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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Case No. 2022-CP-23-01702
Appellate Case No. 2025-000622

James Loper and Lauren Loper, Respondents,

v.

John Dolan, Appellant.

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

The facts of the case are as follows.

According to the trial court's records, Respondent commenced this action on April 1, 2022 with the filing of a summons and complaint naming Appellant as a defendant along with five other persons as co-defendants. The complaint stated causes of action against the Appellant that involved allegations of breach of contract and negligence.

Respondent filed an affidavit of service on May 11, 2022 purporting to show that a private process server named Kenn Doster served Appellant with the summons and complaint on May 7, 2022 at 10:37 am at the address of 104 Fawn Ridge Way; Mauldin, SC 29662. The affidavit of service also indicated two prior unsuccessful attempts at service on April 27, 2022 at the address of 240 Old River Rd.; Pelzer, SC 29669 and on May 3, 2022 at the address of 104 Farm Ridge Way, Mauldin, SC 29662.

The owner of 104 Farm Ridge Way; Mauldin, SC 29662 at the time of the purported service was Mary Jane C. Parks, Appellant's sister. She sold the property to a third party on June 14, 2022.

The affidavit of service contained identifying characteristics attributed to the individual who was served, describing that person as being five foot nine inches tall and having blue eyes.

The Appellant's driver's license, issued in the year 2020, describes Appellant as being five foot six inches tall and having brown eyes. It also shows Appellant's address to be 133 3rd Street; Greenville, SC 29661.

According to the trial court's records, Respondent filed an affidavit of default as to Appellant on June 15, 2022. An order of default was thereafter entered by the trial court on June 22, 2022.

According to the trial court's records, a damages hearing was held on August 2, 2023 at 10:30 am. Notice of the damages hearing was purportedly mailed on July 21, 2023 to 104 Farm Ridge Way; Mauldin SC 29662. Following the damages hearing the trial court awarded Respondent a default judgment against Appellant in the amount of Thirty-Nine Thousand, Seventy-Nine Dollars ($39,079.00). An order to that effect was entered on August 15, 2023 ("First Default Judgment Order").

According to the trial court's records, on September 27, 2023 Respondents filed a stipulation of dismissal as to all other defendants.

Respondents filed a second case (*James Loper and Lauren Loper vs. John Dolan,* 2024-CP-23-01046) against Appellant on February 19, 2024 seeking to foreclose the aforementioned First Default Judgment Order. Appellant was served with the summons and complaint in the foreclosure action on March 23, 2024 at Appellant's home address of 133 3rd Street; Greenville, SC 29661. Appellant then retained counsel and filed an answer and counter-claim in the foreclosure case on April 22, 2024.

Appellant filed a motion to vacate a default judgment in the present case along with supporting affidavits from himself and from his wife, Sharon Caulder, on April 19, 2024.

Respondent filed an affidavit of Carolyn Denney, Respondent's counsel's paralegal, on July 15, 2024.

Appellant filed a second affidavit from himself on July 16, 2024.

A hearing was held on Appellant's motion on July 17, 2024. The trial court entered a Form 4 Order containing its rulings from said hearing on July 22, 2024 ("July 2024 Order"). In said order the trial court granted Appellant's motion to vacate as to the default judgment. The order

denied Appellant's request to be allowed to file an answer and instead confirmed the Appellant's default. The order also ordered that a second damages hearing be held.

Appellant filed a motion to reconsider on July 25, 2024 ("First Motion to Reconsider"). Judge Gravely denied the motion for reconsideration on August 5, 2024 without a hearing.

On October 31, 2024, Appellant filed motions to dismiss pursuant to Rule 12(B)(5), SCRCP alleging insufficiency of service of process, Rule 12(B)(2), SCRCP alleging lack of personal jurisdiction, and a request for an evidentiary hearing (collectively "Rule 12 Motions to Dismiss"). After two continuances, the motions were scheduled to be heard on February 14, 2025 at the same time as the second damages hearing was scheduled.

On February 14, 2025, at the call of the case Judge Gravely denied Appellant's Rule 12 Motions to Dismiss without hearing arguments. The trial court entered a Form 4 Order denying the motions on February 14, 2025. Appellant filed a motion for reconsideration on February 20, 2025, which was denied by a Form 4 Order on February 21, 2025 without a hearing.

