THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

2019-CP-46-01258
Appellate Case No. 2024-001042

Rachel Sanders, ... Respondent,

v.

Novant Health, Inc. Terracon Consultants, Inc., Panther Heating and Cooling, Inc., Modern Construction of South Carolina, LLC, Southern Realty, LLC, and, in their individual capacities, George White, MD, Nicholas Tuttle, MD, and Malcolm Marion, MD, ... Defendants,

Of which Modern Construction Services, LLC is . . . . . Appellant.

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COUNTER-STATEMENT OF THE CASE

On April 8, 2019, Respondent Rachel Sanders (Plaintiff) filed suit against several defendants, including Modern Construction of South Carolina, LLC (Modern Construction of SC).(Tr. p. ___). On April 15, 2019, Plaintiff served the summons and complaint pursuant to Rule 4, SCRCP, on Modern of SC by service upon the registered agent, Samuel Stevens, Jr., at 4 Crest Road, Edgefield, South Carolina 29824.(Tr. p. ___). When Plaintiff received no timely answer then on July 8, 2021, Plaintiff sent the summons and complaint, via certified mail, to the registered agent Tracy Snowdy at "5900 Harris Technology Boulevard, Suite D, Charlotte, NC 28269."(Tr. p. ___). Plaintiff received the green card returned signed "Modern Construction" without a date included. (R. p. ___). Defendant Modern Construction did not respond to either mailing to South Carolina or North Carolina, not even to contest whether it was properly named.

On January 11, 2022, Plaintiff moved for entry of default.(Tr. p. ___). Plaintiff mailed a copy of the motion and accompanying affidavit to Mr. Stevens at the Edgefield, South Carolina, address.(Tr. p. ___). The Court (Judge Daniel Hall) entered the default on February 25, 2022. (Order of Feb. 25, 2022).

Mr. Stevens called Plaintiff's counsel and informed counsel that "Modern Construction" at the Charlotte, North Carolina, address was the intended party. On March 30, 2022, Plaintiff filed a Motion to Vacate Default (Tr. p. ___) and on April 1, 2022, filed an amended Motion for Entry of Default.(Tr. p. ___). Plaintiff mailed a copy of the Motion and accompanying affidavit to Ms. Snowdy at the

Charlotte, North Carolina, address.(Tr. p. ___). Despite notices from both Plaintiff and the Court, Ms. Snowdy did not respond. On May 24, 2022, the Court (Judge D. Craig Brown) ordered the entry of default and that a damages hearing be held.(Tr. p. ___).

On February 17, 2023, the Clerk mailed a notice to Ms. Snowdy of a damages hearing to be held on March 8, 2023, but Ms. Snowdy did not respond. (Tr. p. ___). The Court held the damages hearing on March 8, 2023, but no representatives of Defendant appeared. The Court took judicial notice of Defendant's non-appearance.(Tr. p. ___). On March 23, 2023, the Court (Judge William McKinnon) entered an Order of Judgment for Plaintiff for $1,100,000.00.(Tr. p. ___).

A debt collection attorney contacted Defendant at the Charlotte, North Carolina, address with a deadline to respond to the judgment. On March 19, 2024, Defendant appeared and moved, pursuant to Rule 60, SCRCP, to set aside the default judgment.(Tr. p. ___). Plaintiff filed her memorandum in opposition to Defendant's motion on April 23, 2024.(Tr. p. ___). The Circuit Court (Judge Grace Gichrist Knie) stated the issue before the Court was "whether the Plaintiff properly served Defendant Modern Construction Services, LLC, with the Summons and Complaint."(Order of May 15, 2024, p. 3).

On May 15, 2024, the circuit court (Judge Knie) entered an order denying relief.(Order of May 15, 2024). On May 17, 2024, Defendant filed a motion to reconsider the order denying relief.(Tr. p. ___). The Court entered an order on

May 20, 2024, setting a schedule for written submissions on the motion for reconsideration. (Order of May 20, 2024). Both parties filed memoranda regarding the motion on May 29, 2024.(Tr. pp. ___).

