THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2011-CP-38-00853

Directory Assistants, Inc., ... Appellant,

v.

Dennis Shay d/b/a Marsch Chiropractic Center, ... Respondent.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Does the Full Faith and Credit Clause of the United States Constitution Preclude the Circuit Court from Granting Dr. Shay's Motion Pursuant to Rule 60, SCRCP, in Opposition to Enforcing the Connecticut Judgment in this Case?

II. Does Dr. Shay's Failure to Contest Improper Jurisdiction Before the Arbitrator in Connecticut Preclude His Motion Pursuant to Rule 60(b)(4), SCRCP, Addressed to the Connecticut Judgment?

III. Was Dr. Shay Precluded from Advancing His Arguments Pursuant to Rule 60, SCRCP, by the Arguments Made and Ruled upon in Connecticut?

IV. Did Dr. Shay Establish Entitlement to Relief Under Rule 60, SCRCP?

COUNTER-STATEMENT OF THE CASE[1]

In 2009, Directory Assistants, Inc., (DAI), a Connecticut corporation, obtained an arbitration award for $34,582.00 against Dennis Shay, d/b/a Marsch Chiropractic from American Dispute Resolution Center, also of Connecticut. DAI filed the arbitration award in the Connecticut Superior Court and obtained a judgment confirming the award. DAI filed its judgment in South Carolina on July 20, 2011, claiming entitlement to payment on the judgment together with $13,935.00 in fees and costs.

Upon receiving notice that DAI filed its judgment in South Carolina, Dr. Shay filed an objection and moved to amend or vacate the judgment pursuant to Section 15-35-940 of the South Carolina Code. Dr. Shay contended the judgment was erroneously entered against him individually instead of his chiropractic business. Dr. Shay also pointed out that no court ever ruled on whether DAI's claims were subject to arbitration, as required by the law of both South Carolina and Connecticut.

Following a hearing, the circuit court held that Dr. Shay was entitled to relief from the judgment pursuant to Rule 60(b), SCRCP due to "mistake" and further because the judgment was "void" as lacking a pre-arbitration judicial determination that an agreement to arbitrate existed. DAI filed a motion to alter or amend the judgment and the circuit court denied the motion. This appeal follows.

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[1] Respondent Dr. Shay observes that DAI combined its Statement of the Case and Statement of the Facts in its brief. (App. Br. pp. 2-9). Rule 208(b)(1)(C), SCACR, provides the Statement of the Case "shall not contain contested matters...." Respondent Dr. Shay states no objection here to the manner in which Appellant combined the Statement of the Case with a recitation of the facts that contains contested matters, but includes his own Statement of the Case so as not to be bound by the Statement of the Case presented by Appellant.

FACTS

On September 9, 2008, a DAI representative came to Dr. Shay's business in South Carolina to promote DAI's services, which included taking Marsch Chiropractic "through our Strategic Process to help you determine whether you should make cost saving changes to your baseline yellow page program or renew it as is." (R. p. 130) On that date, the representative presented Dr. Shay with a document entitled "Consulting Contract." The document added, "We will only earn a fee if savings are actually enjoyed." (R. p. 130) The contract contained a number of terms, including a liquidated damages clause in the event of a breach. (R. p. 131)

The "Four Year-Option C" was circled with Dr. Shay's initials alongside. (R. p. 131) However, no signature appears on the agreement. Dr. Shay's name is printed on the document as a "Person Authorized to Contract for Advertiser." The "Company Name/Advertiser" is listed as "Marsch Chiropractic Center." (R. p. 131) Within one month DAI declared a breach and demanded payment. Dr. Shay denied any payment was due.

In 2009, DAI initiated an arbitration proceeding in Connecticut against "Dennis J. Shay d/b/a Marsch Chiropractic Center," even though the purported contract contemplated DAI providing consulting services to "Marsch Chiropractic Center" and not Dr. Shay on an individual basis.

Through counsel, Dr. Shay contested the jurisdiction of the arbitrator DAI designated, the "American Dispute Resolution Center" (ADRC), and denied that a valid arbitration agreement existed. Although Dr. Shay adamantly denied he entered into a

contract with DAI, on July 30, 2009, he paid certain amounts to DAI before refusing any more payment. (R. p. 195) This payment of $1,596.36 was made in an attempt to resolve the matter.[2]

Instead of seeking a judicial determination pursuant to the Federal Arbitration Act of whether an agreement to arbitrate existed prior to arbitrating the matter, the ADRC simply declared that it had jurisdiction and proceeded to render an arbitration award for DAI. On September 17, 2009, the arbitrator entered an ex parte award against Dr. Shay and Marsch Chiropractic for $34,582. (R. p. 92).

DAI then sought judicial confirmation of the award and Dr. Shay's Connecticut counsel objected. On October 25, 2010, the Superior Court of the Judicial District of Hartford at Hartford, Connecticut, entered the following order on Dr. Shay's objection:

> If the defendant wishes the court to consider the factual claims set forth in his objection and affidavit, he must be present to testify and be subject to cross examination. This matter is continued to November 22, 2010 on calendar #3. If the defendant does not appear at that time, the court will consider the matter on the papers but will not consider the defendant's affidavit.

