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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Judge

Common Pleas Case No. 2010-CP-10-6239
Appellate Case No. 2015-000940

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

v.

Todd Chas, Jacara Chas, Marsh Winds Owners Association, Inc. a/k/a Marsh Winds Horizontal Property Regime, and The Marshland Communities, LLC, Defendants,

Of whom Todd Chas and Jacara Chas are the.....Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES

I. **Was it an abuse of discretion for the trial court to deny the Appellants' motion for relief from the judgment, particularly where the judgment was not void and the Appellants had no meritorious defense?**

II. **Is the Appellants' argument that the trial court's orders were not sufficiently detailed one that must fail, as it is against controlling precedent?**

STATEMENT OF THE CASE

The Respondent, D. A. Morgan Price (hereinafter "Price") brought suit against the Appellants (hereinafter "the Chases" or "the Chas Defendants") and Marsh Winds Owners Association, Inc. and The Marshland Communities, LLC (the condominium owners' association and its property management company) due to their concealment from him of defective conditions in a condominium unit he purchased in Folly Beach, South Carolina, from the Chases. (R. pp. __; summons and complaint.) After an unsuccessful search to find the Chases and serve them with the summons and complaint, the Chases were served by publication. (R. pp. __; order for service by publication; affidavit of publication; affidavit of non-service; affidavit in support of service by publication; affidavit of Radeker; affidavit of Lupton.) The Chases did not serve any responsive pleading. ((R. pp. __; affidavit of default .) Both the default case against the Chases and the claims against the other defendants were tried to a jury. (R. pp. __; verdict form.) Price's counsel mailed notice of the trial to the Chases at an address where they had lived, the last place (other than the Marsh Winds unit, where he knew that they could not be found) that Price or his attorney knew that the Chases had lived. (R. pp. __; notice of trial & certificate of service; affidavit non-service; affidavit of Radeker.) On March 21, 2013, the jury returned a verdict resulting in a judgment for Price on his claims against the Chases for $300,227.43 in actual damages. (R. pp. __; verdict form.) The Honorable Roger M. Young, Sr., later awarded Price an additional $12,650.00 against the Chas Defendants in attorney's fees[1] under S.C. Code

[1] Judge Young's order notes that the award of attorney's fees is not larger because the Chas Defendants were in default, which established their liability and limited the work necessary to obtain a judgment against them. (R. pp. __; order awarding attorney's fees to plaintiff.)

Ann. § 27-50-65 by order filed May 6, 2013. (R. pp. __; order awarding attorney's fees to plaintiff.)

Over a year later, on August 29, 2014, the Chases served the subject motion seeking for the judgment against them to be set aside under Rule 60(b)(4), SCRCP, arguing that their service by publication was improper and that the notice of trial had been improperly served. (R. pp. __; motion to set aside judgment.) The Honorable Kristi L. Harrington heard the motion and denied the same. (R. pp. __; order denying motion to set aside judgment; transcript of hearing of motion to set aside judgment.) The Chases moved for reconsideration of that ruling, and Judge Harrington denied that motion as well. (R. pp. __; order denying Chases' motion for reconsideration.) This appeal followed.

STATEMENT OF FACTS

In a sales transaction that consummated in a closing on January 3, 2008, the Chases sold Price their condo unit in the Marsh Winds condominiums in Folly Beach. (R. pp. __; affidavit of Price p. 1 & exh. A-1.) The Chases had lived in the condo unit until they sold it to Price, when they moved away from Folly Beach. (R. pp. __; affidavit of Price.) They did not inform Price or anyone on his behalf of where they were moving after the closing, and it appears they took an extended vacation out of the country. (R. pp. __; affidavit of Price; filed excerpt from deposition of Tom Chorlton; filed excerpt from deposition of Karen Colie.)

