THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge
Trial Court Case No. 2014-CP-36-00109

Appellate Case No. 2014-001215

Larry E. Koon and Allen Lee Koon, by and through his attorney in fact, Larry E. Koon, Respondents,

v.

Thomas Jackson Construction Inc., Appellant.

FINAL BRIEF OF RESPONDENTS

Mindy W. Zimmerman
S.C. Bar # 75793
W. Coleman Lawrimore
S.C. Bar # 100668
Zimmerman & Shealy, LLC
P.O. Box 1207
Newberry, S.C. 29108
(803) 321-0000

ATTORNEYS FOR APPELLANT

Jennifer Dowd Nichols
S.C. Bar # 75916
Robert W. Dibble, Jr.
S.C. Bar # 1675
Harrell & Martin, P.A.
P.O. Box 1000
Chapin, S.C. 29036
(803) 345-3353

Kelley B. Parr
S.C. Bar # 64316
P.O. Box 1074
Chapin, S.C. 29036
(803) 345-5870

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY GRANT THE KOONS' MOTION FOR SUMMARY JUDGMENT AND DENY JACKSON'S MOTION TO DISMISS, ON THE GROUNDS THAT THE JUDGMENT ENTERED AGAINST ALLEN KOON INDIVIDUALLY WAS VOID FOR LACK OF PERSONAL JURISDICTION, AS WELL AS UNAUTHORIZED UNDER RULE 37, SCRCP?

II. DID THE COURT CORRECTLY DENY JACKSON'S MOTION TO DISMISS, ON THE GROUNDS THAT THE KOONS' ACTION TO SET ASIDE THE JUDGMENT AGAINST ALLEN KOON INDIVIDUALLY WAS TIMELY FILED UNDER RULE 60(b), SINCE THE RECORD CONTAINED NO EVIDENCE THAT THE KOONS HAD NOTICE OF THE INDIVIDUAL JUDGMENT BEFORE AUGUST, 2013?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The Respondents object to Appellant's Statement of the Case. In the interest of judicial economy, the Statement of the Case and the Statement of Facts in this brief will be combined, as the facts are significantly intertwined with the case history, and to set each forth separately would be duplicative.

This appeal involves two separate actions; the present case and an action filed in 2006 (the original action), Civil Action No. 2006-CP-36-395, filed by Appellant Thomas Jackson Construction Inc. (hereinafter "Jackson"), against Lake Murray Tree, Inc. (hereinafter "Lake Murray Tree") for collection of an unpaid debt. Respondent Allen Lee Koon (hereinafter "Allen Koon") was the sole shareholder and registered agent for service of process for Lake Murray Tree, but was never named a defendant in the original action (R. p. 296), and neither he nor the attorney for Lake Murray Tree were ever served with or accepted service of a Summons or Rule to Show Cause naming Allen Koon as a defendant in the original action. (R. pp. 128-129; pp. 134-135). The Complaint in the original action, which was never amended, did not contain a cause of action seeking to pierce the corporate veil. (R. pp. 298-300).

By consent, the original action was referred to the Honorable James S. Verner as Special Referee for Newberry County. Following a hearing, an Order was entered in that action on August 6, 2007 granting judgment in the amount of Twenty-Five Thousand Fifty-Six and 00/100 Dollars ($25,056.00) in favor of Jackson against Lake Murray Tree. R. p. 216). Supplemental proceedings were instituted in August, 2008, and on August 18, 2008, a subpoena was issued to Lake Murray Tree, not Allen Koon, individually,

requesting production of documents. (R. p. 179). This subpoena is not in the court file of the original action. (R. pp. 136-304).

On October 26, 2009, Mr. Price was relieved as counsel for Lake Murray Tree pursuant to a motion and an order. After this date, Lake Murray Tree was without counsel. On November 6, 2009, Jackson filed a Motion for Contempt Order and Sanctions against Lake Murray Tree for failure to produce requested documents. This Motion was directed *only* to Lake Murray Tree, the sole party defendant in the original action. The Motion requested that sanctions be awarded under Rule 37(b)(2), and that judgment be entered against Allen Koon individually (R. pp. 56-160).[1] Allen Koon did not appear at the December 15, 2009 hearing on this motion, and thus was not present for Appellant's argument that a judgment should be entered against him individually.

On February 1, 2010, the Special Referee issued an Order granting sanctions; specifically, the Referee ordered under Rule 37(b)(2) that a judgment in the amount of Thirty-Two Thousand, Eight Hundred Fifty Eight and 80/100 Dollars ($32,858.80) be entered against Allen Koon individually based only on the fact that he was the sole shareholder of Lake Murray. In so ordering, the Court mentioned briefly that Allen Koon had transferred assets from Lake Murray Tree to himself, but nowhere did the Court find that the corporate veil was being pierced. (R. pp. 145-151).[2]

---

1 The Motion also requested that the Court pierce Lake Murray Tree's corporate veil, however, the Special Referee chose to award sanctions against Allen Koon individually per Rule 37(b)(2), and never mentioned piercing the corporate veil in its Order. Thus the corporate veil was never pierced, and Appellant does not argue that it was.

2 See footnote 1 for discussion regarding the corporate veil.

The Judgment against Allen Koon was entered on February 1, 2010, at Judgment Roll 2010TR36173 in the Office of the Clerk of Court for Newberry County. The court file in the original action does not contain proof of service on Allen Koon of the Referee's Order granting judgment against him individually (R. pp. 136-304), and no proof of service on Allen Koon was produced by counsel for Appellant in the proceedings below.

On March 3, 2010, Lake Murray Tree filed a motion seeking relief from the judgment against it. (R. pp. 139-142). The Motion was signed by "Allen Koon, Registered Agent for Lake Murray Tree, Inc." The Motion sought to set aside only "the Judgment entered against Lake Murray Tree Inc.," based on a violation of the Statute of Frauds. (R. pp. 139-142). This Motion never mentioned the judgment entered personally against Allen Koon. No ruling was ever issued on this motion. (R. pp. 136-304).

Subsequently, on November 24, 2012, Allen Koon was arrested and charged with the murder of his wife, Cindy Koon. Allen was then incarcerated, where he remains today, awaiting trial. On November 26, 2012, Allen Koon executed a Power of Attorney in favor of his father, Respondent Larry Eugene Koon ("Larry Koon"), which remains valid today.

On May 15, 2013, Allen Koon, transferred his one-half undivided interest in a 23.194 acre tract of land to his father. On May 15, 2013, Larry Koon obtained by Deed of Distribution from the Estate of Cindy Koon, Allen Koon's late wife, the other one-half undivided interest in the 23.194 acre parcel. No title search was done on these transfers, because Allen Koon told his father that the land was unencumbered. (R. pp. 130-133).