At the hearing on February 14, 2025, the trial court heard testimony regarding damages and issued a judgment against Appellant in the amount of Eighty-Four Thousand, One Hundred Forty Four Dollars and 97/100s ($84,144.79). The order from the second damages hearing was entered on March 5, 2025 ("Second Default Judgment Order").

Appellant filed a motion for reconsideration on March 6, 2025, which was denied by a Form 4 Order on March 25, 2025 without a hearing.

This appeal was timely filed and served on April 1, 2025.

ARGUMENTS

Standard of Review

Findings of fact made by the trial court regarding the validity of service of process are reviewed by the appellate court under an abuse of discretion standard. *Fassett v, Evans*, 364 S.C. 42, 49, 610 S.E.2d 841, 845 (Ct. App. 2004)("The power to set aside a default judgment is addressed to the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion."), *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 294-295, 721 S.E.2d 430, 432 (2012)("The trial court's findings of fact regarding validity of service of process are reviewed under an abuse of discretion standard."), and *Clark v. Key*, 304 S.C. 497, 405 S.E.2d 599 (1991). "The trial judge's decision will not be reversed absent an abuse of discretion. An abuse of discretion in setting aside a default judgment 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." *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997); *see also Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 399 S.E.2d 779, (1990); and *Richardson Construction Company, Inc. v. Meek Engineering and Construction, Inc.*, 274 S.C. 307, 262 S.E.2d 913 (1980).

1. **Did the trial court err in failing to either find that the First Judgment Order and the entry of default were both void for lack of service of process or hold an evidentiary hearing on the facts of service of process?**

Appellant's motion to vacate the default judgment was brought under Rule 60(4), SCRCP on the grounds that the First Default Judgment Order entered in on August 15, 2023 was void for lack of service of process as required under Rule 4, SCRCP. "Rule 4, SCRCP, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable

notice of the action." *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006)(*quoting Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 890 (1995)). The failure to comply with Rule 4, SCRCP, makes any subsequent order void for lack of personal jurisdiction. *Id.*

"The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *Belle Hall Plantation Home Owner's Association, Inc. v. Murry*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (2017)(*citations omitted*).

The Court has "never required exacting compliance with the rules to effect service of process." *Roche* 318 S.C. at 209-210, 456 S.E.2d at 899. "Rather, we inquire whether the plaintiff has sufficiently complied with the rules that the court has personal jurisdiction of the defendant and the defendant has proper notice of the proceedings." *Id.*

"Further, an [Officer's] return of process creates the legal presumption of proper service that cannot be 'impeached by the mere denial of service by the defendant.'" *Fassett* 364 S.C. at 47, 610 S.E.2d at 844 (*quoting Richardson Construction Company, Inc.* 274 S.C. at 311, 262 S.E.2d at 916). While the affidavit of process creates a legal presumption of proper service requiring more than a denial by the defendant that does not mean the affidavit of service cannot be challenged or that the bar to such a challenge is so high as to make such a challenge impossible. "An affidavit of service is Prima facie evidence of service which may be impeached by extrinsic evidence." *Richardson Construction Company, Inc.* 274 S.C. at 311, 262 S.E.2d at 916.

In Appellant's first affidavit, he asserts more than a mere denial. (R.O.A. pp. 61-63). First, Appellant asserts that the affidavit of service is intrinsically flawed because the identifying characteristics contained in the affidavit do not match those of the Appellant. *Id.* Appellant

focused on two specific characteristics that are nearly immutable: height and eye color. *Id*. The purpose of including identifying characteristics in an affidavit of service is obviously to enhance the veracity of the affidavit. If the characteristics do not apply to the person they are meant to describe, the affidavit, itself, is inherently flawed. When an affidavit of service itself is materially defective, the affidavit should be considered void on its face. *Cannon v. Haverty Furniture Co.*, 179 S.C. 1, 1, 183 S.E. 469, 473 (1935). A void affidavit of service would not give the trial court jurisdiction over the Appellant. *Id*.

In addition to his denial and the inherent flaw of the affidavit of service, Appellant provided additional extrinsic evidence that runs contrary to the affidavit of service. (R.O.A. pp. 61-63). Appellant asserts that he did not live at 104 Farm Ridge Way; Mauldin SC 29662 on the date and time described by the affidavit. (R.O.A. p. 61). He provided a copy of his driver's license showing a different address. (R.O.A. p. 62). He further stated that 104 Farm Ridge Way was owned by his sister and that he was not there that day. (R.O.A. p. 62). He further stated he was working at a jobsite and how he remembered being there on that date. (R.O.A. p. 62).