Several months after Price bought the condo unit at Marsh Winds, he began to find out about defects in the Marsh Winds buildings, including the one where the unit he bought from the Chases was located. (R. pp. __; affidavit of Price p. 3.) The defects

included problems with the roof, exterior walls, and other structural components of the buildings, the elevator (water pooling at the bottom of the elevator shaft), and the plumbing. (R. pp. __; affidavit of Price.) At least some of these problems caused water seepage on a widespread scale. (R. pp. __; affidavit of Price.) Over time, Price found out more about the extent of these problems. (R. pp. __; affidavit of Price.) These defects significantly affected the value of the condo units in Marsh Winds and resulted in the Marsh Winds Owners Association making large assessments from the unit owners, including Price, for the stated purpose of paying for the defects to be repaired as much as could reasonably be done. (R. pp. __; affidavit of Price; complaint.)

It later became apparent that the Chases had known about these defects in the Marsh Winds buildings and had in fact falsely stated on the real property condition disclosure form they provided to Price that they had no knowledge of any problem with any of the following:

a. "exterior walls";

b. "other structural components";

c. "Roof (leakage or other problem)";

d. "Water seepage, leakage, dampness or standing water or water intrusion from any source in any area of the structure"; and

e. "Plumbing system (pipes, fixtures, water heater, etc.)[.]"

(R. pp. __; affidavit of Price p. 3 & exhs. A-3, A-4.)

Price filed suit against the Chases and Marsh Winds Owners Association, Inc. and The Marshland Communities, LLC (the condominium owners' association and its

property management company).[2] (R. pp. __; summons and complaint.) The causes of action asserted against the Chas Defendants were for violation of S.C. Code Ann. § 27-50-65 for their false representations to Price on the real property condition disclosure form, fraud, constructive fraud, negligent misrepresentation, and civil conspiracy. (R. pp. __; complaint.)

Price did not know where to find the Chas Defendants, and neither did his mother, who lived in the unit at the time. (R. pp. __; affidavit of Price; affidavit of Radeker.) Price tried to discover something about the Chases' whereabouts from Tom Chorlton, who had been the Chases' neighbor in Marsh Winds and was a friend of theirs. (R. pp. __; affidavit of Price; affidavit of Radeker; filed except of deposition of Tom Chorlton.) Mr. Chorlton advised he did not know where the Chases were or how to reach them, as he later testified in his deposition. (R. pp. __; affidavit of Price p. 2; affidavit of Radeker; filed excerpt of deposition of Chorlton.) He informed Price that, as far as he knew, the Chases were still married and together. (R. pp. __; affidavit of Price.)

Price's counsel also attempted to gain some insight into the location of the Chas Defendants from Mr. Chorlton. (R. pp. __; affidavit of Radeker p. 1.) Though he seemed very forthcoming, Mr. Chorlton told Price's counsel that he did not have any information about where the Chas Defendants were, other than that he thought they had gone on an extended vacation, perhaps to Mexico. (R. pp. __; affidavit of Radeker.) He said that he understood this to be a vacation and that the Chases continued to regard

[2] Though there is some overlap in the causes of action that were asserted against the Chases and those asserted against the other defendants, the overlap was not complete. (R. pp. __; complaint.) For example, the claim under S.C. Code Ann. § 27-50-65 was not, and could not have been, asserted against any defendant other than the Chas Defendants. (R. pp. __; complaint.)

the Charleston area as home. (R. pp. __; affidavit of Radeker.) Mr. Chorlton mentioned that he believed the Chases lived in the Berkeley, California, area for a while before they had moved to the Charleston area. (R. pp. __; affidavit of Radeker.)

Using person-finding services to which his firm subscribed, such as Accurint.com and PeopleFinder.com, Price's counsel attempted to find a good address for the Chas Defendants, based on the information he had. (R. pp. __; affidavit of Radeker pp. 1-2.) Kevin Fain, an employee of Price's counsel's law firm at the time, also engaged in efforts to find the Chas Defendants but did not find them. (R. pp. __; affidavit of Radeker pp. 1-2.) Price's counsel's efforts revealed an address for the Chas Defendants on Magnolia Avenue in Charleston as well as hits for addresses in California (consistently with what Mr. Chorlton had advised about the Chases having lived in California). (R. pp. __; affidavit of Radeker; affidavit of Lupton; affidavit of non-service.) All of these addresses appeared somewhat dated.

