THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

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SC Court of Appeals

Case No. 10-CP-10-6239 (Appeal Case No.: 2015-000940)

D.A. Morgan Price, ... Respondent,

v.

Todd Chas, Jacara Chas, ... Appellants.

APPELLANTS' INITIAL BRIEF

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August 24, 2015

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3. **IS THE JUDGMENT VOID BECAUSE THE CHASES WERE NEVER PROVIDED PROPER NOTICE OF THE TRIAL?**

STATEMENT OF THE CASE

This case involves the sale of a condominium unit by the Appellants, Todd Chas and Jacara Chas (hereinafter "the Chases"), to the Respondent, D.A. Morgan Price (hereinafter "Price"), and subsequent litigation concerning the condition of the unit at the time of the sale. On August 2, 2010, Price filed a complaint against the Chases, Marsh Winds Owners Association, Inc. a/k/a Marsh Winds Horizontal Property Regime (hereinafter "Marsh Winds"), and The Marshland Communities, LLC (hereinafter "Marshlands") alleging violation of S.C. Code Ann. § 27-50-65, violation of the South Carolina Unfair Trade Practices Act, failure to disclose defects, negligent misrepresentation, conspiracy, breach of fiduciary duty, and seeking a declaratory judgment rendering certain HOA assessments void. (DM3).

Marshland and Marsh Winds both made appearances and filed responsive pleadings. Marsh Winds filed an answer and a counterclaim, alleging breach of contract and seeking a declaratory judgment regarding Plaintiff's payment of homeowners' assessments. The Chases did not make an appearance and did file an answer or other responsive pleading. A jury trial was held on or around February 19, 2013. The jury found in favor of the Defendants, Marsh Winds and Marshland, and it awarded the Defendant, Marsh Winds, $85,227.43 on its counterclaim. The Chases did not appear at the trial, and judgment was entered against the Chases in the amount of

$300,227.43.

The Chases were allegedly served via publication, and contend they never received notices of the complaint or the trial, which are the issue in this appeal. The Chases learned of the judgment against them in July 2014, and filed a Motion to Set Aside Judgment on August 29, 2014. By Order dated February 17, 2015, the court denied the motion in a form order, ruling: "This matter came before the Court on the Defendants Todd Chas and Jacara Chas's Motion to Set Aside Judgment in the above matter. The Court hereby DENIES Defendant Todd and Jacara Chas's Motion to Set Aside the jury verdict rendered on March 21, 2013." (DM1). On February 27, 2015, the Chases filed a Motion for Reconsideration. By form order dated March 26, 2015, the court denied the Motion ruling: "This matter came before the Court on the Defendants Todd Chas and Jacara Chas's Motion for Reconsideration under Rules 52 and 59, SCRCP, of this Court's Final order denying Defendants' Motion to Set Aside Judgment. The Court hereby DENIES Defendants' Motion for Reconsideration under Rules 52 and 59. See SCRCP Rule 52(a) ("[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."") (DM2).

On April 23, 2015, the Chases filed a Notice of Appeal.

FACTS

The Chases sold the Unit to Price on January 3, 2008. (DM17). Prior to the sale, the Chases provided a disclosure, as required by S.C. Code Ann. § 27-50-10, *et seq.*, listing any known defects or problems with the Unit, and submitted the disclosure to their realtor, Nat Wallen ("Wallen"). (DM13, DM14).

The Chases listed their house through Keller Williams Real Estate Company. The listing

provided an email address for Todd Chas, along with the phone number, and a mailing address of P.O. Box 1602, Folly Beach, South Carolina 29439. (DM12).

The Settlement Statement for the closing listed the Chases' residence as P.O. Box 1602, Folly Beach, South Carolina 29439. (DM17).

Shortly before the closing of the Unit, the Chases completed a change of address form with the United States Post Office so that their mail from P.O. Box 1602, Folly Beach, South Carolina 29439 would be forwarded to 4 Middleton Place, Charleston, South Carolina 29403. (DM28, DM29).