Appellant also provided an affidavit from wife, who was his fiancé at the time of the purported service, who stated that Appellant was not at the location of the purported service at the date and time indicated on the affidavit of service. (R.O.A. p. 65). She also stated that the reason she knew he was not at that location was because she was with him that day and that they were at a worksite. (R.O.A. p. 65).

Appellant also filed with the trial court an affidavit from his sister confirming that she was the owner of 104 Farm Ridge Way; Mauldin SC 29662 at that time. (R.O.A. p. 66). Her affidavit also states that Appellant did not live at that address during the time of the purported service and specifically stated that Appellant was not at her address on the date and time indicated on the

affidavit of service. (R.O.A. p. 66). Finally, Appellant also filed an affidavit with the trial court from John E. Walton, M.D. stating that the Appellant was working for him at the date and time of the purported service at his house located at 4005 Blue Ridge Circle; Greer SC 29651. (R.O.A. p. 67).

The affidavits of Appellant's sister and Dr. Watson were filed after the trial court's hearing on Appellant's Motion to Vacate and were not considered by the trial court in its decision. (R.O.A. p. 3).

Appellant provided evidence sufficient to impeach Respondent's affidavit of service. The trial court acknowledges this impeachment in its July 2024 Order when it states: "The Defendant has raised some questions about the service…" (R.O.A. p. 3). Instead of relieving Appellant of the entry of default or ordering an evidentiary hearing to give due process to the questions raised about the service, the trial court leaped to confirm service of process. (R.O.A. p. 3).

Respondent presented no evidence to support service of process other than the affidavit of service itself and an unauthenticated note. Appellant argued the sufficiency of its evidence and the lack of any evidence supporting service of process that was not impeached or unauthenticated at the hearing and in its subsequent motion for reconsideration. (Transcript of Hearing from July 17, 2024 p. 4-7, R.O.A. p.32-35, Motion to Reconsider Court's Order Denying Motion to Vacate Default Judgment p.1, R.O.A. p. 46). Based on the questions raised by Appellant the trial court should have either allowed Appellant to file an Answer or ordered an evidentiary hearing to take in-person testimony on the issue of service.

The facts of the present case are analogous to those of *Laurens Trust Co. v. Copeland*, 154 S.C. 390, 151 S.E. 617 (1930). In *Laurens Trust Co.*, "Laurens Trust Company obtained a judgment by default against E.W. Copeland and his wife, Lizzie H. Copeland…." *Id.* at 390, 618.

The summons and complaint were filed on December 4, 1924 and an affidavit of proof of service was filed on December 31, 1924. *Id*. A motion to set aside the default judgment was filed on May 31, 1928 on the grounds that the defendants were never served. *Id*. After hearing arguments at an initial hearing on the motion, the trial judge, Judge Featherstone, referred the case to the Honorable Frank P. McGowan "to take the testimony in the case and report the same to the court." *Id*. The testimony provided conflicting evidence regarding whether service of process had actually occurred. *Id*. The Court states: "The return of this offer is only *prima facie* evidence of the facts therein stated, but this affidavit of service has been impeached by extrinsic evidence, and the proof of its falsity has been clearly and convincingly established." *Id*.

In the present case, there is evidence that the affidavit is false on the face of the affidavit, and there is extrinsic evidence contradicting the affidavit. The trial court committed an abuse of discretion by jumping to the conclusion that the First Default Judgment Order and the entry of default were not void for lack of service in the face of an impeached affidavit of service and no other creditable evidence to support service of process. At the very least, the trial court should have ordered an evidentiary hearing as was done in *Laurens Trust Co.* before issuing an order confirming the entry of default in the face of contradictory evidence.

2. Did the trial court err by requiring the Appellant prove fraud in order to successfully show that service of process did not occur?

The trial court's July 2024 Order states: "To accept the Defendant's position, the Court would have to find that someone was impersonating the Defendant or perpetrating a fraud on him, but there is no evidence of this." (R.O.A. p. 3).

Appellant's motion to vacate default judgment was brought under Rule 60(b)(4) SCRCP on the grounds that the judgment was void as previously discussed. Appellant's motion was not

brought on the grounds of fraud, misrepresentation, or other misconduct of an adverse party, which is Rule 60(b)(3) SCRCP. (R.O.A. p. 44).