(R. p. 12). On June 7, 2011, the Connecticut Superior Court issued an order on Dr. Shay's motion for reconsideration. (R. p. 10). The Connecticut court stated:

> The court has reconsidered its order confirming the arbitrator's award in this matter in light of the defendant's objection. However, the court previously indicated that if the defendant wished the court to consider the factual claims set forth in his objection and [affidavit] he

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[2] Although DAI pointed to this check as an admission of liability, it was no such thing. Dr. Shay sent the check in response to going "round and round" with DAI and in an attempt to resolve the dispute by paying an amount that was "fair to" DAI. (R. p. 196). Contrary to DAI's assertion in its motion, the check was not sent to the arbitral forum but was sent directly to DAI. The record does not reveal whether DAI accepted the check or returned those funds.

> must be present to testify and be subject to cross examination. He did not do so. Therefore the court has considered the objection but not the disputed factual claims made therein. The order of the court confirming the arbitration award stands.

(R. p. 10). On May 25, 2011, the Connecticut Superior Court entered the following order: "The arbitration award is confirmed, absent objection." (R. p. 11)

On July 20, 2011, DAI filed a notice that it was recording its judgment in South Carolina and intended to seek enforcement of the judgment. On August 1, 2011, Dr. Shay filed a Notice of Objection to the foreign judgment and sought an order vacating the judgment and denying further enforcement of the judgment.

On February 6, 2012, Dr. Shay filed a motion pursuant to Rules 55, 59 and 60, SCRCP, to vacate the order of judgment and stay execution. (R. p. 114). Dr. Shay also asserted the clerk should not have filed the judgment once Dr. Shay gave timely notice of objection pursuant to Section 15-35-920 of the South Carolina Code. (R. p. 114)

On July 26, 2012, DAI filed a Memorandum in Support of Domesticating Plaintiff's Foreign Judgment and asked that the court overrule Dr. Shay's objection. DAI contended (1) the Connecticut court had personal jurisdiction over Dr. Shay because Dr. Shay failed to move to dismiss after his lawyer appeared for him (R. pp. 123-124); and (2) the Full Faith and Credit Clause, *res judicata* and collateral estoppel all bar the arguments Dr. Shay made in objecting to DAI's notice of filing its foreign judgment (R. pp. 125-126).

On July 31, 2012, Dr. Shay executed an affidavit outlining the basis for his objection. That same date the circuit court held a hearing on Dr. Shay's motion pursuant

to Rule 60, SCRCP, to vacate the foreign judgment. (R. p. 14) At the hearing, Dr. Shay's counsel advised the court that the objection was "basically in the nature of a Rule 60(b) Motion." (R. p. 21, l. 19 - p. 22. l. 21). DAI's counsel stated his agreement, adding Dr. Shay "would simply be limited to asserting a Rule 60(b) as if the judgment is void for lack of personal jurisdiction or subject matter jurisdiction, but...that would be it." (R. p. 23, l. 23 - p. 24, l. 2). Dr. Shay's counsel added, "Just to clarify, I'm not making a Rule 59(e) motion. I'm making a post-judgment Rule 60 motion." (R. p. 24, l. 25 - p. 25, l. 2). Counsel further elaborated that he was attacking the judgment under Rule 60, SCRCP. (R. p. 28, ll. 9-19). Counsel added, "What I'm not asking the court to do is to go behind the Connecticut order and invalidate that order, which, of course, the court can't do. What the court does have the power to do under Rule 60 is to say this order is vacated in South Carolina." (R. p. 31, ll. 7-11; see also p. 34, ll. 12-21). DAI's counsel again acknowledged the court had before it a Rule 60 motion, but disputed whether the court had the authority to refuse to enforce the judgment under Rule 60. (R. p. 36, ll. 11-19).

In reply, Dr. Shay's counsel argued:

> [T]his isn't - - collateral estoppel, res judicata, that has not application to a Rule 60 motion. That's a post-trial motion. That would be like, you know, we had a South Carolina case, trial, trial is finished and I made a Rule 60 Motion and then somebody came in and said well, the jury has already decided that. You don't get to make a Rule 60 Motion. That's absolutely not the law anywhere that res judicata or collateral estoppel would apply to a post-judgment motion.

(R. p. 48, l. 21 - p. 49, l. 4). Counsel added:

> Lastly, on full faith and credit, I don't dispute that the court has to give a foreign judgment full faith and credit. It has to treat it just like it treats a South Carolina judgment. And as the Supreme Court said in

> *Erickson*, that means you got to take the bitter with the sweet. And the bitter is you get to make post-judgment motions on it, and that's what we are doing here. The court has the authority to vacate this. The court has the authority to grant relief from this. And importantly, as the court has recognized, it has the authority, if nothing else, to correct the party. I mean, Dr. Shay individually never made a contract with anybody. That's manifestly unjust. The court has the power to fix that, if nothing else.

(R. p. 50, l. 25 - p. 51, l. 13)

DAI's counsel replied that the court could not use Rule 60 to change parties. (R. p. 51, l. 21 - p. 52, l. 1).