Mr. Fain of the office of Price's counsel provided Charles V. "Skip" Lupton, a veteran process server with experience in finding persons with unknown whereabouts, with what information was available about the Chas Defendants and asked him to serve or attempt to serve process on the defendants. (R. pp. __; affidavit of Lupton.) Mr. Lupton searched for the Chas Defendants in several ways but did not find them, at the Magnolia Avenue address (where he went six times in an effort to find someone at home) or anywhere else. (R. pp. __; affidavit of non-service; affidavit of Lupton.) He

returned an affidavit of non-service[3] that noted that he ultimately found that someone else lived at the Magnolia Avenue address and that:

> Additionally, there are no records in Charleston County for this subject as owning any real property or motor vehicles, or of paying property taxes; there is no listing for this subject in the 2010 Greater Charleston Telephone Directory or the 2010 Charleston Cross-City Directory.

(R. pp. __; affidavit of non-service.)

Price submitted this and an affidavit of his counsel, which stated that "Defendants Todd Chas and Jacara Chas, a/k/a Jacaranda Chas cannot be found after a diligent search[,]" to the court. (R. pp. __; affidavit of non-service; affidavit in support of service by publication.) Price mailed a copy of the summons and complaint to the Chas Defendants at the Magnolia Avenue address by regular mail, as required by S.C. Code Ann. § 15-9-740 as part of the service by publication process, and moved for an order authorizing service by publication, which was granted. (R. pp. __; order for service by publication; affidavit in support of service by publication.) In the interim, the summons was published in the Charleston *Post & Courier*; accordingly, the clerk of court entered the order for service by publication *nunc pro tunc* to note that the authorized publication had already occurred. (R. pp. __; order for service by publication; affidavit of publication.)

Mr. Fain later died, on January 28, 2013. (R. pp. __; affidavit of Radeker p. 2 & exh. B-1.)

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[3] As his more recent affidavit makes clear, though his affidavit of non-service speaks only of efforts to locate Mrs. Chas, Mr. Lupton searched for both of the Chas Defendants. (R. pp. __; affidavit of Lupton.)

Todd Chas had been on the board of directors of the Marsh Winds Owners Association before he moved away from Marsh Winds. (R. pp. __; filed excerpt from Colie deposition; affidavit of Price.) During the course of discovery with the other defendants in the case, Price obtained copies of documents (emails on which Todd Chas is copied and a letter to the board's president) that show plainly that Todd Chas had been aware of the problems with Marsh Winds that the Chases had stated on their disclosure form to Price that they knew nothing about. (R. pp. __; exhibits to Price affidavit.)

Also during discovery, in March of 2012, the Marsh Winds and Marshland defendants served interrogatory responses that listed the Chases' old post office box and a 4 Middleton Place address in Charleston as addresses for them. (R. pp. __; interrogatory answers.) Price and his counsel had no reason to believe that the 4 Middleton Place address given for the Chas Defendants in those responses was anything more than a former address for the Chas Defendants, like the Magnolia Avenue address had turned out to be, or just a *possible* former address for them. (R. pp. __; affidavit of Price; affidavit of Radeker.) The other defendants confirmed, through their 30(b)(6) designee, that they did not know this to actually be an address for the Chas Defendants when, in their 30(b)(6) deposition in May of 2012, their designee testified that she had not heard anything about where the Chas Defendants were for about two years before the deposition and that she did not know where to find the Chas Defendants. (R. pp. __; filed excerpt from Colie deposition.)

After some time, the case proceeded to a jury trial in March of 2013. (R. pp. __; verdict form.) Price mailed notice of the trial to the Chas Defendants at the

Magnolia Avenue address, the last place (other than the Marsh Winds unit, where he knew that they could not be found) that Price or his attorney knew that the Chases had lived. (R. pp. __; notice of trial & certificate of service.)

Tom Chorlton testified at the trial, providing key information about the value of the condominium unit involved (including testimony about a comparable sale, which was invaluable in light of the almost non-existent recent sales of Marsh Winds units at the time of the trial of this case), what it was like to own property in a condominium that had such significant defects, and the nature and extent of the problems with the Marsh Winds buildings that affected the value of Marsh Winds units. (R. pp. __; affidavit of Radeker p. 4.)

The jury rendered the subject verdict against the Chases. (R. pp. __; verdict form.)

