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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Honorable Grace Gilchrist Knie, Circuit Court Judge

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

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 the Appellant.

FINAL BRIEF OF APPELLANT MODERN CONSTRUCTION SERVICES, LLC

Don R. Terry, S.C. Bar No. 101395
Louis Segreti, S.C. Bar No. 107134
150 Milestone Way, Suite C
Greenville, SC 29615
Telephone (864) 520-4847
Facsimile (704) 626-6446
dterry@wtbconstructionlaw.com
lsegreti@wtbconstructionlaw.com
*Attorneys for Appellant Modern
Construction Services, LLC*

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT’S MOTIONS BECAUSE THE COURT DID NOT HAVE JURISDICTION OVER APPELLANT WHEN IT ENTERED THE DEFAULT AND JUDGMENT, THEREFORE THE DEFAULT AND JUDGMENT ARE VOID?**
- II. **DID THE TRIAL COURT ABUSE ITS DISCRETION BY FAILNG TO EXERCISE DISCRETION?**
- III. **DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING APPELLANT’S MOTIONS BECAUSE THE COMPLAINT DID NOT CONTAIN A DEMAND FOR RELIEF AGAINST APPELLANT?**
- IV. **DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING APPELLANT’S MOTIONS TO SET ASIDE OR FOR RELIEF FROM THE JUDGMENT BECAUSE APPELLANT DEMONSTRATED FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT OF RESPONDENT?**

STATEMENT OF THE CASE

This case arises out of allegations that Respondent incurred personal injuries in her place of work. (R. 046). On April 8, 2019, Respondent filed her summons & complaint. (R. 042-059). The summons was directed to various defendants, including Modern Construction of South Carolina, LLC (“Modern of SC”). (R. 042). No summons was issued naming Modern Construction Services, LLC (“MCS” or “Appellant”) as a defendant. (*Id.*) The complaint named Modern of SC, the same party to whom the summons was directed. (R. 043-044). The complaint did not name Appellant as a defendant. (R. 043).

On February 6, 2020, an order was issued granting the individual defendants’ motions to dismiss. Also on February 6, 2020, an order was issued granting Defendant Novant Health, Inc.’s motion to dismiss. On February 28, 2020, the Court issued a Consent Scheduling Order. (R. 001-004). The Consent Scheduling Order identified Modern of SC as a defendant but made no mention

of Appellant. (*Id.*) On February 5, 2021, a stipulation of dismissal was filed dismissing defendants Terracon Consultants, Inc. and Panther Heating and Cooling, Inc. After a status conference, on July 20, 2021, the Court issued a Form 4 Order identifying the defendant as Modern of SC. (R. 005). The Order states in part, “Counsel is trying to perfect service on Defendant Modern Construction.” (*Id.*)

On December 21, 2021, the Court held another status conference. (R. 008). Thereafter, on January 11, 2022, the Court issued a Form 4 Order identifying the defendant Modern of SC. (*Id.*) On January 11, 2022, Respondent filed a Motion for Default Judgment seeking default Judgment against Modern of SC. (R. 060-061). In support of its Motion for Default Judgment, Respondent asserted that it served Modern of SC at 4 Crest Road, Edgefield, SC 29824. (*Id.*) On February 24, 2022, the Affidavit of Shana Evans was filed in Support of Plaintiff’s Entry of Default Judgment against Modern of SC. (R. 062-065). The Affidavit states that Modern of SC was served by US Mail, and includes an exhibit showing that a Mr. Samuel C. Stevens, Jr. was served at 4 Crest Road, Edgefield, South Carolina 29824. (R. 062-065).

On February 25, 2022, the Court issued an Order for Default Judgment against Modern of SC, and ordered a hearing to determine damages. (R. 011-012). On March 30, 2022, Respondent filed a Motion to Vacate the Order for Default Judgment. (R. 066-067). Respondent’s motion to vacate sought for the Court to vacate the Default Judgment against Modern of SC, and relief “to amend her Motion for Default.” (R. 066). On April 1, 2022, the Court vacated the Default Judgment against Modern of SC, and granted Respondent’s request for relief to file an Amended Motion for Default Judgment. (R. 013-015). On April 1, 2022, Respondent filed the Affidavit of Shana Evans in Support of Respondent’s Amended Motion for Default Judgment. (R. 070-075). The Affidavit shows the Defendant as Modern of SC. (R. 070). The Affidavit further states that

“Plaintiff filed her Complaint against Defendant on April 8, 2019. Defendant Modern Construction, LLC located at 4 Crest Road[,] Edgefield, SC 29824 was served via certified return receipt US Mail on April 15, 2019. (*Id.*) The Affidavit also states, “[o]n July 8, 2021, to ensure proper service on the correct Defendant, Modern Construction, LLC located at 5900 Harris Technology Boulevard, Suite D, Charlotte, N.C. 28269 was served via certified return receipt US Mail on July 8, 2021 with a copy of the Summons and Complaint.”¹ (*Id.*) Attached to the affidavit as an exhibit, is a certified mail return receipt that was allegedly mailed to “Tracy Snowdy, Registered Agent for Modern Construction, LLC.” (R. 075). The signature on the return receipt states “Modern Construction” and the return receipt does not contain a date of service. (*Id.*) Neither the “Agent” or “Addressee” box on the return receipt are marked. (*Id.*) The area of the return receipt for the printed name of the person that signed the return receipt is blank. (*Id.*)

On April 1, 2022, Respondent filed a Certificate of Service stating that Erica McCrea “caused a copy of the Motion for Entry of Default, Affidavit in Support of Motion for Entry of Default Judgment, Affidavit in Support of Motion for Entry of Default Judgment and proposed Order for Default Judgment” to be served by US mail to Ms. Tracy Snowdy at 5900 Harris Technology Boulevard, Suite D, Charlotte, N.C. 28269. (R. 070-075). The Certificate of Service identifies Modern of SC as the Defendant. (*Id.*) Also on April 1, 2022, Plaintiff filed an Amended Motion for Default Judgment (the “Amended Motion”). (R. 068-069). The Amended Motion identifies Modern of SC as the Defendant. (*Id.*) The Amended Motion states in part that Plaintiff obtained a summons that was served on Mr. Samuel C. Stevens in Edgefield, South Carolina. (*Id.*) The Amended Motion further states that Respondent, “to ensure proper service on the correct

¹ The return receipt attached to the affidavit shows that certified mail was mailed on July 8, 2021, not that service was made on July 8, 2021. According to the North Carolina Secretary of State, Modern Construction, LLC is a business organized in North Carolina with its registered agent at 9418 Charolais Lane, Charlotte, North Carolina 28213.