On June 14, 2024, the Court (Judge Knie) entered an order denying Defendant's motion for reconsideration. (Order of June 14, 2024). This appeal follows.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial court. *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009); *Roberson v. Southern Finance of SC*, 365 S.C. 6, 615 S.E.2d 112 (2005). The trial court's decision will not be set aside absent a clear showing of an abuse of discretion. *Richardson*; *Roberson.*

An abuse of discretion occurs when the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *Roberson*; *Harbor Island Assoc. v. Preferred Island Properties, Inc.*, 369 S.C. 540, 633 S.E.2d 497 (2006).

FACTS

The Underlying Lawsuit

The underlying lawsuit asserts Plaintiff was employed as a Clinic Administrator with Novant Health, Inc., on December 3, 2018.(Complaint, p. 3, ¶ 9). On her employment application Plaintiff revealed that she suffered from asthma and she listed her asthma medications.(Complaint, p. 4, ¶ 13). Plaintiff began work on December 14, 2018, in Novant's Rock Hill Office. (Complaint, p. 4, ¶¶ 15, 16).

Plaintiff immediately began experiencing medical complications related to her asthma. (Complaint, p. 5, ¶ 18). Despite Plaintiff receiving treatment and requesting accommodations Novant required her to continue to work in the Rock Hill office.(Complaint, pp. 5-6, ¶¶ 19-20). On December 19, 2018, Novant temporarily moved Plaintiff to its office in Charlotte, North Carolina.(Complaint, p. 6, ¶ 21).

Novant then engaged Terracon to perform air testing in the Rock Hill office, and Terracon reported the location needed mold remediation due to poor air quality. (Complaint, p. 6, ¶ 22). Novant contracted with Panther Heating and Cooling and Appellant to do the mold remediation work. (Complaint, p. 6, ¶ 23).

Plaintiff alleged Novant then began to move her to different locations in retaliation and in an attempt to force her to quit. (Complaint, p. 6, ¶ 24). Novant moved Plaintiff back to the Rock Hill office in February 2019, and Plaintiff continued to suffer asthmatic symptoms due to the air quality. (Complaint, p. 6-7,

¶ 25). Plaintiff filed a workers' compensation claim and Novant began its retaliatory actions again trying to force Plaintiff to quit. (Complaint, p. 7, ¶ 26).

Plaintiff alleged Terracon was incompetent in its air testing process. (Complaint, p. 8, ¶ 29). Plaintiff also alleged Modern Construction and Panther negligently performed the mold remediation. (Complaint, p. 8, ¶ 30). Plaintiff asserted Terracon, Modern Construction and Panther failed to properly perform testing, remediation and repairs to the Novant building.(Complaint, p. 9, ¶ 35).

Plaintiff sued Terracon, Panther, and Modern Construction for negligence (Complaint, p. 9. 9-10, ¶¶ 36-43). Plaintiff sued Novant for workers' compensation retaliation. (Complaint, p. 10-11, ¶¶ 44-49). Plaintiff sued Novant and its landlord, Southern Realty, for premises liability. (Complaint, pp. 11-12, ¶¶ 50-57). Plaintiff sued a number of individual defendants under a civil conspiracy claim. (Complaint, pp. 12-14, ¶¶ 58-66). Finally, Plaintiff sued Novant for breach of contract and breach of contract accompanied by a fraudulent act. (Complaint, pp. 14-17, ¶¶ 67-84).

Most of Plaintiff's causes of action against the various defendants have been withdrawn, dismissed or resolved. The only remaining claims relevant to this appeal are the claims against Modern Construction Services, LLC (which Plaintiff had identified in the Complaint as "Modern Construction of South Carolina, LLC").

The Dispute in this Appeal

Appellant essentially contends that because it is misnamed as "Modern Construction of South Carolina, LLC," in the complaint, the circuit court erred as a matter of law in refusing to set aside the default judgment the circuit court entered even though Appellant totally ignored service upon it as well as subsequent communications from the Court. The following facts are therefore relevant to the issue before the Court, that is, sufficient service of process upon Modern Construction Services.

