THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable Teasa K. Weaver
Master-In-Equity

Case No. 2020-CP-46-3434

John Patton and Tara Patton (*Plaintiffs*),

Appellants,

v.

Palmetto Contracting Services of York County, LLC and Lester Van Epps (*Defendants*),

Respondents.

INITIAL BRIEF OF APPELLANTS

Appellate Case No.: 2023-000740

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STATEMENT OF ISSUES ON APPEAL

I. Does Respondent's voluntary appearance in Court equal personal service;

II. Was it an error for the Court to fail to consider Appellants' exhibits that were submitted in the courtroom;

III. Does Rule 6 of the South Carolina Rules of Civil Procedure require advance notice for a transcript of public court records to be introduced into the record;

IV. Is Appellant entitled to amend a misnomer in the pleadings after Defendant fails to raise the issue in Court and raises the issue after judgment is awarded.

STATEMENT OF THE CASE

This case involves a Defendant contractor (Defendant) who was entered into default and found liable for breach of contract, negligence, fraudulent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act. The Summons & Complaint was filed on November 16, 2020. As stated in Plaintiffs' Certificate of Service, personal service was issued on "Lester Van Epps" at 4663 Catawba River Road, Catawba, South Carolina on November 17, 2020 (R. p. 190). Defendant does not contest that this was his residential address (R. p. 253; p. 266; p. 215). On April 29, 2021, the Defendant was entered into default. The Order of Default was again personally served on "Lester Van Epps" at 4663 Catawba River Road on May 5, 2021 (R. p. 195). On June 16, 2021, a Notice of Hearing for Plaintiffs' Motion for Damages was mailed to "Lester Van Epps" at 4663 Catawba River Road (R. p. 200). This hearing took place in the Court of Common Pleas on July 28, 2021, and, as evidenced by the transcript of record, the Defendant appeared in Court and identified himself as "Lester Van Epps. I'm the owner" (R. p. 24, line 10). The Defendant then proceeded to argue that he believed venue was improper but did not raise any arguments regarding service or insufficient notice (R. pp. 24-28). The Court decided that the hearing would be continued so it can be scheduled in the Master in Equity Court and advised that the Defendant would have at least several weeks to obtain an attorney. (R. pp. 27-29). The Defendant admits that the Defendant is the party that appeared in court on July 28, 2021 (R. p.47, lines 16-19). On August 19 2021, Plaintiffs mailed a Notice of Hearing to "Lester Van Epps" at 4663 Catawba River Road (R. p. 202). That hearing took place on August 31, 2021. Defendant did not attend, and a Default Judgment was entered against him on October 5, 2021. An Order of Default Judgment was entered against the Defendant in York County on October 5,

2021. The Order of Default Judgment was personally served on "Lester Van Epps" at 4663 Catawba River Road on October 8, 2021 (R. p. 203).

As supported in the record by the Plaintiffs' July 29, 2022 pre-hearing brief and accompanying exhibits, as well as public record, the Defendant then promptly proceeded to sell his residence at 4663 Catawba River Road (Chester County) on October 22, 2021, before the 30 day appeal window had expired (R. p. 253). On November 1, 2021, Defendant purchased residential real estate located at 171 Tarheel Drive, Washington, North Carolina(R. p. 259). On December 17, 2021, Defendant transferred the North Carolina property to "Pamlico Holdings, LLC," selling the property for "ten dollars and other valuable consideration" (R. p. 255). Pamlico Holdings, LLC is an LLC that was formed in the State of Montana by "L. Van Epps" on December 13, 2021 (R. p. 243). The Defendant actively participated in proceedings brought by the Plaintiffs in Beaufort County, North Carolina, without any dispute as to service of process at the above-listed address, to domesticate the judgment and for claims of fraudulent transfer against the Defendant (R. p. 247).

On May 5, 2022, over seven months after the Default Judgment was issued in York County, and over 18 months after the Defendant was served with the initial Summons & Complaint, the Defendant again appeared in York County after retaining counsel and filed a Motion to Set Aside Judgment, Arguing he was not properly served with the Summons & Complaint (R. pp. 206-207). In essence, the Defendant's argument was that there is no proof of service on the individual Defendant because the pleadings and Certificates of Service name "Lester Van Epps" while his full name is "Lester Van Epps III" (R. pp. 206-207). This individual, who had continuously appeared as the Defendant in this case, accepted multiple documents personally served to his address as "Lester Van Epps," appeared on the record as the Defendant

"Lester Van Epps," and actively litigated against the North Carolina proceedings to domesticate the South Carolina judgment against "Lester Van Epps," was now suggesting, after over a year of litigation, that he was not notified of being the Defendant named in the original lawsuit. In other words, the Defendant was using the simple *oversight* and *omission* of the suffix in his name to fabricate doubt over whether he was actually the individual who was served at his residence.