Defendant, properly served Modern Construction, LLC” in Charlotte, North Carolina. (*Id.*) The Amended Motion states that the proper Defendant is “Modern Construction, LLC.” (*Id.*)

On April 4, 2022, a Notice of Hearing for a March 18, 2022 hearing on Respondent’s Amended Motion for Default Judgment was filed, (and presumably mailed) to Modern of SC at an Edgefield, South Carolina address. (R. 076). On April 6, 2022, the Court issued an Order For Default Judgment against Modern Construction, LLC finding that Modern Construction, LLC was in default, and ordering a hearing on damages.² (R. 016-017). The April 6, 2022 Order identifies the Defendant as Modern of SC. (*Id.*) On May 24, 2022, without amendment to the summons and complaint, the Court issued a new Order for Default Judgment against “Modern Construction Services, LLC (also known as Modern Construction of South Carolina, LLC).” (R. 018-019). The Order arose from a proposed order filed by Respondent’s counsel, and states that Respondent sought that Appellant be held in Default, and requested a Default Judgment Hearing. (R. 297). The May 24, 2022 Order, and the associated proposed order filed by Respondent, were the first time that the case caption identified Appellant as a Defendant. (R. 018-019, 297). On October 20, 2022, a letter was filed (which the Court records state “Did Not Mail”) giving notice for a hearing on November 15, 2022. (R. 294). The letter is written to Modern of SC and addressed to Edgefield, South Carolina. (*Id.*) On October 21, 2022, a letter was filed giving notice for a hearing on November 16, 2022. (R. 295) The letter is written to Modern of SC and addressed to Edgefield, South Carolina. (*Id.*) On December 16, 2022, a letter was filed giving notice for a hearing on January 4, 2023. (R. 296). The letter is written to Modern of SC and addressed to Edgefield, South Carolina. (*Id.*)

² The April 6, 2022 Order does not state that Appellant is in default because Appellant is not Modern Construction, LLC.

On February 17, 2023, a letter was filed giving notice for a hearing on March 8, 2023. (R. 293). The letter is written to Modern of SC and addressed to Charlotte, North Carolina. (*Id.*) On March 22, 2023, Plaintiff filed a Proposed Order, and on March 23, 2023, the Court issued an Order on Damages issuing a Judgment Order against Appellant “(also known as Modern Construction of South Carolina, LLC).” (R. 298, 020-027).

On March 19, 2024, Appellant made its first appearance in this case, and filed a Motion for Relief from Judgment and Order and Motion to Set Aside Entry of Default and Order of Default Judgment (“Motions”). (R. 077-119). On April 19, 2024, Appellant filed its Memorandum of Law in Support of its Motions. (R. 120-165). On April 23, 2024, Respondent filed her Memorandum of Law in Opposition to Appellant’s Motions. (R. 166-178). On April 24, 2024, the Honorable Grace Gilchrist Knie heard arguments on Appellant’s Motions. (R. 028). On May 15, 2024, Judge Knie denied Appellant’s Motions. (R. 028-035). On May 17, 2024, Appellant filed a Motion to Reconsider the denial of its Motions. (R. 179-184). On May 20, 2024, the trial court issued an Initial Order regarding Appellant’s Motion to Reconsider, which stated that the Motion would be decided from written submissions. (R. 036-038). On May 29, 2024, Appellant filed its Memorandum of Law in Support of its Motion to Reconsider. (R. 185-207). On May 29, 2024, Respondent filed her Memorandum of Law in Opposition to Appellant’s Motion to Reconsider. (R. 208-226). On June 6, 2024, Appellant filed its Reply in Support of its Motion to Reconsider. (R. 227-229). On June 14, 2024, the trial court denied Appellant’s Motion to Reconsider. (R. 039-041). On June 20, 2024, Appellant filed its Notice of Appeal. (R. 230-232).

STANDARD OF REVIEW

The trial judge’s decision regarding whether to grant or reject a Rule 60 motion will not be disturbed absent an abuse of discretion. “An abuse of discretion occurs when the trial court’s

ruling is based on an error of law or is not supported by the evidence.” *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). All errors of law made when deciding a Rule 60 motion are an abuse of discretion. *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005).

STATEMENT OF FACTS

This case involves a genuine miscarriage of justice. Appellant, which was never served with the summons and complaint and never even named as a defendant in the summons or complaint, now faces a \$1,100,000.00, plus interest, default judgment. The trial court, which lacked personal jurisdiction over Appellant on account of the Respondent’s undisputed failure to establish proper service on Appellant, abused its discretion by failing to grant Appellant relief from the improper default judgment. Based on the established precedent cited below, and related principles of fundamental fairness, the trial court’s decision should be vacated or reversed.

Furthermore, the facts underlying the default judgment against Appellant are troubling. The record reveals that the default judgment was issued despite the fact that no motion for default judgment was filed seeking a judgment against Appellant. (R. 070-075). The record also reveals that the order granting default against Appellant was the result of Respondent’s counsel unilaterally, and without leave of the trial court to add Appellant as a defendant, adding Appellant’s name to a proposed order. (R. 018-019, 297). The record shows that the default judgment was issued against Appellant based on the Respondent’s attorney changing the name of the defendant through a proposed order from “Modern Construction of South Carolina, LLC,” to “Modern Construction Services, LLC (also known as Modern Construction of South Carolina, LLC).” (*Id.*) The name of the defendant was changed to “Modern Construction Services, LLC (also known as Modern Construction of South Carolina, LLC),” despite the fact that that Respondent’s attorneys

notified the trial court that Appellant and Modern Construction of South Carolina, LLC were not the same company. (R. 066-067).