Mr. Chorlton is now deceased. (R. pp. __; affidavit of Price p. 2 & exh. A-2.) He died on January 5, 2014. (R. pp. __; affidavit of Price p. 2 & exh. A-2.)

On August 29, 2014, the Chas Defendants served the instant motion seeking for the judgment against them to be set aside under Rule 60(b)(4), SCRCP, arguing that their service by publication was improper and that the notice of trial had been improperly served. (R. pp. __; motion to set aside judgment.) The Chases state that they first learned about this case and the judgment against them on July 28, 2014; in other words, more than 30 days before they served the instant motion. (R. pp. __; affidavits of Chases.) They served no proposed responsive pleading with this motion, nor have they served one since. The Chases attached their affidavits, in which they stated that they have lived at 4 Middleton Place in Charleston since November of 2009

and that they provided that address to Price and to Nat Wallen (the Chases' realtor) at the January 3, 2008 closing when they sold the Marsh Winds unit to Price. (R. pp. __; affidavits of Chases.) No explanation is offered for why this address would have been provided to Price or anyone else as a forwarding address a year and 10 months before the Chases say they took up residence there. (R. pp. __; affidavits of Chases.) They say they provided their "address" to their realtor in their listing agreement with him (which Price was not and would not have been provided), but all that is given is the Folly Beach post office box address, which the Chases say in their affidavits ceased to be any kind of address for them shortly before the closing of the condominium unit. (R. pp. __; affidavits of Chases.)

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 606-07, 681 S.E.2d 885, 888 (2009) (internal citations omitted).

ARGUMENT

I. The Chases made material misrepresentations about the property on the residential property condition disclosure form. They have no meritorious defense, and their claim to have disclosed all problems with the condo unit they knew about is demonstrably false.

"A meritorious defense is necessary in order for a judgment to be set aside under Rule 60(b)." McClurg v. Deaton, 395 S.C. 85, 86-87, 716 S.E.2d 887, 887-88 (2011).

Our Supreme Court has not very long ago noted that "it is well settled that the moving party in a Rule 60(b) motion has the burden of presenting **evidence** entitling him to relief." Id. at 86 n. 1 (emphasis in original). "Such evidence is usually provided through affidavits." Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

Here, the closest the Chases come to making a showing of a meritorious defense still falls well short of satisfying this requirement. They state in their affidavits that they "provided a disclosure of any known defects or problems with the Unit and gave the disclosure to our realtor" before the sale. (R. pp. __; affidavits of Chases.) First, this is merely a conclusory statement, something courts disfavor and usually do not consider in evaluating a factual record. See Dawkins v. Fields, 354 S.C. 58, 668, 580 S.E.2d 433, 438 (2003) (court will not consider affiant's conclusory averments in summary judgment proceedings); Cox & Floyd Grading, Inc. v. Kajima Construction Services, Inc., 356 S.C. 512, 516-17, 589 S.E.2d 789 (Ct. App. 2003) (same). Second, the record that is before the court demonstrates amply that this conclusory statement is not true.

As a member of the Marsh Winds Owners Association's board of directors, Todd Chas was provided with a great deal of knowledge of the very problems he denied knowing anything about in his real property condition disclosure statement. (By reasonable inference, we can assume that his wife, Jacara Chas, knew of at least some of this information, either from her husband or from living at Marsh Winds. In any event, she has provided the court with nothing other than her conclusory statement indicating that she completed the disclosure form and gave it to her realtor, and she has

given no testimony that she did not know of the problems with Marsh Winds that are the subject of this lawsuit.) Exhibits A-5 through A-12 to Price's affidavit served in opposition to the motion to set aside the judgment are the following:

a. A copy of an email, on which Todd Chas is copied, stating that "the Developer [of Marsh Winds] knew he had a defective product well before the end of the year 2001." This email is dated January 24, 2006.

b. A copy of an email, on which Todd Chas is copied, by a Marsh Winds board member staring that he was "concerned about saying anything [to Marsh Winds unit owners] about serious defects at this time." This email is dated February 5, 2006.

c. A copy of an email, on which Todd Chas is copied, noting that a "building inspector/expert . . . stated that there were indeed structural issues with Marsh Winds." This email is dated March 1, 2006.