Appellant has never contended it is not the correct entity to be sued in this matter for negligence in the mold remediation services. Appellant instead recognized that it had been misnamed and chose to ignore the lawsuit as well as the communications from the Clerk of Court.

Judge Knie recognized as much and on that basis denied Appellant's motion for relief from the judgment. This Court should affirm.

ARGUMENTS

Appellant contends it was entitled to relief from the judgment for several grounds under Rule 60, SCRCP, and that the Circuit Court abused its discretion in denying relief. This Court should affirm.

Rule 60, SCRCP, provides:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On 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:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.
>
> 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. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. Writs of coram nobis, coram vobis, audita querela, and bills of review and

> bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 60(b), SCRCP.

As noted above, whether to grant relief pursuant to Rule 60(b), SCRCP, is within the Circuit Court's sound discretion. *Raby Construction, LLP v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004). The Circuit Court entertained Appellant's arguments pursuant to Rule 60 but, in the exercise of discretion, denied relief. This Court should affirm.

I. The Trial Court Did Not Abuse its Sound Discretion in Denying Appellant's Motion to Set Aside the Default Judgment in this Matter as the Entry of Default and the Default Judgment Are Not Void

Appellant first contends the circuit court abused its discretion in denying Appellant's motion pursuant to Rule 60(b)(4), SCRCP, because proper service was not made on Appellant so that the court never obtained jurisdiction over Appellant. Appellant contends the judgment was void because "attempted service" was improper, the documents were not served on the authorized agent (Ms. Snowdy), and the caption or signature on the green card do not use Appellant's correct name. The circuit court rejected this argument. This Court should affirm.

A plaintiff need only show compliance with the rules. *Roberson v. Southern Finance of SC*, 365 S.C. 6, 615 S.E.2d 112 (2005). When the civil rules on service are followed, there is a presumption of proper service. *Id.*; *Graham Law Firm v. Makawi*, 396 S.C. 290, 721 S.E.2d 430 (2012). Exacting compliance with the rules is not required to effect service of process. *Richardson v. P.V., Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009).

Rule 4(d)(8), SCRCP, permits service upon a defendant by certified mail, return receipt requested and delivery restricted to the addressee. The Rule provides further that:

> Service pursuant to this paragraph shall not be the basis for the entry of default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return

receipt was signed by an unauthorized person.

Rule 4(d)(8), SCRCP. When the defendant is a corporation or partnership, Rule 4 provides:

> **(d) Summons: Personal Service.** The summons and complaint must be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Voluntary appearance by defendant is equivalent to personal service; and written notice of appearance by a party or his attorney shall be effective upon mailing, or may be served as provided in this rule. Service shall be made as follows:
>
> > **(d)(3) Corporations and Partnerships**. Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Rule 4(d), SCRCP.

Respondent served the pleadings upon the authorized agent, Tracy Snowdy, at the Charlotte, North Carolina address Appellant provided to the North Carolina Secretary of State. Although the green card was signed "Modern Construction" and not Ms. Snowdy's name, Appellant had apparently authorized the acceptance of mail in this fashion. Both Respondent and the Clerk of Court sent additional communications to Ms. Snowdy at the address Appellant provided to the North Carolina Secretary of State's office. Appellant had notice of the action and all proceedings, but chose to ignore the matter while banking on the mistake in identity to prevail. Service upon Appellant in this matter was sufficient

pursuant to South Carolina law. *See, e.g., Roche v. Young Bros., Inc., of Florence,* 318 S.C. 207, 211-212, 456 S.E.2d 897, 900 (1995) ("Rule 4(d)(8) requires that the return receipt be restricted to the addressee and show acceptance by the defendant. The rule simply does not require the specific addressee to sign the return receipt.").[1]