Appellant Modern Construction Services, LLC is a limited liability company organized pursuant to the laws of the State of North Carolina, with its principal office at 5900 Harris Technology Blvd., Suite D, Charlotte, NC 28269. (R. 117). Appellant's registered agent for service of process in North Carolina is Tracy Snowdy. (R. 219). Appellant is authorized to conduct business in South Carolina, and Registered Agents, Inc. is Appellant's statutory registered agent for service of process in South Carolina. (R. 183). Respondent claims that on July 8, 2021 it served the summons and complaint by certified mail to Tracy Snowdy, Registered Agent for Modern Construction, LLC in Charlotte, North Carolina, and received a return receipt for such mail. (R. 68). The record does not show that Appellant was "served" on July 8, 2021, but rather shows that Respondent mailed something on July 8, 2021. (R. 075). On the signature line of the certified mail return receipt are the words "Modern Construction." (*Id.*) The certified mail return receipt does not contain the date of delivery. (*Id.*) Tracy Snowdy is not the North Carolina registered agent for Modern Construction, LLC. (R. 164). Appellant is not Modern Construction, LLC. (*Id.*) Appellant does not, and has never done business as Modern Construction, LLC or Modern Construction of South Carolina, LLC. (*Id.*) Appellant is not related to Modern Construction of South Carolina, LLC in any way. (R. 163).

Tracy Snowdy is the only authorized agent of Appellant in North Carolina who is authorized to accept service of a civil summons and complaint for Appellant. (R. 183). The signature on the return receipt attached to Ms. Shena Evans' affidavit that was filed with the court is not the signature of Tracy Snowdy or that of any representative of Appellant. (R. 164). The signature on the return receipts filed with the Court in this case are not that of Tracy Snowdy, or

that of any representative of Appellant. (*Id.*) Appellant was never served with a Motion for Entry of Default relating to this Lawsuit. (R. 164, 184). Tracy Snowdy did not sign, nor has she ever signed, her name “Modern Construction.” (R. 183). No person who was or is an authorized agent of Appellant accepted service of the Summons and Complaint in this case. (R. 184). No person who was or is an authorized agent of Appellant was served with any pleading relating to this case prior to April 2024. (*Id.*) No person who was or is an authorized agent of Appellant signed a certified mail, or registered mail, return receipt relating in any way to this case. (*Id.*) No person who was or is an authorized agent of Appellant was served with the Summons and Complaint in this case. (*Id.*) The signature on the certified mail return receipts that were filed with the court in this case do not contain Tracy Snowdy’s signature, or the signature of any authorized agent of Appellant. (*Id.*) Appellant has never been served with a copy of the Summons and Complaint in this case. (R. 183). Appellant was never served with a Motion for Entry of Default, or an Amended Motion for Default Judgment in this Lawsuit. (R. 164). Appellant only became aware of the judgment against it a few weeks before March 18, 2024. (*Id.*)

No summons was ever issued by Respondent naming Appellant as a defendant in this case. (R. 042). No complaint was filed in this case naming Appellant as a defendant. (R. 043-059). Respondent did not make a motion for leave to amend the Complaint to name Appellant as a defendant. The court never granted Respondent leave to amend the Complaint to name Appellant as a defendant in this case. The Complaint does not contain any allegations against Appellant or demand any relief of, or relating to, Appellant. (*Id.*)

Respondent’s counsel knew the Appellant and Modern Construction of South Carolina, LLC (“Modern of SC”) were not the same company. (R. 066-067). Respondent’s counsel admitted that it had not served the correct party. (R. 274, lines 5-8). Despite Respondent’s counsel’s

knowledge that Appellant and Modern of SC were not the same company, Respondent's counsel submitted a proposed order to the trial court identifying the defendant as "Modern Construction Services, LLC (also known as Modern Construction of South Carolina LLC)." (R. 018-027, 297-298).

ARGUMENTS

I. **THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTIONS BECAUSE THE COURT DID NOT HAVE JURISDICTION OVER APPELLANT WHEN IT ENTERED THE DEFAULT AND JUDGMENT, THEREFORE THE DEFAULT AND JUDGMENT ARE VOID**

The trial court abused its discretion when it denied Appellant's Motions because the trial court did not have jurisdiction over Appellant when it entered default and default judgment, because proper service of process was not made on Appellant, therefore the judgment against Appellant is void.

Rule 60(b), SCRCP states,

(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 (Emphasis added).

The trial court has discretion under Rule 60(b) regarding whether to grant a party relief from a judgment in some circumstances. See Rule 60(b). When a Rule 60(b) motion is made based on a claim of improper service, and either: (1) the certified mail return receipt fails to show that the defendant accepted service; or (2) the defendant demonstrates that the delivery receipt was signed by an unauthorized person, the trial court no longer has discretion, but “shall ... set aside” the judgment “pursuant to Rule 55(c) or Rule 60(b).” See Rule 4(d)(8), SCRCP.

“A void judgment is one that, from its inception, is a complete nullity and is without legal effect” *Thomas & Howard Company, Inc. v. T.W. Graham and Co.*, 318 S.C 286, 457 S.E.2d 340 (1995). A judgment is void if a court acts without jurisdiction. (*Id.*) The plaintiff has the burden to establish that the court has personal jurisdiction over the defendant. *Jensen v. Doe*, 292 S.C. 592, 358 S.E.2d 148 (Ct.App. 1987). It is the plaintiff’s burden to show compliance with the rules regarding service of process. *Roche v. Young Brothers, Inc. of Florence*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995).

Rule 4, SCRCP, sets forth the requirements for service of process. Rule 4, SCRCP. Rule 4(d)(3) states that service of process on a corporation must be:

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)(3), SCRCPP).

“Rule 4, SCRCPP, serves at least two purposes[:]” (1) to assure that defendants have notice of a civil action; and (2) service of process confers personal jurisdiction on the trial court. *BB&T v. Taylor*, 369 S.C. 548, 551 633 S.E.2d 501, 503 (2006). Proper service of process on a corporation requires serving an authorized agent. *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005). “When a defendant is not properly served, ‘the Court has no jurisdiction of the defendant, and all proceedings based on the pretended service are void.’”³ See *Momani v Van Surdam*, 296 S.C. 409, 410, 373 S.E.2d 692, 692 (Ct. App. 1988) (citing *Wyman v. Hoover*, 10 S.C. 135, 136, (1878)).