In requiring that the Appellant prove fraud in order to show service did not occur, the trial court adds a new element to the Rule 60(b)(4), SCRCP analysis. This additional requirement makes proving that service did not occur nearly impossible. Under the trial court's standard, a defendant would have to file a motion to vacate default judgment immediately upon learning of the existence of a default judgment and prove fraud solely by affidavit without an opportunity to cross-examine witnesses. In addition, such a defendant must do that without the benefit of any discovery. Such a bar would be impossible to reach.

The correct standard would be to acknowledge that a plaintiff bears the burden of properly serving a defendant. Rule 4, SCRCP. Plaintiff also bears the burden of proving service of process. *Christian v. Healy*, 435 S.C. 507, 511, 868 S.E.2d 403, 405 (2021). Filing a sworn affidavit signed by a private process server is *prima facia* evidence of proper service. *Richardson Construction Company, Inc.*, 274 S.C. at 311, 262 S.E.2d at 915.

While being *prima facia* evidence, such an affidavit of service can be impeached by extrinsic evidence. *Id*. Once an affidavit of service is impeached, the *prima facia* evidence aspect of the affidavit of service no longer exists; therefore, the burden of proving service of process would shift back to the plaintiff. *Laurens Trust Co.*, 154 S.C. at 390, 151 S.E. at 618. The court would need to hold an evidentiary hearing to allow the plaintiff to prove service of process in the same way other facts are proven while giving the defendant an opportunity to cross-examine its witnesses and prove its own facts. *Id*.

The trial court abused its discretion by requiring Appellant prove fraud as part of a Rule 60(b)(4), SCRCP analysis rather than just requiring that Appellant impeach the affidavit of service.

3. Did the trial court err in relying on an unauthenticated document as part of its reasoning in finding service of process was sufficient?

The trial court cites an unauthenticated document in support of its ruling that service of process was sufficient. The July 2024 Order states: "Further, Plaintiff submitted an affidavit from Plaintiff's counsel's paralegal that shortly after the Defendant was purportedly served, she received a written note from John Dolan acknowledging receipt of the complaint and indicated that he was 'seeking legal council {sic}.'" (R.O.A. p. 3). At the July 17, 2024 hearing on Appellant's motion to vacate default judgment, Appellant's counsel argued that the note was not signed or dated. (R.O.A. p. 34). Specifically, counsel for Appellant stated: "There's no date on that letter. There's no address on that letter. There's no signature on that letter." (R.O.A. p. 34). Appellant's counsel reiterated its argument that the document was not signed or dated in Appellant's First Motion to Reconsider. (R.O.A. p. 46).

The rules of evidence provide a clear standard as to what documents can be considered as evidence by the finder of fact. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901, SCRE. "A party offering evidence must meet '{t}he requirement of authentication as a condition precedent to admissibility." *Deep Keel, LLC v. Atlantic Private Equity Group, LLC*, 413 S.C. 58, 65, 773 S.E.2d 607, 610-611 (Ct. App. 2015).

The document authentication requirement set forth in Rule 901, SCRE applies to documents presented at motion hearings. *McMillian Pazdan Smith, LLC v. Mattison*, 445 SC 35, 56, 911 S.E.2d 412, 423 (Ct. App. 2024)("'It is well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment.'")(quoting *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993)). "In particular, a letter 'must be attached to an affidavit

and authenticated by its author in the affidavit or a deposition.'" *Orsi v. Kirkwood*, 999 F.2d 86, 92 (4th Cir. 1993) (citations omitted.)

In the July 2024 Order, the document referred to as a "note" and described as coming from Appellant was presented to the trial court by affidavit of Respondent's counsel's paralegal, not the "note's" author. (R.O.A. p. 3). The document is not signed, not dated, not sworn, and not attached to an affidavit claiming authorship. (R.O.A. p. 71). To the contrary, Appellant specifically states in his second affidavit that he did not write that document. (R.O.A. p. 64).

This document is not authenticated in any way, yet the court relied upon it as evidence and specifically cited it in the trial court's order. (R.O.A. p. 3). The document could have come from anyone and been written at any time. There is certainly no evidence that the note was written by the Appellant. The trial court should have excluded the document from its reasoning.