Once the plaintiff has demonstrated compliance with the rules, the defendant can rebut an inference that service was effected only by showing that the return receipt was signed by an unauthorized person. *Graham Law Firm,* citing Rule 4(d)(8), SCRCP. As the Supreme Court explained in *Graham Law Firm*:

> The class of persons authorized to sign on behalf of defendants is narrow: "Actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process." *Moore v. Simpson*, 322 S.C. 518, 473 S.E.2d 64 (Ct. App.1996). Service on an employee is effective when the employee has apparent authority to receive it on behalf of the employer. *See Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009) (holding that hotel receptionist had authority to receive service of process where she was only employee present in office, which represented to third parties that she was in charge).
>
> An agent's high level of actual or apparent responsibility suffices to permit service to be effective as against the principal. *See Richardson, supra*; *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005) (holding that

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[1] The Supreme Court noted "[a]lthough the better practice is to list the corporation and a person authorized to accept service on its behalf as addressees on the return receipt, no such requirement is specified in the rule. See R.Civ.P. 4(d)(8) advisory committees note." *Roche Brothers*, at 211 n. 4, 456 S.E.2d at 900 n. 4. It is noteworthy that since the *Roche Brothers* opinion in 1995 neither the Court nor the General Assembly have amended Rule 4.

> service on clerical employee of registered agent was improper); *Burris Chemical, Inc. v. Daniel Construction Co.*, 251 S.C. 483, 163 S.E.2d 618 (1968) (finding that an acting general superintendent in charge of fifteen men was an agent upon whom service could be made). This Court has also held service on a corporate officer effective as against the corporation. *Roche*, *supra*.

Graham Law Firm, at 295-296, 721 S.E.2d at 433.

Whether an employee may accept service on behalf of a corporation depends on the authority the corporation conferred upon the employee. *Richardson*, at 615, 383 S.E.2d at 615. In order to determine whether an employee is an authorized agent, the court must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent. *Id.*, citing *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App.1996). While actual authority is expressly conferred upon the agent by the principal, apparent authority is when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority. *Id.*, citing *Roberson*, 365 S.C. at 10-11, 615 S.E.2d at 115.

As discussed above, Respondent initially served "Modern Construction of South Carolina" upon the registered agent, Samuel Stevens in Edgefield, South Carolina. When there was no response Respondent sent the Summons and Complaint on July 8, 2021, by certified mail, restricted delivery, to Tracy Snowdy at "5900 Harris Technology Boulevard, Suite D, Charlotte, North Carolina, 28269." Respondent received the green card which was signed "Modern

Construction." (Plaintiff's Memorandum in Opposition of 4/23/2024, Exh. A). At no point did Appellant respond to the Complaint, even to contest whether it was properly identified or served.

On January 11, 2022, Respondent filed a motion for entry of default and sent a copy to Mr. Stevens in Edgefield. Mr. Stevens then contacted Respondent's lawyer and informed counsel that the intended entity was "Modern Construction located at 5900 Harris Technology Boulevard, Suite D, Charlotte, N.C. 28269." Respondent moved to vacate the entry of default and filed an amended motion for default with an affidavit of service upon Appellant at the Charlotte, North Carolina address. Respondent mailed a copy of the amended motion to Ms. Snowdy at that address. Again, there was no response despite notices from Respondent and from the clerk of court.

On February 17, 2023, the Clerk mailed Ms. Snowdy notice of the March 8, 2023, damages hearing, but again Ms. Snowdy did not respond. (Plaintiff's Memorandum in Opposition, Exh. B).

On March 8, 2023, the Circuit Court held a hearing on damages, but no representative for Appellant appeared. The Court took notice of the nonappearance. On March 23, 2023, the Court entered the judgment by default. (Order of Judge McKinnon dated March 23, 2023).

Respondent's debt collection attorney then contacted Appellant at the same address where Ms. Snowdy was served, where notice of the entry of default was sent to her, where notice of the damages hearing was sent to her, and where

notice of the entry of the default judgment was sent to her. (Memorandum of 4/15/24, Exh. D). For the first time Appellant appeared to contest the validity of the judgment. The Circuit Court (Judge Knie) ruled this came too late. This Court should affirm.