A. Attempted Service on Appellant

The undisputed facts regarding attempted service of the summons and complaint on Appellant in this case are: (1) Respondent claims that it mailed the summons and complaint to Appellant’s North Carolina registered agent, Tracy Snowdy, by certified mail return receipt requested; (2) a return receipt was returned to Respondent with the words “Modern Construction” on the signature line; (3) the return receipt does not contain the date of delivery; (4) Tracy Snowdy is the only authorized agent of Appellant in North Carolina who is authorized to accept service of a civil summons and complaint for Appellant. (R. 183); (5) Tracy Snowdy did not sign the return receipt; (6) Tracy Snowdy did not sign, nor has she ever signed, her name “Modern Construction.” (*Id.*); (7) the signature on the return receipts filed with the Court in this case are not that of Tracy Snowdy, or that of any representative or authorized agent of Appellant. (R. 184); (8) no other representative of Appellant was served with the summons and complaint. (*Id.*); (9) no person who

³ Respondent admitted that notices to Appellant that were not actual service of the summons and complaint are irrelevant. (See April 24, 2024, Trans. 32:23-24 stating “I know the other notices aren’t proper service ...”).

was or is an authorized agent of Appellant accepted service of the Summons and Complaint in this case. (*Id.*); (10) no person who was or is an authorized agent of Appellant signed a certified mail, or registered mail, return receipt relating in any way to this case. (*Id.*); and (11) no person who was or is an authorized agent of Appellant was served with the Summons and Complaint in this case. (*Id.*)

Other facts sworn to by the managing member of Appellant, Tracy Snowdy, are: (1) Appellant was not served with the summons and complaint in this case; (R. 163); (2) Appellant was never served with an Amended Motion for Default Judgment in this Lawsuit. (R. 164); and (3) Appellant was never served with a Motion for Entry of Default relating to this Lawsuit. (*Id.*)

The Supreme Court of South Carolina considered similar facts in *Roberson v. Southern Finance of South Carolina, Inc.* *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005). In *Southern Finance*, the Robersons “filed an action against Southern Finance Company (Southern Finance) alleging negligence” and other causes of action. (*Id.* at 8, 615 S.E.2d at 114). After filing the action, the Robersons “mailed the summons and complaint to Southern Finance’s registered agent, Charles Brooks, by certified mail with return receipt requested.” (*Id.*) “A clerical employee, Amy Jones Bair, signed the return receipt” when the summons and complaint were delivered to Southern Finance’s office. (*Id.*) Despite the fact that the summons and complaint were delivered to Southern Finance’s office and the return receipt signed by Ms. Bair, “Brooks[, Southern Finance registered agent,] testified he never received the summons and complaint.” (*Id.*) “Southern Finance never answered the complaint.” (*Id.*) “After holding a damages hearing, the special referee entered a default judgment of \$350,000” against Southern Finance. (*Id.* at 9, 615 S.E.2d at 114). Thereafter, “Southern Finance moved to set aside the default or amend the judgment or for a new trial nisi remittitur on the ground that service was

improper because Bair was not authorized to receive service for Southern Finance.” (*Id.*) “The special referee denied Southern Finance’s motion . . . because the special referee found [that] Bair was an implied agent with the authority to accept service of process.” (*Id.*) Southern Finance appealed. (*Id.*).

The Supreme Court stated the issue on appeal in *Southern Finance* as, “[d]id the special referee err in denying Southern Finance’s Rule 60 motion to set aside the default judgment on the ground the summons and complaint were not properly served?” (*Id.*) The Supreme Court reversed the special referee, holding that the default judgment against Southern Finance was “void” because “service was improper.” (*Id.* at 12, 615 S.E.2d at 115).

The Supreme Court’s analysis of Southern Finance’s Rule 60(b) motion involved consideration of Rule 4, SCRCP. (*Id.* at 10, 615 S.E.2d at 114). The Supreme Court followed up its partial recitation of Rule 4 by stating, “[i]t is undisputed that the [Robersons] sent the summons and complaint via certified mail return receipt requested to Southern Finance’s registered agent, Brooks,” and “it is undisputed that Bair signed the return receipt.” (*Id.* at 10, 615 S.E.2d at 115). Based on these facts, the Supreme Court found that the special referee abused his discretion because there was no evidence from which the special referee could find that Bair was an agent of Southern Finance who was authorized to accept service. (*Id.* at 11, 615 S.E.2d at 115). Accordingly, the Supreme Court held that service on Southern Finance was improper, and the judgment against Southern Finance was void. (*Id.* at 11-12, 615 S.E.2d at 115).

The Supreme Court’s Opinion in *Southern Finance* provides the roadmap for determining whether to grant or deny Rule 55 and Rule 60(b) motions when whether service of process was proper is an issue. Comparing and contrasting *Southern Finance* to the present case is a helpful way to follow the road map drawn by the Supreme Court. *Southern Finance* involved a Rule 60(b)

motion, as does this case. (*Id.* at 10, 615 S.E.2d at 114). In *Southern Finance*, the summons was issued naming Southern Finance as a defendant. (*Id.* at 8, 615 S.E.2d at 114). In this case, no summons was issued naming Appellant as a defendant. In *Southern Finance*, the Plaintiff mailed the summons and complaint to Southern Finance’s registered agent. (*Id.*) Respondent mailed the summons and complaint to Appellant’s registered agent. In *Southern Finance*, an employee of Southern Finance signed the certified mail return receipt, but service was improper because the employee who signed the return receipt was not an authorized agent. (*Id.*) In this case no representative or authorized agent of Appellant signed the return receipt. (R. 183-184). In *Southern Finance*, the court was able to identify the person who signed the certified mail return receipt. (*Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 8, 615 S.E.2d 112, 114 (2005)). In this case, the trial court did not make a finding regarding the identity of the person who wrote “Modern Construction” on the signature line of the certified mail return receipt, therefore the trial court did not make a finding of the person who was served with the summons and complaint. (R. 018-035, 039-041). In *Southern Finance*, the special referee evaluated whether Ms. Bair was an authorized agent for service of process. (*Id.* at 9, 615 S.E.2d at 114). In this case, the trial court did not set forth any analysis in its order regarding whether the person who wrote “Modern Construction” on the return receipt was an authorized agent of Appellant for service of process. (R. 028-035, 039-041). In *Southern Finance*, the judgment against Southern Finance was void due to lack of proper service. (*Southern Finance* at 12, 615 S.E.2d at 115). In this case, the judgment against Appellant is void due to lack of proper service because the summons and complaint were not served on an authorized agent of Appellant.

A critical issue in this appeal that was not a critical issue in *Southern Finance*, is, when was Appellant served? Here, the evidence shows that Respondent mailed the summons and

complaint to Tracy Snowdy on July 8, 2021, but did not provide evidence of the date that service was effective on Appellant. (R. 075). The record is clear though that as of June 30, 2021, Respondent had not served Appellant with the summons and complaint. (R. 005). Importantly, Respondent does not assert that it served the summons and complaint on Appellant between December 21, 2021, when a status conference was held, and March 30, 2022, when Respondent filed its Motion to Vacate the default against Modern of SC. (R. 066).

