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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Daniel Coble, Circuit Court Judge

Appellate Case No. 2024-002074
Civil Action No. 2023-CP-40-03052

Portundo M. Kimble, as Personal Representative
of the Estate of Devon Enrique Kimble, Deceased,

Appellant/Respondent,

v.

Jays Bar and Grill, LLC,

Respondent/Appellant,

FINAL APPELLANT'S BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in declining to set aside default where the complaint did not assert any recognized cause of action under South Carolina law?

II. Did the circuit court err in declining to set aside default where good cause existed to set aside the default?

STATEMENT OF THE CASE AND FACTS

In this action, the estate of Devon Kimble ("Plaintiff") has brought claims against Jays Bar and Grill, LLC ("Jays"), alleging that Jays overserved alcohol to Plaintiff, thus allegedly causing Plaintiff's subsequent single-car accident in which Plaintiff lost control of his vehicle and was killed. (Compl. at ¶¶ 7, 9–10 (R. p. 25)). Plaintiff was 22 years old at the time of the accident. (T. of Hearing on R. from Default at 10 (R. p. 67, line 11)). Plaintiff's estate has filed a Complaint against Jays asserting causes of action for negligence, negligence per se, and negligent hiring, training, supervision, and retention. (Compl. ¶¶ 23, 32, 41 (R. pp. 29, 31, 32)).

Plaintiff attempted to serve this Complaint on Jays' registered agent, Jay Kalin, Jr., at his registered address for service of process in Myrtle Beach, South Carolina, but was unsuccessful. (Pl.'s Aff. of Non-Service (R. p. 37)). Plaintiff then began a series of attempts to serve Kalin at his place of business at Jays Bar and Grill in Columbia, South Carolina. (Pl.'s Aff. of Non-Service (R. pp. 35–36); *see also* Def.'s Mem. in Supp. of Mot. to Set Aside Default (R. pp. 146–147)). These attempts were also unsuccessful, which is not surprising given that all but one of these attempts were made before Jays' business hours of 8 p.m. to 1 a.m. or 2 a.m. (Pl.'s Aff. of Non-Service (R. pp. 35–36); *see also* Def.'s Mem. in Supp. of Mot. to Set Aside Default (R. pp. 146–147); Aff. of Kalin (R. p. 198)). Another attempt at service was made at Jay's Vape and Wellness, despite the process server's acknowledgement within his Affidavit of Nonservice that he had been told that Kalin was not usually at that address. *See id.*

Plaintiff then petitioned the Court for service by publication. (Pet. For Service by Pub. (R. p. 38)). In response, the clerk of court entered an order granting Plaintiff service by publication based on "it appearing that the Registered Agent for Defendant Jays Bar and Grill, LLC cannot, after due diligence, be located" and on "it further appearing that a cause of action

exists against said defendant." (Order for Pub. (R. p. 1)). Plaintiff then published the summons in Richland County's *Free Times* newspaper on August 9, 2023, August 16, 2023, and August 23, 2023, but published nothing in Horry County, South Carolina, where the registered agent had his registered service address. (Pl.'s Aff. of Publication (R. p. 57)).

When Jays did not answer or appear, Plaintiff moved for an entry of default (Not. of Mot. and Mot. for Default (R. p. 135)), and the clerk of court entered a default against Jays (Entry of Default (R. p. 133)). Later, Jays filed a motion to set aside the default, followed by a memorandum in support which argued that the default should be set aside because there was good cause to do so and because service by publication should never have been granted in the first place. (*See* Mot. to Set Aside Def. (R. p. 142); Mem. in Supp. of Mot. to Set Aside Default (R. pp. 144–150)). Jays argued, among other things, that contrary to the clerk's order, Plaintiff's complaint did not state a recognized cause of action as required by the publication statute. *Id*.

At the hearing on Jays' motion, Plaintiff argued among other things that the order granting service by publication was valid because the publication statute's second prong, existence of a cause of action against the defendant, was met in this case. (Transcript of Hearing on Relief from Default (R. pp. 58–77)). In support of this position, Plaintiff's counsel incorrectly posited that "[t]here's nothing in Tobias or the cases that follow [stating] there's no common law duty whatsoever by the owner of a bar establishment to a patron who visits that establishment[;] [s]o there is a cause of action." (*Id*. at 15 (R. p. 72, lines 13–16)).