At the closing of the Unit, the Chases provided both Price and the realtor with a forwarding address of 4 Middleton Place, Charleston, South Carolina 29403. (DM28, DM29).

The Plaintiff filed this action on August 2, 2010, against the Chases, Marsh Winds and Marshland. (DM3).

On November 3, 2010, Marshland filed an answer and motion to dismiss for lack of standing.

On November 17, 2010, Marsh Winds filed an answer and a counterclaim, alleging breach of contract and seeking a declaratory judgment regarding Plaintiff's payment of homeowners' assessments.

On September 8, 2010, Charles V. "Skip" Lipton issued an Affidavit of Non-Service, stating that he attempted to serve Jacaranda C. Chas a/k/a Jacara Chas, one of the defendants, at 95 Magnolia Avenue, #B, Charleston, South Carolina 29403. (DM21). The Affidavit states that he had tried to serve her on several occasions at 95 Magnolia Avenue. *Id.* The Chases' sold that residence on December 2, 2004. (DM5). The Affidavit goes on to state that there are no records in

Charleston County for this subject as owning any real property or motor vehicles. (DM21).

There is no affidavit of service relating to Todd Chas.

On October 22, 2010, the Post and Courier issued an Affidavit of Publication. (DM19).

On November 12, 2010, the attorney for the Plaintiff, Andrew S. Radeker, executed an Affidavit that stated that the Defendants, Todd Chas and Jacara Chas, could not be found with a diligent search and that on November 12, 2010, he had mailed a copy of the Summons and Complaint in the action to Todd Chas and Jacara Chas via regular U.S. Mail at their last known address, with such address being 95 Magnolia Avenue, Apt./Unit B, Charleston, SC 29403. The Affidavit was submitted to the court to support an order for service by publication. (DM20).

On November 22, 2010, the Clerk of Court, Julie J. Armstrong, issued an Order of Service by Publication. The Order refers to a Complaint and an Amended Complaint. (DM21). The Order was also issued allowing the publication to be based on *nunc pro tunc* publications in the Post and Courier. *Id.*

During discovery, the Defendant Marsh Winds listed the Chases' proper address as 4 Middleton Place, Charleston, South Carolina 29403 and/or P.O. Box 1602 Folly Beach, South Carolina 29439. (DM22).

On February 13, 2013, Andrew S. Radeker, attorney for the Plaintiff mailed a Notice of Trial Hearing on Damages to the Chases at the 95 Magnolia Avenue address. (DM26).

The Chases never received notice of the Summons and Complaint, or the hearing and trial. (DM28, DM29). The Chases first learned about the above-captioned case on July 28, 2014. As soon as the Chases were informed that there was a large judgment entered against them, they performed a search online and saw the above-captioned case. *Id.* Prior to this date, no one had

contacted Todd Chas by any method of communication whatsoever regarding the above-captioned case. *Id.*

ARGUMENT

I. THIS MATTER SHOULD BE REMANDED TO THE TRIAL COURT FOR A WRITTEN ORDER SETTING FORTH THE SPECIFIC BASIS FOR THE ORDER.

This matter should be remanded to the trial court to articulate the reasons for denying the Chases' motion to set aside the judgment. When a trial court issues a form order that does not articulate its reasons for granting or denying a final motion, the appropriate remedy is to vacate and remand the matter to the court, requiring the court to articulate the reasons for granting or denying the motion. Bowen v. Lee Process Systems Co., 342 S.C. 232 at 90, 240, 536 S.E.2d 86 (Ct. App. 2000), *see also* Porter v. Labor Depot, 372 S.C. 560 at 568, 643 S.E.2d 96 at 100 (Ct. App. 2007), Froneberger v. Smith, 406 S.C. 37 at 54, 748 S.E.2d 625 at 634 (Ct. App. 2013). However, in Woodson v. DLI Properties, LLC, the Supreme Court of South Carolina overruled Bowman and stated that "findings and conclusions are not required where the 'circuit court's reasoning is clear from the order, as it plainly referenced the evidence the circuit court considered in making its decision.'" Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (S.C. Sup. Ct 2014). The Supreme Court noted that not all situations required a detailed order.