This tract of land is the underlying subject matter of the present action.

In addition to this parcel of land, Allen Koon and Cindy Koon owned two other tracts of land, a 4.39 acre tract and a 1.65 acre tract. In July, 2013, Larry Koon and Austin Koon, the Personal Representative of Cindy Koon's estate, contracted to sell those tracts. The closing date was set for August 25, 2013. Two days prior to the closing, Larry Koon became aware for the first time of the Judgment held by Jackson against Allen Koon, individually. (R. pp. 130-133). He informed Allen Koon of the Judgment against him in late August or early September, 2013. This was the first time Allen Koon became aware of the Judgment against him. (R. pp. 130-133; pp. 128-129). There is no evidence in the record that Allen Koon had actual knowledge of the judgment against him prior to this date.

Negotiations ensued between Larry Koon and Jackson for the release of that land from the judgment. The closing was extended until October 18, 2013, and again to November 7, 2013. The sale closed on that date, after Jackson agreed to release the two tracts of land from the Judgment against Allen Koon in exchange for the payment of Eleven Thousand and 00/100 Dollars ($11,000.00). (R. pp. 130-133). Jackson was advised at that time that Larry Koon intended to bring an action to set aside the Judgment against Allen Koon individually.

On February 26, 2014, six months after learning of the Judgment against him, and three and one-half months after the partial release was filed, Respondents filed the present independent action against Jackson pursuant to SCRCP Rule 60(b)(4), seeking to have the Judgment against Allen Koon individually declared void for lack of personal

jurisdiction over him in the original action. (R. pp. 22-27). On March 12, 2014, Jackson filed an Answer, Defenses and Counterclaim, along with a Motion to Dismiss. (R. pp. 59-64). On March 27, 2014, the Koons filed a Motion for Summary Judgment, along with Affidavits of Allen Lee Koon, Larry Eugene Koon, and Samuel M. Price, Jr., Esquire. (R. pp. 65-66; pp. 128-135). On April 8, 2014, the Koons submitted a Reply to Counterclaim, a Brief in Opposition to Motion to Dismiss and in Support of Motion for Summary Judgment, and a Reply to Jackson's Memorandum in Opposition to Motion for Summary Judgment. (R. pp. 85- 104).

A hearing was held on April 9, 2014, before the Honorable Donald B. Hocker. At the hearing, the court file from the original action was entered without objection in its entirety. Judge Hocker denied Appellant's Motion to Dismiss and granted Respondents' Motion for Summary Judgment on the grounds that the Judgment against Allen Koon was void for lack of personal jurisdiction, that Rule 37 did not authorize a judgment be entered against a non-party, and that the Koons' 60(b) action was brought within an reasonable time. (R. pp. 5-19). The Appellant filed a timely notice of Appeal on June 4, 2014.

ARGUMENT

I. IN GRANTING THE KOONS' MOTION FOR SUMMARY JUDGMENT AND DENYING JACKSON'S MOTION TO DISMISS , THE TRIAL COURT CORRECTLY FOUND THAT THE JUDGMENT ENTERED AGAINST ALLEN KOON INDIVIDUALLY WAS VOID FOR LACK OF PERSONAL JURISDICTION, AS WELL AS UNAUTHORIZED UNDER RULE 37, SCRCP.

The Court in the original action entered judgment against Allen Koon individually as sanctions under SCRCP Rule 37, despite the fact that Allen Koon had never been

named a party to that action or otherwise made an appearance, and further was never found to be an officer, director or managing agent of Defendant Lake Murray Tree, as required under Rule 37. The trial court in the present action corrected this error of law by properly granting the Koons' Motion for Summary Judgment and denying Jackson's Motion to Dismiss, on the grounds that judgment was void for lack of personal jurisdiction, and further, unauthorized under Rule 37.

A. The Judgment Below Was Void As Against Allen Koon Individually Because There Is No Question Of Fact That The Special Referee Did Not Have Personal Jurisdiction Over Allen Koon.

1. The Court had no personal jurisdiction over Allen Koon because he was never named a Defendant in the action, and was never served with or accepted service of a Summons or Rule to Show Cause.

"A void judgment is one that, from its inception, is a complete nullity and without legal effect." Ware v. Ware, 404 S.C. 1, 9, 743 S.E.2d 817, 822 (S.C. 2013) (quoting Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). "The definition of void . . . only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." Id. (quoting Universal Benefits Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002). "[A]n order or judgment which purports to deprive one man of the title to property and vest it in another, is an absolute nullity, unless such order is made or judgment rendered in some action or proceeding to which the person whose title is thus divested has been made a party . . ." Wallace v. Foster, 15 S.C. 214, 220 (S.C. 1881). Thus, a judgment is void as a matter of

law if the court acts without personal jurisdiction over the person subject to the order. Id.; see also Ex Parte S.C. Dept. of Rev. v. McClure, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002); Thomas & Howard, 318 S.C. at 289, 457 S.E.2d at 343; BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).

> A court ordinarily obtains personal jurisdiction by the service of a summons. *See* State v. Sanders, 118 S.C. 498, 502,110 S.E. 808, 810 (1920) ('The purpose of the summons is to acquire jurisdiction of the person of the defendant . . .'); *cf.* Rule 3(a) SCRCP ('A civil action is commenced by the filing and service of the summons and complaint.'). However, our supreme court has 'previously excused the use of the Rule to Show Cause [in place of a summons] to obtain jurisdiction when it contained the essential elements of a valid Summons." Citizens & S. Nat'l Bank of S.C. v. First Palmetto State Bank & Trust Co., 279 S.C. 252, 254, 305 S.E.2d 80,80 (1983).

McClure, 350 S.C. at 407-08, 566 S.E.2d at 198.

When neither a summons or rule to show cause are issued, the court lacks personal jurisdiction as a matter of law. Thornton v. Alford, 274 S.C. 1, 3, 260 S.E.2d 179, 180-81 (1979).

> [N]o summons or rule to show cause accompanied the order [appealed from]. As a result, the court lacked jurisdiction over appellant. . . . Disobedience of an order issued without jurisdiction is not contempt. . . . The order appealed from must, therefore, be reversed and the issuing court admonished for its failure to observe the barest rudiments of substantive or procedural law.

Id. at 1, 3, 260 S.E.2d at 180-81.