After the hearing, Judge Coble issued an order denying Jays' motion for relief from default. (Transcript of Hearing on Relief from Default (R. p. 58); Order Denying Relief from Entry of Default (R. pp. 3–7)). Jays filed a Motion to Reconsider, in which it provided further factual information, submitting via affidavit that Jays' registered agent Kalin did not learn of the

case until his attorney discovered it in the public index long after the default was entered; that Kalin's registered address in Myrtle Beach was in fact a residence he shares with his parents, rather than being a rental dwelling occupied by tenants as Plaintiff asserted; and that the Columbia *Free Times* was not a proper periodical for service by publication because it is based in and reports on news regarding Richland County, whereas Kalin's registered address for service is his permanent address in Myrtle Beach, which is located in Horry County. (Motion to Alter or Amend (R. pp. 173–174, 175–176); Aff. of Kalin (R. p. 198)).

Significantly, Jays also provided case law to the court demonstrating that *Tobias* and its progeny explicitly hold that there exists no first party dram shop action in South Carolina for adult patrons who are injured as a result of their own intoxication, whether under common law or statutory negligence per se. (Motion to Alter or Amend (R. pp. 174)). For this reason, Jays argued, it was a manifest error for the clerk of court to conclude in its publication order that "there exists a cause of action against said defendant," such that the statutory requirements for service by publication were not met. (R. pp. 174–175). Jays further argued that the factors for setting aside default under Rule 55(c), SCRCP, weigh in Jays' favor. (R. pp. 176–177).

Jays' motion to reconsider, however, was denied by subsequent order of Judge Coble dated September 3, 2024. (Order Denying Def.'s Mot. for Recons. Pursuant to Rule 59(e), SCRCP (R. p. 8)). 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 judge." *Delta Apparel, Inc. v. Farina,* 406 S.C. 257, 265, 750 S.E.2d 615, 619 (Ct. App. 2013) (quoting *Roberson v. S. Fin. of S.C., Inc.,* 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005)). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Roberson,* 365 S.C. at 9 (citing *Mitchell Supply Co., Inc. v. Gaffney,* 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988)). "An abuse of discretion in setting aside a default judgment occurs when the trial court issuing 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,* 365 S.C. at 9 (quoting *In re Estate of Weeks,* 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)).

ARGUMENT

I. Default Based on Service by Publication Was Not Proper Because There Was No Recognized Cause of Action Against the Defendant.

As described above, a default was entered against Jays in this case based upon an order of publication provided to Plaintiff by the clerk of court. "An order for service by publication may be issued pursuant to S.C. Code Ann. § 15-9-710 (Supp.1999) when an affidavit, satisfactory to the issuing officer, is made stating that the defendant, a resident of the state, cannot, after the exercise of due diligence, be found, and that a cause of action exists against him." *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 428–29, 535 S.E.2d 128, 130 (2000) (citing S.C. Code § 15–9–710(3)). Default was improper, however, and service by publication should never have been granted, because the Plaintiff's Complaint—the only basis in the record for concluding that a cause of action existed against the defendant—does not contain any cause of action recognized in South Carolina.

a. Plaintiff has not brought a recognized cause of action against Jays.

In South Carolina, an adult patron cannot maintain an action against a dram shop for injuries sustained as a result of his own intoxication. Yet every purported cause of action in Plaintiff's Complaint attempts to do this very thing, whether Plaintiff characterizes his claims as sounding in common law negligence or in negligence per se based on criminal statutes. Plaintiff's Complaint alleges Plaintiff was killed in a car accident because Plaintiff was overserved alcohol by Jays Bar and Grill. The Complaint is thus a first party dram shop action, and as described below, South Carolina's jurisprudence on this issue has been thoroughly developed and explicitly rejects such a cause of action.

i. *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003)

A helpful summary of the history of first party dram shop claims in South Carolina is provided by the Supreme Court of South Carolina in *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003). While *Lydia* was a negligent entrustment case rather than a dram shop case, the Court engaged in an analysis of dram shop claims because "[t]he public policy considerations which govern our decision as to whether to allow civil suits based on negligent entrustment grow out of South Carolina's regulation of the sale of alcohol." *Id.* at 41. As the Court in *Lydia* very clearly explains:

> At common law in American courts, a tavern owner could not be held civilly liable for injuries caused by an over served, intoxicated patron. With the repeal of dram shop laws in all but 18 states, the majority of states did not impose liability upon tavern owners. In the 1950s, several state supreme courts began to develop a theory of tavern owner civil liability based on violations of state criminal statutes forbidding the serving of alcohol to intoxicated patrons.
>
> By 1987, 41 states had some form of tavern liability. South Carolina's General Assembly did not enact a dram shop law, but in 1985, the South Carolina Court of Appeals held that a bar owner's violation of the criminal statute forbidding service to intoxicated persons could support a civil suit against the bar for injuries caused by the intoxicated patron. *Christiansen v. Campbell*, 285 S.C. 164, 328 S.E.2d 351 (Ct.App.1985). In *Christiansen,* the plaintiff was struck by an automobile as he stepped off the curb in front of a bar where he had consumed a number of beers. The bar owner had continued to serve Christiansen after he became intoxicated. Christiansen sued the automobile driver and the bar owner. The Court of Appeals held that Christiansen had a private right of action against the bar owner based on the violation of a penal statute. The Court of Appeals found that the statute existed both to protect the public and to protect intoxicated persons. *Id.*
>
> **In *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998), this Court expressly overruled *Christiansen* holding that we would not permit an intoxicated adult to bring a first party cause of action against a tavern proprietor predicated on a violation of the dram shop statutes.** This Court stated, "public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." *Id.* at 90, 504 S.E.2d at 320. Our Court noted that its decision did not preclude a third party from bringing a cause of action under the statutes. *Id.* at 90, 504 S.E.2d at 319.
> . . . .

> The essence of this case and the *Tobias* case are the same, for in both cases, the plaintiff, who was voluntarily intoxicated when the accident occurred, is attempting to deflect the responsibility that should be imposed upon himself towards another. Just as this plaintiff cannot bring a first party cause of action to challenge the discretionary conduct of the tavern owner, he cannot bring the same action to challenge the discretionary conduct of his entrustor.

Lydia, 355 S.C. at 41–42 (footnotes omitted) (emphasis added). While the Supreme Court's explanation in *Lydia* thus settles the issue, a direct analysis of the landmark *Tobias* case is appropriate.

ii. *Tobias v. Sports Club, Inc.* 323 S.C. 345, 474 S.E.2d 450 (Ct. App. 1996)

In *Tobias v. Sports Club, Inc.*, 323 S.C. 345, 474 S.E.2d 450 (Ct. App. 1996), *aff'd as modified*, 332 S.C. 90, 504 S.E.2d 318 (1998), the South Carolina Court of Appeals reviewed a case involving claims brought against a hotel by a patron alleging he was injured in a car accident caused by his own intoxication after allegedly being overserved liquor at the hotel's bar. *See id*. at 347. The Court began its analysis by noting that while "[a]t common law, a tavern owner had no liability for serving alcohol to an intoxicated person who later injured himself or others," "[m]any jurisdictions, departing from this common law view," "have enacted 'dram shop acts'…. [which] impose civil liability on tavern owners under various circumstances." *Id*. at 348. "In states where dram shop legislation has not been enacted," the Court explained, "some courts have imposed liability on vendors of alcoholic beverages using principles of negligence, often basing a private cause of action on the violation of beverage control statutes." *Id.* at 349. Under the Court of Appeals' prior *Christiansen* decision, "South Carolina is among those jurisdictions that have recognized a civil cause of action based upon the violation of a penal statute." *Id*. at 350.

The specific question before the Court of Appeals in *Tobias* was whether to allow a defendant in a dram shop action to assert the defenses of contributory negligence and assumption of the risk. *Id*. at 346. In evaluating this issue, the Court reviewed the public policy considerations at play because "[s]ince this cause of action was judicially created in South Carolina, we have no statutory guidance on the class of persons who may recover or on the availability of defenses." *Id*. at 351. Because this was a *first party* dram shop action brought under *Christiansen*, the Court began its public policy analysis by noting that "[i]n many states where such a cause of action is statutorily authorized, the dram shop act or cases interpreting it have specifically precluded the intoxicated person from that class of plaintiffs who may bring suit," and that "[i]n addition, many courts in jurisdictions with penal statutes, including most of those relied upon by the Court in *Christiansen*, have precluded first party recovery." *Id.* (footnotes omitted).