In this case, the form order issued by the trial court requires remand. The trial court's complete order in this matter states: "This matter came before the Court on the Defendants Todd Chas and Jacara Chas' motion to set aside judgment in the above matter. The Court hereby DENIES Defendants Todd Chas and Jacara Chas's Motion to Set Aside the jury verdict rendered on March 21, 2013." There is no explanation as to the basis for the decision, the facts relied upon or any law relating to the matter.

The court's order in response to the Chases' motion for reconsideration is equally insufficient. The Order states: "The Court hereby DENIES Defendants' Motion for Reconsideration under Rules 52 and 59. See SCRCP Rule 52(a) ("[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(a)."

Based on the lack of any reasoning for denying the motion or applying any law to the facts of this case, this matter must be remanded to the trial court for a reasoned decision.

Alternatively, based on the information contained in the record, this Court should issue an Order vacating the judgment and remanding this matter to the trial court for a trial on the merits for the reasons set forth below.

II. THE JUDGMENT SHOULD BE VOIDED BECAUSE THE CHASES WERE NEVER PROPERLY SERVED.

The Chases were never properly served with any documents relating to this case; therefore, the court lacks personal jurisdiction over them, and the judgment must be voided. Rule 60(b)(4), South Carolina Rules of Civil Procedure (SCRCP), provides, in pertinent part: "On motion and on such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (4) the judgment is void; . . ." Rule 60(b)(4), SCRCP.

"A void judgment is one that, from its inception, is a complete nullity and is without legal effect[.]" Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995); *see also*, BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). "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." Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) (quoting McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996)); *see also*, BB&T, 369 S.C. at 551, 633 S.E.2d at 503 ("A judgment is void if a court acts without personal jurisdiction."). "It is the plaintiff's burden to show that the court has personal jurisdiction over the defendant." Jensen v. Doe, 292 S.C. 592, 594, 358 S.E.2d 148 (Ct. App. 1987).

Service of process by publication requires the following:

> When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof, the clerk of the court of common pleas, the master, or the probate judge of the county in which the cause is pending and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made ..., the court, judge, clerk, master, or judge of probate may grant an order that the service be made by the publication of the summons in any one or more of the following cases: ... (3) when the defendant is a resident of this State and after a diligent search cannot be found. S.C. Code Ann. § 15-9-710.
>
> The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. The court, judge, clerk, master or judge of probate shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his place of residence, unless it appears that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him. S.C. Code Ann. § 15-9-720.
>
> In all cases in which publication is made the complaint must first be filed and the summons, as published, must state the time and place of such filing. When service is made by publication the ten days' notice of application for judgment to be made at chambers as required in contested cases of certain kinds as provided by law may be inserted in the first or any subsequent publication mailed to the last known residence of the defendant. . . . S.C. Code Ann. § 15-9-740.

None of the requirements for service of process by publication were met.

1. No attempt to serve Todd Chas was made. The record is absolutely void of anything showing any attempt was made to serve Mr. Chas. The Affidavit of Non-Service is only for Jacara Chas. (DM18). There is no Affidavit of Non-Service relating to any attempt to serve Todd Chas.

2. The Affidavit of Non-Service expressly acknowledges the Chases were not residents at the place where service was attempted. (DM18).

3. No diligent search was made. The Plaintiff missed, disregarded, or did not pursue numerous items that would have given Plaintiff the correct contact information for the Chases. The Settlement Statement signed at closing by both the Chases and the Plaintiff provided the Chases' mailing address as P.O. Box 1602, Folly Beach, South Carolina 29439. (DM17). The Plaintiff never attempted service by using that address. Prior to the closing, the Chases completed a change of address form with the United States Post Office so that any mail sent to P.O. Box 1602, Folly Beach, South Carolina 29439 would be forwarded to 4 Middleton Place, Charleston, South Carolina 29403, where they have continuously resided since November of 2009. (DM28, DM29). Finally, at the closing, the Chases gave their correct forwarding address to both the Plaintiff and to the Chases' realtor. The address given was 4 Middleton Place, Charleston, South Carolina 29403. (*Id.*).