Similarly, the Court in McClure, held that an order issued by the Master-in-Equity was not binding upon the Department of Revenue because the Master lacked personal jurisdiction over the Department. 350 S.C. at 408; 566 S.E.2d at 198-199. In that case, a mortgagor foreclosed on a mortgage, and later found that the Department of Revenue had

a lien on the foreclosed property. The Department was not a party to the original foreclosure action. Mortgagor served the Department with a rule to show cause and an order that the Department would be bound by the judgment of foreclosure. The Department appealed, arguing that the rule to show cause did not contain the essential elements of a summons (it did not provide 30 days in which to respond), and thus the Master did not have personal jurisdiction over the Department. The Court of Appeals agreed, holding that since the rule to show cause did not comply with a summons, "the Master lacked personal jurisdiction over SCDOR, and the order binding it to the Master's initial judgment of foreclosure and sale *is void and must be vacated.*" Id. (emphasis added).

The lack of personal jurisdiction over Allen Koon in the present case is considerably more compelling than even that in Thornton and McClure, because in the present case, neither a Summons nor a Rule to Show Cause was *ever issued or served* on Allen Koon at all. The Summons in the original case was clearly captioned Thomas Jackson Construction Inc., v. Lake Murray Tree, Inc., and did not include as a defendant Allen Koon. (Summons in original action). This Summons was never amended to name Allen Koon as a defendant. Respondents' Motion for Summary Judgment in the present case was supported by two Affidavits, one by Allen Koon and one by Samuel M. Price, Jr., Esq., the attorney for Lake Murray Tree. Both confirm unequivocally that Allen Koon was never a named defendant in the original action, and no Summons or Rule to Show Cause was ever served upon nor accepted by Allen Koon or Samuel Price. (Affidavits of Allen Lee Koon and Samuel M. Price, Jr., Esq.). Appellant presents no

evidence to the contrary. Thus, the court below had no personal jurisdiction over Allen Koon, and the judgment against him individually is void and was correctly vacated by the lower court.

2. There is no question of material fact that Allen Koon ever made a voluntary appearance conferring personal jurisdiction over himself, individually.

Appellant contends in rather belabored fashion that Allen Koon, by virtue of a handful of actions he took exclusively in a representative capacity on behalf of Lake Murray Tree as its sole shareholder or registered agent, made a voluntary appearance in the original action sufficient to either automatically confer to the Court personal jurisdiction over himself, individually, or to evidence an intent to submit to the court's jurisdiction. This erroneous contention is wholly without factual or legal support.

As an initial and dispositive matter, the issue of personal or voluntary appearance was never raised by Appellants below in the present action. It was never raised in Appellant's Answer, Defenses and Counterclaim, Appellant's Motion to Dismiss, or Appellant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment in the present action. (R. pp. 59-62; pp. 63-64; pp. 81-84), and it was never argued at hearing. (R. pp. 105-127). It was never addressed in the lower court's Final Order Granting Summary Judgment in the present action. (R. pp.5-19). And it was never raised in any post-trial motion, since no post-trial motions were made. Therefore, the issue is not preserved for appeal. Trivelas v. S.C. Dept. of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001) (where defendant failed to raise issue in his argument to the court, issue was not addressed in order, and no post-trial motion raised the issue, the issue is not

preserved for appeal).

a. Allen Koon did not make a voluntary appearance, because a voluntary appearance requires *a Defendant* to evidence an intent to submit to the Court's jurisdiction, and Allen Koon was never a Defendant in the original action.

Voluntary appearance is governed by Rule 4(d) of the SCRCP, which states in pertinent part "[v]oluntary appearance *by defendant* is equivalent to personal service . . ." Rule 4(d), SCRCP (emphasis added). The operative language here is "by defendant." A case relied upon heavily by Appellant unequivocally states that "'[t]he term 'appearance' is used particularly to signify or designate the overt act by which *one against whom suit has been commenced* submits himself to the court's jurisdiction.'" Stearns Bank Nat'l Assn. v. Glenwood Falls, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007) (quoting 4 Am. Jur. 2d, Appearance, Section 1 (1995)) (emphasis added). An appearance may be express, or it may be implied from some act "'done with the intention of appearing and submitting to the court's jurisdiction.' . . . [C]ourts decide on a case by case basis whether *a defendant's act demonstrates an intent to submit to the court's jurisdiction.*" Id. (emphasis added).

The cases cited by Appellant in support of its argument that Allen Koon made a voluntary appearance provide no precedential value here, because each involve a *named defendant* in the action, who did not come under the personal jurisdiction of the court, for various reasons, usually lack of service. In Stearns, a *named defendant*, who was not served properly with a cross-claim, nonetheless made a voluntary appearance when its attorney wrote a letter to the cross-claimant's attorney, the content of which manifested

an intent to reach the merits of the case. Id., 373 S.C. at 341, 644 S.E.2d at 798. Likewise, in Rainwater Furniture Co. v. Blanton, 246 S.C. 172, 143 S.E.2d 124 (1965), a *named defendant* made a motion to dismiss for defect in service after striking a jury in the case. The court held that striking the jury in his case constituted a voluntary appearance, by which he submitted to the court's jurisdiction. Id., 246 S.C. at 173, 143 S.E.2d at 124. And once again in Southeastern Equip. Co. v. One 1954 Autocar Diesel Tractor, 234 S.C. 213, 107 S.E.2d 340 (1959), the *named defendant* was found to have made a voluntary appearance, thus submitting to the jurisdiction of the court despite a defect in service, when it made a motion to dissolve an attachment and demanded a copy of the Complaint, receipt of which it acknowledged. Id., 234 S.C. at 218, 107 S.E.2d at 342. Furthermore, a *named defendant* who questioned the validity of service upon him nonetheless made a voluntary appearance when he filed an Answer and Return, alleging several defenses in Connell v. Connell, 249 S.C. 162, 168, 153 S.E.2d 396, 398 (1967).

None of these cases apply legally to the present case, because they are inapposite factually. Allen Koon was *never* named as a defendant in the original action and Appellant *never* even attempted to serve Allen Koon with a Summons or Rule to Show Cause, as in each of Appellant's cited cases. Allen Koon simply was never even considered a party Defendant by anyone, not Jackson, not Jackson's attorney, not the Special Referee, and certainly not Allen Koon or Lake Murray Tree's former attorney. As such, the law of voluntary appearance does not apply.

b. The voluntary appearance of a non-party is rare, and requires a significant undertaking to evidence intent to submit to personal jurisdiction.