Describing other jurisdictions allowing dram shop defendants to raise the defenses of contributory or comparative negligence and assumption of the risk, the Court noted that "[t]hese courts have held that voluntary intoxication is a self-indulgent act and a person who voluntarily consumes alcohol to the point of intoxication is at the very least partially responsible for his injuries." *Id.* at 354 (citation omitted). Addressing concerns by its concurrence that permitting a dram shop such defenses would abrogate the legislative purpose of deterring drunk driving and punishing tavern owners who serve obviously intoxicated persons, the Court responded that "[t]he tavern owner is still subject to fines and license revocation for his actions under the statute regardless of whether the inebriant assumed the risk of becoming intoxicated," and that "[t]hus, the legislative purpose of deterring drunk driving and punishing tavern owners who serve

obviously intoxicated persons is served without absolving the inebriant of responsibility for his actions." *Id*. at 355.

Continuing this reasoning, the Court of Appeals found that holding voluntarily-intoxicated adult patrons responsible for their actions would actually help deter drunk driving, quoting approvingly from a New Jersey Supreme Court case as follows:

> In reassessing the principles that should govern liability in dram-shop litigation, we are strongly influenced not only by the principles of comparative negligence but also by the public interest in deterring those who would create risk to others by voluntarily drinking to the point of intoxication. Our statutory and case law reflect the compelling public policy that those who voluntarily become intoxicated must be held responsible for the consequences of their behavior.

Id. at 355 (citation omitted). On the basis of all these public policy considerations, and mindful that "the majority of states that have considered this issue limit the inebriated patron's ability to sue the tavern owner for the consequences of the patron's voluntary intoxication," the Court of Appeals held that both contributory negligence and assumption of the risk were properly submitted to the jury in that case. *Id*. at 356.

So holding, the South Carolina Court of Appeals concluded its analysis by stating that "a rule which allows an intoxicated individual to hold a tavern owner liable without regard to his own actions in continuing to consume alcohol promotes irresponsibility and rewards drunk driving," and that "[g]iven a choice between a rule that fosters individual responsibility and one that forsakes personal accountability, we opt for personal agency over dependency and embrace individual autonomy over paternalism." *Id*. at 356 (citation and quotation omitted).

iii. *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 504 S.E.2d 318 (1998)

The plaintiff in *Tobias* appealed the Court of Appeals' decision to the Supreme Court of South Carolina, which granted certiorari "to consider the Court of Appeals' decision holding that the defenses of contributory negligence and assumption of the risk were available in a negligence

suit brought by the intoxicated adult patron against the tavern owner who served him." *Tobias v. Sports Club, Inc.*, 332 S.C. 90, 91, 504 S.E.2d 318, 319 (1998). Reviewing the analysis of the Court of Appeals, the Supreme Court agreed with its opinion and went a step farther, holding that "[w]e now join the majority of jurisdictions that have addressed this issue, and hold that South Carolina does not recognize a 'first party' cause of action against the tavern owner by an intoxicated adult predicated on an alleged violation of S.C. Code Ann. §§ 61–5–30 and/or 61–9–410 (1990)." *Id*. at 91. The Supreme Court thus "overrule[d] *Christiansen v. Campbell.*… and its progeny to the extent they recognize a first party action, but explicitly retain the right of injured third parties to maintain a negligence suit against the tavern owner based on a violation of these statutes." *Id*. at 92. It accordingly affirmed the opinion of the Court of Appeals in *Tobias* as modified. *Id*.

In overruling *Christiansen*'s creation of a first party cause of action against a dram shop, the Supreme Court reviewed the *Christiansen* opinion and agreed with *Christiansen*'s finding that the "purpose [of statutes preventing the knowing sale of alcohol to an intoxicated persons] is to promote public safety, and to prevent an already intoxicated person from becoming even more intoxicated, and thus an even greater risk to the public at large, when he leaves the establishment," but it disagreed with *Christiansen*'s finding that "another of the statutory purposes was to protect the intoxicated person from their own incompetence and helplessness." *Id*. at 92 (citation omitted). Disagreeing with this second conclusion of *Christiansen*, the Supreme Court found intoxicated patrons to be outside the class of persons the statutes were designed to protect, and "h[e]ld that public policy is not served by allowing the intoxicated adult patron to maintain a suit for injuries which result from his own conduct." *Id.* at 92.