Because the summons and complaint were not served on an authorized agent of Appellant, the trial court made a reversible error of law when it denied Appellant's Motions to set aside the default and for relief from the default judgment. Furthermore, because there is no evidence in the record from which the trial court could determine that an authorized agent of Appellant was served with the summons and complaint in this case, and there is no evidence in the record from which the trial court could determine the identity of the person who wrote "Modern Construction" on the signature line of the return receipt, the trial court abused its discretion by when it denied Appellant's Motions. Accordingly, the trial court abused its discretion when it denied Appellant's Motions because it did not have jurisdiction over Appellant, the default and judgment against Appellant are void, and the trial court's denial of Appellant's Motions should be reversed such that Appellant is granted relief from the Judgment.

B. Respondent Did Not Meet Its Burden to Show the Court Had Jurisdiction Over Appellant

The plaintiff has the burden to establish that the court had personal jurisdiction over the defendant. *Jensen v. Doe*, 292 S.C. 592, 358 S.E.2d 148 (Ct.App. 1987). It is also the plaintiff's burden to show compliance with the rules. *Roche v. Young Brothers, Inc. of Florence*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995). To show that the trial court had jurisdiction over Appellant, the Respondent had to show that an authorized agent of Appellant was properly served with the

summons and complaint. Respondent did not offer any evidence to prove that an authorized agent of Appellant was actually served. Respondent also failed to offer evidence of the identity of the person who signed “Modern Construction” on the return receipt. Respondent did not offer any evidence that the person who signed the return receipt “Modern Construction” was a person authorized to accept service for Appellant. Because Respondent did not offer any evidence to show that it served the summons and complaint on an authorized agent of Appellant, Respondent did not meet its burden to show that the trial court had jurisdiction over Appellant and the trial court’s decision is not supported by the evidence.

Instead of putting forth evidence of service of process on an authorized agent of Appellant, Respondent relies solely on the fact that it claims to have mailed the summons and complaint by certified mail return receipt requested to Appellant’s North Carolina registered agent, and that it received a return receipt with the words “Modern Construction” in the signature block. (R. 271, lines 7-15). In other words, Respondent’s sole argument is that if it mailed the summons and complaint by certified mail to Appellant’s registered agent, and received a return receipt, therefore proper service has occurred. (*Id.*) Respondent’s argument demonstrates that Respondent failed to offer evidence to meet its burden that it served Appellant and that the trial court had jurisdiction over Appellant. (R. 287, lines 2-7). Specifically, Respondent stated its position as:

[Appellant’s] argument is that, well, we don’t know whose signature that is. That’s not our fault or problem. That’s why South Carolina says all you have to do is just look for that address, look for who the registered agent is and send it to them. Once you send it to them, the ball’s out of our court.

(*Id.*)

Despite Respondent’s argument, Respondent’s counsel likely knows that more than mailing the summons and complaint is required, that being, service must actually be made on the

authorized agent of the Appellant. Respondent also apparently misunderstands the law regarding service of process by certified mail. During the hearing at the trial court, Respondent's counsel argued, "So whatever the signature is on that green card does not matter." (*Id.*, lines 14-15). Respondent's argument is incorrect because Respondent must produce evidence that the person who wrote "Modern Construction" on the signature line of the return receipt had authority to accept service of process for Appellant. (*See Moore v. Simpson*, 322 S.C. 518, 473 S.E.2d 64 (1996), quashing a summons and complaint and stating, "The appellants failed to produce any evidence that the receptionist has express authority to accept service of process."). Respondent did not produce any evidence of the identity of the person who wrote "Modern Construction" on the signature line, much less any evidence that such person had authority to accept service of process. Accordingly, Respondent failed to meet its burden to show that the trial court had jurisdiction over Appellant.

There is no evidence in the record from which the trial court could determine that it had jurisdiction over Appellant through service of process. Therefore, the trial court abused its discretion by denying Appellant's Motions, the decision of the trial court should be reversed, the default and judgment against should be set aside, and Appellant should be granted relief from the judgment.

C. Respondent Did Not Show Compliance with the Rules.

Service of process on a corporation must be made by a method prescribed by Rule 4, SCRPC. Rule 4(d)(3). Respondent does not allege service by personally delivering a copy of the summons and complaint to an officer, a managing or general agent or to any other agent authorized by appointment of law to receive service of process on behalf of the Appellant pursuant to Rule 4(d)(3), SCRPC. Accordingly, Respondent must demonstrate the trial court's personal jurisdiction over Appellant by showing service of the summons and complaint upon Appellant by registered

or certified mail return receipt requested and delivery restricted to the addressee pursuant to Rule 4(d)(8), SCRCF. Additionally, to obtain judgment by default, Respondent must show acceptance of service by Appellant. (*Id.*)

Respondent did not put forth any evidence that: (a) it or Respondent's attorney issued a summons to Appellant as required by Rules 4(a) and 4(b), SCRCF; (b) it served an authorized agent of Appellant with the summons and complaint; (c) the date that service on Appellant was effective;⁴ (d) that Appellant accepted service; or (e) the basis for general or specific jurisdiction over Appellant. A rebuttable presumption that service of process occurred exists if the Plaintiff complied with the rules, but no such presumption exists without showing compliance with the Rules. (*Southern Finance supra* at 10, 615 S.E.2d at 155). Because Respondent did not provide the requisite evidence that it complied with the rules for service of process, Respondent does not enjoy a presumption that service on Appellant was proper, and the entry of default and default judgment were error.

Because the record does not contain any evidence that an authorized agent of Appellant was served, Plaintiff failed to establish that the trial court had personal jurisdiction over Appellant, accordingly the judgment order is void, and the trial court abused its discretion by denying Appellant's Motions. The trial court's decision should be reversed and the default and judgment against Appellant should be set aside, and Appellant should be granted relief from the judgment.

D. The Trial Court Abused Its Discretion By Ignoring the Requirement of Rule 4(d)(8) That The Default Judgment Must Be Set Aside

Rule 4(d)(8) states that service by certified mail

“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 default judgment shall be set aside pursuant to Rule 55(c) or 60(b) if the defendant

⁴ See Rule 4(d)(8), “Service is effective upon the date of delivery shown on the return receipt.”

demonstrates to the court that the return receipt was signed by an unauthorized person.” Rule 4(d)(8), SCRCP. (Emphasis added).