The trial court abused its discretion by including the unauthenticated document in its analysis. Furthermore, once the unauthenticated document and the impeached affidavit of service are excluded from evidence, the Respondent has presented no evidence to support its position that Appellant was served.

4. **Did the trial court err in making a factual finding as to a disputed material fact on affidavits alone without holding an evidentiary hearing?**

As previously stated, the July 2024 Order acknowledged that Appellant had "raised questions." (R.O.A. p. 3). Despite these questions the trial court made a factual finding regarding the sufficiency of service of process without holding an evidentiary hearing. (R.O.A. p. 3). By extrapolation, the trial court's same finding served as the basis for the trial court's personal jurisdiction over the Appellant and the basis for denying that its prior orders in the case were void. (R.O.A. p. 3).

In so doing, the trial court made no determination about witness credibility. Instead, the trial court accepted the hearsay statement that the process server "confirmed identity." (R.O.A. p. 3). Appellant is then left with his own questions that he could never ask, such as: How was identity confirmed? Was the phrase "confirmed identity" boilerplate language that the process server included on all of his affidavits? Would the process server have been able to identify the Appellant as the person he served? These are basic questions that Appellant would have liked to have asked but never had an opportunity to do so.

Without an evidentiary hearing, the trial court made a factual determination on an issue that determined the entire case based solely on two affidavits, both of which are plagued with issues previously discussed: the affidavit of service containing a description of someone other than the appellant and the "note" attached to Respondent's counsel's paralegal's affidavit that was unauthenticated.

On October 31, 2024 Appellant filed Rule 12 Motions to Dismiss. (R.O.A. p. 48). These motions were denied without a hearing because the trial court ruled it had already decided the issue of service of process. (R.O.A. p. 6). In so doing, the trial court also denied appellant's request for an evidentiary hearing. (R.O.A. p. 6). The trial court denied Appellant the opportunity to present witnesses and cross-examine Respondent's witnesses because the trial court made a factual determination using only affidavits.

An evidentiary hearing to decide a legitimate factual dispute is essential to due process. "Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses." *Graham Law Firm, P.A.*, 396 S.C. at 299, 721 S.E.2d at 435 (*quoting Brown v. South Carolina State Board of Education*, 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990)).

An evidentiary hearing was held in *Laurens Trust Co.* when that court faced a similar factual scenario, showing past precedent for holding an evidentiary hearing to determine this specific issue. *Laurens Trust Co.*, 154 S.C. at 390, 151 S.E. at 618.

Furthermore, the South Carolina State Supreme Court has specifically held that issues of fact should not be decided by affidavits. "This court has decided in several cases that to decide an issue of fact on affidavits in most cases is unsatisfactory." *Union Sav. Bank v. Hubbard*, 138 S.C. 328, 328, 136 S.E. 481, 482 (1927). Therefore, the trial court committed an abuse of discretion when it chose to decide the factual issue of service of process on affidavits without an evidentiary hearing; thus, the trial court committed error.

5. Did the trial court err in applying a Rule 60(b), SCRCP (other than Rule 60(b)(4), SCRCP) analysis to Rule 60(b)(4), SCRCP?

Appellant's motion to vacate default judgment was brought under Rule 60(b)(4), SCRCP. (R.O.A. p. 44). Appellant's request for relief in his motion was as follows: "Defendant prays that his motion be granted, the Default judgment be vacated, and he be allowed to file an Answer." (R.O.A. p._45). The portion of the requested relief asking that the default judgment be vacated was granted; however the portion asking that "he be allowed to file an Answer" was denied. (R.O.A. p. 3).

Under a Rule 60(b)(4), SCRCP analysis, the default judgment and the entry of default are linked issues. Both the default judgment and the entry of default would be void upon a factual finding of lack of service. *Belle Hall Plantation Owner's Association, Inc.*, 419 S.C. at 617, 799 S.E.2d at 316. A void judgment is a nullity and without legal effect. *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (2002). If Appellant was not served, both the entry of default and the default judgment would both be void. *Id.* Likewise, if the trial court found

that the Appellant was served, both the entry of default and the default judgment would be valid orders. *Id*.

In this case, the trial court, having made a finding of fact that service of process was proper, should have ended its analysis, but instead the trial court proceeded with a Rule 60(b), SCRCP analysis for something other than Rule 60(b)(4), SCRCP.