As the Supreme Court further expounded the public policy basis for its decision,

> Imposing liability on a tavern owner for continuing to serve an intoxicated person who later injures others serves public policy by imposing upon the tavern owner a duty to use judgment and discretion. We do not believe that the owner will exercise this judgment and discretion less prudently if he risks a law suit only when the intoxicated person injures others. The decision to refuse to serve alcoholic beverages, beer or wine to an intoxicated patron will be unaffected by our decision today. In overruling *Christiansen*, we join other jurisdictions that have refused to allow intoxicated persons to maintain a first party action against a tavern owner based on alleged violations of statutes imposing criminal penalties for the sale of alcoholic beverages to an intoxicated adult.

Id. at 92–93 (collecting cases). The Supreme Court concluded by reiterating that "our alcohol control statutes do not create a first party cause of action for an intoxicated adult patron, but that they do permit a third party action." *Id.* at 93. It left "for another day the issue whether [South Carolina] will recognize a first party action brought by a minor." *Id.*

In the present case, in total disregard of *Tobias* and *Lydia*, Plaintiff has sought to bring a first party cause of action by an intoxicated adult patron. Plaintiff has attempted to dodge these authorities by arguing that they leave open the possibility of common law first party actions, but that argument completely ignores the above-quoted language of these cases explaining that there is no common law right of recovery against a tavern owner for overserving a patron, whether brought by a first party or even a third party. *See also Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 417, 697 S.E.2d 558, 563 (2010) ("Because South Carolina does not have a Dram Shop Act, our civil remedy arises out of criminal statutes…. The civil remedy is predicated on criminal statutes." (citing *Tobias*, 332 S.C. at 92)). Thus, despite Plaintiff's arguments to the contrary, there is no cause of action against Jays in this case, under common law or otherwise.

b. Given the lack of a cause of action, the publication order was invalid.

"South Carolina courts have repeatedly required strict compliance with publication statutes" because "[t]o avoid resolving litigation by default, strict compliance with the publication statutes is appropriate." *Caldwell v. Wiquist*, 402 S.C. 565, 572, 575, 741 S.E.2d 583,

587, 588 (Ct. App. 2013). "An order for service by publication may be issued pursuant to S.C. Code Ann. § 15-9-710 (Supp.1999) when an affidavit, satisfactory to the issuing officer, is made stating that the defendant, a resident of the state, cannot, after the exercise of due diligence, be found, and that a cause of action exists against him." *Wachovia Bank*, 341 S.C. at 428–29 (citing S.C. Code § 15–9–710(3)).

With respect to challenges to a clerk's conclusion under the first prong of the statute, whether due diligence was exercised in attempting service, our courts have found that "[w]hen the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion." *Wachovia Bank*, 341 S.C. at 429 (citing *Yarbrough v. Collins*, 293 S.C. 290, 360 S.E.2d 300 (1987); *Ingle v. Whitlock*, 282 S.C. 391, 318 S.E.2d 367 (1984); *Gibson v. Everett*, 41 S.C. 22, 19 S.E. 286 (1894); and *Yates v. Gridley*, 16 S.C. 496 (1882)). However, in addition to circumstances of fraud or collusion, multiple other carveouts from this rule have been adopted. For example, courts analyzing the due diligence prong of the publication statute have deliberately left open the possibility that an order of publication could contain errors amounting to a jurisdictional defect invalidating default:

> A judgment may be collaterally attacked if the court lacked jurisdiction and the lack of jurisdiction appears on the face of the record….
>
> The Court of Appeals also noted that the order of publication contained some factual statements different from those found in the publication affidavit. These differences do not constitute a jurisdictional defect which will support a collateral attack on the judgment. *See Fouche v. Royal Indemnity Co.*, 217 S.C. 147, 60 S.E.2d 73 (1950); *Gladden v. Chapman*, 106 S.C. 486, 91 S.E. 796 (1917). Finally, we have reviewed the grounds relied upon by the circuit court in holding the default judgment void and find that neither of these grounds constitutes a jurisdictional defect apparent on the face of the record.