A hearing was held on June 30, 2022. At the hearing, the Court considered, among other evidence, the following exhibits:

1. Affidavit of Personal Service for the Summons & Complaint on "Lester Van Epps" at 4663 Catawba River Road, Catawba, South Carolina 29704 on November 17, 2020;
2. Affidavit of Personal Service for the Order of Entry of Default on "Lester Van Epps" at 4663 Catawba River Road, Catawba, South Carolina 29704 on May 5, 2021;
3. Notice of Hearing mailed on June 16, 2021 to "Lester Van Epps" at 4663 Catawba River Road, Catawba, South Carolina 29704;
4. Notice of Hearing mailed on August 19, 2021 to "Lester Van Epps" at 4663 Catawba River Road, Catawba, South Carolina 29704;
5. Affidavit of Personal Service for the Order of Default Judgment on "Lester Van Epps" at 4663 Catawba River Road, Catawba, South Carolina 29704 on October 8, 2021;
6. The project's Building Permit Application reading "Gen. Contractor: Palmetto Contracting Services: 4663 Catawba River Rd 29704."
7. Deeds (Chester County, SC Deed Book: Vol. 1360, p. 132[1] and Beaufort NC Deed Book Vol. 2021008052, p. 2090-133).

[1] Hard copies provided at hearing.

8. A Transcript of Hearing for the hearing that took place on July 28, 2021, where the Defendant appeared and identified himself as "Lester Van Epps. I'm the owner." (R. pp. 225-246).

Based on this evidence, after taking the matter under advisement, the Court denied the Motion to Set Aside Judgment, concluding that "throughout this action, Plaintiffs served notices upon USCA and Epps" (R. p. 9). The Court supported its conclusion stating:

> "A copy of the motion was mailed to Epps. The Clerk of Court scheduled the motion before the Circuit Court, which was held on July 28, 2021. Notice of the hearing was mailed to Epps. Epps appeared at the hearing, pro se, and identified himself to the Court as "Lester Van Epps. I'm the owner" (R. p. 9). The Court further reasoned "Epps asserts that the judgment is void against him due to a misnomer, as his name is "Lester Van Epps, III". A court will not set aside a default judgment in a case where the defendant is sued by a wrong name, and fails to plead in abatement. *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 399 S.E.2d 779 (1990); *Waldrop v. Leonard,* 22 S.C. 118 (1885). Epps, who was properly served with the pleadings, did not raise this issue in a responsive pleading. He also appeared at a hearing before the Circuit Court and identified himself as "Lester Van Epps" (R. p. 10).

After the Court denied the Defendants' Motion to Set Aside Judgment, the Defendant then filed a Motion to Alter or Amend, arguing that the transcript should not have been considered because "under Rule 6 they had to provide that several days before the hearing" (R. p. 33, lines 6-7). (Plaintiffs submitted the transcript by email along with its brief and other exhibits to the Court and the attorney the day before the hearing) (R. p. 300). The Defendant contended

that it was an error that the Court considered the submission of to the transcript in its Order (R. p. 33, lines 2-4). At the hearing, the Court responded to this argument stating:

> "I do think it's important what transpired at that appearance before the Circuit Court whether it's considered an appearance just that he showed up. It's important to me regarding – to set aside the judgment because what did Mr. Van Epps have notice of? I don't think there was any objection or at least no denial from Mr. Van Epps that he did not appear on that date before the circuit court" (R. p. 47, lines 7-15).

The Defendant proceeded to admit that it was in fact the individual who appeared at the hearing, stating:

> "What he did -- If the court reads the transcript, what he did was say I got notice or I'm here as the owner. The court cut him off. He said I want time to hire an attorney" (R. p. 47, lines 15-19).

To this, the Court responded:

> "Here's the importance of that. His notice for that hearing was sent by the clerk of court to the same address that a Lester Van Epps was personally served with the pleadings. That, to me, is very important. If Mr. Epps appeared at that hearing before the circuit court for notice to the same address that the pleadings" (R. p. 48, lines 3-9).