Cases in which a *non-party* are alleged to have made a voluntary appearance, while they do exist, are few and far between, and require a significant undertaking, such as answering the complaint in one's own name or defending the action, to evidence a real intent for the court to have jurisdiction over the person, despite not being named a party to the action. See Ex parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (S.C. App. 2009). Appellant cites not one case in which a non-party made a voluntary appearance sufficient to grant personal jurisdiction over him. Generally, a court cannot bind a non-party to a judgment. Green Tree Servicing v. Adams, 375 S.C. 583, 654 S.E.2d 100 (2007) (foreclosure judgment in action that omitted party with a lien on the property cannot bind that non-party). However, it appears that a non-party can actually make himself a party by answering the complaint in his own name, or by defending the action, and can thus be bound by a judgment in the action. For instance, "[t]he husband of a defendant who has not been made a party to a foreclosure suit, but who *joins his wife in an answer,* will be bound by a decree. Anderson v. Watts, 138 U.S. 694, 704, 11 S.Ct. 449, 452, 34 L.Ed. 1078 (1891). And, in the only South Carolina case located that is arguably on point, a trustee and personal representative who was removed from both posts and found to be in criminal contempt in an action to remove the PR, appealed such findings, arguing he was never made a party to any proceedings in his capacity as trustee, was never served with a rule to show cause for contempt, and was only before the court in his capacity as personal representative, such that the court lacked personal jurisdiction over him. The court disagreed, stating that not only did the trustee/personal representative consent to the court's jurisdiction by accepting the appointments as such, but also he and his counsel

appeared in court and argued the merits of the action multiple times without objection to personal jurisdiction. These actions constituted a voluntary appearance by one at least technically a non-party, and thus consent to personal jurisdiction. Ex parte Cannon, 385 S.C. 643, 685 S.E.2d 814 (S.C. App. 2009).

c. The only evidence in this case is that any action taken by Allen Koon was taken in a representative capacity, on behalf of Defendant Lake Murray Tree, and not in an individual capacity; as such, he did not make a voluntary appearance sufficient to submit himself to the jurisdiction of the court.

Under this law, Allen Koon, a *non-party* to the original action, did absolutely nothing to evidence an intent to submit himself to the jurisdiction of the court, personally. First, Appellant alleges in cursory fashion that Allen Koon "appeared at some of the Special Referee proceedings, answered a portion of the required discovery requests issued to him in supplementary proceedings, and filed an Emergency Motion for Continuance by and through his late wife." (Initial Brief of Appellant, p. 31). What Appellant fails to address anywhere in its brief is the fact that Allen Koon was the sole shareholder of the only Defendant, Lake Murray Tree, and as such, took each action listed above in a representative capacity, as agent for Defendant Lake Murray. A corporation is not an individual; a live person must undertake to manage an action on behalf of a corporation. Allen Koon was acting solely in this capacity when he appeared at hearings, answered discovery, and submitted a motion for continuance drafted by his wife. This is especially

true after Lake Murray Tree's attorney was relieved.[3]

There is absolutely no indication anywhere in the case file that Allen Koon was appearing or acting in his individual capacity. Every indication is that he was acting on behalf of the corporation. He was not a named party initially, he was not served with any pleading in his individual capacity, he never accepted service, he never signed a pleading or motion on his own behalf, he never answered on his own behalf, he never filed a Notice of Appearance, there is no evidence that he ever indicated verbally in court that he was appearing in his individual capacity, and notably, the caption of the case never changed to indicate Allen Koon was a party defendant. There is simply no evidence in the record whatsoever that Allen Koon appeared in any capacity other than as agent for Lake Murray Tree. He had the absolute right to appear at a hearing in a case involving Lake Murray Tree, and such an appearance does not make him a party to the action in his individual capacity.

Furthermore, there is no indication that the Emergency Motion for Continuance filed by Cindy Koon was filed in any capacity other than representative, on behalf of the corporation. First of all, the motion does not even appear in the Clerk's file for Civil Action No. 2006-CP-36-395, and thus it is questionable whether the Motion is even properly before this Court. The only reference to the motion is in the Order Granting Motion for Contempt and Sanctions, which states "[h]owever, approximately 30 minutes before the hearing, Cindy Koon faxed an Emergency Motion for Continuance . . . to the

---

3 It bears noting that Lake Murray Tree was represented by Attorney Samuel Price until October 25, 2009, at which time he was relieved as counsel. After this time, Allen Koon, as shareholder of Lake Murray Tree, necessarily began appearing at hearings, in a representative capacity for Lake Murray Tree.

Court stating that her father passed away on December 9, 2009. . . . In addition, the Emergency Motion does not attempt to explain the absence of *Allen Koon or anyone else with the authority to represent the Defendant* . . ." (R. p. 148). Nowhere does the Order say or even suggest that the Emergency Motion for Continuance was made on behalf of Allen Koon, individually. Instead, it refers to Allen Koon in a purely representative capacity, and even distinguishes him from the Defendant, Lake Murray Tree. Thus, even the Order which Appellant seeks to uphold in this appeal states clearly that Allen Koon's role at the hearing was for the purpose of *representing the Defendant*, Lake Murray. To argue otherwise in light of this language is disingenuous.

Lastly, Appellant argues that Allen Koon made a voluntary appearance sufficient to waive personal jurisdiction by two additional actions: 1) in bringing the present action under Rule 60 in 2014 to set aside the Judgment against Allen Koon, individually, and 2) by filing, in the original action, a motion to relieve Lake Murray Tree from the judgment against it. (R. pp. 139-142). Neither of these actions are sufficient to constitute a voluntary appearance, for multiple compelling reasons.

First, and most importantly, a voluntary appearance conferring personal jurisdiction, to be binding upon the party as the equivalent of personal service, must be made *before* judgment is rendered against such party. The court must have jurisdiction at the time the judgment is rendered; it cannot be acquired after. State ex rel McCall v. Cohen, 13 S.C. 198 (1880); see also Langley v. Graham, 322 S.C. 428, 472 S.E.2d 259 (Ct. App. 1996) (citing Cohen). Lake Murray Tree's motion, entitled Relief from Judgment, was filed on March 3, 2010, *after* the judgment was rendered against Allen

Koon, personally. And clearly, the present action to set aside the judgment against Allen Koon personally was filed in 2014, long after the judgment attached to Allen Koon. As such, neither are sufficient to validate the personal judgment, as neither conferred to the court jurisdiction *at the time* the judgment was rendered.

Even, however, if these actions were taken before judgment was rendered, neither action indicates the requisite intent to become a party to the *original* action. Plainly, filing the present action under Rule 60 in 2014, which seeks to set aside the judgment entered against Allen Koon personally in the *original* action, does not indicate an intent to come under the jurisdiction of the court in the *original* action. Such an argument is nonsensical. The present 2014 action is a completely separate action, and Allen Koon's act in seeking invalidation of a judgment from a previous action cannot afford personal jurisdiction over him in that previous action.

