THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2014-CP-22-0280

Ernest Bliey,..... Appellant,

v.

Linda Robinson and Herringtons, LLC,..... Defendants,

Of Whom Herringtons LLC is the..... Respondent.

BRIEF OF APPELLANT

James Almond Merritt, Jr.
William M. Saltzman
Merritt, Webb, Wilson & Caruso, PLLC
Post Office Box 24109
Columbia, South Carolina 29224
(803) 255-0655
Email: jmerritt@merrittwebb.com
Email: wsaltzman@merrittwebb.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING THAT APPELLANT ERNEST BLIEY'S NAMING OF HERRINGTON'S, LLC AS A DEFENDANT DID NOT CONSTITUTE A CLERICAL MISTAKE UNDER RULE 60(a) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE?

2. DID THE TRIAL COURT ERR IN FINDING THAT SUBSTITUTING HERRINGTON'S, LLC WITH THE PROPER DEFENDANTS WOULD IMPROPERLY ALTER THE SCOPE OF THE JUDGMENT ENTERED ON SEPTEMBER 9, 2015?

3. DID THE TRIAL COURT ERR IN FINDING THAT APPELLANT ERNEST BLIEY FAILED TO MEET THE EVIDENTIARY BURDEN REQUIRED BY RULE 60(b) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE TO VACATE THE JUDGMENT ENTERED ON SEPTEMBER 9, 2015?

STATEMENT OF THE CASE

On March 28, 2014, Ernest Bliey (hereinafter "Appellant") filed a Summons and Complaint in Georgetown County Circuit Court naming Herrington's, LLC (hereinafter "Respondent") and Linda Robinson (hereinafter "Ms. Robinson") as Defendants. (R. pp. 19-24). Both Defendants were served, with Respondent being served by personal service on Mr. Dale Herrington on April 22, 2014. (R. p. 25). The Affidavit of Service for Respondent was filed with the Court on May 2, 2014. (Id.) Neither Respondent nor Ms. Robinson responded to the Complaint. (R. pp.1-3). Ms. Robinson was dismissed from the lawsuit on September 15, 2014 after reaching a settlement agreement with Appellant. (Id.) Appellant obtained a default judgment in the amount of $175,000.00 on September 9, 2015. (R. pp. 4-5).

As Appellant's counsel began preparation to collect on the judgment, he became aware for the first time that Respondent was not an actual business entity. On October 15, 2015, Appellant's counsel filed a Motion to Correct Clerical Mistake to substitute the name of the actual Defendant for Respondent on the September 9, 2015 judgment. (R. pp. 35-39). The actual defendant was evidently an unincorporated business or unincorporated business association that was owned by Mr. Dale Herrington (hereinafter "Mr. Herrington"). It appears that this unincorporated business did business under various names including Herrington's, LLC, Herrington's Construction, aka Herrington's Construction Septic Tank and Land Cleaning, aka Herrington's Septic Tank and Land Cleaning, Herrington's, as well as Herrington's, LLC and Herrington's Construction, LLC (hereinafter "the Herrington Trade Names").[1] The actual business represented by these various names was not a business entity (despite its use of the LLC suffix with several of its names), but was an unincorporated business owned and run by

[1] It also appears that Mr. Dale Herrington personally did business under different names including Roger D. Herrington, Roger D. Herrington, Sr., Roger D. Herrington, I, and Dale R. Herrington.

Mr. Herrington under these various names or trade names. In support of this motion, Appellant also filed an Affidavit of David Miller (the attorney who initially filed and served this action) on October 27, 2015 which indicated that he had mistakenly named Herrington's, LLC as a defendant. (R. pp. 31-32). Appellant then filed, as an alternative remedy to Plaintiff's Motion to Correct Clerical Mistake, a Motion to Vacate Relief from Judgment or Order. (R. p. 56).