The Court elaborated:

"In this case, according to the record, which is for the motion to set aside, all I had before me was the record. The only thing in addition was the transcript of the hearing that did not proceed before the circuit court. Whether or not he's Lester Van Epps, III, or goes by Lester Epps, Lester Van Epps was served, and there's nothing before me to show -- I know there's arguments that maybe his dad was served, maybe this was served. **There's nothing before me to say other than your client was served.** There is an affidavit before me, a Lester Van Epps was served at that address. It is important. If I said at the prior hearing that I wouldn't couldn't consider the transcript, then it's within my discretion to go back on that ruling because I do think it's important to note what your client, Mr. Epps, III, that he appeared at the hearing, expressed himself as Lester Van Epps before a circuit court, regardless if the hearing went through or not, which proves notice upon him at that time. If he's the registered agent, then the business had notice at that point. I think all that is important. That's what's before the court. I don't have anything else before me that somebody else was served or that he's not Lester Van Epps or hasn't represented himself to be Lester Van Epps. If someone else was served, then maybe that's where the North Carolina judge for the supplemental proceedings are. What I have before me is I have an affidavit of service upon a Lester Van Epps at an address in which the clerk of court then sent a notice of hearing to that Lester Van Epps at that address, and the person that appeared at that hearing was your client" (R. pp. 52, lines 11-25 – 53, lines 1-19).

Notably, in response to the Court's contention that the Defendant had not presented any evidence that his client was not the individual served at the property, the Defendant falsely asserted:

> "I presented the information to the court in the form of an affidavit. There was nothing timely provided opposing it" (R. p. 46, lines 1-4).

The Court replied:

> "There was no affidavit from Mr. Epps that he was not served with the pleadings" (R. p. 48, lines 11-12).

In addition, the Defendant admitted:

> "It's clear that Mr. Van Epps, III, that's public record, is the owner of the company..." (R. p. 35, lines 21-22);
>
> "Clearly, I represent Mr. Epps, III..." (R. p. 37, line 21); and
>
> "He was aware that there was a hearing that day" (R. p. 50, lines 7-8).

The Court then took the matter under advisement. Later, it issued a Form 4 Order vacating its Order Denying Defendant's Motion to Set Aside Judgment, stating:

> "As part of the basis for denying Defendants' motion to set aside the judgment, the Court relied on a transcript of a hearing before a Circuit judge. The transcript was offered by Plaintiffs. Defendants received a copy of this transcript one day prior to the hearing. Defendants assert that they were not provided sufficient notice to respond. I agree (R. p. 13)."

The Order further stated:

"Defendant's motion to set aside judgment shall be scheduled for a re-hearing. Any exhibit that is a part of the record does not need to be re-filed. The parties may present other exhibits or witnesses" (*Id.*).

Although Plaintiffs did not agree that Rule 6 requires any multi-day notice to introduce a public transcript at a hearing, they understood the Court's position to be, based on this Order, that the Defendant must have "sufficient notice" of the transcript for the exhibit to be considered. Plaintiffs also understood, based on this Order, that it was not necessary to resubmit their exhibit packet that the Court considered in the previous two hearings and had referenced multiple times on the record. At the January 11, 2022 rehearing (second Motion to Alter or Amend Motion to Vacate Judgment), over six months since the Plaintiffs submitted the transcript/exhibit packet to the Court and counsel before and at the original hearing, the Plaintiffs moved to reintroduce the transcript. The Plaintiffs argued that the Defendant now had over six months' notice of the transcript, Rule 6 did not apply, and there were no legitimate grounds to exclude Plaintiffs' relevant evidence. Plaintiffs also argued that, even in absence of the transcript, the Court consider Defendant's admissions that it appeared at the July 28, 2021 hearing and that it knew about the hearing. The Plaintiffs also argued that the Court consider the other previously submitted evidence, including the deeds and public records connecting Lester Van Epps III to the property, the building application permit confirming that the Defendant's address matches the Certificates of Service, the Board of Residential Builders' lapsed license confirming that the Defendant's address matches the Certificates of Service, the drivers' license connecting Lester Van Epps III to the property in the chain of fraudulent transfers, as well as consider the complete lack of evidence that any individual besides the Defendant, who resided at the address that was

served and appeared in Court, was served. Defendant did not submit any additional evidence but reiterated its arguments.

After again taking the matter under advisement, the Court, in blatant contradiction to its previous Orders that were based on the same evidence, determined that there was not enough proof that the Defendant had been served and granted Defendant's Motion to Set Aside Judgment. In its Order, the Court stated:

> "Plaintiffs' counsel references other proof in his pre-trial brief, but the Defendants objected. The pre-trial brief was not accompanied by testimony, affidavit or exhibit, so it can only be considered as argument. Therefore, the only proof of service provided by Plaintiff is Dover's affidavit" (R. p. 18).

This language suggests that not only did the Court decline to consider the transcript (without citing any grounds as to why), but it also failed to consider the entire exhibit packet that was submitted to the Court and opposing counsel both before and at the original June 30, 2022 hearing, along with Plaintiff's pre-trial brief. The packet with the same exhibits that the Court referenced, quoted, and elaborated upon on the record in the previous Order Denying Defendant's Motion to Set Aside Judgment, and the same exhibits that the parties had argued over the course of three separate hearings. The Court directly acknowledged its consideration of the transcript and exhibits in its Order after Plaintiff both emailed them the day before and physically provided them in the original hearing, and the Court explicitly stated in its original Order Denying Defendant's Motion to Set Aside Judgment and the Form 4 Order from the following motion that it had relied on the transcript from this exhibit packet in its original ruling. Further, the Court specifically stated in its Form 4 Order that previously submitted exhibits need not be refiled and had confirmed its receipt of the exhibits on the record multiple times.