And furthermore, the Relief From Judgment (R. pp. 139-142) was submitted and signed by "Allen Lee Koon, Registered Agent for Lake Murray Tree, Inc.," again, acting in a representative capacity. The motion "gives the court Notice that the Judgment entered *against Defendant Lake Murray Tree Inc. on August 6, 2007* is void for lack of jurisdiction" by virtue of a random and legally insufficient Statute of Frauds argument that Lake Murray Tree was attempting to assert. Importantly, nowhere does the motion attempt to set aside the judgment against Allen Koon personally. Thus, Allen Koon was seeking relief specifically for Lake Murray Tree, not for himself, and as such, was acting in a representative capacity. The only language that Appellant points to as indicating that Allen Koon was making a voluntary appearance sufficient to evidence an intent to

become a party defendant, albeit *after* the Judgment was entered, is the first sentence of the motion, which states "Lake Murray Tree, Inc. by and through Allen Lee Koon, and Allen Lee Koon, alleged defendants . . . ." However, based on the relief sought, on behalf of Lake Murray Tree only, and based on the method by which Allen Koon signed the motion, on behalf of Lake Murray Tree only, this language referencing himself as a defendant appears to be a mere misnomer or mistake by an unsophisticated shareholder of a company without legal counsel. Regardless, based on the above-cited cases, such language hardly rises to the level required to evidence that a non-party has the intent to make himself a party to the action.

Lastly, Appellant's argument under Stearns and Rainwater, that this Relief from Judgment attempted to invoke the court's jurisdiction for one purpose (to set aside judgment for lack of subject matter jurisdiction) and thereby constituted a general appearance, waiving any personal jurisdiction argument, must fail as well, for all the reasons stated above. Even if none of the above arguments were compelling, the Relief from Judgment questioned only the court's subject matter jurisdiction, and the law is clear that "a defendant cannot be said to have waived personal jurisdiction merely because he alerts the court to other types of jurisdictional defects" as well. Maybin v. Northside Correctional Center, 891 F.2d 72 (4th Cir. 1989) (defendant that was improperly served did not make voluntary appearance sufficient to waive personal jurisdiction simply because it argued other jurisdictional defects as well, as long as it did not argue the merits). Thus, Respondent's Relief from Judgment could not have constituted a general appearance for the additional reason that it argued only a

jurisdictional defect, and could not thereby have waived personal jurisdiction.

3. The trial court did not err in granting summary judgment, because there was no question of fact that Allen Koon was not subject to the personal jurisdiction of the court, the proper standard was used in granting summary judgment, and the Special Referee did abuse his discretion by making an error of law in entering a judgment against Allen Koon individually that was unauthorized by law.

Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. Appellant argues that the lower court used the improper standard in granting summary judgment, i.e., it construed the affidavits of Larry Koon and Allen Koon in the light most favorable to the Koons, because it assumed the statements therein were true and uncontraverted "despite evidence presented at hearing to the contrary." (Appellant's Brief, pp. 32-33). Appellant fails, however, to outline any such evidence presented at the hearing that contradicted these affidavits. Without setting forth the factual evidence contradicting the affidavits, this Court cannot rule thereon.

The flaw in Appellant's argument is that the facts contained in the affidavits *were* uncontradicted. Allen Koon's affidavit first establishes that Allen Koon was never made a party to the original action. (R. pp. 128-129). This has been admitted by Appellant. (R. p. 122, lines 3-5). The second fact established by the affidavits of Allen and Larry Koon is that neither had knowledge of the Judgment against Allen Koon individually until August, 2013. (R. pp. 128-133). The only argument presented at the hearing to counter this fact, and the "evidence" to which Appellant must be referring, was the March 3, 2010 Relief from Judgment, which Appellant incorrectly argued at hearing sought to relieve

Allen Koon from the judgment against him individually. (R. p.108, lines 14 -18; p. 121, lines 24-25 - p. 122, lines 1-3; p. 122, lines 6-11; p. 123, lines 21-25 - p. 124, lines 1-2). This is wholly inaccurate. The Relief From Judgment never mentions the individual judgment, only the judgment against Lake Murray Tree (R. pp. 139-142; R. p. 125, lines 7-9), thus bolstering *Respondents'* contention that Allen Koon had no knowledge of the individual judgment at that time. As such, the facts contained in the affidavits as to knowledge of the individual judgment were uncontradicted by any valid evidence sufficient to raise a question of fact, and Appellant, in its brief, points to none. If Appellant submits no evidence contradicting Respondents' affidavits, then the lower court can only view the affidavits in one way, as true. Absent valid evidence countering the facts contained therein, the lower court properly ruled.

Appellant also argues summarily and without discussion that summary judgment was improper because "further inquiry was necessary to properly determine whether Koon made a personal appearance which conferred jurisdiction." (Appellant's Brief, p. 33). As an initial and dispositive matter, as set forth in Respondent's argument regarding voluntary appearance above, the issue of personal or voluntary appearance was never raised by Appellants below in the present action. Therefore, the issue is not preserved for appeal. Trivelas v. S.C. Dept. of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001) (where defendant failed to raise issue in his argument to the court, issue was not addressed in order, and no post-trial motion raised the issue, the issue is not preserved for appeal).

Even if the issue is preserved, if Appellant needed additional time for "further

inquiry" into the matter of personal appearance, Appellant was required under Rule 56(f) SCRCP to submit an affidavit requesting additional time to allow for this inquiry and to supply responsive affidavits. Rule 56(f), SCRCP; Middleborough Horizontal Prop. Regime Council v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995) (in face of defendant's argument that discovery was needed before summary judgment would be appropriate, court held summary judgment proper because defendant failed to make a formal motion for continuance per Rule 56(f) and failed to point out with specificity that additional discovery would be helpful). See also Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002) (non-moving party failed to present affidavits to counter summary judgment motion, and failed to move pursuant to Rule 56(f) for additional time to supply affidavits; thus, summary judgment proper); Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2004) (non-moving party seeking continuance of hearing for further inquiry must demonstrate that further discovery will uncover additional relevant evidence and the party is not merely engaged in a fishing expedition).

Appellant submitted no such affidavit, and never mentioned at the hearing that additional time was needed to prepare and submit affidavits, per Rule 56(f). (R. pp. 136-304). Without a Rule 56(f) affidavit or at the very least a request in court for additional time for "further inquiry," Appellant must stand on the evidence in the record. Appellant points to no evidence indicating a voluntary appearance, other than that discussed and negated at length above, and suggests no "further inquiry" that would shed light on this matter. On the other hand, extensive evidence exists in the record that Allen

Koon was acting solely in a representative capacity when appearing in court and did not make a voluntary appearance sufficient to confer personal jurisdiction over him, as set forth above. No question of fact exists on this issue because, again, no valid evidence was presented to dispute the Respondent's position, and no request was made for further inquiry.