The Rule 60(b), SCRCP analysis that the trial court apparently used splits the default judgment and the entry of default into separate issues with each having its own standard of analysis. "'The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the 'good cause' standard established in Rule 55(c) [for relief from an entry of default.].'" *Ex parte Trustgard Insurance Company*, 442 S.C. 485, 510, 900 S.E.2d 448, 461 (Ct. App. 2023)(*quoting Sundown Operating Co. v. Intedge Indus., Inc*., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009)). "'[R]elief from default judgment under Rule 60(b), SCRCP, 'requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party.'"" *Id*. (*quoting ITC Com. Funding, LLC v. Crerar*, 393 S.C. 487, 494, 713 S.E.2d 335, 339 (Ct. App. 2011) (*quoting Sundown Operating Co.*, 383 S.C. at 608, 681 S.E.2d at 888)). "'The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default.'" *Id*. (quoting *Sundown Operating Co.*, 383 S.C. at 608, 681 S.E.2d at 888-89). "Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009).

In the present case, the trial court vacated the judgment, but not under Rule 60(b)(4), SCRCP. (R.O.A. p. 3). The trial court vacated the default judgment because it found that Appellant did not have notice of the first damages hearing. (R.O.A. p. 3). Though the trial court is silent on its reason, it is evident that the trial court in vacating the judgment found that Appellant's lack of notice outweighed the finality of the judgment. (R.O.A. p. 3). Thus, the relief requiring the more particularized showing was granted.

With the judgment vacated, the analysis changes to the entry of the default. A difference standard applies to setting aside an entry of default. Setting aside an entry of default is controlled by Rule 55(c), SCRCP and has a lower standard than vacating a default judgment. *Ex parte Trustgard Insurance Company*, 442 S.C. at 510, 900 S.E.2d at 461. An entry of default may be vacated for "good cause." *Id*. and Rule 55(c), SCRCP.

Appellant did not make a "good cause" argument because the motion before the court was brought under Rule 60(b)(4), SCRCP not under Rule 55(c), SCRCP. (R.O.A. p. 46). Nothing in the July 2024 Order indicates that the Rule 55(c), SCRCP "good cause" analysis was done. (R.O.A. p. 3). Apparently, the trial court changed its analysis for vacating the default judgment away from Rule 60(b)(4), SCRCP, but did not change its analysis away from Rule 60(b)(4), SCRCP for the entry of default.

In addition to this pair of rulings (the vacating of the judgment and the confirming of the entry of default without a "good cause" analysis), the trial court also ruled that a second damages hearing be held because of Appellant's lack of notice of the first damages hearing. (R.O.A. p. 3). The July 2024 Order states: "[T]he Court, already confirming the Default, sets aside the Default Judgment and orders that a hearing be scheduled with proper notice to Defendant's attorney. This hearing will only be for the purpose of establishing damages as provide by Rule 55(b)(2)." (R.O.A.

p. 3). Appellant did not request that a second damages hearing be held. (R.O.A. pp. 44-45). The request for a second damages hearing came from Respondent's counsel during the hearing on Appellant's motion to vacate. (R.O.A. p. 40).

In the aforementioned statement, the trial court first confirmed the default, which as previously discussed, has a lower standard of proof under Rule 55(c), SCRCP than is required to vacate a judgment. (R.O.A. p. 3). The trial court then proceeded to vacate the default judgment even though it has a higher standard. (R.O.A. p. 3). The trial judge abused his discretion first by applying a standard other than a determination as to whether the judgment was void, second by confirming the default, which was not a separate part of Appellant's motion, and third by vacating the default judgment after the entry of default was confirmed.

These rulings placed Appellant in a precarious position. The effect of the rulings was to allow Respondent to have a second damages hearing. (R.O.A. p. 3). As a result of Respondent's second damages hearing, the trial court issued the Second Default Judgment Order awarding damages in the amount of Eighty-Four Thousand, One Hundred Forty-Four and 97/100 Dollars ($84,144.97). (R.O.A. pp. 8-10). This amount exceeds Respondent's original damages award of Thirty-Nine Thousand, Seventy-Nine and 00/100 Dollars ($39,079.00). Thus, the net effect of Appellant filing his motion to vacate along with his supporting affidavits was an increase in the judgment against him by Forty-Five Thousand, Sixty-Five and 97/100s Dollars ($45,065.97).