d. A copy of a letter from an architect to the president of the Marsh Winds board of directors noting the existence of Marsh Winds' problems with "water infiltration and the mechanical and plumbing systems" and that "there may be some issues with the structural system as well." This latter is dated June 19, 2006.

e. A copy of an email, on which Todd Chas appears to be copied, noting problems with the plumbing infrastructure in the Marsh Winds buildings. This email is dated October 30, 2006.

f. A copy of an exchange of emails, on which Todd Chas is copied, discussing ongoing problems with the roof leakage and way the roofs on the Marsh Winds buildings were constructed. These emails are dated in July of 2007.

g. A copy of an email, on which Todd Chas is copied, discussing ongoing problems with the elevator in Building 1 of Marsh Winds (the building where the unit Price bought is). This email is dated December 21, 2007.

h. A copy of an email, on which Todd Chas is copied, noting that the elevator problem was not fixed and was an ongoing problem. The email is dated January 3, 2008, the day of the closing at which Price acquired the Marsh Winds unit involved in this case.

(R. pp. __; affidavit of Price exhs. A-5 through A-12.)

The Chases could have made no representation as to these matters, and that would have complied with S.C. Code Ann. § 27-50-40. The Chases, however, chose to affirmatively represent that they had no knowledge of any problems with these aspects of the property they were selling to Price when, in fact, they did. (R. pp. __; affidavit of Price exhs. real property condition disclosure forms.) The Chas Defendants' conduct ran afoul of S.C. Code Ann. § 27-50-65, which provides that "[a]n owner . . . who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading is liable for actual damages proximately caused to the purchaser and court costs. The court may award reasonable attorney fees incurred by the prevailing party."

While the Chases point out the defense verdict the other defendants received at trial, that is not evidence that the Chases have a meritorious defense. The situation of the other defendants, who were not the sellers of the property but were the property owners' association and its management company, was legally different from that of the Chas Defendants. What happened at trial is actually illustrative of the materially different legal situation the Chase Defendants occupied vis-à-vis Price. On the grounds that Marsh Winds and Marshland would not have, as a matter of law, owed a *preexisting* duty to Price to disclose what they knew of defects in the Marsh Winds buildings *before* the Marsh Winds unit was sold to him, the trial court sent Price's case as against those defendants to the jury only on his breach of fiduciary duty claim against them, as there was evidence from which the jury could have concluded that those defendants undertook a duty of disclosure to Price based on pre-closing communications they had with him. (R. pp. __; verdict form.) Evidently, the jury determined that the Marsh Winds and Marshland defendants had not undertaken such a duty, as they returned a defense verdict as to those defendants. (R. pp. __; verdict form.)

The Chases, on the other hand, had a duty of disclosure to Price as a matter of law. Where there are latent defects in real property, "the seller, if he has knowledge thereof, is bound to disclose such latent defects or conditions to the buyer, and his failure to do so may be the basis of a charge of fraud." Cohen v. Blessing, 259 S.C. 400, 403, 192 S.E.2d 204 (1972) (quoting 37 Am. Jur. 2d Fraud and Deceit § 158); accord May v. Hopkinson, 289 S.C. 549, 557, 347 S.E.2d 508 (Ct. App. 1986). Here, not only did these defendants fail to disclose what they knew, they falsely stated to

Price that they knew nothing of the problems with Marsh Winds. (R. pp. __; real property condition disclosure forms.)

The Chases did not demonstrate a meritorious defense, and Judge Harrington did not abuse her discretion in denying their motion.

II. The judgment is not void. This was a proper case for service by publication, and the Chases received all the notice they were entitled to get, under the circumstances.

"A judgment may be set aside more than one year after its entry only if it is 'void.'" Thomas & Howard Co., Inc. v. T.W. Graham & Co., 318 S.C. 286, 457 S.E.2d 340, 343 (1995) "Generally, a judgment is void only if a court acts without jurisdiction. Irregularities which do not involve jurisdiction do not render a judgment void." Id. (internal citation omitted). The Chases point at most to irregularities, but not jurisdictional ones. Out of a few of molehills, they would have the court imagine a range of towering peaks. They want the court to focus on that mirage while ignoring how difficult it would have been for Price and his counsel to find them.

