attempted at her former address, that she had notice of the lawsuit, and that she was avoiding service.

For the foregoing reasons, we find that it was not clear and free from doubt that service of process was defective, and hence, dismissal of the action was improper. Ms. Davis offered no evidence to refute Appellant's evidence that counsel served the complaint by certified mail return receipt requested in compliance with Rules 403, 404, and 405. Furthermore, there was evidence in the record that Ms. Davis had notice of the lawsuit. Hence, we vacate the

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When counsel made such representations, he was obligated to tell the truth based upon the attorney's duty of candor toward the tribunal set forth in Pennsylvania Rule of Professional Conduct 3.3. That rule forbids attorneys to knowingly "make a false statement of material fact or law to a tribunal" or "offer evidence knowing it to be false." The comment to the Rule provides, "an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." Explanatory Comment to Pa. Rule of Professional Conduct 3.3.

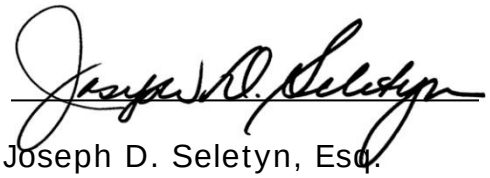
order sustaining the preliminary objections and dismissing the case with prejudice and remand for further proceedings.

Order vacated. Case remanded. Jurisdiction relinquished.

Judge Stabile joins the opinion.

Judge Olson files a dissenting opinion.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/22/2019

2019 PA Super 319

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| VICTOR R. SAWYERS<br><br>Appellant<br><br>v. | : | IN THE SUPERIOR COURT OF PENNSYLVANIA |
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Appeal from the Order Entered July 6, 2018
In the Court of Common Pleas of Dauphin County
Civil Division at No(s): 2016-CV-07689-CV

BEFORE: BOWES, J., OLSON, J., and STABILE, J.

DISSENTING OPINION BY OLSON, J.: FILED OCTOBER 22, 2019

I must respectfully dissent from my learned colleagues. I would reverse the certification of finality under Pennsylvania Rule of Appellate Procedure 341(c) and remand.

As the majority ably explains, on October 12, 2016, Appellant, Victor R. Sawyers, filed a complaint, which named both Novelette Davis (hereinafter "Defendant Davis") and Josita DeJesus (hereinafter "Defendant DeJesus") as defendants. Appellant's Complaint, 10/12/16, at 1-10. Within the complaint, Appellant averred that, on October 20, 2014, he was a passenger in a vehicle operated by Defendant Davis. *Id.* at ¶ 5. He averred that the vehicle "collided head-on with a vehicle operated by Defendant DeJesus, causing [Appellant] injuries and damages." *Id.* Appellant claimed that both Defendant Davis and Defendant DeJesus were negligent and liable to him for causing his injuries.

*See id.* at 1-10. Defendant DeJesus answered the complaint on September 18, 2017. *See* Defendant DeJesus' Answer and New Matter, 9/18/17, at 1-7.

On April 12, 2018, Appellant "mailed a 10-day notice of intention to enter judgment by default to Defendant Davis and [Defendant Davis' insurance company] because Defendant Davis never filed an answer" to the complaint. Appellant's Brief at 9 (some capitalization omitted). In response, Defendant Davis filed preliminary objections to Appellant's complaint and claimed that Appellant never properly served her with the complaint. Defendant Davis' Preliminary Objections, 4/20/18, at ¶¶ 18-36; *see also* Pa.R.C.P. 1028(a)(1). Defendant Davis thus requested that the trial court dismiss Appellant's claims against her with prejudice. Defendant Davis' Preliminary Objections, 4/20/18, at ¶ 36.

The trial court heard argument on the preliminary objections and, on June 19, 2018, the trial court entered an order sustaining Defendant Davis' preliminary objections on the ground of improper service of the complaint; further, since the statute of limitations on Appellant's claims had expired, the trial court ordered Appellant's complaint against Defendant Davis dismissed with prejudice. Trial Court Order, 6/19/18, at 1; *see also* Trial Court Opinion, 9/21/18, at 4.

On June 29, 2018, Appellant filed a motion for reconsideration of the June 19, 2018 order. Appellant's motion requested that the trial court either enter an order overruling Defendant Davis' preliminary objections or "amend its current order, to state that an immediate appeal to the Pennsylvania

Superior Court would facilitate effective resolution of the entire case." Appellant's Motion for Reconsideration, 6/29/18, at 8. With respect to the latter request, Appellant provided no argument or reason as to why the trial court should so amend its order. *See id.*

On July 6, 2018, the trial court entered the following order:

> AND NOW, this 6th day of July 2018, upon consideration of [Appellant's] Motion for Reconsideration of [the] June 19, 2018 order which dismissed [Appellant's] complaint against [Defendant Davis], with prejudice, it is hereby ORDERED that said motion is DENIED.
>
> This court expressly determines that an immediate appeal of this order would facilitate resolution of the entire case.