The requirement that default and/or default judgment “shall” be set aside under Rule 4(d)(8) arises if either of two conditions is present. (*Id.*) First, when the return receipt does not show that the defendant accepted service, the court must set aside the default and/or default judgment. (*Id.*) The return receipt in this case does not show acceptance of service by Appellant, therefore the trial court was required to set aside the default judgment against Appellant, and abused its discretion by failing to set aside the default and/or default judgment against Appellant. Second, under Rule 4(d)(8), if the defendant demonstrates that the return receipt was signed by an unauthorized person, the court must set aside the default and/or the default judgment. (*Id.*) In this case, Appellant demonstrated that no authorized agent of Appellant signed the return receipt by demonstrating that whoever wrote “Modern Construction” on the return receipt was not an authorized person. Therefore, Appellant demonstrated that the return receipt was signed by an unauthorized person, which required the trial court to set aside the default and default judgment. Because the trial court denied Appellant’s Motions to set aside the default and default judgment, the trial court committed reversible error. The trial court also erred by exercising discretion, when it did not have any such discretion because Rule 4(d)(8), SCRCP, required the trial court to set aside the default and default judgment.

The trial court abused its discretion by failing to set aside the default and default judgment against Appellant.⁵ Accordingly, the trial court’s denial of Appellant’s Motions should be reversed.

⁵ The trial court’s Order denying Appellants Motions to Set Aside does not set forth any findings regarding whether the return receipt shows acceptance of service by Appellant, or whether the person who signed the return receipt was an authorized agent of Appellant. Therefore, the trial court either: (1) made no finding on either of these issues; (2) made a finding on one or more issues but failed to articulate its findings in the Order; or (3) incorrectly believed that regardless of its finding on these issues it had discretion about whether to set aside the default and judgment when it had no such discretion. Regardless of how the trial court came to its decision, the trial court abused its discretion because Appellant demonstrated that an unauthorized person signed the return receipt, and the return receipt does not show that Appellant accepted service.

E. No Action was Commenced Against Appellant

The trial court abused its discretion by failing to grant Appellant's Motions because an action was never commenced against Appellant. Rule 3(a), SCRPC, states,

[a] civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitation; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Rule 4(d)(8), SCRPC, states, when service is made by certified mail, "[s]ervice is effective upon the date of the delivery as shown on the return receipt."

It is undisputed that the date of delivery is not shown on the return receipt, which was apparently relied on by the trial court for service of process on Appellant. (R. 075). Because there is no date of delivery shown on the return receipt, service was never effective, and no action was commenced against Appellant. See Rule 3 and Rule 4, SCRPC. Therefore, the trial court did not have jurisdiction over Appellant at the time of the default and default judgment, therefore the judgment is void. Accordingly, the trial court abused its discretion by denying Appellant's Motions to set aside the default and default judgment, and the trial court's decision should be reversed.

F. No Summons was Issued Naming Appellant as a Defendant

The beginning of each civil action, and the first steps to bring a defendant within the jurisdiction of a trial court, is the issuance, filing, and service of a summons directed to the defendant. See Rule 3 and Rule 4, SCRPC. Until these steps occur, the defendant is not properly informed of the civil action, and the court cannot exercise jurisdiction over the defendant. *BB&T v. Taylor*, 369 S.C. 548, 551 633 S.E.2d 501, 503 (2006). In this case, the trial court abused its discretion when it failed to set aside the judgment against Appellant, because a summons was never issued that was directed to Appellant.

Rule 4(a), SCRC, states in part, “The summons shall be issued by plaintiff or plaintiff’s attorney.” Rule 4(b), SCRC, states in part, “The summons shall ... be directed to the defendant, ... and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default shall be rendered against him for the relief demanded in the complaint.”

No summons was issued and filed in this case that was directed to Appellant. (R. 042). Therefore, no action was commenced against Appellant and the trial court did not have jurisdiction over Appellant when it issued the default and default judgment against Appellant.

G. Due Process is Not Satisfied When the Identify of the Person Who Allegedly Accepted Service of Process is Unknown

Due process is not satisfied when no one knows the identity of the person who was allegedly served. Due process requires that the defendant be given notice and an opportunity to be heard. *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct.App. 2002) Notice occurs through proper service of process. Proper service of process on a corporation by certified mail occurs when an authorized agent of the corporation accepts service. Rule 4(d)(8), SCRC. Determining whether an individual is an authorized agent of the corporation first requires knowing the identity, or at least the title, of said person. Therefore, when the identity of the person who signed the return receipt is not known or ascertainable from the record, notice cannot be found to have occurred, and due process cannot be satisfied. In this case, there is no evidence in the record from which the trial court (or any known person) can determine the individual who signed the certified mail return receipt. The undisputed evidence proves that Tracy Snowdy, Appellant’s only authorized agent for service in North Carolina, did not sign the certified mail return receipt. (R. 183-184). Additionally, Appellant has demonstrated that the person who wrote “Modern Construction” on the return receipt was not an authorized agent of Appellant.

Because due process is not satisfied when the identity (or title) of the person who wrote “Modern Construction” on the return receipt is not ascertainable from the record, it is impossible to determine that an authorized person for acceptance of service signed the return receipt, and the judgment must be set aside. Accordingly, the trial court abused its discretion by denying Appellant’s Motions, the trial court’s decision should be reversed, and the default and judgment against Appellant should be set aside.

Moreover, the burden of establishing proper service of process is on the plaintiff. *Jensen v. Doe*, 292 S.C. 592, 358 S.E.2d 148 (Ct.App. 1987). The Respondent’s inability to identify the individual who allegedly accepted service of process in this case is therefore fatal to Respondent’s arguments because Respondent lacks evidence to establish that an authorized agent was served.