South Carolina Circuit Court's Ruling

On March 11, 2014, the circuit court entered an order granting Shay's motion for relief from the foreign judgment. The court ruled:

1. Pursuant to Section 15-35-940 of the South Carolina Code, a judgment debtor against whom a foreign judgment is filed may move for relief from the judgment "on any other ground for which relief from a judgment of *this* state is allowed." S.C. Code Ann. § 15-35-940 (emphasis by the court). (R. p. 6).
2. The relief permitted by Section 15-35-940 allows for a post-judgment motion under Rule 60, SCRCP, under *Law Firm of Paul L. Erickson v. Boykin*, 383 S.C. 497, 681 S.E.2d 575 (2009). (R. p. 6).
3. Under Rule 60, the court may relieve a party from a judgment where the judgment is the product of mistake or where it is otherwise void. (R. p. 6).
4. Dr. Shay is entitled to relief under Rule 60 under the ground of mistake, that is "the false premise that the party to whom DAI's consulting contract provided

services for was "Dennis Shay d/b/a Marsch Chiropractic." (R. p. 6).

5. The evidence stipulated into the record makes clear that the chiropractic business is not a "d/b/a" but a professional corporation. According to its Articles of Incorporation, "Dennis J. Shay, PA" was incorporated in South Carolina on March 31, 1994. (R. p. 7, citing Articles of Incorporation).

6. DAI's Consulting Contract evidences the fact that the professional corporation was the actual party for whom DAI was to provide its services.

   A. The contract expressly identifies Marsch as the "Advertiser." (R. p. 7)

   B. The contract refers repeatedly to DAI's providing "businesss" services (R. pp. 130-131). (R. p. 7)

   C. The business services offered revolve solely around yellow page advertising, which by definition is business advertising. (R. p. 7)

   D. The Contract references Dr. Shay only as the "Person Authorized to Contract *for* Advertiser," indicating Dr. Shay and the "advertiser" were not one and the same. (R. p. 131). (R. p. 7) (emphasis by the court).

7. In summary, any services to be provided were to be provided to the corporation, Dennis J. Shay, PA, not to Dennis Shay individually. Rule 60(b), SCRCP, expressly provides for relief on grounds of mistake, regardless of whether the mistake is the moving party's or not. Dr. Shay is therefore entitled to relief from the judgment on the grounds of mistake.

8. Alternatively, the court was persuaded by Dr. Shay's argument that the Connecticut judgment was void because no court ever determined whether Dr.

Shay had to arbitrate before the arbitration actually took place.

9. Both Connecticut and South Carolina law require that a court – not an arbitrator – must determine the existence of a valid arbitration agreement before a party can be compelled to arbitrate. (R. pp. 7-8)

10. Dr. Shay contested the validity of the arbitration agreement; however, no court determination of abitrability has ever been sought or made. (R. p. 8)

11. Dr. Shay also, through counsel, objected to confirmation but the Connecticut court refused to consider any "disputed factual claim" because Dr. Shay would not appear personally in Connecticut. (R. p. 8)

12. Not even the arbitrator's findings address Dr. Shay's challenge in the award. (R. p. 8)

13. Because the judgment DAI seeks to enforce is predicated wholly on the award, the judgment cannot stand. Dr. Shay is therefore entitled to be relieved from the effect of this judgment in South Carolina under Rule 60. (R. pp. 8-9)

14. DAI's request for additional attorney fees of $13,495 and $440 in costs was beyond the scope of DAI's action to enroll its judgment. Such claim must be based on either statute or contract.

    A. The Uniform Enforcement of Foreign Judgments Act provides for no such relief.

    B. If the claim is based on the consulting contract, DAI would (by its own argument) be required to arbitrate this claim.

(R. p. 9)

15. The affidavit of fees DAI's counsel submitted discloses neither the number of hours expended by DAI's counsel nor the hourly rate; thus, the court could not make a determination of whether the fees claimed were reasonable even if such fees could be awarded. (R. p. 9, n. 5)

16. Section 15-35-960 of the Act provides that judgments that are contrary to public policy may not be given effect.

A. The purpose of DAI's consulting conract on its face was to simply assist the business in making choices about its yellow page advertising. The fact that this service turned into a claim for more than $50,000.00 (the majority of which is liquidated damages and fees) troubled the court.

B. Also troubling was the fact that, despite the absence of any forum selection clause or choice of law provision in the consulting contract, DAI filed the arbitration in its home state and thereby obtained relief against Dr. Shay. Absent physical appearance, Dr. Shay was not permitted to contest any of the above.

(R. p. 9, n. 6) The circuit court therefore granted Dr. Shay's motion for relief, denied DAI's request for attorney's fees, and ordered the clerk of court to vacate the judgments DAI filed against Dr. Shay and/or Shay d/b/a Marsch Chiropractic. (R. p. 9)

Motion for Reconsideration

On October 10, 2013, DAI filed a motion to alter or amend the judgment. DAI contended Dr. Shay "failed to offer any valid objection to the domestication of the

Connecticut judgment, nor did [Dr. Shay] offer any valid basis for obtaining relief from the Connecticut judgment." (R. p. 185). DAI contended:

1. The remedies pursuant to Rule 60 are not available in this situation because the FAA provides the exclusive means of seeking to vacate an arbitration award, citing *e.spire Communications, Inc. v. CNS Communications*, 39 Fed. Appx. 902 (4th Cir. 2002) (unpublished). (R. pp. 185-186)
2. The court's reliance on the "mistake" prong of Rule 60(b)(1) is "misplaced" because:
    a. Misidentification of the proper defendant is not the kind of "mistake" that would entitle Dr. Shay to relief from the judgment; rather, courts applying the "mistake" prong "uniformly apply it to procedural mistakes, not purportedly erroneous factual determinations." (R. p. 186)
    b. Rule 60(b)(1) does not contemplate relief from a judgment based on the collateral attack of a disputed fact that has already been resolved by the arbitrator in Connecticut. That finding is now *res judicata*. (R. p.187)
    c. The factors for relief under Rule 60(b)(1) do not support relief, particularly in the absence of argument or proof of the existence of a meritorious defense. This is particularly true where Dr. Shay sent a letter admitting liability and including a check. (R. p. 188)
3. The court's ruling that the judgment is void because there has been no judicial finding of the existence of an enforceable arbitration agreement "is not a valid basis for relief under the situation presented in this case." (R. p. 188)

a. The existence of the arbitration has been litigated during the confirmation proceedings in the Connecticut court and is therefore *res judicata*. (R. pp. 188-189)

b. The law does not require a judicial finding that an arbitration agreement existed where there is an objection. Instead, Dr. Shay had the burden of rasing and prosecuting this challenge and, absent him doing so, there was nothing that would prevent a court from confirming the award. (R. p. 189)

c. The South Carolina Arbitration Act supports the notion that an arbitration claimant need not secure a judicial finding that an enforceable arbitration agreement exists. Rather, the issue must be raised by a motion to vacate the award made within 90 days. (R. pp. 189-190)

d. Although Rule 60(b)(4) permits relief where a "judgment is void," that provision only applies where a court that rendered the judgment failed to provide proper due process, or lacked subject matter or personal jurisdiction. Whether there is an enforceable arbitration agreement "cannot form the basis for relief under Rule 60(b)(4)." (R. p. 190)

4. The court erroneously failed to award attorneys' fees and costs incurred in pursing domestication of the judgment.

a. The contract allowed for the recovery of the fees and costs sought.

b. The claim for fees and costs was not subject to arbitration.

c. To assuage the court's concern of a failure of proof, DAI included a supplemental affidavit outlining the number of hours spent, the names of

the professionals involved, and their hourly rates.

(R. p. 191)

5. The doctrine of *res judicata* and the Full Faith and Credit Clause prevent Dr. Shay from appearing and raising issues in Connecticut and then trying to relitigate the issues again in South Carolina after a judgment has been entered. (R. pp. 191-192)

Ruling on the Motion to Alter or Amend

On February 26, 2014, the court entered an order denying DAI's motion to alter or amend the previous ruling. The court held:

1. The FAA expressly provides for court determination of the existence of an agreement to arbitrate before an arbitration may proceed where one party objects, citing 9. U.S.C. § 4.(R. p. 2, n. 1)
2. There was no record of an arbitration hearing for the court to review, which caused "further concern" so that it was "unclear if even the arbitrator himself considered [Dr. Shay's] objection." (R. p. 2, n. 2)
3. The *e.spire* decision was distinguishable from this case in a meaningful way. The Fourth Circuit found the defendant could not challenge a *later* arbitration agreement it entered as part of a settlement with e.spire over an original dispute. In this case, there was "a dispute as to whether a valid arbitration agreement *ever* existed (in Connecticut or elsewhere)." No agreement was reached as to this issue, nor was it placed before a court. (R. p. 3)

4. Traditionally, a defendant has the right to defend himself in his home state. There was nothing in the record that indicated Dr. Shay "received any bargained-for consideration under the contract to give up this constitutional right." The court added, "the contract was executed in South Carolina, to be performed in South Carolina, for business done in South Carolina. There are no 'minimum contacts' with Connecticut apart from the arbitration clause in the contract. This Court will not deprive Defendant of his right to defend himself against these claims in the courts based on these facts." (R. p. 3, n. 3)

DAI served and filed a notice of appeal on March 11, 2014.

ARGUMENTS

The circuit court found that the judgment DAI sought to enforce was subject to being treated the same as a judgment that was entered in South Carolina. This includes the ability to seek relief therefrom pursuant to Rule 60(b), SCRCP. That is all the Full Faith and Credit Clause and the Uniform Enforcement of Foreign Judgments Act require. To rule otherwise would favor foreign judgments over judgments rendered in South Carolina.

This Court should apply a deferential review of the circuit court's discretionary decision to grant relief from the Connecticut judgment and affirm.

I. The Full Faith and Credit Clause of the United States Constitution Does Not Preclude the Circuit Court from Granting Dr. Shay's Motion Pursuant to Rule 60, SCRCP, in Opposition to Enforcing the Connecticut Judgment in this Case

DAI argues the "defenses to enforcement of judgments from other states are not controlled by the [Uniform Enforcement of Foreign Judgments Act (the Act)] or Rule 60, SCRCP." (App. Br. p. 10). DAI contends that "[t]he defenses to a foreign judgment under the South Carolina Act are limited by the Full Faith and Credit Clause to those defenses that are directed to the enforcement of the judgment, and Rule 60(b) of the South Carolina Rules of Civil Procedure has no applicability." (App. Br. p. 20). DAI contends the "majority rule" precludes the use of Rule 60 where the enforcement of a foreign judgment is at issue. (App. Br. pp. 10-20). The Court should not be persuaded by this argument.