Judge Benjamin H. Culbertson held a consolidated hearing for both motions on February 25, 2016. At that hearing, Judge Culbertson denied both of Appellant's motions in an Order filed on April 8, 2016. (R. pp. 8-16). Appellant then timely filed a Motion to Alter or Amend Judgment. (R. pp. 76-87). Judge Culbertson denied Appellant's Motion to Alter or Amend Judgment at the hearing of April 28, 2016. (R. p. 133, line 25-p. 134, line 7). Appellant received written notice of the entry of the order denying the Motion to Alter or Amend Judgment on May 13, 2016. (R. pp.17-18). On June 10, 2016, Appellant served the Notice of Appeal on counsel for Respondent, the Herrington Trade Names and Mr. Herrington.

FACTS

On or about December 18, 2011, Appellant was visiting his girlfriend, Ms. Robinson at her home in Georgetown County, South Carolina. (R. pp.20-21). Appellant asserts that, unbeknownst to him, a hole "opened up" in Ms. Robinson's backyard on or about her septic tank which Appellant fell into causing him serious injuries. (Id.). Appellant subsequently retained David J. Miller, Esq. of the law office of Merritt, Webb, Wilson and Caruso, PLLC to pursue negligence and premises liability causes of action against Ms. Robinson and the business that did the work on Ms. Robinson's septic tank as Appellant believed Ms. Robinson paid that business to "complete an inspection and work on Ms. Robinson's septic system...." (R. pp.20-21; R. p. 107, lines 2-8). Mr. Miller named "Herrington's, LLC" as a Defendant in the Summons and Complaint because when Mr. Miller attempted to research the proper name of the business that had performed the work on Ms. Robinson's septic tank he was unable to locate a definitive name. (R. p. 31).

Mr. Miller effected service of the Summons and Complaint on the Respondent by personal service on Mr. Herrington, the actual Defendant as owner of the unincorporated business in question, on April 22, 2014. (R. p. 25; R. p. 107, line 17). The Affidavit of Service was filed with the Court on May 2, 2014. (R. p. 25; R. pp. 57-58). Neither the Respondent nor Mr. Herrington responded to the pleadings, nor did Respondent or Mr. Herrington, despite being served the Complaint naming Herrington's, LLC as the Defendant, provide the court or Appellant with the proper name of the entity or person which should have been sued. (R. p. 107, lines 9-11).

After obtaining a default judgment against Respondent, Appellant became aware that Herrington's, LLC was not an actual business entity. (R. pp. 57-58). The record seems to reveal that Mr. Herrington misleadingly conducted his business under a number of different names or

trade names of which Herrington's, LLC was one. Further, it appears that Herrington's, LLC was not a limited liability company as its name suggests, but simply another name or trade name of Mr. Herrington's business in Horry County, South Carolina. (Id.).

Mr. Herrington's business actually operated as a sole proprietorship (or possibly as a de facto partnership). (Id.). Nevertheless, as noted above, Mr. Herrington conducted business under a number of different names or trade names including: Herrington's Construction, Herrington's Construction Septic Tank and Land Cleaning, Herrington's Septic Tank and Land Cleaning, Herrington's, Herrington's, LLC and Herrington's Construction, LLC. (Id.). Mr. Herrington even filed unrelated lawsuits in Horry County improperly naming his business as Herrington's Construction, LLC as the plaintiff in such claims despite not being registered as an LLC. (*See* Herrington's Constr., LLC v. Blankenship, Case No. 2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015). (Id.). The business represented by various Herrington Trade Names and Mr. Herrington share an address of 2737 Joyner Swamp Rd., Galivants Ferry, South Carolina, 29544. (Id.).

After this lawsuit was filed, but before judgment was entered, a limited liability company named "Herrington's Since 1986, LLC" was formed in January 2015. (Id.). There is reason to believe that Mr. Herrington is a member of "Herrington's Since 1986, LLC" and is the same individual involved in the business in the instant case as of the date of the lawsuit's underlying incident. (R. p. 59).