The new default judgment amount is over twice as large as the original default judgment. (R.O.A. pp. 8-10). This doubling of the judgment amount is a harsh result of Appellant's motion to vacate a default judgment. The harsh result is exacerbated by the fact that Respondent was given two damages hearings while the Appellant was denied even one evidentiary hearing. The South Carolina Supreme Court has indicated that such results should be scrutinized. "It is

generally recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits." *Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc.*, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981).

The trial court committed an abuse of discretion in applying the law to Appellant's motions to vacate. The trial court should have treated the motion for relief from a default judgment as being tied to the issue of the entry of default under the concept that they are either both void or neither is void. If the trial judge found that the service of process was sufficient, the motion would be denied. If the trial court found that service of process was not sufficient the motion would be granted. Dividing the issues and only granting relief from the judgment and not the entry of default created a harsh, unfair, and unjust outcome that should be scrutinized and overturned.

6. **Did the trial court err by denying Appellant's Rule 12 Motions to Dismiss without hearing arguments?**

The trial court in its Form 4 order denying Appellant's Rule 12 Motions states:

> In addition, Defendant Dolan filed a Motion pursuant to South Carolina Rule of Civil Procedure, Rule 12(b)(5) and Rule 12(b)(2) and a Request of an Evidentiary hearing pursuant to Rule 43(e). Prior to hearing the Plaintiffs' Motion for damages, the Court determined that Defendant Dolan was not entitled to a further hearing on the issues of personal service since those issues had been specifically addressed at the hearing on July 17, 2024 and ruled on in the Order issued on July 22, 2024. The issue of personal service was one of the primary issues addressed at the hearing and Order and Defendant Dolan's Motion was supported by several affidavits, all of which were considered by the Court in rendering its ruling as set out in the July 22, 2024 Order. Defendant Dolan filed a timely Motion for Reconsideration which was denied by Order issued August 5, 2024. Therefore, the Court has previously addressed the specific issues raised in this Defendant's current Motions and finds that he is not entitled to another "bite at the apple" by way of another hearing.

(R.O.A. p. 6).

Appellant filed a motion to reconsider said ruling setting forth the following argument.

Appellant's motions are not an impermissible second "bite at the apple" as indicate in the trial court's order because of the unique nature of the issue of service of process. The determination of proper service of process is a factual determination made by the trial judge. *Graham Law Firm, P.A.* 396 S.C. at 294-95, 721 S.E.2d at 432. Proper service of process grants the court personal jurisdiction over the defendant. *Roche* 318 S.C. at 209, 456 S.E.2d at 899. Without service of process the court has no personal jurisdiction over the defendant. *Id*. Therefore, the trial judge's factual determination regarding service of process is also a determination as to whether the court has personal jurisdiction. *Id*.

Personal jurisdiction over a person is essential to the power of a court to determine a legal controversy. *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 51, 435 S.E.2d 377, 379 (Ct. App. 1993). A lack of jurisdiction removes the power of a court to determine a legal controversy. *Id*. Therefore, in order for a trial judge to have the power to make a factual determination about service of process, service of process must be sufficient. *Id*. If service of process is not sufficient then the trial judge has no jurisdiction to make such a factual determination. "Jurisdiction is generally defined as 'the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.'" *Limehouse*, 404 S.C. at 104, 744 S.E.2d at 572 (*quoting* 32A Am.Jur.2d Federal Courts § 581 (2007)).

An Order issued from a court lacking personal jurisdiction is void. "It is a universal principle as old as the law, that proceedings of a court without jurisdiction are a nullity, and its judgment without effect, either on the person or property." *Ex parte Hart*, 186 S.C. 125, 195 S.E. 253, 257 (1938). "The definition of void under the rule only encompasses judgments from courts

which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or person jurisdiction." *Universal Benefits, Inc.* 349 S.C. at 183, 561 S.E.2d at 661. "A void judgment is one that, from its inception, is a complete nullity and is without legal effect…." *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291 (1995).