Service on Appellant, if any such service actually occurred, was not proper because service was not made on an authorized representative of Appellant. Accordingly, because there is no evidence in the record from which the trial court could find that an authorized agent of Appellant was served with the summons and complaint, the trial court abused its discretion by denying Appellant’s Motions and the trial court’s decision should be reversed.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO EXERCISE DISCRETION

The failure of the trial court to state the basis upon which its discretion was exercised supports a finding that the trial court failed to exercise its discretion. *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 201 (1981). In *State v. Smith*, finding that the trial judge had failed to exercise its discretion, the Supreme Court cautioned the bench and the bar “that the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis the discretion was exercised.” (*Id.*) See also *City of Charleston Housing Authority v. Brown*, 437 S.C. 514, 526-27, 878 S.E.2d 913 (Ct. App. 2022)

(citing Smith and holding that “Without seeing that CHA considered some factors or policy, ... we cannot know whether CHA’s decision to pursue the eviction... was the result of applied discretion or the rote, discretionless enforcement of the One-Strike Rule. Accordingly, the circuit court erred in concluding CHA demonstrated it exercised discretion simply by being ‘aware of the applicable regulations’....This finding is not supported by the record, nor could it be, as the record is silent as to CHA’s exercise of discretion.”); Jordan v. Hartford Financial Group, Inc., 435 S.C. 501, 507, 868 S.E.2d 400 (Ct. App. 2021) (citing Smith and holding that “We therefore hold the commission’s summary denial of Hartford’s motion to reinstate without rational analysis of the good cause standard was arbitrary and an abuse of discretion.”); Samples v. Mitchell, 329 S.C. 105, 112, 459 S.E.2d 213 (Ct. App. 1997) (“This decision in and of itself does not show the judge exercised discretion, especially where the Supreme Court has articulated the legal analysis which should be utilized.”). The trial court’s order denying Appellant’s Motions does not include findings of fact, conclusions of law, or analysis to explain its determination that Appellant’s Motions “should be and is therefore” denied. (R. 028-035, 039-041). Specifically, the trial court failed to set forth facts, conclusions or analysis regarding:

1. whether Appellant accepted service;
2. the basis for its determination that Appellant accepted service, if any such determination was made;
3. whether the certified mail return receipt shows that Appellant accepted service;
4. whether the Appellant failed to demonstrate to the court that the return receipt was signed by an unauthorized person;
5. the name of the authorized person who was served;

6. the basis for its determination that the person who signed the return receipt “Modern Construction” was an authorized agent of Appellant for acceptance of service, if any such determination was made;
7. the date that service on Appellant was effective;
8. whether an action was commenced against Appellant by Respondent;
9. whether Respondent followed the Rules, and whether the trial court had jurisdiction over Appellant, when no summons was directed to Appellant;
10. the date that Appellant was in default for failing to plead in response to the summons and complaint;
11. whether it made a determination that Respondent satisfied its burden to show that the trial court had jurisdiction over Appellant, if any such determination was made;
12. the factual and legal basis for a determination, if any, that Respondent satisfied its burden to show that the trial court had jurisdiction over Appellant;
13. whether the trial court had jurisdiction over Appellant when the default and default judgment were issued;
14. that fraud, misconduct, mistake or inadvertence did not occur;
15. whether the statute of limitations barred Respondent’s claims against Appellant;
16. whether a default and default judgment against Appellant may be issued when the complaint does not identify Appellant as a defendant, and when the complaint does not demand a remedy against Appellant; or
17. whether the trial court could pierce the corporate veil by issuing a default judgment against Appellant and Modern Construction of South Carolina, LLC based solely

on a summons and complaint directed only to the Modern Construction of South Carolina LLC. (*Id.*)

By failing to make findings of fact, failing to set forth conclusions of law, and failing to set forth the evidence that support its determinations, the trial court failed to exercise discretion and therefore abused its discretion. Accordingly, the trial court's decision should be reversed, or alternatively, the case should be remanded to the trial court with direction for the trial court to make findings of fact and conclusions of law consistent with this Court's decisions.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTIONS BECAUSE THE COMPLAINT DID NOT CONTAIN A DEMAND FOR RELIEF AGAINST APPELLANT

A requirement of all civil actions is the filing and serving of a complaint that includes allegations setting forth the basis for the Plaintiff's claims against the defendants, and the complaint must include a demand for relief from the defendant(s). Rule 4, SCRPC. The complaint issued by Respondent's attorney does not identify Appellant as a defendant. (R. 042-059). Instead, the complaint identifies Modern Construction of South Carolina, LLC ("Modern of SC"), a South Carolina limited liability company, as a defendant. Modern of SC is not affiliated with Appellant. (R. 163). The complaint includes a few allegations regarding Modern of SC, and demands relief in the form of a judgment against Modern of SC. (R 043-059). The complaint does not alleged facts, or contain a single allegation, regarding Appellant. (*Id.*) Furthermore, the complaint does not demand any relief against Appellant. (*Id.*)

Default judgment may be entered against a defendant for the "relief demanded in the complaint." Rule 4(b), SCRPC. Because a default judgment may be entered only for the relief demanded in the complaint, and because no relief was demanded in the complaint as to Appellant, the trial court erred by granting a default and default judgment against Appellant, and the trial court

abused its discretion by denying Appellant's Motions. Accordingly, this Court should reverse the trial court's decision and set aside the default and default judgment against Appellant, such that Appellant has relief from the judgment.

IV. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTIONS TO SET ASIDE THE JUDGMENT BECAUSE APPELLANT DEMONSTRATED FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT OF RESPONDENT

The trial court abused its discretion when it denied Appellant's Motions to set aside, and for relief from, the judgment because Appellant demonstrated to the trial court that the default judgment against Appellant was procured by either fraud, misrepresentation, or other misconduct of Respondent's counsel.

Rule 60(b), SCRCP, gives the trial court discretion to grant a party relief "from a final judgment, order or proceeding for the following reasons: ... (3) fraud, misrepresentation, or other misconduct of an adverse party[.]" Rule 60(b), SCRCP. Rule 60(b) motions based on fraud will only be granted when the fraud is extrinsic. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 273, 644 S.E.2d 755, 768 (2007). "Fraud is extrinsic when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing and opportunity to present its case ... Relief is granted for extrinsic fraud on the theory that because the fraud prevented the party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." (*Id.*)

The record shows that Respondent's counsel either committed extrinsic fraud, made a misrepresentation to the trial court, or engaged in other misconduct. As previously stated, no summons or complaint was ever filed or served naming Appellant as a defendant. (R. 042-059). From April 8, 2019, when the summons and complaint were filed, until May 18, 2022, no pleading or other document filed with the trial court identifies Appellant, or names Appellant, as a

defendant. On March 24, 2022, for the first time, in a proposed order submitted by Respondent's counsel to the trial court on May 19, 2022, the case caption was changed to name the defendant as "Modern Construction Services, LLC (also known as Modern Construction of South Carolina LLC)." (R. 018-019, 297). Between April 8, 2019, and the proposed order on May 24, 2022, Respondent did not file a motion for leave to amend the complaint to add Appellant as a defendant. Respondent's counsel appears to have unilaterally changed the case caption to identify Appellant as the only defendant. (*Id.*) Respondent knowingly made the change to make Appellant the defendant. (R. 019). During the hearing on Appellant's motion for relief from judgment, Respondent's counsel stated,

5 Now, as far as the name goes, yes. The name was
6 different. There's multiple Modern Construction Services.
7 That's why the amended motion was filed or the amended order
8 was filed so that we could get the right party served.