Yarbrough, 293 S.C. at 293.

Still more significantly, in *Caldwell v. Wiquist*, 402 S.C. at 571, the Court of Appeals reversed a trial court's denial of a defendant's motions to set aside default where "[t]he affidavits requesting publication are defective on their face because they state that the [plaintiffs] tried to serve a non-resident of Beaufort County only in Beaufort County." "Furthermore," the court continued, "the affidavits requesting service by publication do not contain any statements regarding the due diligence undertaken and, in fact, do not even contain the phrase 'due diligence.'" *Id.* at 571–572. Squaring this ruling with prior cases holding that when the issuing officer is satisfied by the due diligence affidavit, his decision to order service by publication is final absent fraud or collusion, the Court explained that it was the lack of any basis for the clerk to have determined that due diligence had been exercised which enabled the Court to review the clerk's decision:

> Based on the foregoing, we find the affidavit must include some factual basis upon which the court issuing the order of service by publication can find that the defendant cannot, after due diligence, be found within the state. It is the existence of this factual basis that our appellate courts have found make the order for service by publication unreviewable, absent fraud or collusion. Accordingly, the trial court erred as a matter of law in denying [defendant's] motions to set aside default judgment because the affidavits requesting service by publication did not meet the statutory requirements, and were therefore, facially defective.
>
> Furthermore, our decision to reverse the trial court's refusal to set aside the default judgments is consistent with the policy of our state to resolve cases on the merits. To avoid resolving litigation by default, strict compliance with the publication statutes is appropriate.

Caldwell, 402 S.C. at 574–75 (citation omitted). Thus, this Court has found that an order of publication is invalid and that any ensuing entry of default should be reversed where facial defects in the record demonstrate that the requirements of the publication statute were not met.

On this appeal, Jays' challenge to the order of publication granted to Plaintiff is based on the second prong of the publication statute. Specifically, Jays argues that an order of publication

which concludes that "there exists a cause of action against said defendant" based solely on a complaint devoid of any cause of action recognized under South Carolina law is facially defective and in violation of the publication statute's requirement that "it in like manner appears that a cause of action exists against the defendant." S.C. Code § 15-9-710. This issue is a matter of first impression for this Court, as a clerk's factual conclusion regarding due diligence based on factual representations in a due diligence affidavit is clearly distinct from a clerk's legal conclusion regarding whether a cause of action exists against a defendant based on a complaint. Even putting aside for a moment the significant carveout in *Caldwell*, the general rule that "[w]hen the issuing officer is satisfied by the [due diligence] affidavit, his decision to order service by publication is final absent fraud or collusion"[1] simply does not map well onto this second requirement of the publication statute.

As it has previously done in the context of the due diligence requirement of the publication statute in *Caldwell*, the Court should in this case require the trial court to review the basis of the clerk's conclusion that requirements of the publication statute were met with respect to the existence of a cause of action against the defendant. Where, as here, the Complaint was facially defective in that there was no cause of action, such that the statutory requirement was not met, the publication order was invalid and the trial court erred as a matter of law in refusing to grant the defendant relief from default. Indeed, the rationale for court review of the clerk's decision is even stronger here than in *Caldwell*, where it is not a question of fact that the statute requires the clerk to consider—whether due diligence has been exercised—but rather a pure question of law: whether a cause of action exists against the defendant.

[1] *Wachovia Bank*, 341 S.C. at 429 (citations omitted).

By inclusion of the cause of action requirement, the statute itself demonstrates a clear intent by the Legislature that default through service by publication not be available to a plaintiff where there is no cause of action against the defendant. *See Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 599, 654 S.E.2d 284, 289 (Ct. App. 2007) (quoting *Collins Music Co., Inc. v. IGT*, 365 S.C. 544, 550, 619 S.E.2d 1, 3 (Ct. App. 2005)) ("Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers."). Furthermore, our courts have repeatedly found that "the policy of our state to resolve cases on the merits," and that "[t]o avoid resolving litigation by default, strict compliance with the publication statute is appropriate." *Caldwell*, 402 S.C. at 575 (citation omitted). *See also Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 152, 169 S.E.2d 387, 390 (1969) (noting that the statute applicable to vacating a default judgment "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits" (citation omitted)); *Melton v. Olenick*, 379 S.C. 45, 54, 664 S.E.2d at 487, 492 (Ct. App. 2008) (stating that Rule 55(c), SCRCP, permitting the setting aside of a default, should be "liberally construed to promote justice and dispose of cases on the merits" (internal quotations and citations omitted)).