In the final Order denying Plaintiffs' Motion to Reconsider, the Court stated:

> "even if the court were to have considered the transcript, the transcript does not provide a basis which would substantiate this court to modify its order filed January 31, 2023. The transcript does not establish that either Defendant was ever served with the pleadings" (R. p. 16).

This blatantly contradicted the conclusion in her original Order, which again, was explicitly based on the submission of the transcript into the record. The Court arbitrarily shifted from ruling in Plaintiffs' favor based on the consideration of the transcript, to ruling that the submission of the transcript to the Court and opposing counsel the day before the hearing was not sufficient notice under Rule 6, to ruling that the transcript and exhibit packet had never been submitted to the record at all. Throughout the entire proceedings up until this Order was issued, there was no indication that the Court had not accepted the submission of the Plaintiffs' exhibits or any communication that the email and hard copy submissions of the exhibits in the courtroom were improper. Finally, even in light of the Court's refusal to consider *any* of Plaintiffs' evidence, the Court also failed to address the reversal of its earlier conclusion, again under the consideration of the same evidence, that "There's nothing before me to say other than your client [Lester Van Epps III] was served" (R. p. 52, lines 20-21). The Plaintiffs submitted substantial evidence that Lester Van Epps III resided at 4663 Catawba River Road. The Defendant's own exhibit established 4663 Catawba River Road was the Defendant's address as well (R. p. 215). And the Defendant submitted absolutely no evidence supporting its supposed "doubt" that there *could* have been another individual residing there. Despite the properly filed Certificates of Service and the overwhelming evidence that the Defendant was the correct individual served at the correct address, the Court has arbitrarily and inconsistently rejected the same evidence that it

had previously considered when it ruled for the Plaintiffs, deferred to the Defendant in the absence of evidence, and enabled the Defendant to continue perpetrating its fraud on the Plaintiffs and the Courts.

STANDARD OF REVIEW

"The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Richardson v. P.V., Inc.,* 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009) (emphasis added). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Stearns Bank N.A. I/. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007). "The burden rests on the appellant to show that an order based on factual conclusions is without evidentiary support, or that the judge was controlled by an error of law." *Berry v. lanuario,* 286 S.C. 522, 526, 335 S.E.2d 250, 252 (Ct. App. 1985).

Rule 60(b) states that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:. . . (4) the judgment is void . . . ." *South Carolina Rules of Civil Procedure*, Rule 60(b). It is well established that the standard for relief under Rule 60(b) is more rigorous than the standard to set aside default under Rule 55(c). *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief." *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) (emphasis added). **"Voluntary appearance by defendant is equivalent to personal service"** Rule 4(d). *SCRCP*.

ARGUMENT

I. The Court's decision to consider Plaintiffs' evidence in the first hearing but not the subsequent hearings was arbitrary and not based on rule of law.

When the Court considered the evidence submitted by the Plaintiffs, it ruled for the Plaintiffs (R. p. 9). When it did not consider the evidence, it ruled for the Defendant (R. p. 18). That is the difference between the two Orders. The original Order references the transcript and acknowledges the exhibits submitted by Plaintiffs as a part of the record, while the subsequent Order states "the only proof of Service provided by Plaintiffs is Dover's affidavit" (R. p. 18). In other words: the Court is claiming that no evidence was submitted to the record besides the Certificates. But looking at the record, that is clearly not the case. The record repeatedly acknowledges that exhibits that were physically presented in the Courtroom, which is an appropriate way to offer evidence into the record.[2] In fact, the ground for Defendant's Motion to Alter or Amend the original Order Denying Defendant's Motion to Set Aside Judgment was that the Court's consideration of the transcript in the record violated Rule 6 of the South Carolina Rules of Civil Procedure (R. p. 33, lines 2-15). At the hearing to address this motion, the Court rejects this argument and explicitly states that it properly considered the transcript in its original Order. When the Defendant incorrectly stated that the Court had sustained his objection to the transcript at the original hearing, the Court replied:

> "The last hearing I know that there was some evidence that I was not inclined to hear particularly regarding the North Carolina Supplement Proceedings. There was nothing really that I felt that would be relevant to hear. I did not remember

[2] In addition, the full exhibit packet was emailed to the Court and opposing counsel the day before the hearing.

making that same ruling as to the transcript. If I did, I believe I have the authority to reconsider that before issuing my final order so I do consider it. I do think it's important what transpired at that appearance before the Circuit Court whether it's considered an appearance just that he showed up" (R. pp. 46, line 24 – p. 47, line 10).