While it does not appear to Price that he failed to comply with the law regarding service of process in this case, Price points out that our Supreme Court has noted that "[w]e have never required exacting compliance with the rules to effect service of process. Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 456 S.E.2d 897 (1995) (internal citations omitted).

One of the ways a court can acquire personal jurisdiction over a defendant is through service by publication. S.C. Code Ann. § 15-9-710. The statute authorizing service by publication provides as follows, in pertinent part:

> 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 or that he is a proper party to an action relating to real property in this State, 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[.]

Id.

While the Chases originally argued that the mailing to the last known address to them of the summons and complaint was done by regular mail rather than by certified mail, they missed the point: mailing a copy of the summons and complaint by regular mail is part of the service by publication process. (R. pp. __; motion to set aside judgment.) S.C. Code Ann. § 15-9-740 provides that:

> 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.

Actually, as the affidavits of Mr. Lupton and Price's counsel show, the Chases' residence was not known to Price and could not, with reasonable diligence, have been ascertained by him. (R. pp. __; affidavit of non-service; affidavit of Lupton; affidavit of Radeker.) It would have been permitted for the summons and complaint not to have been mailed at all. The trail of the Chases had gone cold, probably because of their absence from the area for a prolonged time between when they sold the property to Price and when they say they returned in late 2009. (R. pp. __; affidavits of Chases.)

As discussed above, the Chases' statement that they provided the 4 Middleton Place address to Price at the closing makes no sense. The Chases did not move to that address for until a year and 10 months after the closing. (R. pp. __; affidavits of Chases.) Their affidavit testimony that they provided this address to Price nearly two years before they moved to it is simply not credible.

While the Chases say they could have been found through their vehicle tax records, there are and were no such records under the names Todd Chas and Jacara or Jacaranda Chas. (R. pp. __; exhibits to affidavit of Radeker.) Charleston County website tax information search results under the names of the Chas Defendants and showing no results are attached to the affidavit of Price's counsel as Exhibits B-4 through B-13. (R. pp. __; exhibits to affidavit of Radeker.) (The website instructs the user that searches work better with the search subject's last name entered before his or her first name, so that is how the searches were performed.) (R. pp. __; affidavit of Radeker.) Attached as Exhibit B-14 to that affidavit is a printout of a record for a *J.*

Todd Chas for an automobile and showing a 4 Middleton Place address. Finding that record is far from simple, however, as Price's counsel had to enter "chas" for owner's name and "4 middleton pl" for address in order to find it. (R. pp. __; affidavit of Radeker.) In other words, to find the tax record of vehicle ownership that gives the 4 Middleton Place address, it appears one has to already know the address and use it along with the name "chas," and *only* "chas" or "chas j," not "chas todd." (R. pp. __; affidavit of Radeker.) Searching under "chas todd" and "4 middleton pl" produces no record. (R. pp. __; affidavit of Radeker.)

Further, the Charleston County website has no real property record for a 4 Middleton Place at all. (R. pp. __; affidavit of Radeker.) Searching under "4 middleton pl" as the property address on the website for real property record produces no records. (R. pp. __; affidavit of Radeker.) An owner address search under "4 middleton pl" shows a 4 Middleton *Court* and lists its owner as a Thomas Irvin Fetzer. (R. pp. __; affidavit of Radeker.) That record nowhere mentions the name Chas at all. (R. pp. __; affidavit of Radeker.) The only documents produced by a search under the Chas Defendants' names on the website of the Charleston County Register of Mesne Conveyances are those associated with the Magnolia Avenue address and with the unit subject of this case that Price purchased from the Chas Defendants. (R. pp. __; affidavit of Radeker.) Nothing associated with a 4 Middleton Place shows up in those results. (R. pp. __; affidavit of Radeker.)

It is no wonder that Mr. Lupton did not find the Chas Defendants.