ARGUMENTS

1. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT ERNEST BLIEY'S NAMING OF HERRINGTON'S, LLC AS A DEFENDANT DID NOT CONSTITUTE A CLERICAL MISTAKE UNDER RULE 60(a) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

A. Rule 60(a).

The issue before the court is whether the Appellant naming "Herrington's, LLC" rather than Mr. Herrington in his Complaint was a correctable clerical mistake as defined by Rule 60(a) of the South Carolina Rules of Civil Procedure (hereinafter "Rule 60(a)"). Under Rule 60(a) "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders." A clerical error "is a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function." Ex Parte J.P. Strom, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000). "While a court may correct mistakes or clerical errors in its own process to make it conform to the record, it cannot change the scope of the judgment." Dion v. Ravenel, Eisenhardt Assoc., 316 S.C. 226, 230, 449 S.E.2d 251, 253-54 (Ct.App.1994).

While a clerical error is ordinarily a mistake in writing or copying, South Carolina law has expanded that definition to include instances such as the one at hand in this case. *See* Ex Parte Strom, 334, S.C. 605, 514 S.E.2d 599, 600 (Ct. App. 1999). For example, in Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E.2d 779 (1990), a case strikingly similar to this one, the plaintiff sued the defendant for conversion under the name "Palmetto Ice Company." The plaintiff then served the summons and complaint on the president of the business under that name. Id. at 238. The defendant did not appear and default judgment was entered against Palmetto Ice Company. Id. However, when the plaintiff in that matter attempted to execute on the judgment, the defendant moved to vacate the judgment on the

ground that Palmetto Ice Company was not a legal entity. Id. In response, the plaintiff moved to amend the default judgment to name P&H Company (the actual legal entity that operated the business under the name Palmetto Ice Company) as the defendant. Id. at 239. The trial court granted the Plaintiff's motion to amend the default judgment and the South Carolina Supreme Court affirmed that decision on appeal. Id.

In supporting its decision, the Court in Tri-County held that "...a default judgment entered against a defendant in the name under which a business is being operated may be amended by changing the name of the defendant to the name of the corporation which operates the business." Id. at 241. The Tri-County court also relied on its earlier decision in Tunstall v. Lerner Shops, Inc., 160 S.C. 557, 159 S.E. 386 (1931) which held that "a mere misnomer of a corporation defendant in words and syllables is immaterial and a judgment in the action will bind it if it is dully served with process or appears and does not plead the misnomer in abatement." Tunstall, 160 S.C. at 563.

B. Appellant Ernest Bliey Naming "Herrington's, LLC" as a Defendant Constitutes a Clerical Mistake Under Rule 60(a) of the South Carolina Rules of Civil Procedure.

The facts in this case are very similar to Tri-County. Here Appellant's counsel attempted to research the names of the entity which performed the work at Ms. Robinson's property but was unable to locate a definitive name used by Mr. Herrington's business. (R. p. 31). Therefore, as in Tri-County, Appellant sued Mr. Herrington's business using the wrong name as the Defendant, but still successfully served the correct party, here Mr. Herrington. *See* Tri-County, 303 S.C. at 238. Mr. Herrington then, as in Tri-County, chose to not appear and plead the misnomer in abatement. (R. p. 107, lines 9-11). In this matter, the Appellant's service on Mr. Herrington should constitute good service on Mr. Herrington as the owner of the business that operated under various trade names (including, evidently, Herrington's, LLC). This is

because Mr. Herrington was operating his company as an unincorporated entity of some nature. It does not matter whether Mr. Herrington was operating the business as sole proprietorship or de facto partnership as of the date of the incident that led to the lawsuit being filed. *See* S.C. Code Ann. § 15-9-330; *See* Rule 4(d)(3), SCRCP.

In South Carolina, once a judgment is "obtained against an unincorporated association...final process may issue to recover satisfaction of such judgment, and any property of the association and the individual property of any copartner or member thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment." S.C. Code Ann. § 15-35-170. Therefore, even if Mr. Herrington's business was actually a partnership rather than a sole proprietorship, service on one of the "owners," such as Mr. Herrington in this case, is sufficient to confer personal jurisdiction over the business and other partners or participants. Id. Any judgment then entered against an unincorporated association or partnership is enforceable against the unincorporated association or partnership and any of the individual partners or participants. Id. Due to this, Appellant should have been allowed to amend the default judgment to replace "Herrington's, LLC" with Mr. Herrington and the Herrington Trade Names.