As an initial point, the Court must decide if the precise argument DAI makes here

is preserved for appellate review. As set forth above, Dr. Shay explained that he was pursuing a motion pursuant to Rule 60(b), SCRCP, for relief from a final judgment due to mistake or that the judgment was void, as permitted by Section 15-35-940 of the Code. DAI did not assert either in its Memorandum in Support of Domesticating Plaintiff's Foreign Judgment or at the hearing before the circuit court that Rule 60 "has no applicability." Instead, it was not until DAI filed its motion pursuant to Rule 59, SCRCP, that DAI contended the remedies pursuant to Rule 60 were not available in this situation because the Federal Arbitration Act (FAA) provided the exclusive means of seeking to vacate an arbitration award, citing *e.spire Communications, Inc. v. CNS Communications*, 39 Fed. Appx. 902 (4th Cir. 2002) (unpublished). (R. pp. 185-186).

A party cannot use a Rule 59(e), SCRCP, motion to present an issue to the court that could have been raised prior to judgment but was not so raised. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005). Where an issue is raised for the first time in a Rule 59, SCRCP, motion, the issue is not preserved for appellate review. *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005). *See also Stevens & Wilkinson of SC, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693 (2014) (a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not).

Prior to the initial decision by the circuit court, DAI did not contend as it does on appeal that Rule 60, SCRCP, "has no applicability" where a party seeks to domesticate a foreign judgment under the Full Faith and Credit Clause. Accordingly, this precise argument is not available on appeal.

Furthermore, the circuit court did not rule on this precise argument in denying the Rule 59 motion. Instead, the court framed the argument as a contention that the FAA precluded application of Rule 60. (R. p. 2). The circuit court specifically ruled that "the requirement for prior judicial review fully follows the requirements of the FAA. See, 9 U.S.C.A. § 4." (R. p. 3). Thus, the precise argument DAI makes here is not preserved for this Court's review.

Even so, the Court should affirm the circuit court's decision. The Full Faith and Credit Clause provides, in part, that "Full faith and credit shall be given in each state to the ... judicial proceedings of every other state." U.S. Const. art. IV, § 1. In essence, the thrust of the clause is that courts of one state must give such force and effect to a foreign judgment as the judgment would receive in its own state. *Minorplanet Systems USA Ltd. v. American Aire, Inc.*, 368 S.C. 146, 628 S.E.2d 43 (2006); *Hamilton v. Patterson*, 236 S.C. 487, 115 S.E.2d 68 (1960).

The Uniform Enforcement of Foreign Judgments Act provides:

> (A) The judgment debtor may file a motion for relief from, or notice of defense to, the foreign judgment on the grounds that the foreign judgment has been appealed from, that enforcement has been stayed by the court which rendered it, *or on any other ground for which relief from a judgment of this State is allowed.*

S.C. Code Ann. § 15-35-940 (A) (2005 & Supp. 2014) (emphasis added). The statute provides further:

> (B) If the judgment debtor has filed a *motion for relief* or notice of defenses, then the judgment creditor may move for enforcement or security of the foreign judgment as a judgment of this State, if all appeals of the foreign judgment are finally concluded and the judgment is not further contested. The judgment creditor's motion must be heard before a judge

> who has jurisdiction of the matter based upon the amount in controversy as the amount remaining unpaid on the foreign judgment. The South Carolina Rules of Civil Procedure apply. The judgment creditor has the burden of proving that the foreign judgment is entitled to full faith and credit.

S.C. Code Ann. § 15-35-940 (B) (2000) (emphasis added). Only the last sentence of Section (B) is offensive to the United States Constitution and the Supreme Court thus severed that sentence from the statute. *Law Firm of Paul L. Erickson, P.A. v. Boykin*, 383 S.C. 497, 681 S.E.2d 575 (2009).

DAI contends that South Carolina's courts have not addressed the impact of the Full Faith and Credit Clause on the Act and Rule 60. (App. Br. p. 14). In fact, however, the Supreme Court indicated its view in *Boykin*, stating:

> Subsection (A) of § 15-35-940 permits the debtor to file a motion for relief from judgment or a notice of defense to the foreign judgment. Once a foreign judgment is properly enrolled pursuant to [S.C. Code Ann.] § 15-35-920 it "has the same effect and is subject to the same defenses as a judgment of this State and must be enforced or satisfied in like manner ...." § 15-35-920(C). In our view, a "Motion for Relief" refers to a Rule 60, SCRCP, motion brought by the debtor, while a "notice of defense" would be filed in a creditor's enforcement action, and raise either defenses found in Rule 12(b), SCRCP, or those found specifically in § 15-35-940(A), *i.e.*, that the judgment is under appeal in the rendering jurisdiction or that jurisdiction has stayed the judgment. Read this way, subsection (A) simply establishes procedures by which a debtor can raise an objection to a foreign judgment.

Boykin, 383 S.C. at 504, 681 S.E.2d at 579.

A court may relieve a party from a final judgment for any of the five reasons enumerated under Rule 60(b). *Momani v. Van Surdam*, 296 S.C. 409, 373 S.E.2d 691 (Ct. App. 1988). One of those reasons is that "the judgment is void." Rule 60(b)(4). 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." *Thomas & Howard Co., Inc. v. T.W. Graham and Co.*, 318 S.C. 286, 457 S.E.2d 340 (1995). The Court in *Thomas & Howard* added:

> Generally, a judgment is void only if a court acts without jurisdiction. Irregularities which do not involve jurisdiction do not render a judgment void. There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal. A judgment will not be vacated for a mere irregularity which does not affect the justice of the case, and of which the party could have availed himself, but did not do so until judgment was rendered against him.