(R. 274, lines 5-8) (Emphasis added).

Respondent's counsel's statement not only shows that Respondent's counsel knew that it had not served Appellant on July 8, 2021, the statement is inconsistent with its claim that Appellant was served on July 8, 2021, because the "amended motion or the amended order" was filed on April 1, 2022, many months after July 8, 2021. Therefore, Respondent's counsel's statement is an admission that it knew it had not served Appellant prior to filing its "amended motion or the amended order" on or about May 19, 2022 because Respondent filed the "amended motion or the amended order" so that Respondent "could get the right party served." It is unclear from the record how Respondent asserts that filing the "amended motion and the amended order" resulted in proper service on Appellant, but it is clear that the record does not contain any evidence that Appellant was served with the summons and complaint before or after May 19, 2022 when the "amended motion or the amended order" was filed.

The result of Respondent’s counsel changing the case caption and identifying Appellant as a defendant, was the issuance of a default judgment against Appellant. Changing the case caption to identify Appellant as the defendant without issuing and serving a summons naming Appellant a defendant, and without filing a motion for leave to amend the complaint to add Appellant as a defendant, may not be fraud or misrepresentation, but certainly raises the suspicion of misconduct. Unfortunately, Respondent’s counsel went a step beyond simply adding Appellant as a defendant and obtaining a default judgment against Appellant, Respondent’s counsel changed the caption, and included language in the proposed order that states that Appellant is “(also known as Modern Construction of South Carolina LLC)”. (R. 018-019, 297). 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. (R. 066, wherein Respondent’s counsel represented to the trial court that, “Defendant Modern Construction of South Carolina LLC ... contacted Plaintiff’s counsel to identify the correct Defendant as Modern Construction, LLC”). Respondent’s counsel represented to the trial court that the correct defendant was “Modern Construction, LLC,” not Modern of SC, and based on that belief filed a motion that resulted in the trial court vacating the judgment against Modern of SC. (*Id.*) Thereafter, Respondent’s counsel filed a motion seeking, and obtained default judgment against “Modern Construction, LLC.” (R. 069). After obtaining a Form 4 Order granting default judgment against Modern Construction, LLC, Respondent’s counsel submitted a proposed order granting default judgment against “Modern Construction Services, LLC (also known as Modern Construction of South Carolina LLC)” (R. 297). The order was then issued by the trial court on May 24, 2022. (R. 018-019). This series of events resulted in a default judgment being issued against “Modern Construction Services, LLC (also known as Modern Construction of South Carolina LLC),” rather

than a default judgment order being issued solely against the named defendant Modern Construction of South Carolina LLC.

By identifying the defendant as Appellant “(also known as Modern Construction of South Carolina LLC),” Respondent: (1) could claim that service on Modern of SC was sufficient service of process on Appellant; (2) attempted to impute the Court’s jurisdiction over Modern of SC, to jurisdiction over Appellant; (3) attempted to make Appellant and Modern of SC alter egos;⁶ (4) induced the trial court into wrongfully enter and order of default judgment against Appellant; and (5) shifted allegations and demands for relief that Respondent expressly made against Modern of SC in the complaint, to allegations and demands for relief against Appellant, without ever taking the required procedural steps to obtain leave of the trial court to make any allegations against Appellant, or to demand relief against Appellant.

Notably, the trial court did not make any findings of fact, or conclusions of law, related to Appellant’s argument that the judgment against Appellant was procured by extrinsic fraud, misrepresentation or misconduct of an adverse party. (R. 028-035).

Although a Rule 60(b) motion must be filed “not more than one year after the judgment,” Rule 60(b) does not prevent a party from filing an independent action to obtain “relief ... from a judgment, order or proceeding, or to set aside the judgment for fraud upon the court.” Rule 60(b), SCRPC. Therefore, Rule 60 expressly indicates that a person has special protection against, and the court has authority to grant relief from, judgments obtained by fraud, even after the one year deadline imposed by Rule 60(b). The protection recognized by Rule 60(b) indicates that when a party makes a Rule 60(b) motion based on fraud, the trial court should give special consideration

⁶ Prior to obtaining a default judgment against Appellant, Respondent obtained an order of default judgment against Modern of SC, therefore if Respondent’s counsel considered Modern of SC and Appellant alter egos, Respondent did not need to vacate the judgment against Modern of SC because judgment against Modern of SC would be the same as judgment against Appellant, its alleged alter ego.

to, and make specific findings regarding, all allegations of such fraud. Here, the record does not reveal that the trial court exercised any discretion regarding whether the judgment against Appellant was obtained by fraud, misrepresentation or misconduct.

The record unequivocally shows that Respondent's counsel modified the proposed order and the case caption without justification, which resulted in issuance of a default judgment order against Appellant. The modifications made by Respondent's counsel were either fraud, misrepresentation, or misconduct that justify that Appellant be granted relief from the judgment. Therefore, the trial court abused its discretion when it denied Appellant's motion for relief from, and motion to set aside the default and default judgment. Accordingly, the decision of the trial court should be reversed, and the default and default judgment against Appellant should be set aside such that Appellant is granted relief from the judgment.

CONCLUSION

For the reasons stated herein, the trial court abused its discretion when it denied Appellant's Motions to set aside the default and default judgment issued against it, and for relief from judgment, therefore this Court should REVERSE the trial court's decision, set aside the default, and grant Appellant relief from the default judgment. Alternatively, this Court should remand the case to the trial court for findings of fact and conclusions of law consistent with this Court's opinion and South Carolina law.

Respectfully submitted,

WINDLE TERRY BIMBO
s/Don R. Terry
Don R. Terry, S.C. Bar No. 101395
Louis Segreti, S.C. Bar No. 107134
150 Milestone Way, Suite C
Greenville, SC 29615
(864) 520-4847
dterry@wtbconstructionlaw.com

*Attorneys for Appellant Modern Construction
Services, LLC*

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Greenville, South Carolina