Respondent may argue that this matter differs from Tri-County because Tri-County involved a misnomer of a "trade name." This argument fails because the rulings in Tri-County and Tunstall, are not reliant on the plaintiff suing an unregistered "trade name." *See* Tri-County, 303 S.C. at 241; Tunstall, 160 S.C. at 563. Neither Tri-County nor Tunstall limited their holdings to "trades names."[2] Rather these cases examined various other factors in deciding whether the plaintiffs' use of an incorrect name in attempting to sue a defendant constitutes a correctable clerical error under Rule 60(a). One of the key factors the Tri-County court relied upon in

[2] It would not avail Respondent even if the holdings were so limited as it appears that the various names Mr. Herrington used for his business were simply various different trade names for his general business.

allowing the plaintiff to modify his judgment under Rule 60(a) was whether the Palmetto Ice Company and P&H Company, Inc. were "one in the same." Tri-County, 303 S.C. at 239.

Applying that factor to this matter, it appears that "Herrington's, LLC," Mr. Herrington and Mr. Herrington's various other business names are "one in the same" business. Respondent was evidently and simply a name or trade name of Mr. Herrington's general business operation. Mr. Herrington appears to have conducted his general business and held his general business out to the public under a plethora of different names such as Herrington's Construction, Herrington's Construction Septic Tank and Land Cleaning, Herrington's Septic Tank and Land Cleaning, Herrington's, Herrington's, LLC and Herrington's Construction, LLC. All of these named "businesses" appear to be merely additional names or trade names of Mr. Herrington's general business.

As noted above, Mr. Herrington filed unrelated lawsuits in Horry County for his business by improperly naming the nonexistent corporate entity Herrington's Construction, LLC as the Plaintiff. (R. pp. 57-58). Therefore, it is apparent that Mr. Herrington operated and held his business out to the public under a number of different names, some of which were patently and falsely represented to be corporate entities when they were not.[3] Appellant's counsel, despite his good faith effort to research the proper name for Mr. Herrington's business, mistakenly named one of those false pseudonyms in its Complaint. (R. pp. 31-32).

Respondent may also argue that Appellant in this case should not have originally sued Mr. Herrington under the name "Herrington's LLC" because he should have discovered that Herrington's, LLC was in fact not an LLC when he was attempting to identify its registered agent for service of process. This argument lacks merit. Unlike Rule 60(b), relief under Rule 60(a) does not require the moving party to show inadvertence or excusable neglect in order

[3] There is no evidence that Mr. Herrington ever incorporated his business until January of 2015 when "*Herrington's Since 1986, LLC*" was organized.

to be entitled to relief. *See* Rule 60(b), SCRCP. The only issue is whether the amendment merely corrects a misnomer or substitutes a new party. Responsibility for the initial error, even if it lies with the Appellant, is irrelevant to this determination. *See* Id. Here, Appellant served the right party, Mr. Herrington, with a lawsuit accurately describing his alleged claims against the party. (R. pp. 20-21; R. p. 25). Therefore, although Appellant used an incorrect name, the actual Defendant was clearly and timely on notice of the claims and the nature of the claims and could have entered an appearance. Therefore, the name on the judgment should be changed from Herrington's, LLC to Mr. Herrington and the Herrington Trade Names pursuant to Rule 60(a) just as in Tri-County and Tunstall. *See* Id.; Tri-County, 303 S.C. at 241; Tunstall 160 S.C. at 563.

Even if Appellant's counsel intentionally named Herrington's, LLC as a party, Herrington's, LLC and Herrington's Construction, LLC can be considered synonymous because Mr. Herrington filed lawsuits for his business under false names and operated under the false name of Herrington's Construction, LLC. Due to the above, the trial court should have held that Herrington's Construction, LLC, Herrington's, LLC and Mr. Herrington are one in the same for purposes of its operation. *See* Tri-County, 303 S.C. at 239. Therefore, Appellant naming "Herrington's, LLC" as a Defendant in his Complaint should have been found to be a clerical mistake which could be corrected by amendment through Rule 60(a) by the trial court.