318 S.C. at 291, 457 S.E.2d at 343 (citations omitted).

Here, the circuit court viewed the Connecticut judgment as void because even though Dr. Shay objected to the validity of the arbitration clause, no court ruled on the existence of an enforceable arbitration agreement even though both South Carolina and Connecticut law mandated a judicial determination "*before* a party can be compelled to arbitrate." (Order of 1/31/14, p. 2) (emphasis by the court). *See MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008) (an agreement to arbitrate bestows jurisdiction to arbitrate and enter an award; when the existence of an agreement is challenged, the issue must be settled by a court before the arbitrator may proceed). In fact, once a party disputes the existence of an arbitration agreement, the arbitral forum does not have jurisdiction to enter an arbitration award until the proponent petitions the court to compel arbitration. *MBNA America Bank.*

The rule is the same in Connecticut:

> [B]ecause an arbitrator's jurisdiction is rooted in the agreement of the

> parties a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make that decision.

Nussbaum v. Kimberly Timbers, Ltd., 271 Conn. 65, 72-73, 856 A.2d 364, 369 (2004). Accordingly, the circuit court exercised appropriate discretion in ruling that Dr. Shay was entitled to relief pursuant to Rule 60(b)(4). *See Raby Const., LLP v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004) (whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge; appellate review is limited to determining whether there was an abuse of discretion). *See also Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 748 S.E.2d 781 (2013) (in reviewing a decision with respect to Rule 60(b), the Supreme Court utilizes a deferential standard of review).

Another of the enumerated reasons under Rule 60(b) is "mistake," which means a mistake of fact. *Hillman v. Pinion*, 347 S.C. 253, 554 S.E.2d 427 (Ct. App. 2001). Here, the circuit court found "the mistake lies in the false premise that the party to whom DAI's consulting contract provided services was 'Dennis Shay d/b/a Marsch Chiropractic.'... [I]t is clear that any services to be provided wre to be provided to the corporation, Dennis J. Shay, PA, not to Dennis Shay individually." (R. pp. 6-7) The court added "Rule 60(b) expressly provides relief on grounds of mistake, regardless of whether the mistake is the moving party's or not." (R. p. 7). Once again, this is a ruling that was within the circuit court's discretion.

Although DAI cites to cases from numerous jurisdictions that it contends undermine Dr. Shay's argument and the circuit court's rulings, those decisions focus on

the "notice of defenses" portion of the Act, not the "motion for relief" portion discussed in *Boykin*. The concern in those cases was that the party attacking the judgment was attempting to litigate defenses to enforcement by relitigating defenses to the judgment itself. Here, however, Dr. Shay sought relief from the judgment as permitted by Rule 60(b).

The primary case upon which DAI relies is *DocRx, Inc. v. EMI Services of NC*, LLC, 759 S.E.2d 390 (N.C. 2014). (App. Br. pp. 15-17). The narrow issue in *DocRx* was whether the North Carolina Court of Appeals erred by holding that the Full Faith and Credit Clause precluded the use of intrinsic fraud to defeat a foreign monetary judgment pursuant to North Carolina's version of the Uniform Enforcement of Foreign Judgment Act and its version of Rule 60(b)(3). The defendant's contention was that plaintiff and its lawyer falsely inflated the amount of the damages owed to plaintiff in obtaining a default judgment in Alabama that plaintiff then sought to enforce in North Carolina. The trial court found fraud, and the plaintiff appealed, contending a state may only deny enforcement of a sister state's judgment for extrinsic fraud, not intrinsic fraud. The Court of Appeals vacated the trial court's order and the Supreme Court affirmed, holding "the defenses to a foreign judgment under the UEFJA are limited by the Full Faith and Credit Clause to those defenses that are directed to the enforcement of the foreign judgment, and Rule 60(b) of the North Carolina Rules of Civil Procedure has no applicability." *DocRx*, 759 S.E.2d at 398.

As noted above, the argument that Rule 60(b) does not apply was not made prior to DAI's Rule 59 motion, and most certainly was not ruled upon by the circuit court.

Furthermore, the ruling in *DocRx* is directly contrary to the analysis our Supreme Court set forth in *Boykin*. Lastly, as pointed out by the circuit court, the judgment in this case was void because under the law of both Connecticut and South Carolina, the arbitral body lacked jurisdiction to enter the judgment absent a pre-arbitration judicial finding that an agreement to arbitrate existed. That situation is vastly different from the attack on the default judgment that was at issue in *DocRx*.

Accordingly, this Court should not be persuaded to apply the analysis from *DocRx* in this case. The Court should affirm the circuit court's decision to grant Dr. Shay relief from the Connecticut judgment under the Act and Rule 60(b).

II. Dr. Shay's Failure to Contest Improper Jurisdiction Before the Arbitrator in Connecticut Does Not Preclude His Motion Pursuant to Rule 60(b)(4), SCRCP, Addressed to the Connecticut Judgment

DAI contends Dr. Shay was precluded from challenging whether the Connecticut judgment was void for lack of jurisdiction because he failed to follow the appropriate procedure in Connecticut to challenge personal or subject matter jurisdiction of the Connecticut court. (App. Br. pp. 20-23). The Court should not be persuaded by this argument to reverse the circuit court's ruling.