This statement establishes two important facts: 1. The Court's position at this time was that the transcript was properly submitted and accepted into the record at the original hearing and 2. The Court acknowledges that other exhibits were submitted as well. The Court then speaks at length about the importance of the evidence in the transcript and why it was, and should be, considered in its ruling (R. pp. 47-53). Then, in blatant contradiction to its position at the hearing, the Court issued a Form 4 Order vacating its original Order, stating:

> "As part of the basis for denying Defendants' motion to set aside the judgment, the Court relied on a transcript of a hearing before a Circuit judge. The transcript was offered by Plaintiffs. Defendants received a copy of this transcript one day prior to the hearing. Defendants assert that they were not provided sufficient notice to respond. I agree" (R. p. 13).

Before getting into the inconsistencies and arbitrariness of this Order, it is important to note that the language in this Order reinforces facts that are very important to this Appeal. The Court acknowledges that the transcript *had* been offered and accepted as part of the record. Even if the Court was ruling that it was an error to consider the transcript, this is an admission that the exhibit was properly submitted into the record at the original hearing. This is important because the transcript was submitted to the Court as part of an exhibit packet that was submitted by the Plaintiffs (R. p. 300; p. 225). In addition to the transcript, these exhibits included deeds, notices,

corporate filings, and other public records connecting the Defendant to the address that was served. And, as the Court acknowledges in the above-quoted language, the Plaintiffs offered the evidence from the North Carolina Supplemental Proceedings, which included additional deeds and LLC records establishing the chain of fraudulent transfers, proving that Lester Van Epps III sold 4663 Catawba River Road after the default judgment, purchased 171 Tarheel Drive in North Carolina, and transferred the title to a Montana corporation (R. pp. 252-259). In addition, the Defendant submitted its own exhibits, including a Building Permit Application listing the Defendant's address as 4663 Catawba River Road and a driver's license listing the Defendant's current address as 171 Tarheel Drive. (R. pp. 215-216).

These exhibits, along with the transcript, provide overwhelming evidence that the Defendant was the individual served at 4663 Catawba River Road, that he understood himself to be the Defendant in the action, that he made a voluntary appearance in court, and that he sold his residence to avoid paying the judgment against him. Even independent of the transcript, this additional evidence is material. Defendant's only real argument is to cast doubt over whether "Lester Van Epps III" was the individual residing at the property that was served. These exhibits unequivocally refute this argument and establish that the Defendant resided at 4663 Catawba River Road at the time of service. And, again, the Court explicitly acknowledged that these exhibits were submitted to the Court at the original hearing and that it did not sustain any objections.

What's particularly egregious about the Court's final ruling is that it not only refuses to consider the transcript as part of the record, but fails to consider **all** exhibits submitted by Plaintiffs at the original hearing. After three hearings arguing over the Plaintiffs' exhibits, the Court concluded that Plaintiffs' evidence "was not accompanied by testimony, affidavit or

exhibit, so it can only be considered as argument. Therefore, the only proof of service provided by Plaintiff is Dover's affidavit" (R. p. 18). At Plaintiffs' motion to reconsider the Order Granting Defendants' Motion to Set Aside Judgment, the Court raised the issue that the exhibits were not e-filed, but again, the Court had explicitly acknowledged the submission of Plaintiffs' exhibits at the original hearing and referenced them throughout the subsequent proceedings. Further, The Court explicitly stated in its Form 4 Order that "any exhibit that is a part of the record does not need to be re-filed," immediately after making a ruling in regard to one of Plaintiffs' exhibits that had been physically offered into the record. Until the judgment was already vacated, the Plaintiffs had no indication that the Court considered the submission of their exhibits in the courtroom to be improper. In fact, that had been the accepted protocol in that courtroom throughout the entire action. The Order for Default Judgment stated:

> "At the hearing, Plaintiffs presented evidence, through the testimony of John Patton and other exhibits, of the damages caused by the Defendants' defective work, and the state of the home and property after it was abandoned by the Defendants. The documentary evidence included photographs, invoices, statements, cancelled checks, and an affidavit of attorney's fees. The exhibits also demonstrated the Defendants' lapsed general contractor's license, which was expired at the time the contract was entered into, as well as representations on the Defendants' website where the Defendants advertise to be licensed contractors" (R. p. 4).

As stated, these exhibits were all offered, physically, in the Courtroom during the damages hearing. They were all accepted and incorporated into the record. They were not e-filed before or afterwards, and the Court never communicated any requirement to do so. And it is

entirely arbitrary for the Court to consider these exhibits when offered in the courtroom, while refusing to consider other exhibits offered in the same manner because they were not e-filed.