Trial Court Order, 7/6/18, at 1 (emphasis and some capitalization omitted).

On July 18, 2018, Appellant filed a notice of appeal from the trial court's July 6, 2018 order. Appellant claims on appeal that the trial court erred when it dismissed his complaint against Defendant Davis on the ground of improper service. *See* Appellant's Brief at 4. Within his brief, Appellant does not discuss the propriety of the trial court's certification "that an immediate appeal of this order would facilitate resolution of the entire case."[1] *See id.* at 1-31. Further,

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[1] Within Appellant's statement of jurisdiction, Appellant claims that we have jurisdiction over this appeal "pursuant to 42 Pa.C.S. § 702(b)." Appellant's Brief at 1. Appellant is not correct.

42 Pa.C.S.A. § 702(b), entitled "interlocutory appeals by permission," declares:

> When a court or other government unit, in making an interlocutory order in a matter in which its final order would

within the trial court's opinion to this Court, the trial court does not explain why it certified its order for immediate appeal. *See* Trial Court Opinion, 9/21/18, at 1-11. I would reverse the trial court's certification.

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> be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 Pa.C.S.A. § 702(b).

We have held:

> [the Section 702(b)] certification is a jurisdictional prerequisite to the filing of a petition for permission to appeal pursuant to Chapter Thirteen of the Appellate Rules of Procedure. If the trial court's order from which the appeal is sought to be taken contains the requisite certification and if a petition for permission to appeal is filed pursuant to Chapter Thirteen, only then may we exercise our discretion to permit the appeal. If a petition for permission to appeal is filed without the requisite Section 702(b) statement or if no petition for permission to appeal is filed with the appellate court, the appeal will be quashed, as we are without jurisdiction to exercise our discretion in this regard.

*Commonwealth v. Brister*, 16 A.3d 530, 534-535 (Pa. Super. 2011) (quotations, citations, and some capitalization omitted).

In the case at bar, the trial court's July 6, 2018 order does not contain the requisite Section 702(b) certification and Appellant did not file a "petition for permission to appeal" the order. Therefore, the order is not appealable under Section 702(b).

As we have explained, this Court is obligated to "first ascertain whether the [order appealed from] is properly appealable, because the question of appealability implicates the jurisdiction of this [C]ourt." *Commonwealth v. Borrero*, 692 A.2d 158, 159 (Pa. Super. 1997). "The general rule is that, unless otherwise permitted by statute, only appeals from final orders are subject to appellate review." *Commonwealth v. Sartin*, 708 A.2d 121, 122 (Pa. Super. 1998).

Pennsylvania Rule of Appellate Procedure 341 defines a "final order" as any order that:

> (1) disposes of all claims and of all parties; or
>
> . . .
>
> (3) is entered as a final order pursuant to paragraph (c) of this rule.

Pa.R.A.P. 341(b).

In relevant part, Rule 341(c) declares:

> (c) Determination of finality.--When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim or when multiple parties are involved, the trial court or other government unit may enter a final order as to one or more but fewer than all of the claims and parties only upon an express determination that an immediate appeal would facilitate resolution of the entire case. Such an order becomes appealable when entered. In the absence of such a determination and entry of a final order, any order or other form of decision that adjudicates fewer than all the claims and parties shall not constitute a final order.

Pa.R.A.P. 341(c).

Appellant's claims against Defendant DeJesus are viable and ongoing. Therefore, the trial court's July 6, 2018 order – which reaffirmed the dismissal of Appellant's complaint against Defendant Davis – did not "dispose[] of all claims and of all parties" and is not final under Rule 341(b)(1). Hence, it must be determined whether the order is properly appealable under Rule 341(c).

Rule 341(c) permits a trial court to "enter a final order as to one or more but fewer than all of the claims and parties" by making an "express determination that an immediate appeal would facilitate resolution of the entire case." Pa.R.A.P. 341(c). The note to Rule 341 declares:

> [Rule 341(c)] permits an immediate appeal from an order dismissing less than all claims or parties from a case only upon an express determination that an immediate appeal would facilitate resolution of the entire case. Factors to be considered under paragraph (c) include, but are not limited to:
>
> > (1) whether there is a significant relationship between adjudicated and unadjudicated claims;
> >
> > (2) whether there is a possibility that an appeal would be mooted by further developments;
> >
> > (3) whether there is a possibility that the court or government unit will consider issues a second time; and
> >
> > (4) whether an immediate appeal will enhance prospects of settlement.