As noted above, the circuit court viewed the Connecticut judgment as void because despite the fact that Dr. Shay objected to the validity of the arbitration clause before any arbitration took place, no court ruled on the existence of an enforceable arbitration agreement. As the circuit court noted, the law of both South Carolina and Connecticut mandated a judicial determination "*before* a party can be compelled to

arbitrate." (R. p. 2) (emphasis by the court).

This is the rule in South Carolina. *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008) (an agreement to arbitrate bestows jurisdiction to arbitrate and enter an award; when the existence of an agreement is challenged, the issue must be settled by a court before the arbitrator may proceed). That is, under either the FAA or the state arbitration act, "the arbitrator's power to resolve the dispute must find its source in the agreement between the parties." *MBNA America Bank*, 377 S.C. at 215, 659 S.E.2d at 212 (citing *MBNA America Bank, N.A. v. Credit*, 281 Kan. 655, 132 P.3d 898 (2006)). And once a party disputes the existence of an arbitration agreement, the arbitral forum does not have jurisdiction to enter an arbitration award until the proponent petitions the court to compel arbitration. *MBNA America Bank*. This "power" to hear and determine the matter involves "subject matter jurisdiction." *Dove v. Gold Kist*, 314 S.C. 235, 442 S.E.2d 598 (1994). Issues related to subject matter jurisdiction may be raised at any time. *In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009). The lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by the appellate court. *Id.*

The rules are the same in Connecticut. As the Supreme Court of Connecticut held:

> [B]ecause an arbitrator's jurisdiction is rooted in the agreement of the parties a party who contests the making of a contract containing an arbitration provision cannot be compelled to arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make that decision.

Nussbaum v. Kimberly Timbers, Ltd., 271 Conn. 65, 72-73, 856 A.2d 364, 369 (2004).

And under Connecticut law, "[s]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it."*Keller v. Beckenstein*, 46 A.3d 102, 107 (Conn. 2012). A court lacks discretion to consider the merits of a case over which it is without jurisdiction. *Id.* The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal. *Id.*

Thus, contrary to DAI's contention, Dr. Shay was permitted to raise a challenge to the arbitrator's authority, and the circuit court in South Carolina was permitted to address that argument under the Full Faith and Credit Clause, the Uniform Act and Rule 60(b)(4), SCRCP. The circuit court exercised appropriate discretion in ruling that Dr. Shay was entitled to relief pursuant to Rule 60(b)(4). *See Raby Const., LLP v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004) (whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge; appellate review is limited to determining whether there was an abuse of discretion). See also *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 748 S.E.2d 781 (2013) (in reviewing a decision with respect to Rule 60(b), the Supreme Court utilizes a deferential standard of review).[3]

This Court should not be persuaded to ignore the lack of the arbitrator's power to adjudicate under the veil of an argument that Dr. Shay may not challenge personal jurisdiction in his motion for relief from the judgment. The Court also should not reject

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[3] In fact, the circuit court stated it took "no position on the viability of the judgment in Connecticut, but relieves [Dr.] Shay of the prospective effect of the judgment in South Carolina." (R. p. 9, n. 4). The court rejected DAI's framing of the issue as "personal jurisdiction," pointing out that "Rule 60 applies in numerous cases where there is no challenge to personal jurisdiction." *Id.*

the obvious misstatement of parties that occurred throughout the proceedings in Connecticut. Instead, the Court should give deference to the discretion of the circuit court and affirm the order granting Dr. Shay relief from the judgment in South Carolina.

III. Dr. Shay Was Not Precluded from Advancing His Arguments Pursuant to Rule 60, SCRCP, by the Arguments Made and Ruled upon in Connecticut

DAI contends that because Dr. Shay hired counsel in Connecticut to object to DAI's proceeding with the arbitration and the superior court's confirmation of the arbitrator's ex parte award, he is precluded from seeking relief from enforcement of the judgment in South Carolina. (App. Br. pp. 23-28). The Court should not be persuaded by this argument.

Contrary to DAI's assertion, Dr. Shay did not appear and fully litigate his defenses to either the arbitration or the confirmation. As noted above, the arbitrator summarily rejected Dr. Shay's assertion that no agreement to arbitrate existed without explanation or a judicial determination that the agreement to arbitrate existed. And the superior court expressly declined to address any of Dr. Shay's defenses because he did not appear in person at the hearing in Connecticut. Dr. Shay's arguments were not fully litigated in Connecticut.

Even so, as pointed out in Part II, above, in both South Carolina and Connecticut, Dr. Shay's argument that the arbitrator lacked the power (*i.e.*, jurisdiction) to adjudicate the claim without a judicial determination as to the existence of the agreement to arbitrate may not be waived and must be raised, even by the court sua sponte. *In re November 4,*

2008 Bluffton Town Council Election, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009); *Keller v. Beckenstein*, 46 A.3d 102, 107 (Conn. 2012). The Full Faith and Credit Clause is not offended by permitting Dr. Shay to seek relief from the superior court's judgment that was entered on the award of an arbitrator who lacked the power to adjudicate the claim.