4. The Affidavit of Plaintiff's attorney in support of the Order for Service by Publication is defective. (DM20). The affidavit states that the Chases cannot be found after a diligent search, but the affidavit of non-service upon which the attorney relies only references Jacara Chas. There is nothing in the record about

any search for Todd Chas. The affidavit also states the Plaintiff's attorney sent a copy of the Summons and Complaint to the Chases at 95 Magnolia Avenue "via regular U.S. mail," which service was improper because it was not to the last known address. *Id.*

5. The Affidavit of Publication shows the Notice of Publication was published in The Post and Courier, on October 7, 14, and 21, 2010. (DM19). However, Plaintiff did not file an Affidavit in Support of an Order of Publication until November 18, 2010. (DM20). The Publication Order was filed November 22, 2010. (DM21). Plaintiff attempted to serve the Chases by publication, but did not have the required order at the time of publication.

6. The Order for Service by Publication is defective for several reasons. First, the Order refers to an "Amended Summons" and an "Amended Complaint" be served by publication on the Chases. (DM21). There is no Amended Summons or Amended Complaint filed in this case. The Publication Order orders the service of documents that do not exist.

7. Second, the Order for Service or Publication was not issued properly, was not in accordance with the law, and is null and void. The order allowed publication *nunc pro tunc*, which is a phrase applied to acts allowed to be done after the time they should have been done, with a retroactive effect. Black's Law Dictionary, 737 (7th Ed. 1991). "*Nunc pro tunc* orders can only be used to place in the record evidence of judicial action that has actually taken place." Ex Parte Strom, 343 S.C. 257, 264, 539 S.E.2d 699, 702-703 (2000). "[S]uch an order can be used only for the purpose

of placing in the record evidence of judicial action that has actually been taken, not to correct an error or supply an omission of judicial action." Ex Parte Strom, 343 S.C. at 265 (*quoting* Carroll v. Carroll, 338 S.W.2d 694, 695 (Ky. Ct. App. 1960)). There are simply no facts or circumstances in this case that warrant the issuance of the Publication Order *nunc pro tunc*.

8. Third, the Notice of Publication is defective because it does not state when the Complaint was filed. (DM19). "In all cases in which publication is made the complaint must first be filed and the summons, as published, must state the time and place of such filing." S.C. Code Ann. § 15-9-740. The Complaint was filed on August 2, 2010. The Summons, as published, does not state this date.

Any one of the above defects renders service by publication ineffective and void. The number of defects demonstrates the Plaintiff's complete failure to follow the applicable laws for service by publication. Regardless of the number of errors, the Plaintiff's failure to comply with the applicable laws for service by publication require that the judgment be set aside. The Chases never had notice of the complaint because of the Plaintiff's lack of due diligence and failure to follow the law.

III. THE JUDGMENT SHOULD BE VOIDED BECAUSE THE CHASES WERE NEVER PROVIDED PROPER NOTICE OF THE TRIAL

The Notice of Trial was not properly served on the Chases at their "last known address." Rule 55 of the SCRCP states: "Pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the **last known address** of such party whether or not such party has appeared in the action." The notice was not sent to the "last known address," but was sent to an address the Plaintiff knew was not the last known address.