Appellant next contends that because the return receipt did not contain a date, then service upon Appellant was not effective. (Appellant's Br. pp. 20-21). As mentioned above, exacting compliance with the rules is not required to effect service of process. *Richardson v. P.V., Inc.*, at 615, 682 S.E.2d at 265. Respondent established it complied with the requirements of Rule 4 by sending the pleadings to Appellant at the address Appellant filed in the public records. The Circuit Court agreed. Again, this Court should affirm.

Appellant contends further that because no summons was issued naming Appellant as "Modern Construction of SC" but Appellant is "Modern Construction Services," then no action was properly commenced against Appellant. (App. Br. Pp. 21-22). The theory is that since Plaintiff did not identify Appellant as "Modern Construction Services" then the action was never commenced against Appellant. This argument elevates form over substance, and the Circuit Court correctly rejected it. This Court should do the same.

Appellant was well aware that it was the intended defendant. Appellant was the entity that did the faulty work at Novant's facility resulting in injuries to Respondent. A quick review of the allegations in the complaint advised Appellant of the facts underlying the claims. Appellant chose to ignore the matter and did so

at its peril.

Next, Appellant contends that because someone signed "Modern Construction" on the receipt instead of Ms. Snowdy's name, due process is violated by upholding the judgment. (App. Br. pp. 22-23). As noted above, all Respondent had to do is establish that she complied with Rule 4, and exacting compliance is not required. *Richardson v. P.V., Inc.*, at 615, 682 S.E.2d at 265.

Respondent established to the satisfaction of Judge Hall, Judge Brown, Judge McKinnon and Judge Knie that Respondent complied with Rule 4, SCRCP, and service upon Appellant was effective. Appellant has failed to demonstrate that the person who signed the green card "Modern Construction" was not expressly or implicitly authorized to accept the documents. Appellant's appearance in the matter once the collection attorney communicated *at the identical address* is sufficient to support the Circuit Court's denial of relief.

Accordingly, this Court should affirm.

II. The Trial Court Expressly Exercised its Discretion

Appellant contends the Circuit Court failed to state the basis upon which it exercised discretion and, therefore, there was an abuse of discretion. (App. Br. pp. 23-26). This issue is not preserved for appellate review. Even so, the Court should reject this argument.

The Circuit Court outlined in detail each of the arguments both sides presented to the Court. (Order of 5/15/24, pp. 3-5). The Circuit Court also stated the applicable law. (Order of 5/15/24, pp. 5-7). The Court concluded:

> After consideration of the record, arguments made, exhibits presented, and the applicable law, the Court finds and concludes as follows: That Defendant Modern Construction Services, LLC's Motion for Relief From Judgment and Order and Motion To Set Aside Entry of Default and Order of Default Judgment filed with the Court on March 19, 2024, should be and is therefore, respectfully denied.

(Order of 5/15/24, p. 7).

Appellant filed a motion for reconsideration raising twenty-one separate points. (Motion filed 5/17/24). The Circuit Court then entered an initial order acknowledging the Motion and providing a briefing schedule. (Order of 5/20/24). Appellant then filed a 23-page memorandum in support of its Motion for Reconsideration which set out many of the same arguments Appellant has made in its brief to this Court. (Memorandum filed 5/29/24). The Circuit Court entered a "Final Order Regarding Motion for Reconsideration" in which the Court stated:

> After careful consideration of the able arguments and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been

> overlooked or disregarded and further finds no error of law or fact not appropriately considered. According, the Defendants' Motion for Reconsideration made pursuant to Rule 59, SCRCP, is respectfully DENIED.

(Order of 6/14/24, p. 2). Both of the Circuit Court's order sufficiently set forth its consideration of all of the arguments and its ultimate decision.