Lastly, Appellant argues that the lower court erred in finding that the Special Referee abused his discretion in "exercising personal jurisdiction over Koon. Thus his exercise of personal jurisdiction should not have been disturbed, because his finding was supported by evidence and reached only after the review and application of relevant caselaw." (Appellant's Brief, p. 33). Appellant refers to no such evidence supporting the "exercise of personal jurisdiction over Koon." Quite frankly, the Special Referee never made a "finding" that he was exercising personal jurisdiction over Allen Koon. Personal jurisdiction over Allen Koon was never at issue before the Special Referee. Instead, the Special Referee based his entry of judgment against Allen Koon individually on his status as shareholder of Defendant Lake Murray Tree, under Rule 37. (R. pp. 144-151). This ruling was wholly unsupported factually and unauthorized by law, because Rule 37 clearly requires one to be an officer, director of managing agent of a party in order for sanctions to even arguably attach (see Argument B below). Thus, the ruling was an error of law, and therefore an abuse of discretion, corrected by the lower court in the present action

B. The Court Properly Held That Rule 37, SCRCP, Did Not Authorize a Judgment to be Entered Against Allen Koon Individually Because the Only Evidence Was That Allen Koon Was a Non-Party to The Action, and Was A Shareholder of Defendant, Not an Officer, Director or Managing Agent, as Required by Rule 37.

1. Rule 37(b) does not authorize sanctions against an individual who is a non-party to the action.

Rule 37(b)(2) provides in pertinent part:

> (2) Sanctions by Court in which Action is Pending. If a party or an officer, director, or managing agent of a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . .[a]n order striking out pleadings or parts thereof . . . or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . .

Rule 37(b)(2), SCRCP.

In the Order Granting Plaintiff's Motion for Contempt Order and Sanctions, the Special Referee in the original action based its entry of judgment against Allen Koon individually on the following:

> [t]hroughout this entire case, Defendant, through the actions or failures to act of its sole shareholder, Allen Koon has repeatedly failed to comply with discovery requests and subpoenas . . . These actions by Defendant and its sole shareholder indicate a complete disregard for legal obligations and compliance with Court orders . . . It is apparent that there has been a pattern and practice of distribution of the Defendant's assets for the benefit of Mr. Koon . . . The Court finds that the judgment shall attach to Allen Koon, personally.

(R. pp. 149-150).

By using this language, the Special Referee plainly distinguishes between Defendant Lake Murray Tree and Allen Koon, and makes clear that Allen Koon is not a party to the action, but merely the shareholder of a party. He thus bases his Judgment against Allen

Koon individually on the fact that he is a shareholder, not on the perception that he is a party to the action.

Under the provisions of Rule 37(b)(2), the Court is limited to sanctions against a party to the action who, if an individual, fails to make or cooperate in discovery or fails to obey a court or order, or which, if an entity, through an officer, director or managing agent fails to make or cooperate in discovery or fails to obey a court order. Rule 37(b)(2), SCRCP. Rule 37(b)(2) authorizes the Court to issue various sanctions against a party to the action, but it *does not* authorize the Court to sanction a person who is not a party to the action, even though he or she is an officer, director or managing agent. Not one case exists in South Carolina jurisprudence in which a court issues sanctions under Rule 37(b)(2) against an individual who is not a party to the case, not even if the individual is an officer, director or managing agent of a party. Therefore, not surprisingly, Appellant in its brief conveniently avoids altogether the issue of sanctions against a non-party, focusing only on the propriety of the sanction itself. Because the Judgment against non-party Allen Koon individually was unauthorized by Rule 37(b)(2), the Judgment was based on an error of law, and thus was properly overturned by the Court in the present action.

2. To the extent Rule 37 does allow the Court to issue sanctions against a non-party, it only authorizes those sanctions against an officer, director or managing agent of an entity, not a shareholder such as Allen Koon.

Even if Rule 37(b)(2) does arguably allow the court to impose sanctions upon a non-party officer, director or managing agent of an entity named as a party, such as Lake Murray Tree, the Judgment issued against Allen Koon individually in this case still

cannot stand. As set forth in his Order (quoted above), the Special Referee in the original action entered Judgment against Allen Koon individually on the basis of his role as *shareholder* of Lake Murray Tree, *not* as an officer, director or managing agent, as required by Rule 37(b)(2). There is no finding of fact by the Special Referee in his Order, and in fact no evidence in the record whatsoever, that Allen Koon was either an officer, director or managing agent of Lake Murray Tree. (R. pp. 144-151). Although Appellant, throughout its brief, uses the terms "shareholder" and "officer" interchangeably when describing Allen Koon in an attempt to lull this Court into perceiving Allen Koon as an officer, the fact remains that the terms are legally distinguishable, and no evidence or finding exists that Allen Koon was an officer of Lake Murray Tree. The Order says what it says; it cannot be rewritten now to include such factual findings, assuming they even exist. The Order must stand as written by the Special Referee, who failed to find Allen Koon to be an officer, director or managing agent of Lake Murray Tree, as required by Rule 37(b)(2) for a sanction to even arguably attach to a non-party individual.

Rule 37(b)(2) authorizes the Court to make such orders as are just in regard to failure to cooperate in discovery. There is no justification for the issuance of an order entering judgment against Allen Koon individually when he was never made a party to the action, and was never found to be an officer, director or managing agent of Lake Murray Tree. There is simply no legal basis for the entry of Judgment against Allen Koon individually as the sole shareholder of Lake Murray Tree in the original action. Entry of such Judgment was an error of law, constituted abuse of discretion, and as such, was properly overturned by the lower Court, whose ruling should be sustained.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING JACKSON'S MOTION TO DISMISS, SINCE THE RECORD CONTAINED NO EVIDENCE THAT THE KOONS HAD NOTICE OF THE INDIVIDUAL JUDGMENT BEFORE AUGUST, 2013, AND THUS THEIR ACTION TO SET ASIDE THE JUDGMENT AGAINST ALLEN KOON INDIVIDUALLY WAS TIMELY UNDER RULE 60(B), SCRCP.

Rule 60(b) provides that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . ." Rule 60(b)(4), SCRCP. The Rule further provides that "the motion shall be made within a reasonable time . . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . ." Id. The present independent action to set aside the Judgment against Allen Koon individually was brought by Respondents under Rule 60(b)(4), on the grounds that the judgment was void for lack of personal jurisdiction over Allen Koon. The Judgment against Allen Koon was filed on February 1, 2010. The present independent action to set aside that judgment was filed on February 26, 2014. Appellant argues that the roughly four years between filing of the Judgment and the filing of the action to set aside the Judgment was not reasonable under the rule. This argument is without merit, however, given the specific, uncontested facts of this case and the relevant caselaw.