Pa.R.A.P. 341 note.

There is a tension between Rule 341(c) and the 1992 amendment to Rule 341. As the note to Rule 341 explains:

> The 1992 amendment [to Rule 341] generally eliminates appeals as of right under Pa.R.A.P. 341 from orders not ending the litigation as to all claims and as to all parties. Formerly, there was case law that orders not ending the litigation as to all claims and all parties are final orders if such orders have the practical consequence of putting a litigant out of court.

*Id.*

Given that Rule 341(c) permits a trial court to certify an otherwise non-appealable, interlocutory order as final and immediately appealable, the use of Rule 341(c) must be cabined, lest it swallow the general rule of finality. Therefore, as we have held:

> A determination that an immediate appeal of a non-final order is appropriate should be made only in the most extraordinary circumstances because such action would frustrate the amendments to the Rule. The revisions to the Rule were designed to eliminate the confusion created by the prior case law and to prevent piecemeal appeals which unnecessarily result in delay.
>
> . . .
>
> The mere fact that some of the parties have been dismissed from a case, or that some of the counts of a multi-count complaint have been dismissed is insufficient reason to classify an order as final. While the comment to Rule 341 suggests areas where certification may be appropriate, courts are cautioned to refuse to classify orders as final except where the failure to do so would result in an injustice which a later appeal [cannot] correct.

*Pullman Power Prods. of Can. Ltd. v. Basic Eng'rs, Inc.*, 713 A.2d 1169, 1172-1173 (Pa. Super. 1998) (quotations and citations omitted) (emphasis added), *quoting Liberty State Bank v. N.E. Bank of Pa.*, 683 A.2d 889, 890

(Pa. Super. 1996) and *McKinney v. Albright*, 632 A.2d 937, 939 (Pa. Super. 1993).

The trial court's July 6, 2018 order declares: "this court expressly determines that an immediate appeal of this order would facilitate resolution of the entire case." Trial Court Order, 7/6/18, at 1. This language tracks the requirements of Rule 341(c); thus, the trial court certified that its July 6, 2018 order is a "final order." Nevertheless, under our precedent, we may look behind a trial court's certification to determine whether the trial court properly certified an otherwise interlocutory order as final – and we may do so *sua sponte*. *Pullman Power Prods.*, 713 A.2d at 1174 (reversing the trial court's Rule 341(c) certification of an order as final); *F.D.P. v. Ferrara*, 804 A.2d 1221, 1227 n.6 (Pa. Super. 2002) (*sua sponte* raising and analyzing the issue of whether the trial court properly certified its order as final under Rule 341(c) and concluding that the trial court did, in fact, properly certify its order as final); *see also Knopick v. Boyle*, 189 A.3d 432, 436 (Pa. Super. 2018) ("[t]he appealability of an order directly implicates the jurisdiction of the court asked to review the order. Accordingly, this Court has the power to inquire at any time, *sua sponte*, whether an order is appealable") (quotations and citations omitted). Our opinion in *Pullman Power Products* guides my inquiry into whether the trial court properly certified its order as final.

In *Pullman Power Products*, Pullman filed a complaint against Stone & Webster Canada, Limited ("S&W") and Basic Engineers, Inc. ("Basic"). Essentially, the complaint alleged that the defendants breached their

contractual duties to Pullman. *See Pullman Power Prods.*, 713 A.2d at 1170-1171.

S&W filed preliminary objections to the complaint and claimed lack of personal jurisdiction. *Id.* at 1171. The trial court sustained S&W's preliminary objections and dismissed Pullman's complaint against it with prejudice. With Pullman's claims against Basic still extant, the trial court certified the order dismissing S&W from the case as final, by providing "it is expressly determined that an immediate appeal of this order would facilitate resolution of the entire case." *Id.* (some capitalization omitted).

Both Pullman and S&W filed appeals to this Court. Pullman claimed that the trial court erred in sustaining S&W's preliminary objections; S&W claimed that the trial court erred in certifying the order as final under Rule 341(c). We agreed with S&W and held that the trial court erred when it certified its order as final. *Id.* at 1174.