Perhaps more to the point that Judge Harrington did not abuse her discretion by denying the Chases' motion, though, is that the affidavits of Mr. Lupton and Price's

counsel submitted in support of the order permitting service by publication provide a basis for the clerk of court's determination that the Chas Defendants could not be found in this state after a diligent search. (R. pp. __; affidavit of non-service; affidavit in support of service by publication.) Mr. Lupton's affidavit notes the efforts he undertook, and Price's counsel's affidavit states that "Defendants Todd Chas and Jacara Chas, a/k/a Jacaranda Chas cannot be found after a diligent search[,]" period, not a search even confined to this state. (R. pp. __; affidavit of non-service; affidavit in support of service by publication.) "When the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion." Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 429, 535 S.E.2d 128 (2000); accord Yates v. Gridley, 16 S.C. 496, 499-500 (1882) (noting that service by publication statute does not specify character or quantity of facts that need be shown to satisfy issuing officer, only that it must appear by affidavit to his satisfaction). The Chases have made no showing of fraud or collusion here, nor was there any. (R. pp. __; affidavits of Chases; motion to set aside judgment.) Accordingly, Judge Harrington was "without authority to overrule the finding of the clerk of court." Montgomery v. Mullins, 325 S.C. 500, 505-06, 480 S.E.2d 467, 470 (Ct. App. 1997).

The instant case is distinct from this court's recent decision in Caldwell v. Wiquist, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013). There, the court determined that an affidavit given in support of service by publication was defective where it affirmatively stated the defendant was *not* a resident of Beaufort County and stated that the plaintiffs had only attempted to serve the defendant in Beaufort County, where they knew she did not reside, and the affidavit contained no statements at all concerning

diligence in looking for the defendant. Caldwell, 402 S.C. at 571-72. The instant case is also distinct from Miles v. Lee, 319 S.C. 271, 460 S.E.2d 423, 425 (Ct. App. 1995), in which service by publication was determined to be ineffective where the affidavit given in support of it described efforts to locate an entirely different individual from the defendant.[4]

The Chases complain that the order authorizing service by publication states that it is *nunc pro tunc* to when the publication occurred. Not only does the relative timing of the publication vis-à-vis the filing of the order make absolutely no difference in whether the publication was calculated to give the Chas Defendants notice of the pendency of the action, they rely on a case that is hardly on all fours with the instant one for their argument on this point. In Ex parte Strom, 343 S.C. 257, 539 S.E.2d 699 (2000), the Supreme Court held, largely for policy reasons, that an order relieving counsel may not be entered *nunc pro tunc*. Nothing in that case supports the proposition that a clerk of court cannot authorize service by publication where the service by publication has already been done. Our Supreme Court has upheld *nunc pro tunc* orders that extended the time for a special referee to render his decision, Roche v. Young Bros, Inc. of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998), that retroactively appointed a guardian *ad litem*, Lipscomb v. Poole, 247 S.C. 425, 147 S.E.2d 692 (1966), and that permitted amendment of a complaint, Pace v. Still, 166 S.E. 494 (1932).

Finally, whether the order was *nunc pro tunc* or not does not matter. The order authorized service by publication; it did not dictate that it must occur after the issuance

[4] While the Chases contend that the record showed only efforts to locate Defendant Jacara Chas and not Defendant Todd Chas, Price notes that the Chases are married, and there is a presumption that spouses reside together. Fasset v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841 (Ct. App. 2005).

of the order. (R. pp. __; order for service by publication.) In fact, it expressly authorized the publication that had already happened. (R. pp. __; order for service by publication.)

The sometime use of "amended summons" and "amended complaint" in the order permitting service by publication is simply a clerical error, and a non-prejudicial one, at that. (R. pp. __; order for service by publication.) On clerical errors, the Court of Appeals has said:

> Generally, a clerical error is defined as a mistake in writing or copying. See Black's Law Dictionary 252 (6th ed. 1990). As applied to judgments and decrees, it is a mistake or omission by a clerk, counsel, judge or printer which is not the result of exercise of judicial function. Id. While a court may correct mistakes or clerical errors in its own process to make it conform to the record, it cannot change the scope of the judgment.

Dion v. Ravenel, Eiserhardt Assocs., 316 S.C. 226, 230, 449 S.E.2d 251, 253-54 (Ct. App. 1994). Here, the scope of the judgment is plain and unchanged: there was only one summons and complaint, and, obviously, that was the subject of the order permitting service by publication. (R. pp. __; summons and complaint; order for service by publication.)