Furthermore, if the trial judge makes an erroneous finding of proper service of process, those findings have no legal effect because the judge had no power to make the finding in the first place. *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 435 S.E.2d 377 (Ct.App. 1993). See also *McCall v. Cohen*, 16 S.C. 445 (1882). Such an order is still void for lack of personal jurisdiction. *New Hampshire Ins. Co.*, 312 S.C. at 51, 435 S.E.2d at 379. ("[B]ecause the special referee's assertion of personal jurisdiction over [the defendant] was based on erroneous findings that [the defendant] had been properly served with service of process and had made a voluntary appearance at the foreclosure hearing his merit finding must be disregarded.") See also *McCall* 16 S.C. at 3. ("Trial Justice Huggins was a judicial officer, and in the course of his official duties he rendered a judgment which, as it afterwards appeared, was void for the want of proper service of the parties.") "'A court may not act against a party without personal jurisdiction. Moreover, a court should not render a judgment affecting the rights of a party without proper notice.'" *Maybank v. Zurlo*, 444 S.C. 47, 72-73, 906 S.E.2d 94, 108 (2024)(*quoting Green Tree Serv., LLC v. Adams*, 375 S.C. 583, 586, 654 S.E.2d 100, 102 (Ct. App. 2007)).

Therefore, the issue of the factual determination of proper service of process has the unique property of removing the trial judge's authority to render a decision on the sufficiency of service of process if the service of process is not sufficient. See *McCall* 16 S.C. at 3. Because the trial court's entire authority to hear a case rests on this one factual determination, Appellant argues that the issues of service of process and a lack of jurisdiction derived from insufficient service of

process should be heard at any stage of the case, regardless of prior findings in the case, until a final order is issued. *South Carolina Public Interest Foundation v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022)("{T}he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits."). "Ordinarily an interlocutory order which merely decides some point or matter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 784 (2013)(*quoting Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct.App.1989)).

The court has examined this topic with respect to subject matter jurisdiction. "A judgment of a court without subject-matter jurisdiction is void." *South Carolina Department of Social Services, v. Tran*, 418 S.C. 308, 314, 792 S.E.2d 254, 257 (2016)(*quoting Coon v. Coon*, 364 S.C. 563, 566, 614 S.E.2d 616, 617 (2005)) "Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court.'" *Id. (quoting Badeaux v. Davis*, 337 S.C. 195, 205, 522 S.E.2d 835, 840 (Ct. App. 1999).

The distinction between subject matter jurisdiction and personal jurisdiction on this point is a practical one: "Lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court." *Anderson v. Anderson,* 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). "Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised." *Bakala v. Bakala*, 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003). Thus, the issue of lack of personal jurisdiction has to be raised at the trial court. *Id*. Failure to raise the issue prior to an appearance waives the issue. *Id*.

Appellant argues that when personal jurisdiction has not been waived and the issue of lack of personal jurisdiction has been raised, the trial court has an ongoing obligation to ensure that personal jurisdiction does in-fact exist in the same way that it has such an obligation with subject matter jurisdiction. "Lack of subject matter jurisdiction may not be waived and should be taken notice of by this Court." *Ex parte Reichlyn*, 310 S.C. 495, 499, 427 S.E.2d 661, 664 (1993)(emphasis added)(citing *Anderson*, 299 S.C. at 115, 382 S.E.2d at 900).

This duty of a trial court to continually monitor jurisdiction is further acknowledged by the trial court's ability to raise the issue of lack of subject matter jurisdiction *sua sponte*. *South Carolina Department of Social Services, v. Tran*, 418 S.C. at 314, 792 S.E.2d at 257. The trial court should also have a duty to monitor for lack of personal jurisdiction, when personal jurisdiction has not been waived, and address the issue *sua sponte* if necessary.

In the present case, the issue of lack of personal jurisdiction was raised and never waived. The issue of lack of personal jurisdiction was specifically placed before the trial court in Appellant's Rule 12 Motions to Dismiss. (R.O.A. p. 50). The trial court has a continual obligation to monitor for lack of jurisdiction. *See South Carolina Department of Social Services, v. Tran*, 418 S.C. at 314, 792 S.E.2d at 257. Furthermore, the trial court's previous interlocutory order finding proper service of process did not bar the issue from being brought back before the court because the final order had not been entered. *Shirley's Iron Works, Inc.*, 403 S.C. at 573, 743 S.E.2d at 784. At a minimum, Appellant was entitled to present his arguments regarding lack of jurisdiction to the trial court. The trial court abused its discretion by denying Appellant's Rule 12 Motions without at least hearing arguments.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court vacate the Order of Damages of the Honorable Perry H. Gravely dated March 5, 2025 as being void for lack of service of process and remand the case to allow Appellant to file an answer or, in the alternative, to remand the case for an evidentiary hearing to be held on the issue of service of process.