At the outset, we looked at the note to Rule 341 and at the above-quoted four, nonexclusive "[f]actors to be considered" for certification under Rule 341(c). We held:

> the trial court should consider at least the four factors mentioned in the Official Note to Rule 341, and [] the trial court should only certify a non-final order for immediate appeal in "the most extraordinary circumstances" and "where the failure to do so would result in an injustice which a later appeal [cannot] correct." Accordingly, we find that the aforementioned factors and requirements should be considered and met before a trial court may certify, pursuant to Pa.R.A.P. 341(c), a non-final order for immediate appeal to this Court.

*Id.* at 1173 (some citations omitted).

The *Pullman Power Products* Court remarked that the trial court in its case "provided no rationale for its order certifying this case for immediate appeal; it did not specifically find extraordinary circumstances and it did not specifically find that a failure to classify its order as final would result in an injustice which a later appeal could not correct." *Id.* This Court then independently analyzed the four factors listed in the note to Rule 341, to determine the propriety of the certification. We held: 1) there was not a "significant relationship between [the] adjudicated [claim against S&W] and [the unadjudicated claims against] Basic;" 2) "[t]he outcome of Pullman's lawsuit against Basic would not preclude [Pullman's] pursuance of its lawsuit against S&W;" 3) although there was "the possibility that a court [would] have to consider the jurisdictional issue again if an immediate appeal were not permitted, . . . the failure to consider the issue [during the current appeal would] not result in an injustice to Pullman that a later appeal [could not] correct; and, 4) "settlement may be encouraged regardless of whether this Court decides the jurisdictional issue [during the current appeal]." *Id.*

Therefore, we held:

> Based upon (a) our aforementioned findings regarding the four factors that the trial court should have considered, pursuant to the Official Note to Pa.R.A.P. 341, in determining whether to certify this case for immediate appeal to this Court; (b) the trial court's failure to demonstrate that extraordinary circumstances justified an immediate appeal in this case; and, (c) the trial court's failure to demonstrate that refusal to classify the . . . order would result in an injustice

> which a later appeal cannot correct, we find that the trial court erred in determining that an immediate appeal would facilitate resolution of the entire case.

*Id.* at 1173-1174.

We thus reversed the trial court's certification order. *Id.* at 1174.

As applied to the case at bar, I initially note that (like the trial court in *Pullman Power Products*) the current trial court did not: analyze the four factors contained in the note to Rule 341(c); demonstrate that extraordinary circumstances justified an immediate appeal in this case; or, demonstrate that refusal to classify its order as final would result in an injustice which a later appeal could not correct. *See* Trial Court Order, 7/6/18, at 1; Trial Court Opinion, 9/21/18, at 1-11. Further, at no point did Appellant ever provide the trial court or this Court with any reason or analysis as to why the trial court should certify its order for immediate appeal or as to why that certification was proper. *See* Appellant's Motion for Reconsideration, 6/29/18, at 1-8; Appellant's Brief at 1-31. Nevertheless, like the *Pullman Power Products* Court, I will independently analyze the propriety of the certification. *See Pullman Power Prods.*, 713 A.2d at 1173-1174. My analysis begins with the four factors listed in the note to Rule 341. Pa.R.A.P. 341 note; *Pullman Power Prods.*, 713 A.2d at 1173.

The first factor is "whether there is a significant relationship between adjudicated and unadjudicated claims." Pa.R.A.P. 341 note. As West's Pennsylvania Practice explains:

> The degree to which adjudicated and unadjudicated claims are related bears directly upon the decision of whether an

> appeal under Rule 341(c) is proper. Undesirable tension is created where the trial court and the appeals court simultaneously consider similar factual or legal issues in the context of the same action. Where the adjudicated and unadjudicated claims are closely related, either factually or legally, certification normally should not be granted.

20 WEST'S PENNSYLVANIA PRACTICE, APPELLATE PRACTICE, § 341:6.

In the case at bar, the adjudicated claim concerns service of process on Defendant Davis. This claim is discrete from the unadjudicated negligence claims. Therefore, as in *Pullman Power Products*, this factor does not disfavor the certification.

As was also true in *Pullman Power Products*, the second factor – "whether there is a possibility that an appeal would be mooted by further developments" – does not disfavor the certification. Indeed, the current appeal will be unaffected by the progression or outcome of Appellant's case against Defendant DeJesus. *See* 20 WEST'S PENNSYLVANIA PRACTICE, APPELLATE PRACTICE, § 341:7 ("[t]o the extent that disposition of pending related claims in the trial court may render moot the issue on appeal, certification should not be granted").