Importantly, Appellant did not assert in its Motion for Reconsideration that the Circuit Court's order did not sufficiently set out its reasoning for denying the motion. *See, e.g., S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (stating that, to be preserved for appellate review, an issue "must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity"); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

Issue preservation rules are rules of fairness to a trial judge, who should be given the first opportunity to address any mistakes in the order. *Atlantic Coast Builders v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues); *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011) (issue preservation rules prevent a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept

that ace card and, via a reversal, give him another opportunity to prove his case). Accordingly, this argument is not preserved for this Court's review.

Even so, the Circuit Court's failure to expressly address each of the arguments is not a sufficient basis for invalidating the order, especially where the Circuit Court outlined all of the arguments presented by each party. *Cf. Borg Warner Acceptance Corp. v. Darby*, 296 S.C. 275, 279, 372 S.E.2d 99, 101-02 (Ct. App. 1988) (holding Rule 52(a)'s requirement that a court in an action tried without a jury "find the facts specially and state separately its conclusions of law thereon" was "merely directory and provide[d] no basis for invalidating a judgment").

The Court should find Appellant failed to properly preserve any challenge to the sufficiency of the Circuit Court's findings and conclusions. Alternatively, the Court should reject this argument as the orders below are sufficient.

III. The Trial Court Did Not Abuse its Discretion in Denying Appellant's Motion to Set Aside the Default Judgment Where the Complaint Sufficiently Identified Appellant, Who Ignored All Service and Communications from the Clerk

Appellant once again contends that because the Complaint identified the defendant as "Modern Construction of South Carolina" and not "Modern Construction Services, LLC, the Circuit Court should have granted Appellant's motion. (App. Br. P. 26). The Court should reject this conclusory argument.

First, as noted below, under South Carolina law, a defendant is required to inform a plaintiff if the defendant has been misidentified. *Cf.* Rule 33(b)(8), SCRCP (a defendant who is improperly identified must give proper identification); Rule 15(c), SCRCP (amendments "changing the party against whom a claim is asserted" relates back to the original filing where the defendant knew or should have known that but for the mistake in identity that action would have been brought against him). *Compare* Local Civil Rule 26.01(F) and (G), D.S.C. (South Carolina federal court's local civil rules mandate that defendants who are improperly identified give proper identification and, if contending another entity is, in fact liable, identify that fact and give the identity of that party).

Notably, Appellant does not argue it was not the entity that negligently did the mold remediation work at the Novant facility that caused Respondent's injuries. Appellant did not reach out to Respondent's counsel or the Clerk of Court and inform either of the mistake in the caption. Instead, Appellant sat back

and failed to respond to any communication until the collection counsel contacted Appellant at the identical address where all other documents were sent.

The Circuit Court, in its discretion, rejected this argument and denied Appellant's motion to set aside the default judgment. This Court should affirm.

IV. The Trial Court Did Not Abuse its Discretion in Denying Appellant's Motion to Set Aside the Default Judgment on the Ground of Fraud, Misrepresentation or Other Misconduct by Respondent

Appellant asserts that because the complaint does not properly identify Appellant as the defendant, and Respondent never moved to amend the pleading to correct the name but made the change in the order of default, "Respondent's counsel either committed extrinsic fraud, made a misrepresentation to the trial court, or engaged in other misconduct." (Appellant's Br. pp. 27-28). Appellant states "Respondent's counsel believed that Appellant and Modern of SC were unrelated entities, the reason that Respondent's counsel stated that they sought to set aside the default judgment against Modern of SC." (Appellant's Br. p. 29). Appellant contends "[t]he modifications made by Respondent's counsel were either fraud, misrepresentation, or misconduct that justify that Appellant be granted relief from the judgment." (Appellant's Br. p. 31). This Court should reject these contentions and affirm the trial court's order.

