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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.

FINAL REPLY BRIEF OF APPELLANT TO BRIEF OF RESPONDENT

Kenneth G. Southerlin, Jr.
S.C. Bar No. 71891
Upstate Legal Solutions, LLC
P.O. Box 765
Travelers Rest, SC 29690
864-354-6689
attorneysoutherlin@gmail.com
Attorney for Appellant

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Rules

Other Authorities

ARGUMENT

1. Response to "The Circuit Court Properly Exercised Jurisdiction Because Dolan Was Validly Served and Subsequently Appeared"

A. APPELLANT DID NOT WAIVE PERSONAL JURISDICTION BY MAKING AN APPEARANCE

Respondent argues that Appellant waived personal jurisdiction by making an appearance. Respondent's Brief p. 8. The question of whether a defendant waives personal jurisdiction by appearance is addressed by this court in *Williams v. Williams*, 436 S.C. 550, 873 S.E.2d 785 (Ct. App. 2022). In the *Williams* case, the court walks through an extensive examination of jurisdictional issues, specifically including the issue of whether a defendant waives personal jurisdiction by an appearance. The Court of Appeals held:

> [Defendant] objected to the court's jurisdiction over the retirement benefits at his earliest opportunity and before he took any further action, such as filing his answer and counterclaim. He reasserted his objection at every stage of the proceeding, including in his answer and counterclaim. Therefore, we find he did not explicitly consent to have his military retirements benefits decided in South Carolina.

Id. at 596, 810.

When we examine the present case in the light of the holding in *Williams*, we note that Appellant only filed motions (and affidavits in support of those motions). Each of those motions was in furtherance of Appellant's position that the court lacked personal jurisdiction because of lack of service. The argument that Appellant was not served was raised at each court appearance as well. Thus, applying the holding in *Williams*, Appellant objected to the court's jurisdiction at his earliest opportunity and before he took any further action, and he reasserted his objection at every stage of the proceeding. Therefore, the Appellant did not waive personal jurisdiction.

B. ISSUES REGARDING SERVICE OF PROCESS

Respondent correctly notes that Appellant relies on *BB&T v. Taylor*, 369 S.C. 548, 633 S.E.2d 501 (2006). Respondent's Brief p. 9. Respondent states "But *BB&T* involved a complete failure of service, not a facially valid sworn return of personal service." *Id.* However, Appellant's position is that the present case, like *BB&T,* also involves a complete failure of service. The distinction between *BB&T* and the present case is that *BB&T* did not involve a dispute about the facts surrounding service of process. *BB&T,* 369 S.C. at 553, 633 S.E.2d at 503 ("Petitioner's residence and the manner of service of process are undisputed.") Because a dispute exists as to the facts of service of process, that dispute should have been resolved at an evidentiary hearing.

Respondent take the position that there is no factual dispute as to service of process. Respondent's Brief pp. 8—10. Respondent argues that a filed affidavit of service is *prima facie* evidence that Appellant was served with service of process and that the trial court made a finding of fact that Appellant was properly served thereby removing any dispute. *Id*. Furthermore, Respondent states that the Court of Appeals should defer to that determination. *Id*. That being said, Respondent's brief does not address any of the issues Appellant raised regarding the process that the trial court used to make a determination of proper service of process. *Id*. Instead, Respondent relies entirely on the trial court's decision that service of process was valid and proceeds with arguments related to different issues. *Id*. However, Appellant asserts that an examination of the process by which the trial court made its decision shows multiple instances of abuse of discretion by the trial judge.

A sworn affidavit of service of process from a process server is *prima facie* evidence that a defendant was served, and it does create a presumption as such. *Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct. App. 2004). That presumption, however, does not make such an

affidavit of service infallible. *Richardson Construction Company Inc. v. Meek Engineering and Construction, Inc.*, 274 S.C. 307, 311, 262 S.E.2d 913, 915 (1980)("An affidavit of service is *prima facie* evidence of service which may be impeached by extrinsic evidence.") The court in *Richardson* specifically states that an affidavit of service may be impeached. *Id*. The only additional guidance the court provides about impeaching an affidavit of service is that a "mere denial" of service by a defendant is not sufficient. *Fassett,* 364 S.C. at 47, 610 S.E.2d at 844 ("[A]n [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.")

Black's Law Dictionary defines the word "impeach" in this context as meaning "to challenge the accuracy or authenticity of (a document)." *Impeach*, Black's Law Dictionary (11th ed. 2019). Thus, the sole purpose of the July 17, 2024 hearing on Appellant's Rule 60(b)(4) SCRCP motions was to provide a forum for Appellant to challenge the accuracy of the affidavit of service.