As an initial matter, the law is not fully settled in South Carolina that a Rule 60(b)(4) action to set aside a judgment as void is even required to be made within a reasonable time. In McDaniel v. U.S. Fid. and Guar. Co., 324 S.C. 639, 478 S.E.2d 868 (1996), the Court of Appeals stated that:

[t]here is inconsistency among the decisions of South Carolina appellate courts as

> to whether the 'reasonable time' requirement applies to Rule 60(b)(4) motions. See Sijon v. Green, 289 S.C. 126, 128 n.2, 345 S.E.2d 246, 248 n.2 (1986) (noting that 60(b)(4) motions must be made within a reasonable time); Smith Cos. v. Hayes, 311 S.C. 358, 359, 428 S.E.2d 900,902 (Ct. App. 1993) (affirming denial of relief on the basis that the 60(b)(4) motion was not made within a reasonable time). Contra Gatling v. Beach Palace, Inc., 294 S.C. 464, 365 S.E.2d 736 (Ct.App. 1988) (per curiam) (holding that the reasonable time requirement does not apply to 60(b)(4) because a void judgment is a nullity and thus may be attacked at any time); Flanagan, South Carolina Rules of Civil Procedure 487 (2nd ed. 1996) (citing Gatling, which cited Lightsey and Flanagan's first edition of the treatise).

McDaniel, 324 S.C. at 642, 478 S.E.2d at 870. See also Marquette Corp. v. Priester, 234 F.Supp. 799 (D.S.C. 1964) (reasonable time requirement does not apply to attacks on a void judgment); Vinten v. Jeantot Marine Alliances, 191 F. Supp. 642 (D.S.C. 2002) ("if a judgment is void for lack of personal jurisdiction, the district court must grant the Rule 60(b)(4) motion, without consideration of timeliness . . ").

In choosing, without explanation, to follow Sijon and Smith in requiring such a motion be brought within a reasonable time, the court nonetheless made abundantly clear in a lengthy footnote that there is a very significant "disagreement among the various federal and state jurisdictions as to whether the reasonable time requirement should be imposed on motions which attack a judgment as void." McDaniel, 324 S.C. 639, 645 n.1, 478 S.E.2d 868, 871, n.1. Citing numerous federal and state cases as well as multiple treatises that uphold no reasonable time requirement for attacks on a void judgment, the Court admits that Sijon and Smith are in the minority, and explains that "[t]hese authorities, including Gatling [from South Carolina], generally reason that a void judgment cannot gain validity with the movant's delay because it is a nullity from its inception." Id. This reasoning makes certain logical sense. Due to the state of the law in the South Carolina state courts, the District Court for South Carolina, and other federal and state jurisdictions, it is certainly arguable that the reasonable time requirement should

not apply when attacking a void judgment, thus negating Appellant's argument that the present action should be dismissed as untimely.

However, even if this Court chooses to impose a reasonable time requirement, Appellant's argument that the present action was untimely must fail, based on the evidence in the record and the applicable law. Whether or not the reasonable time requirement is met must be decided under the facts and circumstances of each case. The lower court relied upon Sijon v. Green, 289 S.C. 126, 345 S.E.2d 246, in holding that the Koons' action was timely. In that case, judgments were entered against Green at a hearing in 1979, of which he had no notice. He brought an action to set aside the judgments five years later, in 1984, claiming he had no notice of the hearing and was unaware of the judgments until 1984. The court noted that such an action under 60(b)(4) must be brought within a reasonable time, and did not hold that five years was unreasonable. Thus, implicitly, the court ruled that five years was not unreasonable, under the circumstances. Id.

Other cases, too, including each of those cited by Appellant, actually support the Koons' contention that their action was timely *under the facts of their case*. In Perry v. Heirs at Law of Gadsden,, 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003), the Court of Appeals found that under the specific facts of that case, a four-year delay was unreasonable for attempting to set aside a partition order, when the movant was aware of the order from date of entry. Importantly, however, the Court specifically stated that "[w]hile we are reluctant to proclaim that four years is per se unreasonable period of time, Gadsden, who bore the burden of showing the propriety of his motion, has failed to

proffer an argument as to why we should find that a four-year delay is reasonable in this case." Id., 590 S.E.2d at 505. The court thus left the door open for a four-year delay being reasonable, if the movant had a good reason for the delay, such as lack of notice.

And similarly, in Smith Cos. v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993), the court found that an eighteen-month delay between an order to surrender property and the filing of a Rule 60(b)(4) motion was unreasonable, when the movant had notice of the order, failed to appeal the order when he had the opportunity, and most importantly, "the record reveal[ed] no justifiable reason to excuse Hayes's delay in seeking to set aside the . . . judgment." Id., 311 S.C. at 359, 428 S.E.2d at 902. Again, the court focuses on notice of the order and the reason for the delay, and finding none, ruled the filing untimely, thus leaving open the door for delay when a good reason exists therefor.

Likewise, in McDaniel, 324 S.C. 639, 478 S.E.2d 868, the movant voluntarily entered into a settlement agreement which was incorporated into an order, filed in 1990. In 1994, he moved to set aside the order as void, offering no reason for the delay. In determining that the four-year delay was unreasonable, the Court of Appeals again focused on notice of the order: "The special referee's decision that McDaniel's motion was untimely after nearly four years is not an abuse of discretion, especially since McDaniel participated in the settlement, [and] received substantial benefits from it . . . ." Id., 324 S.C. at 644, 478 S.E.2d at 871. Again, the movant was aware of the order he sought to set aside, and thus had no good reason for the delay.

Based on this caselaw, and under the undisputed facts of the present case, there is

no question but that the Koon's 60(b0(4) action was timely filed. The Judgment against Allen Koon individually was filed on February 1, 2010. Importantly, there is absolutely no evidence that Allen Koon was ever served with this Judgment. It is undisputed that the court file in the original action contains no evidence that Allen Koon was ever served with the Judgment, and no proof of service on Allen Koon was ever produced by counsel for Appellant in the proceedings below. (R. pp. 136-304). Respondents submitted the Affidavit of Larry Eugene Koon and the Affidavit of Allen Lee Koon in support of their Motion for Summary Judgment, which confirm unequivocally that Larry Koon first became aware of the Judgment on August 23, 2013, and Allen Koon was first informed of the Judgment against him by his father in August or September, 2013. (R. pp. 128-133). These affidavits are uncontradicted; Appellants submitted no evidence to the contrary. Thus, the only evidence in the record is that the Koons were first made aware of the Judgment against Allen Koon individually in August, 2013. Subsequent to this notice, negotiations took place between Larry Koon and Jackson for the release of some or all of the land subject to the Judgment, and an agreement was reached as to some of the land on or before the closing on November 7, 2013 (R. pp. 13-133), after which time the land was sold. Thereafter, on February 26, 2014, the present action was filed, only six months after first notice of the Judgment, and only three and one half months after final negotiations to compromise a portion of the Judgment.