II. Defendant had sufficient notice of the Transcript

The Court reversed its position at the hearing of whether to include the transcript on the grounds that "Defendants received a copy of this transcript one day prior to the hearing. Defendants assert that they were not provided sufficient notice to respond. I agree" (R. p. 13). According to the Defendant, the transcript should have been excluded from the record because "under Rule 6 they had to provide that several days before the hearing" (R. p. 33, lines 6-7). No one disputes that the transcript is relevant evidence. If considered, it verifies that the Defendant made a voluntary appearance in court. And, of course, voluntary appearance by defendant is equivalent to personal service Rule 4(d), *SCRCP*. The probative value of this evidence is undeniable. The only stated ground on the record to exclude this evidence then is that it violates a timing requirement under SCRCP Rule 6. In regard to the timing requirements for motion exhibits, the rule states "When a motion is to be supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time" Rule 6(d), *SCRCP*. The Defendant's assertion that Rule 6 requires a transcript to be provided several days in advance of a hearing is not accurate. The rule only requires that an affidavit be submitted two days in advance of a hearing. The transcript is not an affidavit, therefore Rule 6 does not apply. Otherwise, without any grounds besides timing, relevant evidence should only be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. Considering that the exclusion of this transcript was the difference in the Court's amended decision to vacate the Plaintiffs' judgment, it is clear

that the transcript is highly relevant and probative evidence. This is a public record that the Defendant has equal access to obtain, Plaintiffs provided a copy within two days after they obtained it themselves, and any arguments as to the unfairness of its use is far outweighed by the unfairness in its exclusion. Further, even if the Court did determine in the Defendant's initial Rule 60 hearing that the Defendant was prejudiced by not having sufficient notice of the transcript, the Plaintiffs again offered the same exhibit and cited the same language at the rehearing 118 days later. No possible prejudice as to "sufficient notice" existed and no legal grounds were stated as to why the Court would not consider the Plaintiffs' evidence. Further, the Plaintiffs were using the transcript to introduce party opponent admissions that the Defendant appeared in court, the Defendant subsequently and independently admitted it was the party that appeared in Court, and there was no dispute that a voluntary appearance was made by the Defendant. None of this was considered by the Court. The transcript literally is the record and the Court's failure to consider the record was materially prejudicial to the Plaintiffs.

In *Graham v. Full Logistics, Inc.*,[3] a recent South Carolina trial court decision (currently pending on Appeal), tractor-trailer truck owned by the company Full Logistics was wrecked by the driver in Greenville County. The passenger in the truck, Plaintiff Graham, was injured and brought suit in Common Pleas. The Defendant did not respond to the pleadings and a Default Judgment was eventually entered against Full Logistics. Three months later, Trustgard Insurance Company (Trustgard), appeared on behalf of Full Logistics, and filed a Motion to Set Aside Judgment, arguing that Full Logistics was "never properly served under Rule 4." SCRCP. At the hearing, Trustgard argued that the initial pleadings were left on the porch of the registered agent Fuller's address and was picked up by his wife, who is not registered to receive service, and was

[3] 2017-CP-23-00311 (Final Order issued August 9, 2019. Case is currently pending on appeal).

therefore defective service. However, the Plaintiff filed a pre-hearing memorandum **the day before the hearing, incorporating a prior hearing transcript as an exhibit, proving that the registered agent Fuller appeared in Court and identified himself as the registered agent.**[4] Based on the consideration of this transcript, the Court denied Trustgard's motion, reasoning that:

> "the Court finds Fuller testified under oath in Court that he was personally served and made a voluntary appearance, thus warranting the denial of Trustgard's 60(b) Motion."[5]

Importantly, the Court further elaborated that the appearance of the party in Court, without contesting service, satisfied the Rule 4 requirements.

> "Fuller not only acknowledged service in his testimony **but also made a voluntary appearance on January 8, 2019. Rule 4(d), SCRCP ("Voluntary appearance by defendant is equivalent to personal service").**[6]

And although the Defendant in the present case did not directly acknowledge personal service, it did clearly identify itself and established making a personal appearance. And the admissibility of the transcript in *Graham* is not even an issue on Appeal in that case. The *Graham* Court also concluded through this evidence that that:

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[4] *See* Plaintiff's Memorandum in Opposition to Trustgard Insurance Company's Motion to Intervene and Motion to Set Aside Default Judgment. The prior hearing was a motion that was continued by the Court.
[5] Pg. 5, Order Denying Trustgard Insurance Company's Motion to Intervene and Motion to Set Aside Default Judgment. Graham v Full Logistics 2017-CP-23-00311.
[6] *Id.*, pg. 6. Citing Rule 4 SCRCP.