At that hearing, Appellant provided his own affidavit in which he stated that he was not served. In addition to his "mere denial," he also stated specific reasons that supported his statement, including that he was not at the purported service location at the time service was alleged to have occurred. (Dolan's First Affidavit pp. 1—3; R.O.A. pp. 61-63.) Thus, Appellant's affidavit alone contains more than a mere denial of service. Additionally, Appellant showed specific inaccuracies contained within the affidavit of service, itself: namely that the identifying characteristics contained in the affidavit of service did not match those of the Appellant. (Dolan's First Affidavit p. 2; Affidavit of Service p. 1; R.O.A. pp. 62, 63.)

Appellant also provided an affidavit from his wife, Sharon Caulder, that corroborated Appellant's affidavit. (Caulder's Affidavit p.1; R.O.A. p. 65.) A corroborating affidavit shows

that Appellant is not making a "mere denial" of service. Appellant further provided an affidavit from his sister, Mary Jane Parks, that further corroborated Appellant's position that he was never served. (Parks's Affidavit p.1; R.O.A. p. 66.) Respondent collectively refers to these affidavits in his brief as being from the Appellant "and those of family members." Respondent's Brief p. 8. In referring to the corroborating affidavits as coming from family members, Respondent makes an implied reference to the credibility of these affidavits. *Id*. The fact that affidavits came from Appellant's family members is only relevant because it implies the possibility that the family members are biased. Otherwise, Respondent would not lump all of the affidavits together as "mere denials" when the case law specifies that the defendant's "mere denial" cannot be used to impeach. *Fassett,* 364 S.C. at 47, 610 S.E.2d at 844. Affidavits from other people are not "mere denials" but rather corroboration of Appellant's position.

Therein lies a fundamental problem with making a factual determination with only affidavits. The trial court unnecessarily placed itself in the position of making a determination of credibility based on affidavits alone. The trial court, in finding that the Appellant was served, had to discount the credibility of everyone who filed an affidavit supporting Appellant's position that he was never served. Thus, the trial court abused its discretion by making a factual determination by affidavit alone without holding an evidentiary hearing. *Graham Law Firm. P.A. v. Makawi*, 396 S.C. 290, 299, 721 S.E.2d 430, 435 (2012)("Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse witnesses.")(citations omitted.).

Respondent is correct in stating that the standard for "appellate review of factual findings on service is highly deferential." Respondent's Brief p. 10. However, the court has provided additional details regarding the standard for appellate review specifically in the context of a finding

related to the validity of service of process. On this issue, the court of appeals has stated the following:

> The trial court's findings of fact regarding validity of service of process are reviewed under an abuse of discretion standard. Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal. Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to {circuit} court findings where matters of credibility are involved.

Ex parte Trustgard Insurance Company, 442 S.C. 485, 505—506, 900 S.E.2d 448, 459 (Ct. App. 2023)(citations omitted.)

The court of appeals defers to the trial court's finding of fact because the trial court has the opportunity for direct examination of witnesses on the factual issue of service of process. *Id.* In the present case, there was no direct testimony. There was no opportunity for cross-examination. The trial court's decision to make a finding of fact without direct testimony is an abuse of discretion. Additionally, the lack of direct testimony undermines the basis for the appellant court's standard of review as set forth in *Ex parte Trustgard Insurance Company*. *Id.*

As previously stated, the sole purpose of the July 17, 2024 hearing on Appellant's Rule 60(b)(4) SCRCP motion was to afford Appellant an opportunity to impeach the affidavit of service. On this issue, the evidence provided by Appellant was successful. The trial court's July 22, 2025 order states: "This Defendant has raised some questions about the service, …" (Form 4 Order of July 22, 2024 p. 2; R.O.A. p. 3.) Raising questions about the accuracy of the affidavit of service satisfied Appellant's burden for removing the presumption of proper service.

Upon finding that Appellant had raised questions about the accuracy of the affidavit of service, the trial judge should have ordered an evidentiary hearing on the issue of service of process. See *Raby Const., L.L.P. v. ORR*, 358 S.C. 10, 15, 594 S.E.2d 478, 481 (2004)("The trial

court conducted an evidentiary hearing on the Rule 60(b) motion….). The trial court thus erred by not holding such an evidentiary hearing on Appellant's Rule 60(b)(4) SCRCP motion in the present case.

The trial court further erred by immediately addressing the questions raised by Appellant's impeachment of the affidavit of service. The trial court's order cites an affidavit provided by Respondent's counsel's paralegal as rehabilitating the affidavit of service. (Form 4 Order of July 22, 2024 p. 2; R.O.A. p. 3.) Additionally, the trial court further erred by citing to an unauthenticated document that was attached to Respondent's paralegal's affidavit. *Id*. The trial court used that unauthenticated document to support a finding that service of process had occurred. *Id*. The use of an unauthenticated document as evidence is a misapplication of Rule 901 of the evidentiary rules. Rule 901, SCRE.