DAI argues further that neither of Dr. Shay's claims "fall within the ambit" of Rule 60(b)(1) or (4). (App. Br. p. 26). This assertion was not made below and was not ruled upon by the trial court; it is accordingly not preserved for review. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006) (an issue must have been raised to and ruled upon by the trial court to be preserved for appeal). Even so, as set forth in Part II, above, the arguments Dr. Shay makes are well within the ambit of the rule.

DAI argues "mistake" under Rule 60(b)(1) means "procedural mistakes, not purportedly erroneous factual determinations." (App. Br. p. 27). Again, this argument was made for the first time in DAI's motion to alter or amend the judgment pursuant to Rule 59, SCRCP. Furthermore, the circuit court did not rule on this point. It is therefore not preserved for appellate review. *See Stevens & Wilkinson of SC, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693 (2014) (a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not). Furthermore, the law provides otherwise. *Hillman v. Pinion*, 347 S.C. 253, 554 S.E.2d 427 (Ct. App. 2001) ("mistake" under Rule 60(b)(1) means mistake of fact).

Finally, DAI contends the circuit court erroneously applied Rule 60(b)(4) because "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." (App. Br. p. 28) (underline and bold in original). Once again, this argument was not made until DAI filed its Rule 59 motion so that it is not preserved for review. *Stevens & Wilkinson of SC, Inc. v. City of Columbia.* Furthermore, as argued in Part I, above, the Connecticut ruling meets the test of being a "void" judgment as set forth in *Thomas & Howard Co., Inc. v. T.W. Graham and Co.*, 318 S.C. 286, 457 S.E.2d 340 (1995) because the arbitrator lacked the power under both South Carolina and Connecticut law to adjudicate the matter without first obtaining a judicial determination that an agreement to arbitrate existed.

The circuit court appropriately granted relief to Dr. Shay pursuant to Rule 60(b), SCRCP. This Court should affirm that ruling.

IV. Dr. Shay Established Entitlement to Relief Under Rule 60, SCRCP

DAI contends the circuit court should not have granted Dr. Shay any relief because he failed to introduce evidence and argue the existence of a meritorious defense in order to obtain relief from the Connecticut judgment. (App. Br. pp. 29-30). The Court should reject this argument out of hand.

To begin with, the precise argument DAI makes here is not preserved for appellate review. DAI was well aware prior to the hearing that Dr. Shay sought relief under Rule 60, acknowledging as much throughout the hearing. (See p. 6-7, above). The first time DAI raised whether Dr. Shay established a meritorious defense was in DAI's motion pursuant to Rule 59, SCRCP. (R. p. 188)

As noted above, a party cannot use a Rule 59(e), SCRCP, motion to present an issue to the court that could have been raised prior to judgment but was not so raised. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005). Where an issue is raised for the first time in a Rule 59, SCRCP, motion, the issue is not preserved for appellate review. *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005). *See also Stevens & Wilkinson of SC, Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 693 (2014) (a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not).

Prior to the initial decision by the circuit court, DAI did not contend as it does on appeal that Dr. Shay failed to present argument or proof of a meritorious defense under Rule 60. Accordingly, this precise argument is not available on appeal. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006) (an issue must have been raised to and ruled upon by the trial court to be preserved for appeal).

Furthermore, the circuit court did not rule on this precise argument in denying DAI's Rule 59 motion. In fact, the circuit court did not mention any contention regarding a meritorious defense in its original order granting relief or in the order denying DAI's motion to alter or amend. Thus, the precise argument DAI makes here is not preserved for this Court's review.

Even so, Dr. Shay argued in both his motion and at the hearing that DAI sought and obtained a judgment based upon a false representation that Dr. Shay as an individual was a party to the agreement. (R. pp. 110-112, ¶¶ 1-3, 7, 11). Dr. Shay also pointed out that the arbitrator lacked jurisdiction due to his failure to obtain a pre-arbitration judicial

determination as to the existence of an agreement to arbitrate in the face of Dr. Shay's objection to jurisdiction. (R. pp. 111-112, ¶¶ 6, 8, 9, 11). The arbitrator's ruling itself notes that Dr. Shay objected to proceeding but the arbitrator himself overruled the objection. (R. p. 93, ¶ 3; R. p. 139). Dr. Shay's counsel raised these objections before the superior court in Connecticut. (R. pp. 169-173) Furthermore, Dr. Shay presented his affidavit in which he contested the claim that he individually entered any agreement with DAI or knowingly agreed to arbitrate any disputes under the contract. (R. pp. 183-184.). All of this was presented to the circuit court for its consideration.

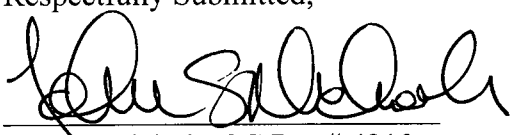
Even if this issue was preserved for this Court's review, the Court should reject DAI's argument. Dr. Shay presented both argument and proof supporting his assertion of a meritorious defense. "A meritorious defense need not be perfect[,] nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) (quoting *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)).

Accordingly, the Court should affirm the circuit court's decision to grant Dr. Shay's motion for relief from the judgment pursuant to Rule 60(b), SCRCP and the Act.

CONCLUSION

For the reasons stated the Court should affirm the circuit court's order.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2011-CP-38-00853

Directory Assistants, Inc., ... Appellant,

v.

Dennis Shay d/b/a Marsch Chiropractic Center, ... Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Final Brief of Respondent* and *Certificate of Compliance* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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