C. Respondent Had a Duty to Abate Appellant's Mistake in Naming Herrington's, LLC as a Defendant in its Complaint.

In addition, the Tri-County court also held that the defendant had a duty to abate the plaintiff's mistake and, in failing to do so, the plaintiff was allowed to amend their judgment to include the proper defendant. In support of its decision, the South Carolina Supreme Court recited the rule that:

> When a party is served by a **wrong name**, and the writ is served on the **party intended to be served** and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained by default against it in the erroneous name, he is concluded, and

> execution may be issued on the judgment in that name and levied upon the property and effects of the real defendant. Tri-County, 303 S.C. at 240 (quoting Waldrop v. Leonard, 22 S.C. 118 (S.C. 1885) (emphasis added)

Further, the Court in Waldrop cited several courts holding that a defendant who is incorrectly named has a duty to come forward and inform the court of the error and have the service discharged and if he fails to so inform the court there should be some liability on his part for omitting to do so. The Tri-County court indicated that the purpose of the court's ruling is to prevent a defendant from purposely choosing not to correct the misnomer in a complaint, ignore the pleadings, and then "rely on it to attack the validity of the judgment." Id. at 241.

Significantly, the Tri-County court found that the president of P&H "clearly knew that Tri-County intended to sue P&H, but that Tri-County was under a misapprehension as to the identity of Palmetto Ice Company." Id. Similarly in this matter, Mr. Herrington clearly knew, when he was served the Appellant's Complaint naming "Herrington's, LLC" (a name he evidently had used previously) as defendant and describing a personal injury arising from work he knew his business had done, that Appellant intended to sue him and his unincorporated business or association but was under a misapprehension as to the Defendant's actual name. (R. pp. 20-21). As a result, Mr. Herrington and his unincorporated business should not be allowed to profit from their failure to inform or correct Appellant of this clerical error. Tri-County, 303 S.C. at 241. As in Tri-County, amending the judgment by substituting the names of Mr. Herrington and his business's various trade names for the named Defendant Herrington, LLC is proper as Mr. Herrington has not been misled or prejudiced by this lawsuit and in fact he received timely notice of the claim and its substance and all hearings thereafter and could have timely appeared and moved to dismiss it. It appears that Mr. Herrington's plan was to do what the Supreme Court in Tri-County found improper and a basis for correction: "ignore [the pleadings] and rely on it to attack the validity of the judgment." Id.

2. THE TRIAL COURT ERRED IN FINDING THAT SUBSTITUTING HERRINGTON'S, LLC WITH THE PROPER DEFENDANTS WOULD IMPROPERLY ALTER THE SCOPE OF THE JUDGMENT ENTERED ON SEPTEMBER 9, 2015.

As shown above, the Appellant's naming "Herrington's, LLC" in his Complaint by Appellant was a clerical error as defined by Rule 60(a) and the Tri-County decision. The question is, does the correction of this error impermissibly alter the scope of the judgment? While a court has the power to correct mistakes or clerical errors in its own process to make it conform to the record, courts cannot use that power to change the scope of the judgment. Dion, 316 S.C. at 230. In Tri-County, the court found that amending the judgment to name the proper party was proper when it 1) "was not so extensive as to substitute a new defendant, but was merely a correction of a clerical mistake in the name of the corporation[ ]" and 2) that the defendant was not "misled to their prejudice as to the nature of the lawsuit." Tri-County, 303 S.C. at 241. Here, there is no evidence that Mr. Herrington was misled or could have possibly been misled by the Appellant using the wrong name of Mr. Herrington's business in the Complaint. Hence the mistake, in the terms of the Tunstall court, was immaterial. Tunstall, 160 S.C. at 563. The trial court evidently overlooked these factors, however, and ruled that amending the judgment from "Herrington's, LLC" to Mr. Herrington and his business's various trade names would improperly alter the scope of the judgment "because the [Appellant] is attempting to substitute "Herrington's, LLC" by adding multiple businesses and individuals." Order at 6, Apr. 8, 2016.

This ruling is incorrect because "Herrington's, LLC," is simply one of the many pseudonyms or trade names Mr. Herrington used in conducting his business which was actually a sole proprietorship or possibly a partnership. It appears that Mr. Herrington and all of these names or trade names are one and the same business. While Mr. Herrington's business may have

names that are legion, it is really only one non-corporate business owned, whether in whole or as a partner, by Mr. Herrington.