> "In determining whether a default judgment should be set aside for these reasons, courts should consider the promptness with which relief is sought, the reasons for failure to act promptly, the existence of a meritorious defense, and the degree of prejudice to the plaintiff if relief is granted."[7]

In regard to prejudice against the Plaintiff:

> "even if there was a valid basis to vacate the default judgment under Rule 60(b), the prejudice to Graham also outweighs vacating the judgment...Vacating the judgment will start these proceedings anew, which will likely add several years before this matter is brought to a close. The Court has weighed the prejudice to Graham and will not vacate the default judgment in light of Fuller's sworn testimony regarding personal service and turning everything over to his insurance company. Having found Fuller made a voluntary appearance and service was waived, the Court likewise denies Full Logistics' Motion to Set Aside the Default Judgment."[8]

Plaintiffs' point here is to illustrate that the reasoning in the *Graham* decision primarily relied on a transcript exhibit that was submitted the day before the hearing, and was properly considered as evidence in the Court. Here, the Plaintiffs are asking this Court for the same deference and consideration that is the consistent standard in trial courts. The prejudice to the Plaintiffs by excluding this evidence is that the consideration of this evidence has proven to be the difference between the judgment being upheld or vacated. The Defendant, after actively taking measures to avoid this judgment through a series of unlawful transfers, is now making the

[7] *Id.* Citing *Rouvet v. Rouvet,* 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010).
[8] *Id.* P. 9.

rather disingenuous argument that it had no notice of this lawsuit. The transcript proves that is blatantly false. The Defendant was personally served at his correct residential address, appeared in Court in response to this service, and identified himself as the Defendant/owner. The Defendant has been aware that he was named the Defendant this lawsuit since November 16, 2020 and never raised any objections that he is "Lester Van Epps III" until 7 months after he appeared in Court and identified himself as "Lester Van Epps, I'm the owner." The transcript proves this and is an essential piece of evidence to be considered in this case.

III. Plaintiffs established a *prima facie* case of service

Plaintiffs properly filed their Certificates of Service. No evidence on the record contests that Defendant did not reside at 4663 Catawba River Road at the time of service. The Defendant admitted that it made a voluntary appearance in Court. Even if the Court was to reject all of Plaintiffs' exhibits and the public record confirming all of this, the Certificates of Service and the record of the proceedings establish a *prima facie* case that the Defendant was properly served. The Defendant simply did not present clear and convincing evidence to prove that it was not served. Rule 4 of the SCRCP is abundantly clear that proof of service is established by an Affidavit/Certificate of Service. Further, South Carolina has long held:

> "where 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 him in the erronerous 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 Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 399 S.E.2d 779 (S.C. 1990).

North Carolina Courts have also addressed the issue of when a named Defendant's suffix is incorrect on a proof of service:

> The misnomer upon which defendant bases his argument is minor, consisting only of the omission of "Jr." from the title; the remaining portion of the name is correct. Furthermore, plaintiffs' evidence showed that defendant did not always use the "Jr." in his name, noting specifically that when called as a witness for the State in the criminal case arising out of the 6 July 1980 batteries, defendant was identified as Clarence W. Houston. If defendant was properly served, this misnomer would not deprive the trial court of jurisdiction, and would in fact have been corrected by the later amendments of the complaints to change the name to "Clarence W. Houston, Jr."... *Olschesky v. Houston*, 352 S.E.2d 884, 84 N.C.App. 415 (N.C. App. 1987).

The Defendant's only real argument is that the Defendant's name is not correct on the Certificates of Service. Without any evidence that he was not the actual individual served, this is not a valid argument to set aside service. What makes this proof of service even more convincing is that the Defendant *did* appear in Court, failed to raise any issues concerning misnomers with his name, made no claim he was not the correct party served, and even identified himself as Lester Van Epps. In the original Motion to Set Aside Judgment, the Court elaborated that the Affidavits were sufficient to establish proof of service:

> "The affidavit speaks for itself. An affidavit says a Lester Van Epps was served at that address. He later appears at a hearing before the circuit court based upon service of a notice of hearing to that same address. Based upon the record, what I have before me, is service upon Lester Van Epps, who is the registered agent of

> defendant, Palmetto Contracting Services. Exact compliance with the rules is not required. It is all about reasonable notice or notice. I'm just at a - Just what's before me in the record shows that Mr. Epps had notice of this action, was served with the pleadings and delayed in getting counsel to represent him and litigate these matters" (R. pp. 48, line 21 – p. 49, line 9).

Again, with the same evidence, the Court determined there was no evidence on the record to overcome the Affidavits of Service. There is no evidence whatsoever that a Lester Van Epps Jr., IV, V, etc… was the actual party served. And while Plaintiffs' position is that its additional evidence certainly should have been considered to further verify proof of service, the Affidavits should also speak for themselves.