Third, I must consider "whether there is a possibility that the court or government unit will consider issues a second time." Pa.R.A.P. 341 note. According to West's Pennsylvania Practice:

> There is a possibility that resolution of legal issues by the appellate court will aid the trial court in resolving the same legal issue in the same or other cases. For instance, if the appeal involves the interpretation of a statutory provision, review by the appellate court may aid the trial court in ruling upon the same provisions in the future.

20 WEST'S PENNSYLVANIA PRACTICE, APPELLATE PRACTICE, § 341:8.

Appellant's claims on appeal concern the service of process upon a single defendant. These claims have no bearing upon any other issue in controversy and the resolution of the claims will not aid the trial court in ruling upon the same issues in the future. Therefore, this factor disfavors certification.

Finally, I must consider whether "an immediate appeal will enhance [the] prospects of settlement." Pa.R.A.P. 341 note. As to this factor, I note that Appellant has never made any assertion, whatsoever, that an immediate appeal will enhance the prospects of settlement. Indeed, in Appellant's motion for reconsideration, Appellant simply tacked on a request for certification – without any supporting argument or claim as to why certification would be proper; and, on appeal, Appellant has not provided us with any argument as to why certification was appropriate. I further note that, regardless of the status of Appellant's claims against Defendant Davis, Appellant may always settle any claim he has against Defendant DeJesus. Therefore, in the absence of any statement to the contrary by Appellant, this factor disfavors certification.

Thus, in the case at bar, two of the four factors do not disfavor allowing the immediate appeal, none of the factors weigh heavily in favor of allowing the appeal, and two of the four factors disfavor an immediate appeal. The balancing of the factors thus favors reversal of the trial court's certification. Indeed, in *Pullman Power Products*, the four factors weighed more heavily

in favor of allowing the appeal – and the *Pullman Power Products* Court still reversed the certification.

Further, as was true in *Pullman Power Products*, both the trial court and Appellant failed "to demonstrate that extraordinary circumstances justified an immediate appeal in this case" or that "refusal to classify the . . . order would result in an injustice which a later appeal cannot correct." *See Pullman Power Prods.*, 713 A.2d at 1173-1174. At the outset, I recognize that postponing review of Appellant's claim might lead to increased costs, in the form of a new trial, if the claim of improper service is determined to be meritorious. I also recognize that, in appropriate cases, this concern can militate in favor of certification. *See F.D.P.*, 804 A.2d at 1227 n.6 (finding that the certification was proper, in part, because: "if we delay determining whether [a defendant] properly was dismissed, there is a significant risk of the necessity for costly re-litigation, as the case involves complex issues of liability based on the actions of third parties"). Nevertheless, this concern cannot rule the day – or else certification would become the norm, rather than the exception. Moreover, in this case, there has been no showing that "the case involves complex issues of liability" where, if review is postponed, "there [would be] a significant risk of the necessity for costly re-litigation." *See id.* Therefore, this concern does not allow for certification.

Finally, with due respect to the litigants, I observe that this is a conventional civil case that concerns an unexceptional service of process issue. Simply stated, I see no "extraordinary circumstances" that justify an

immediate appeal and I see no possibility that, without an immediate appeal, an injustice would occur that a later appeal could not correct.

I thus conclude that the trial court erred in certifying its order for immediate appeal; accordingly, I conclude that we lack jurisdiction to consider this appeal.[2] Therefore, I would reverse the portion of the trial court's order that certified the order for immediate appeal and remand. I respectfully dissent.

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[2] I note that interlocutory orders are appealable in certain circumstances. Our Supreme Court has explained:

> in addition to an appeal from final orders of the Court of Common Pleas, our rules provide the Superior Court with jurisdiction in the following situations: interlocutory appeals that may be taken as of right, Pa.R.A.P. 311; interlocutory appeals that may be taken by permission, Pa.R.A.P. [312]; appeals that may be taken from a collateral order, Pa.R.A.P. 313; and appeals that may be taken from certain distribution orders by the Orphans' Court Division, Pa.R.A.P. 342.

*Commonwealth v. Garcia*, 43 A.3d 470, 478 n.7 (Pa. 2012) (quotations omitted), *quoting McCutcheon v. Phila. Elec. Co.*, 788 A.2d 345, 349 n.6 (Pa. 2002).

Here, the challenged order is not an appeal from an orphans' court distribution order (*per* Pa.R.A.P. 342). Further, the order is not defined as appealable as of right (*per* Pa.R.A.P. 311), Appellant did not ask for or receive permission to appeal the order (*per* Pa.R.A.P. 312), and Appellant has not provided this Court with any argument as to whether − or how − the order could satisfy the collateral order doctrine (*per* Pa.R.A.P. 313).