As noted above, one factor showing that "Herrington's, LLC" was a pseudonym held out to the public by Mr. Herrington is the fact that unrelated lawsuits were filed in Horry County improperly identifying the plaintiff in the pleadings as Herrington's Construction, LLC. (R. pp. 57-58). Further, "Herrington's Since 1986, LLC's" Facebook page further revealed that it previously operated under the name "Herrington's, LLC" as recently as October 7, 2012. (R. pp. 96-97; *See also* R. p. 128, lines 5-7). These factors show that the Mr. Herrington's business has a long history of operating under false LLC pseudonyms, including Herrington's, LLC. Despite using these LLC pseudonyms, Mr. Herrington's business, with the multiple names at the time of the incident giving rise to the Complaint, was not an LLC, but rather a sole proprietorship.

It is possible that Mr. Herrington owned the business in question as a *de facto* partnership rather than as a sole proprietor. Even if so, that does not change the outcome here. It is well established that judgments against an unincorporated association or partnership are enforceable against the unincorporated association or partnership and the individual partners or participants. S.C. Code Ann. § 15-35-170. As such, amending the judgment from Herrington's, LLC to substitute Mr. Herrington and his business's various trade names is not substituting a new Defendant, but merely correcting the mistake of naming Herrington's, LLC. This is because all of these entities are the same the entity. *See* Tri-County, 303 S.C. at 239. Therefore, amending the judgment to include the Mr. Herrington would not have altered the scope of the judgment. This is true even if it had added multiple businesses names and individual names in the caption. This is because all of the proposed business names and individuals are identical and representative of one business.

Nor would Mr. Herrington have been prejudiced by substituting Mr. Herrington and the Herrington Trade Names on the judgment instead of Herrington's, LLC because Mr. Herrington and his business had notice of the lawsuit when he was served with the Summons and Complaint. (R. p. 25; R. p. 107, line 17). As explained above, the Tri-County court held an entity should appear and plead the misnomer in abatement instead of "ignor[ing] the pleadings and attack[ing] the validity of the judgment." Tri–County, 303 S.C. at 240. Mr. Herrington clearly knew that Appellant intended to sue him due to Appellant's allegations in his Complaint but that Appellant was under a misapprehension as to the business's actual name. (R. pp. 20-21). As a result, amending the judgment by naming Mr. Herrington and the various Herrington Trade Names is proper as Mr. Herrington has not been misled or prejudiced by this lawsuit.

3. THE TRIAL COURT ERRED IN FINDING THAT APPELLANT ERNEST BLIEY FAILED TO MEET HIS EVIDENTIARY BURDEN REQUIRED BY RULE 60(b) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE TO VACATE THE JUDGMENT ENTERED ON SEPTEMBER 9, 2015.

A. Rule 60(b).

Pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure, "the court may relieve a party or his legal representative from a final judgment order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;...(3) fraud, misrepresentation, or other misconduct of an adverse party;...The motion shall be made within a reasonable time, and for reasons (1) (2), and (3) not more than one year after the judgment order or proceeding was entered or taken." Rule 60(b), SCRCP. "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." Perry v. Heirs at Law of Dadsen, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003). In a motion to vacate a judgment because of a mistake, the party must make a showing that failure to avoid the mistake was justified. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). A judgment may be vacated due to extrinsic fraud under

Rule 60(b)(3), SCRCP. Raby Const.,L.L.P. v. Orr, 358 S.C. 10, 20, 594 S.E.2d 478, 483; Jamison v. Ford Motor Co., 373 S.C. 248, 273, 644 S.E.2d 755, 768 (Ct.App. 2007). "Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." Hilton Head Ctr. of S.C., Inc. v. Public Serv. Commn. of S.C., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Id.

B. Appellant Ernest Bliey Meets the Evidentiary Requirement of Rule 60(b)(1) Necessary to Vacate the Judgment Entered on September 9, 2015 Against Herrington's, LLC.