Last, once the Defendant finally disputed this misnomer, 7 months after the judgment, the Plaintiffs did in fact move to amend the pleadings to correct the misnomer. Although the Court did not provide a legal explanation why, it denied this motion. Plaintiffs contend that Plaintiffs should have been permitted to correct the misnomer. According to North Carolina law:

> "Where service of process is made on the party intended to be sued, a misnomer which does not leave the name of the party to be sued in doubt, may be corrected by amendment at any stage of the suit." *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984).

CONCLUSION

In addition to the properly filed Certificates of Service, the Plaintiffs submitted overwhelming evidence that the Defendant was the individual residing at 4663 Catawba River Road. The Court demonstrated that the evidence was material in its decision. The evidence is

heavily cited on the record. There was no legal basis for the Court to reverse its consideration of the evidence. And the Defendant did not meet its burden to prove otherwise, or prove that the Affidavits of Service were insufficient. Nor did the Defendant actually assert that an individual besides the Defendant was served. It simply cast vague doubt on the sufficiency of service based on a misnomer. This is not enough to void a judgment that has stood for seven months while the Defendant has actively avoided it. The Defendant had ample notice of this lawsuit and the Defendant is fully aware that he is the Defendant in this lawsuit. It was an error of law for the Court to reverse this conclusion.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

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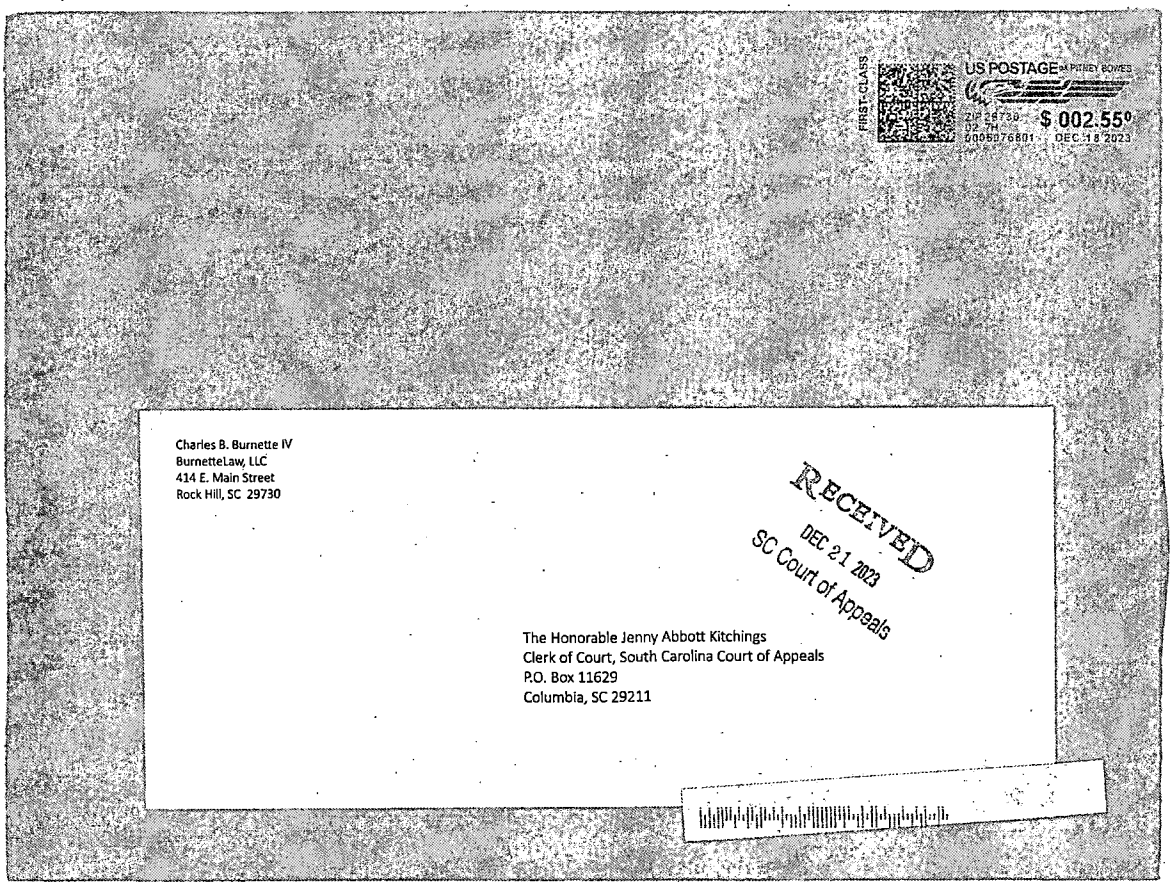
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