Applying the law to the facts of this case, this filing was timely, as the lower court properly held. Unlike in Perry, Smith and McDaniel, the evidence is uncontradicted that Allen Koon had no knowledge of the Judgment against him until six months before filing

his action. This lack of knowledge of the Judgment as well as his incarceration constitutes a valid reason why the action wasn't filed sooner, a critically important element lacking in Perry, Smith and McDaniel. Recall, in Perry, Smith and McDaniel, that the court found lengthy delays to be unreasonable, because the movants in those cases had notice of the order against them from date of filing, and because they proffered no good reason for the delay. In this case, however, Allen Koon had no knowledge of the Judgment, which by itself constitutes a good reason for the delay. And since four years is not *per se* unreasonable, under Perry, the lower court did not err in holding the Koon's action to be timely filed. Appellant may argue that Allen Koon should have appealed the Judgment against him, under Smith. However, it is already established that Allen Koon had no notice of the Judgment in order to appeal, and even if he did, he had no standing to appeal, since he was not a party to the action. His only remedy was an independent action under Rule 60(b), which he filed a short time after first gaining knowledge of the Judgment against him.

Appellant's contention that the lower court abused its discretion in denying the Motion to Dismiss because "the record is replete with *indications* and *inferences* that Koon was on notice of the judgment against him in his individual capacity shortly after the entry of the judgment" (Appellant's Brief, p. 33) is simply untrue. Appellant points to only two such "indications" or "inferences" that Allen Koon was aware of the judgment against him, both wholly insufficient to "indicate" notice: first, the Relief from Judgment filed on March 3, 2010, and second, the partial release from the judgment filed on or about November 7, 2013. Appellant misleadingly argues multiple times at hearing

and in its Brief, that the Relief From Judgment sought to set aside the judgment against Allen Koon in his individual capacity, thus indicating that Allen Koon knew about the Judgment against him in 2010. However, this is simply not the case. A mere cursory review of the Relief From Judgment clearly shows that the motion sought to set aside *only* "the Judgment against Defendant Lake Murray Tree Inc." (R. pp. 139-142). Nowhere does the motion mention the Judgment against Allen Koon individually. As such, the Relief From Judgment actually supports Respondents' contention that they had no notice. Had Allen Koon had notice of a Judgment against him individually, certainly the Relief From Judgment would have sought to have that Judgment set aside as well. The fact that it did not do so only further evidences Allen Koon's lack of knowledge of the Judgment.

Appellant's argument that the partial release from the Judgment indicates knowledge of the Judgment early on is equally farcical. The partial release was filed on or about the time of the November 7, 2013 closing, only three and one half months before filing the present action, and thus indicates nothing other than that the Koons had only recently learned of the Judgment against Allen Koon. Had the Koons known of the Judgment earlier, they would have attempted to negotiate a compromise much sooner. Thus, the partial release does nothing to support Appellant's argument as to notice, but does serve, again, to bolster Respondent's contention of lack of notice.

Based on the uncontradicted evidence in this case, there is no question but that the Koons' independent action to set aside the Judgment was filed within a reasonable time. There is no evidence to even suggest that the Koons knew of the Judgment in 2010; as

such, there can be no abuse of discretion on the part of the trial court in denying Appellant's Motion to Dismiss.

CONCLUSION

For all the reasons above stated, the trial court correctly granted Respondents' Motion for Summary Judgment and denied Appellant's Motion to Dismiss in the present action. The entry of judgment against Allen Koon individually in the original action was improper, as Allen Koon was not a party to the litigation and thus the court had no personal jurisdiction over Allen Koon, causing the judgment necessarily to be deemed void. Furthermore, Rule 37, SCRCP does not authorize entry of a judgment against a non-party who is a mere shareholder of the party defendant. Lastly, based on the undisputed evidence in the case that Allen Koon was not aware of the judgment against him individually until August or September, 2013, the Respondents' independent action under Rule 60(b)(4) was timely filed. Thus, Respondents' 60(b)(4) action was properly before the Court, and the Court properly vacated the individual judgment against Allen Koon as void. The lower court's order should be upheld.

Respectfully submitted,

Jennifer Dowd Nichols
S.C. Bar # 75916
Robert W. Dibble, Jr.
S.C. Bar # 1675
Harrell & Martin, P.A.
P.O. Box 1000
Chapin, S.C. 29036
(803) 345-3353

Kelley B. Parr
S.C. Bar # 64316
P.O. Box 1074
Chapin, S.C. 29036
(803) 345-5870

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Please

Donald B. Hocker, Circuit Court Judge
Trial Court Case No. 2014-CP-36-00109

Appellate Case No. 2014-001215

Larry E. Koon and Allen Lee Koon, by and through his attorney in fact, Larry E. Koon, Respondents,

v.

Thomas Jackson Construction Inc., Appellant.

CERTIFICATE OF COMPLIANCE

This is to certify that Respondents' Final Brief complies with Rule 221(b)o f the South Carolina Appellate Court Rules.

Respectfully submitted,

Jennifer Dowd Nichols
S.C. Bar # 75916
Robert W. Dibble, Jr.
S.C. Bar # 1675
Harrell & Martin, P.A.
P.O. Box 1000
Chapin, S.C. 29036
(803) 345-3353

Kelley B. Parr
S.C. Bar # 64316
P.O. Box 1074
Chapin, S.C. 29036
(803) 345-5870

ATTORNEYS FOR RESPONDENTS

Dec. 11, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Please

Donald B. Hocker, Circuit Court Judge
Trial Court Case No. 2014-CP-36-00109

Appellate Case No. 2014-001215

Larry E. Koon and Allen Lee Koon, by and through his attorney in fact, Larry E. Koon, Respondents,

v.

Thomas Jackson Construction Inc., Appellant.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents on Thomas Jackson Construction Co. by depositing a copy of the Initial Brief of Respondents in the United States Mail, postage prepaid, on Dec. 16, 2014, addressed to the attorney of record for Appellant, Mindy W. Zimmerman, Esquire, P.O. Box 1207, Newberry, S.C. 29108.

Jennifer Dowd Nichols

Jennifer Dowd Nichols
S.C. Bar # 75916
Robert W. Dibble, Jr.
S.C. Bar # 1675
Harrell & Martin, P.A.
P.O. Box 1000
Chapin, S.C. 29036
(803) 345-3353

Kelley B. Parr
S.C. Bar # 64316
P.O. Box 1074
Chapin, S.C. 29036
(803) 345-5870

ATTORNEYS FOR RESPONDENTS
12/16, 2014