In this case, it is clear on the face of the record that the clerk of court was mistaken when she concluded "that a cause of action exists against said defendant," because South Carolina has explicitly rejected all first party dram shop actions by adult patrons, as explained at great length in *Tobias* and *Lydia*. As a result, the cause of action requirement of the publication statute was not met, the publication order should not have been issued, and Jays should have been granted relief from the default arising from that publication order. Accordingly, Jays requests that this Court reverse the trial court's denial of the motion to set aside default and remand for further

proceedings, just as it did in *Caldwell* when the due diligence prong of the publication statute was not met.

II. Good Cause Existed to Set Aside the Default.

In the alternative, even if default had been properly entered against Jays in this case, good cause existed to set aside the default. "Under Rule 55(c) of the South Carolina Rules of Civil Procedure, a default may be set aside 'for good cause shown.'" *Melton*, 379 S.C. at 54. *See also* Rule 55(c), SCRCP ("For good cause shown the court may set aside an entry of default"). "Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits." *Id.* (quotation and citation omitted). But "[t]he decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge," and "[t]he trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606–07, 681 S.E.2d 885, 888 (2009) (citing *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006); *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162–63, 375 S.E.2d 321, 322–23 (Ct.App.1988). "An abuse of discretion occurs when the judge issuing 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." *Id.* (citing *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997)).

"The standard for granting relief from an entry of default under Rule 55(c) is mere 'good cause.'" *Regions Bank v. Owens*, 402 S.C. 642, 648, 741 S.E.2d 51, 54 (Ct. App. 2013). "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Id.* (citing *Sundown Operating Co.*, 383 S.C. at 607–608). "Once a party has

put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Sundown Operating Co.*, 383 S.C. at 607–608 (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–502 (Ct.App.1989)).

Even assuming the default was valid in this case, the circuit court abused its discretion in denying Jays relief from default, as there was not "sufficient evidentiary support on the record for the finding of a lack of good cause." *See Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App.1995). Indeed, the circuit court appears to have materially misapplied the default analysis described in *Sundown Operating Co*. Under that analysis, the circuit court should have begun by determining whether Jays had "put forth a satisfactory explanation for the default," and if Jays' explanation was satisfactory, proceeded to apply the *Wham* factors to determine whether good cause existed to set aside the default. *See Sundown Operating Co.*, 383 S.C. at 607–608.

In its order denying Jays' motion for relief from default, however, the circuit court appears to have approached the analysis differently. First, in response to Jays' explanation that the default occurred because Jays' registered agent Kalin, a resident of Horry County, had not seen the publication of the summons in Richland County's *Free Times* due to Kalin not residing in Richland County, the circuit court appeared to reduce its inquiry not to whether this account *explained* Jays' default, but rather whether such publication was *proper* under the Rules of Civil Procedure. (Order Denying Relief from Entry of Default (R. pp. 4–5)). The circuit court initially found "that publication in a newspaper of general circulation in Richland County, the Defendant's principal place of business, was proper," and seemingly because it found such

publication proper, concluded later in its order that "[w]hile the Defendant points to alleged procedural defects in the process, all of which I find unavailing, there is *no* explanation advanced as to why the Defendant defaulted." (Order Denying Relief from Entry of Default (R. pp. 4–5) (emphasis added)). Procedural propriety of the publication should not have been the benchmark of whether Jays' explanation of its default was satisfactory, nor indeed of whether it had offered any explanation of default at all.

