IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
In the Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2022-001028

Alison Meyers, ... Petitioner,

v.

Shiram Hospitality, LLC, ...Respondent.

FINAL REPLY BRIEF OF PETITIONER

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Respondent's Final Brief fails to acknowledge or respond to the elephant in the room: Sanjay H. Mishra's affidavit ("Affidavit") lacked substantive facts and was wholly insufficient to be the sole basis upon which the Court of Appeals affirmed the Trial Court's decision.[1] More importantly, Respondent fails to refute in any manner that the Affidavit failed to state that if called to testify as to the veracity of the facts and claims in the affidavit, Sanjay H. Mishra would be able to do so competently and to the best of his knowledge. Therefore, this Court should reverse the Court of Appeals' Opinion No. 2022-UP-014 and find that Petitioner's foreign judgment should be entered in South Carolina and be given full faith and credit.

I. The Court of Appeals misapplies the facts in evidence and applies facts not in evidence.

Respondent contends that the Trial Court's opinion, which used the facts alleged in the Affidavit, was relied upon by the Court of Appeals as its basis for finding "some evidence" to uphold the Trial Court's decision. As previously argued, however, the Trial Court asked the parties to each submit a proposed order. Subsequently, the Trial Court chose to sign Respondent's subjective version which favored itself and lacked accurate facts and findings that the Trial Court should have determined on its own.[2] Notwithstanding the foregoing, the Affidavit is self-serving by its nature and fails to meet the burden to undermine Petitioner's foreign judgment. See Law Firm of Paul L. Erickson, P.A. v. Boykin, 383 S.C. 497, 504, 681 S.E.2d 575, 579 (2009) ("The burden of undermining the decree of a sister state '*rests heavily on the assailant*'...") (Emphasis

[1] Sanjay Mishra's affidavit was not sworn to under penalty of perjury.
[2] The Trial Court's opinion was filed on February 24, 2020, which is the same date as the retirement of the Honorable Larry B. Hyman, Jr.

added.) Accordingly, the Trial Court should not have given any weight to the Affidavit and the statements therein.

a. Petitioner properly raised arguments before the Trial Court and Court of Appeals.

Respondent contends that Petitioner did not raise any concern(s) to the Trial Court, nor did she object to the Affidavit or argue that the Affidavit was somehow defective or lacking. This argument is disingenuous and false because Petitioner unequivocally objected and argued against the Affidavit as memorialized in the transcript from the hearing before the Trial Court.

First, Petitioner argued at the hearing that "process of service was served on Mike Shiram - - no, sorry, Mishra, who was at the hotel when the process server served him. He accepted service and did not refuse and, apparently, *based on an affidavit that has been filed by the defendant*, after accepting it, he did not inform other – the other member of the LLC that the process had been served." (Trans. p. 5, ¶ 25: p. 6, ¶ 7.) (Emphasis added.)

Second, paragraph 9 within the Affidavit states, in pertinent part, that "Mike Mishra was not, and never has been a Member, 'officer, managing or general agent, nor any other agent authorized by appointment of by law to receive service of process . . .' for the Company, as described in Rule 4(d)(3), SCRCP." (Aff. Sanjay, Dec. 2, 2019.) During the hearing, however, the Trial Court asked whether it is Petitioner's allegation that Mike Mishra is in fact a member of the LLC or there is agency. Petitioner's counsel responded with three (3) exhibits in opposition to Sanjay Mishra's affidavit, and stated, in pertinent part, that

> Based on the documents I handed up to you as exhibits, there is an exhibit . . . that he was an agent and possibly a manager for the LLC. If you will look at Exhibit A, this was an article that appeared in the Strand Hospitality Services and it states that Mr. Far (phonetic), who is pictured there with Mr. Mishra, was the owner of the La Quinta North Myrtle Beach hotel . . . And Exhibit B is a Linkedin printout, and in that Mr. Mishra states that he is the managing director of the Shiram, LLC. . . Then, there is a third article, Your

> Honor. It appears it was a reprint from the Sunday newspaper. It was in 2012, and in the article it states that Mishra -- referring to Mike Mishra -- signed an utility easement agreement in December stating that he is a managing member of Shiram . . . (Trans. p. 6, ¶ 10 : p. 7, ¶ 12.)