The issue before the court is whether Appellant should be allowed to have the judgment entered against "Herrington's, LLC" vacated pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure and have the matter returned to the *status quo ante* so that he may move pursuant to Rule 15(c) of the South Carolina Rules of Civil Procedure to have the proper party named before the trial court. Rule 60(b)(1) states that a judgment can be vacated as a result of mistake, inadvertence, surprise or excusable neglect. Rule 60(b)(1), SCRCP. Appellant's original attorney, Mr. Miller erred in naming Herrington's, LLC as a Defendant in his Summons and Complaint. (R. pp. 31-32). While Mr. Miller attempted to research the correct name of the entity he wished to sue on Appellant's behalf, he was unable to locate a definitive name used by the entity which had performed the work in question. In hindsight, Mr. Miller mistakenly chose Herrington's, LLC. (Id.). Only after obtaining a default judgment did it become apparent to Appellant that Herrington's, LLC was the incorrect name of an unincorporated business entity he was trying to sue. (R. pp. 57-58). Therefore, Appellant naming Herrington's, LLC as the Defendant to the lawsuit was a result of a mistake, surprise, inadvertence, or excusable neglect and, as such, it was improper for the trial court to deny Appellant's motion to vacate the

judgment pursuant to Rule 60(b)(1). *See* Rule 60(b)(1), SCRCP.

C. Appellant Ernest Bliey Meets the Evidentiary Requirement of Rule 60(b)(3) Necessary to Vacate the Judgment Entered on September 9, 2015 Against Herrington's, LLC.

In the alternative, Appellant should have been allowed to vacate the judgment against Herrington's, LLC pursuant Rule 60(b)(3) due to the extrinsic fraud, misrepresentation, of Mr. Herrington. Rule 60(b)(3), SCRCP. Mr. Herrington and the Herrington Trade Names had a duty to come forward and alert the court and the Appellant that the defendant had been wrongly named. By failing to fulfill this duty they committed extrinsic fraud by allowing Appellant to obtain a judgment against Herrington's, LLC which Mr. Herrington knew was the wrong name of the business Appellant was trying to sue. *See* Hilton Head, 294 S.C. at 11. Mr. Herrington knew that the Summons and Complaint concerned his business, the Herrington Trade Names, when he was served on April 22, 2014, because the Complaint clearly referenced work he and/or the Herrington Trade Names had performed. (R. pp. 20-21). Rather than filing an Answer or contacting Appellant's attorney about the lawsuit misnaming party with which he was served, Mr. Herrington decided to ignore the lawsuit, purposely failed to Answer it, failed to attend any of the case's hearings (despite having notice of same) and allowed Appellant to obtain a judgment that Mr. Herrington believed would be worthless. (R. p. 25; R. p. 107, line 17).

Mr. Herrington ignored the lawsuit perhaps because he knew it wrongly named his business, meaning that a judgment would not be entered against his name or the name of his business. (R. p. 107, lines 7-17). If so, then just as Mr. Herrington expected, a default judgment was filed on September 9, 2015 against Herrington's, LLC which might be uncollectable. (*See* R. pp. 4-5; R. p. 107, lines 17-18). Mr. Herrington's fraud is extrinsic because it appears his failure to appear prevented Appellant from being able to present his case and obtain the needed information to name the proper parties for the case. *See* Hilton Head, 294 S.C. at 11.

Had Mr. Herrington answered the Complaint or moved to dismiss it, Appellant would have had the opportunity to gather the correct information regarding Mr. Herrington's business's true identity and amend his Complaint to assert the correct name of the Defendant. (R. p. 74). Unfortunately, Mr. Herrington chose not to participate in the litigation. Id.

Furthermore, Mr. Herrington apparently misrepresented the true name of his business to the public, including the Appellant, by using multiple trade names, some of which were inherently deceptive because they implied they were corporate entities. One example of such misrepresentation includes the filing of lawsuits as "Herrington's Construction, LLC" by Mr. Herrington. There was no such LLC in existence, nor has there been. (R. pp. 57-58; *See also* Herrington's Constr., LLC v. Blankenship, Case No. 2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015)). Mr. Herrington also acknowledged his business went by the name "Herrington's," as evidenced by his acceptance of a check issued by Ms. Robinson made payable to that name. (R. p. 34; R. p. 127, lines 22-23). As such, "Herrington's Construction, LLC", "Herrington's, LLC" and Mr. Herrington are, as noted above, one in the same for purposes of Mr. Herrington's business operations. Tri-County, 303 S.C. at 239. This misrepresentation by Mr. Herrington of his business's true name (and sometimes as to its true nature) aided in Appellant naming the incorrect party in the Complaint and failure to correct that mistake.