The evidence in the record certainly does not support the circuit court's conclusion that no explanation of default following the publication was offered. Jays provided an explanation for the default (and a satisfactory one) when it explained that the Columbia *Free Times* utilized by Plaintiff for publication is based in and reports on news regarding only Richland County, whereas Jays' registered agent Kalin's registered address for service is his permanent address in Myrtle Beach, which is located in Horry County. (Def.'s Mem. in Supp. of Mot. to Set Aside Default (R. p. 149); Motion to Alter or Amend (R. p. 176); (Aff. of Kalin (R. p. 198)). Indeed, Jays went beyond the requirements of Rule 55(c) and also provided explanations to the court for why Plaintiff's initial attempts at service were unsuccessful leading up to the order granting service by publication. (Def.'s Mem. in Supp. of Mot. to Set Aside Default (R. pp. 146–147); Motion to Alter or Amend (R. pp. 173–174); (Aff. of Kalin (R. p. 198)).

Even more problematically, the circuit court seemed to conflate and combine *Sundown Operating Co.*'s threshold satisfactory-explanation inquiry with its contingent good-cause inquiry, noting—in the same sentence in which it had concluded no explanation of default had been provided—"nor is there an explanation of how and why he ultimately filed his Motion to Set Aside Default, nearly (10) months after the filing of the Summons and Complaint and nearly six (6) months after the Entry of Default." (Order Denying Relief from Entry of Default (R. p.

5)). And as the circuit court's order immediately continued, "[h]aving failed to demonstrate any cause, much less good cause, for the default, it is not necessary for the Court to examine the *Wham* factors." (Order Denying Relief from Entry of Default (R. p. 5)). These findings are out of step with the standards for obtaining relief from default. The timing of the motion for relief is not a part of the threshold satisfactory-explanation inquiry, and the "good cause" contemplated by Rule 55(c) and associated jurisprudence is not good cause for why the default occurred, but rather good cause for setting aside the default. *See Regions Bank*, 402 S.C. at 648.

The circuit court did go on to state that "[n]evertheless, I further find that were I to consider the *Wham* factors, the Defendant's request for relief fails also based on the timing of the motion for relief and the continuing prejudice of the plaintiff whose suffering after the loss of his son is only exacerbated by the inability to achieve closure of the judicial process." (Order Denying Relief from Entry of Default (R. pp. 5–6)). But the evidence in the record is not sufficient to support such a finding under the *Wham* factors. As Jays argued below as to the first good cause factor under *Wham*, as soon as Jays was informed of Plaintiff's legal proceeding against it on March 4, 2024, it immediately moved to respond to those proceedings, including by informing its insurance carrier of the matter and cooperating with counsel. (Def.'s Mem. in Supp. of Mot. to Set Aside Default (R. p. 150); Motion to Alter or Amend (R. p. 176); (Aff. of Kalin (R. p. 198)). Within mere days of that notification, counsel for Jays filed its motion for relief from default. (Def.'s Mem. in Supp. of Mot. to Set Aside Default (R. p. 150); Motion to Alter or Amend (R. p. 176). Thus, this factor should properly have weighed in favor of relief from default.

Furthermore, as to the second good cause factor, whether the defendant has a meritorious defense, this factor should properly have weighed *overwhelmingly* in favor of relief from default,

because not only does Jays have meritorious defenses, but no defense is even required in this case, where Plaintiff has not even brought a recognized cause of action. (*See* Complaint, (R. pp. 23–34); *see also* Section I, *supra* pp. 6–16). Finally, as to third factor, the degree of prejudice to the plaintiff if relief is granted, Jays appeared in the case on March 22, 2024, less than halfway through the statute of limitations period for a claim based on the March 5, 2023 accident. (Def.'s Mem. in Supp. of Mot. to Set Aside Default (R. p. 150); Motion to Alter or Amend (R. p. 176)). Additionally, partly because this case involves only two parties, no steps unrelated to the default issue have been taken by Plaintiff or any other party in this case, such as taking depositions or completing discovery. Thus, relief from default would have allowed the parties to begin to litigate the case on the merits with no difficulty, as is the policy of this state. *See Rochester*, 253 S.C. at 152. For all these reasons, the only determination supported by the evidence in the record is that good cause existed to set aside default.

CONCLUSION

For the reasons stated above, Respondent/Appellant Jays respectfully requests that this Court reverse the circuit court's order denying Respondent/Appellant relief from default.

Signature Page Follows

Respectfully submitted,

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