Third, Respondent argues that Petitioner does not provide any counter-affidavit and Respondent should prevail for that reason alone. Yet the Affidavit itself cannot stand alone in support of Respondent's position. Rather, it was created and submitted on behalf of Respondent with the sole intent to rebut the Affidavit of Substituted Service from the Horry County Sheriff, which was submitted by Petitioner as Exhibit A to the Memorandum in Support of Plaintiff's Notice of Intent to Domesticate a Foreign Judgment. In other words, the purpose of the Affidavit was defensive rather than offensive. Accordingly, Petitioner could not submit a counter-affidavit simply as a rebuttal to the Affidavit. Rather, the proper procedure was to attack Mishra's Affidavit through exhibits, which Petitioner did.

Further, submitting a counter-affidavit would likely be an impossibility because any witness who has first-hand knowledge of the facts in this case would likely be a member or other agent of the Respondent and would not testify against the hand that feeds him/her. Accordingly, the Affidavit can only be interpreted as self-serving and significantly weakened by Petitioner's exhibits, which prevents Respondent from meeting the heavy burden required of it.

Conversely, Respondent does not cite any authority that requires Petitioner to object to a counter-affidavit in lieu of the Court's own review and determination as to whether an affidavit is sufficient to meet the burden required by Boykin. Moreover, an appellate court also has the power to determine that a Rule 59(e) motion is unnecessary because the issue may have already been raised in the trial court and obtained a ruling. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). Here, as stated above, the issue of the Affidavit's veracity was timely raised

at hearing and a ruling was obtained – by Respondent's subjective proposed order that was adopted by the Trial Court.

In addition, Respondent contends that Petitioner did not raise the same concerns to the Court of Appeals. In fact, the argument was raised in Petitioner's Final Brief as well as in her Final Reply Brief before the Court of Appeals. Moreover, Petitioner also argued that Respondent failed to object to the exhibits that were presented to the Trial Court as it relates to concerns raised before the Court of Appeals. Thus, concerns against the Affidavit were properly and timely raised.

Lastly, there is no "ace" up Petitioner's sleeve as suggested by Respondent. Nor was the Verified Complaint hidden in any manner because Respondent cited to the original Verified Complaint in its arguments, too.

II. The Court of Appeals did not properly apply Illinois Law to the facts of this case as it relates to specific jurisdiction.

Notwithstanding all of the case law previously argued by the parties in their briefs before the Trial Court and Court of Appeals, which part of this Petition by way of the Appendix and Record on Appeal, Respondent for the first time sets forth the argument that "a plaintiff may not 'lure' a nonresident defendant into a jurisdiction, and the mere unilateral action of the plaintiff in seeking and obtaining the service of the defendant cannot serve to satisfy the jurisdictional requirement." Allen v. Mo. Baptist Med. Ctr., 2022 Ill. App. (5th) 210263, ¶ 18. Respondent failed to raise this argument before the Trial Court or Court of Appeals. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) ("It is axiomatic that an argument cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Further, the facts in this matter are entirely distinguishable and inapposite to Allen. There, a personal representative and executor of an estate of a patient brought an Illinois action against a

Missouri hospital for medical negligence and wrongful death after the patient was transferred to that facility. On the other hand, the Plaintiff in this case was not seeking and obtaining the service of the Defendant.

If anything can be taken from Allen, it is that "each case where the issue of personal jurisdiction arises, especially in the context of medical services, must be decided upon its own facts." Allen, 2022 Ill. at ¶ 30. Not only does this case not involve medical services, but the facts presented by Petitioner to the Trial Court were clear, unambiguous, and substantially prevented Respondent from meeting the heavy burden required to undermine the personal jurisdiction of the foreign judgment.

CONCLUSION

Based upon the foregoing, Petitioner Alison Meyers respectfully submits that the Court of Appeals overlooked these important legal considerations and misapplied the holdings of the Illinois Supreme Court to the facts presented in this case. Petitioner prays, therefore, that the Supreme Court set the matter for oral argument, reverse the Court of Appeals' Opinion No. 2022-UP-014 affirming the trial court's decision to deny her motion for entry of foreign judgment, and/or reverse the Trial Court's order with a finding that personal jurisdiction was properly exercised by the Illinois court and service was proper.

June 20, 2023

Respectfully submitted,

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