Moreover, after the instant lawsuit was filed, but before judgment was entered, a limited liability company named "Herrington's Since 1986, LLC" was formed in January 2015. (R. pp. 57-58). This appears to be an actual corporate entity. There is reason to believe that the members of "Herrington's Since 1986, LLC" are the same as the individuals involved in the business in the instant case. (Id.). Mr. Herrington's relative, Mr. Keith Herrington, is listed as

the registered agent of the business and claims to be an owner and operator. (R. pp. 57-61). The creation of "Herrington's Since 1986, LLC" at that time suggests that Mr. Herrington was seeking a way to move and protect business assets in anticipation of Appellant's default judgment. The most interesting aspect of the creation of Herrington's Since 1986, LLC, is its admission that it had operated previously as Herrington's, LLC. (R. pp. 96-97). This admission is especially interesting in light of the fact that there is no evidence that any such corporate business entity known as Herrington's, LLC ever existed. Furthermore, the logo of Herrington's Since 1986, LLC gives the appearance that the entity's name is actually Herrington's, LLC. (R. pp. 92-95).

Finally, the trial court erred in allowing Mr. Herrington's counsel to argue in opposition to Appellant's Motion to Vacate. Since Mr. Herrington had never answered the Complaint and by his claim the judgment did not affect him, he had no standing to argue against its vacation. The court in Narruhn v. Alea London, Ltd., had a somewhat similar issue and that court held that a non-party did not have standing to make a Rule 60 motion, based on the plain language of the rule, which states that the court may review a party or its legal representative from a final judgment or order. Narruhn v. Alea London, Ltd., 404 S.C. 337, 745 S.E.2d 90 (2013). Based on this specific language, The Narruhn court held a non-party could not seek relief under Rule 60. Id. It is axiomatic the inverse is also true: a non-party cannot seek to prevent a party from obtaining relief under Rule 60. If the court found that Mr. Herrington was not present before the court for purposes of not reforming or altering the judgment, the court – for consistency sake – should have found he was not present before the court for purposes of opposing the motion to vacate judgment. As a non-party Mr. Herrington had no standing to object to or oppose Appellant's motion. As such, Herrington should not have been allowed to

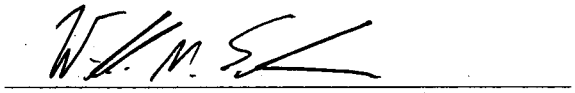
contest the Motion to Vacate at the February 25, 2016 hearing as the Motion to Vacate did not concern those parties at this time.

CONCLUSION

In conclusion, the Court of Appeals should reverse the trial court's decision to deny Appellant's Motion to Correct Clerical Mistake or, in the alternative, the trial court's decision to deny Appellant's Motion to Vacate Relief from Judgment or Order.

MERRITT, WEBB, WILSON & CARUSO, PLLC

December 19, 2016



James Almond Merritt, Jr.
William M. Saltzman
Merritt, Webb, Wilson & Caruso, PLLC
Post Office Box 24109
Columbia, South Carolina 29224
(803) 255-0655
Email: jmerritt@merrittwebb.com
Email: wsaltzman@merrittwebb.com
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2014-CP-22-0280

Ernest Bliey,

Appellant,

v.

Linda Robinson and
Herrington's, LLC,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

December 19, 2016

James Almond Merritt, Jr.
William M. Saltzman
Merritt, Webb, Wilson & Caruso, PLLC
Post Office Box 24109
Columbia, South Carolina 29224
(803) 255-0655
Email: jmerritt@merrittwebb.com
Email: wsaltzman@merrittwebb.com
Attorneys for Appellant