Respondent's brief is silent as to all of the aforementioned allegations of error. Respondent's brief fails to provide any authority in support of the trial court's decisions on these issues.

C. Respondent Argues that the Judgment was Voidable Rather than Void

Respondent states that "[e]ven if some irregularities existed, the judgment would be voidable, not void." Respondent's Brief p. 9. Appellant does not argue that minor irregularities occurred. Appellant's position is that he was never served; therefore, he did not have notice of the action against him and the court did not obtain jurisdiction over the Appellant. Failure to serve a defendant is not a minor irregularity. It is a complete failure of due process. Thus, the trial court's entry of default and all subsequent orders would be void. Once those orders are shown to be void, the Appellant would be entitled to relief from the judgment in this case under Rule 60(b)(4) SCRCP. Rule 60(b)(4), SCRCP.

2. Response to "The Circuit Court Properly Denied Dolan's Rule 60(b) Motion Because He Failed to Demonstrate a Basis for Relief"

Respondent incorrectly states that proving a meritorious defense is a required element under Rule 60(b)(4) SCRCP. Respondent's Brief p. 10. The meritorious defense element is a requirement under Rules 60(b)(1) SCRCP, 60(b)(2) SCRCP, and 60(b)(3) SCRCP. *See Raby Const., L.L.P.*, 358 S.C. 10, 594 S.E.2d 478; *Ex parte Trustgard Insurance Company*, 442 S.C. 485, 900 S.E.2d 448. Appellant only filed for relief under Rule 60(b)(4) SCRCP; therefore, Appellant did not need to provide a meritorious defense to prevail said rule. *Id.* No South Carolina case has held that a showing of a meritorious defense is required under Rule 60(b)(4). *Id.*

A. RESPONSE TO "RULE 60(B)(4) DOES NOT APPLY BECAUSE THE JUDGMENT WAS NOT VOID"

Respondent argues that the judgment in the present case was not void and that a procedural error would only render the judgment voidable rather than void. Respondent's Brief pp. 11—12. Failure to serve a defendant with service of process is not a procedural error; failure to serve a defendant with service of process is a complete failure of due process and clearly renders any judgment issued thereafter void. *Belle Hall Plantation Home Owner's Association, Inc. v. Murry*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (2017).

Respondent also incorrectly states that "Dolan filed multiple pleadings and motions after default." Respondent's Brief p. 12. The record clearly shows that Dolan has not filed any pleadings in the present case. All motions filed by Appellant have been in furtherance of Appellant's position that he was never served. As previously argued, the court has stated in *Williams* that a defendant who objects to the court's jurisdiction at the earliest opportunity and

reasserts that objection at every stage of the proceeding does not waive personal jurisdiction. *Williams*, 436 S.C. at 596, 873 S.E.2d at 810.

B. RESPONSE TO "THE TRIAL COURT PROPERLY APPLIED THE RULE 60(B) STANDARD, NOT THE LESSER 'GOOD-CAUSE' TEST OF RULE 55(C)."

Respondent incorrectly states that Appellant argues that the lesser Rule 55(c) SCRCP standard should apply…." Respondent's Brief p. 12. Appellant does not make the argument that the lesser Rule 55(c) SCRCP standard should apply. Appellant's argument is that once the trial judge vacated the default judgment in its July 22, 2024 order, the entry of default should also have been vacated because Rule 60(b) SCRCP has a higher standard than Rule 55(c) SCRCP. *Ex parte Trustgard Company*, 442 S.C. at 461, 900 S.E.2d at 510 ("Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP.")(*quoting Sundown Operating Co. v. Intedge Indus. Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009)). If a default judgment is granted under Rule 60(b) SCRCP the entry of default should also be granted as part of that same relief. *Id*. To grant relief from the default judgment, but not from the entry of default, simply allows the plaintiff to have a second damages hearing without allowing the defendant to present any defenses or participate in litigating the issues in a meaningful way.

C. RESPONSE TO "DOLAN FAILED TO ESTABLISH EXCUSABLE NEGLECT OR ANY OTHER EQUITABLE GROUND FOR RELIEF"

Respondent makes an argument as to why relief should not be granted under Rule 60(b)(1) SCRCP. Respondent's Brief p. 13. Appellant, however, did not seek relief under Rule 60(b)(1) SCRCP. (Appellant's 60(b)(4) SCRCP Motion to Vacate p. 1; R.O.A. p. 44.) Appellant makes no allegation of mistake, inadvertence, surprise, or excusable neglect. *Id*. Appellant's position is that he was not served and had no knowledge of the action against him. *Id*. Appellant could not

have "waited nearly a year to file his motion" because he had no knowledge of the action. He did not wait any time at all. The passage of time between the court's entry of the original judgment on August 15, 2023 and Appellant filing his motion to vacate under Rule 60(b)(4) SCRCP on April 19, 2024 is the natural course of events for someone who had no knowledge of the action against him until March 23, 2024 when Appellant was served in a separate action.