On February 13, 2013, Plaintiff sent the Notice of Trial to the Chases at 95 Magnolia Avenue, Apartment/Unit B, Charleston, SC 29403. (DM26). The Chases sold that property in 2004, before they purchased the condo unit at issue in this case; therefore, it could not have been their last known address. (DM5). The closing statement provided to the Plaintiff included the Chases' address as P.O. Box 1602, Folly Beach, South Carolina 29439. (DM17). Further, the Plaintiff was provided with the Chases' correct address in responses to discovery by the other defendants: 4 Middleton Place, Charleston, South Carolina 29403, or P.O. Box 1602, Folly Beach, South Carolina 29439. (DM22). Despite having the more recent addresses, Plaintiff mailed the required notice to an address that was known not to be the Chases' last known address. Since the Plaintiff failed to provide notice of the hearing or trial as required by Rule 55, the judgment must be set aside.

While a motion to set aside a judgment pursuant to Rule 60(b)(4) does not require a showing of a meritorious defense, the Chases have a meritorious defense. They disclosed any known defects or problems with the Unit to their realtor prior to the sale. (DM 13, DM14). Further, the jury returned a defense verdict for the other defendants. Had the Chases been properly served and informed of the trial in this case, they could have asserted a proper defense and prevailed.

CONCLUSION

For the foregoing reasons, the Chases request that this matter be remanded to the trial court for a reasoned decision on the Chases' Motion to Set Aside the Judgment, or alternatively, that this court issue an order setting aside the judgment, and that the case against the Chases be remanded so that the Chases can properly defend themselves in a trial on the merits.

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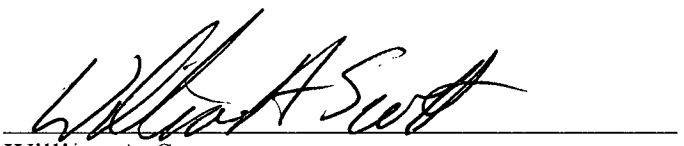
Respectfully submitted.

PEDERSEN & SCOTT, P.C.



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August 24, 2015

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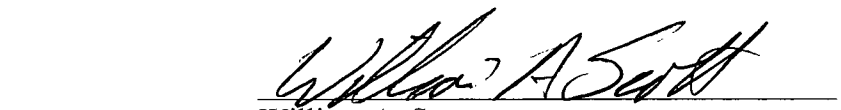
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Initial Brief complies with Rule 208(a)(1) and (b)(1), SCACR.

PEDERSEN & SCOTT, P.C.



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D.A. Morgan Price, ... Respondent,

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PROOF OF SERVICE

I certify that I served the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, Certificate of Counsel and Proof of Service by depositing a copy of it in the United States Mail, postage prepaid, on August 24, 2015, addressed to counsel for Respondent, Andrew S. Radeker, Esq., Harrison & Radeker, P.A., Post Office Box 50143, Columbia, SC 29250.

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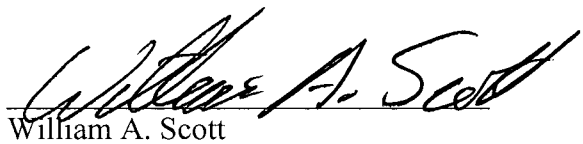

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August 24, 2015

The Honorable Jenny A. Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
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RE: D.A. Morgan Price v. Todd Chas
Appellate Case No. 2015-000940

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Appellants' Initial Brief, Designation of Matter to be Included in the Record on Appeal, Certificate of Counsel and Proof of Service. Please return a stamped-in copy of these documents in the enclosed envelope.

By copy of this letter, the Brief of Appellants, Designation of Matter to be Included in the Record on Appeal, Certificate of Counsel and Proof of Service are being served upon Respondent's counsel.

Please contact me if you have any questions.

With regards,

William A. Scott

WAS/teb
Enclosures
cc: Andrew S. Radeker, Esq. (w/encs.)

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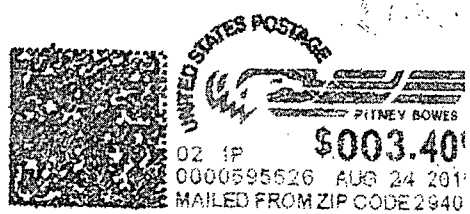

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