To begin with, Appellant carefully navigates the various names related to "Modern Construction" throughout its filings below and its brief to this Court. What is missing from any discussion in the filings with the Circuit Court and this

Court, however, is *any* contention that Appellant was not the proper entity to be a defendant in this case, or that Appellant had nothing to do with the mold remediation effort at the Novant facility. The reason is obvious: Appellant *is* the entity who did the work at the Novant facility and, although misnamed, is the proper defendant in this case. Appellant apparently recognized it had been misidentified in the Complaint and instead of alerting Respondent to that fact it chose to sit on its hands in the hope it could avoid this case in South Carolina or use these technical arguments to prevail.

The Rules of Civil Procedure seek to avoid this kind of gamesmanship. For instance, Rule 33(b)(8), SCRCP, mandates that a defendant who is improperly identified give proper identification and state whether counsel will accept service of an amended summons and pleading reflecting the correct information. Rule 15(c), SCRCP, provides amendments "changing the party against whom a claim is asserted" related back to the original filing where the defendant knew or should have known that but for the mistake in identity that action would have been brought against him.

In this case, there was no "changing of the party" since Respondent had sued the correct entity. But even where a plaintiff sues the wrong party, South Carolina's state court rules do not permit that party to sit back in silence in an attempt to escape responsibility as Appellant did in this case. The federal rules are in agreement. *Compare* Local Civil Rule 26.01(F) and (G), D.S.C. (South Carolina federal court's local civil rules mandate that defendants who are

improperly identified give proper identification and, if contending another entity is, in fact liable, identify that fact and give the identity of that party).

The Circuit Court correctly ruled Appellant did not demonstrate fraud, much less extrinsic fraud, by Respondent. *See Chewning v. Ford Motor Co.*, 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003) ("Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud ... because the fraud prevented a party from fully exhibiting and trying his case ....'" (*quoting Hilton Head Ctr. of S.C. v. Pub. Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987))). Although Appellant avers that Respondent's counsel deliberately engaged in fraudulent activity, Appellant provided no evidence of such, and did not establish there was any intent to defraud anyone. *See Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504-05 (Ct. App. 2003) ("Like all other types of fraud, proving [extrinsic fraud] requires showing that the perpetrator acted with the intent to defraud, for there is no such thing as accidental fraud."). Instead, after being served with the pleadings and notices, Appellant chose to sit back because the name on the pleadings was incorrect. There was no fraud, no extrinsic fraud, or any conduct that prevented Appellant from doing what Mr. Stevens in Edgefield did - contacting Plaintiff regarding the documents and notices it received.

Even if Appellant truly believed Respondent was engaging in fraud, rather than ignore the action or the communications from the clerk, Appellant was required to exercise diligence and take action. *See King v. Oxford*, 282 S.C. 307,

312, 318 S.E.2d 125, 128 (Ct. App. 1984) ("It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests."); *id.* ("A party must avail himself of the knowledge or means of knowledge open to him. The court will not protect the person who, with full opportunity to do so, will not protect himself." (citation omitted)). *See, also, Robinson v. Estate of Harris*, 388 S.C. 616, 625-626, 698 S.E.2d 214, 219 (2010) (" If a judgment procured by extrinsic fraud could have been avoided if the challenging party exercised due diligence, a court generally will not grant relief from the judgment."); *Ray v. Ray*, 374 S.C. 79, 84, 647 S.E.2d 237, 239-240 (2007) ("The essential distinction between intrinsic and extrinsic fraud is the ability to discover the fraud."), *citing Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App.2004) ("South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial."); *Mr. G. v. Mrs. G.*, 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App.1995) ("Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments."); *Raby Construction, LLP v. Orr*, 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004) ("a party may not prevail on a Rule 60(b)(3) motion on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct").

The Circuit Court properly denied Appellant's motion to set aside the default judgment on the grounds of "fraud, misrepresentation, or other misconduct by an adverse party." Rule 60(b)(3), SCRCP. (Order of May 15, 2024, pp. 3, 6). This Court should affirm.

Conclusion

For the reasons stated the Court should affirm the circuit court's denial of Appellant's motion to set aside the default judgment.

Respectfully submitted,

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