D. RESPONSE TO "POLICY CONSIDERATIONS FAVOR FINALITY OF JUDGMENTS"

Respondent cites the importance of preserving the finality of judgments. Respondent's Brief p. 14. This policy, however, does not apply in the present case for three reasons.

First, while the preservation of the finality of judgments is an important policy, its importance as a policy consideration is completely eclipsed by the need to ensure due process. Due process a fundamental right that is enshrined in the South Carolina State Constitution.

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

S.C. Const. art. I § 3. The policy to preserve the finality of a judgment is meaningless if the judgment was obtained without due process.

Second, when a judgment is issued without due process (and thus no jurisdiction), that judgment is void. *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)("A void judgment is one that, from its inception is a complete nullity and is without legal effect and must be distinguished from one which is merely 'voidable'. Generally, a judgment is void only if a court acts without jurisdiction.")(citations omitted.). In the case of a void judgement, the judgment is a nullity; therefore, there is no actual judgment to preserve. *Hart v. Bowen*, 186 S.C. 125, 125, 195 S.E. 253, 256-257 (1938)("It is a universal principle as old as

the law, that the proceedings of a court without jurisdiction are a nullity, and its judgment without effect, either on the person or property.").

Third, because the trial court vacated the August 15, 2023 judgment, the finality of that judgment was not preserved. In the present case, the entry of default's finality was preserved, not the original judgment. Because the trial court vacated the judgment, the policy of preserving the finality of judgments is irrelevant in this case. Instead, Respondent's argument would need to be directed at the entry of default rather than the judgment to be applicable to the present case.

In contrast, the policy that is relevant to this case and that should be applied in this situation is the policy that favors a trial on the merits rather than a default. *Lewis v. Congress of Racial Equity and/or C.O.R.E. Inc.*, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981)("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.").

3. Response to "The Circuit Court Properly Determined That the Damages Award was Supported by Competent Evidence"

Appellant's argument against the second damages award is not evidentiary in nature as Respondent's brief describes. Respondent's Brief p. 15—16. Appellant's argument is that the court should not have conducted a second damages hearing. If service of process had been proper then the original judgment should have remained undisturbed. Appellant was the moving party at the July 17 2024 hearing, and Appellant did not request that a second damages hearing be held. (R.O.A. pp. 44-45.) The second damages hearing served to allow Respondent a second opportunity to present evidence while Appellant was denied even one opportunity to put witnesses before the court.

It is a harsh result of the legal system for the Appellant to file a motion to vacate, to successfully impeach the affidavit of service, to show that Appellant had no notice of the original damages hearing, then to be prevented from presenting any defenses, and to have an even larger judgment be issued against him. This is a harsh result of a default that the South Carolina Supreme Court warned about in *Lewis*. *Lewis*, 275 S.C. at 560, 274 S.E.2d at 289. It is the policy of the court to avoid such harsh results. *Id*.

4. Response to "Dolans Remaining Allegations of Error, Including Judicial Bias and Due Process, Are Unsupported by the Record"

Respondent states that the "record contains no evidence of judicial bias or denial of due process." Respondent's Brief p. 17. Appellant has made no allegations of judicial bias and does not claim judicial bias. Rather, Appellant claims that he was denied due process in the present case as a result of judicial error. As discussed herein and in Appellant's Brief, Appellant argues that judicial error occurred in both the application of the law and the application of the rules of evidence, but Appellant does not allege judicial bias.

Respondent is correct in stating that "due process requires only notice and an opportunity to be heard, not a particular outcome." Respondent's Brief p. 17. Appellant's position is that he was not given notice of this case or an opportunity to be heard. In addition to not being given an opportunity to be heard on the merits of this case, Appellant was also denied an opportunity to have a determination of the issue of service of process decided in an evidentiary hearing. Appellant has been denied the opportunity to cross-examine witnesses and to conduct discovery.

Conclusion

For the reasons discussed herein and those presented in Appellant's Brief, this Court should vacate the Order of Damages of the Honorable Perry H. Gravely dated March 5, 2025 as being

void for lack of service or process and remand the case to allow Appellant to file an answer, or, in the alternative, to vacate said Order and remand the case for an evidentiary hearing on the issue of service of process.