Further, this typographical error in the publication order did not affect whether the publication served its purpose. The principal object of service of process is to give notice to a defendant of the proceedings against him or her. Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 693 S.E.2d 27, 30 (Ct. App. 2010). Regardless of what the order said or when it was filed, the summons for this case, naming both of the Chas Defendants, was published for three consecutive weeks in the Charleston *Post & Courier*, which is not only a newspaper of general circulation in Charleston County,

where the Chas Defendants admit they lived at the time, but also the newspaper of record for the area. (R. pp. __; affidavit of publication; affidavit of Radeker.) The Chases endured no prejudice as the result of any irregularities in the publication order.

Indeed, our Supreme Court has upheld service by publication in the face of irregularities that were far more material than anything present here. See Wachovia Bank, 341 S.C. at 428; Yarbrough v. Collins, 293 S.C. 290, 292-93, 360 S.E.2d 300, 301 (1987); Busch v. Aldrich, 110 S.C. 491, 96 S.E. 922, 925 (1918); Clemson Ag. Coll. of S.C. v. Pickens, 42 S.C. 511, 20 S.E. 401 (1894). That is because the point of service by publication is *provision of notice by alternative means*, not exacting technical compliance. See id.

The clerk of court's decision to permit service by publication was not wrong, and the order permitting it is not defective. Further, the clerk of court's determination is final, as there has been no fraud or collusion here. Wachovia Bank, 341 S.C. at 429; Yates, 16 S.C. at 499-500.

Judge Harrington did not abuse her discretion in denying the Chases' motion.

III. There is nothing wrong with Judge Harrington's Form 4 orders.

The Chases complain of the brevity of Judge Harrington's orders denying their motions. (Initial Brief of Appellants pp. 5-6; R. pp. ___; order denying motion for relief from judgment; order denying motion to reconsider denial of motion for relief from judgment.) While Judge Harrington's Form 4 orders denying the Chases' motions are indeed brief, they did all that they were required to do. Rule 52(a), SCRCP, provides that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)."

In Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428, 433 (2014), our Supreme Court held that this language means what it says, and an order's lack of stated findings of fact and conclusions of law is not a basis for remand. The Court held as follows:

> We agree it is better practice—and in most cases common practice—as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment. However, Rule 52, SCRCP, provides that "[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56...." Thus, such findings and conclusions are not required for appellate review, and, for this reason, we overrule Bowen[v. Lee Process Systems Co., 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000),] to the extent it is relied upon to vacate and remand orders granting summary judgment.

Id.

The argument about this made by the Chases is simply not a basis for success in an appeal. Id. They cannot prevail on this argument.

IV. The Chases make argument now that they did not make at the trial level.

To be preserved for appellate review, an argument must have been both raised to and ruled upon by the trial court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). The Chases now argue that the service by publication was defective because the published summons did not note the date of its filing. This is not an argument they raised before this appeal. It is unpreserved.

V. Given that a key witness for Price's case had died, it would have been unjust to grant the Chases' motion for relief from the judgment, which was not made within a reasonable time.

Rule 60(b) permits a court to relieve a defendant from a judgment, provided he shows a meritorious defense and that one of the Rule's subsections is met, only "upon such terms as are just." While Rule 60(b)(4) does not have an absolute one-year time limit attached to it like subsections (1), (2), and (3) do, any motion for relief from a judgment must "be made within a reasonable time[.]" Rule 60(b), SCRCP. What is a reasonable time for making such a motion, and what are "such terms as are just[,]" will necessarily vary with the circumstances of a particular case. This court determined 18 months to be too long to be a reasonable time in Smith Cos. of Greenville, Inc. v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (Ct. App. 1993), under the facts of that case. It is also too long to be a reasonable time here, and it would have been unjust to have granted the motion for relief from the judgment.

Here, Tom Chorlton, who provided critical testimony at the trial of this case, had died by the time the Chases made their motion. (R. pp. ___; affidavit of Price.) Price cannot put him on the stand again if this case goes to trial a second time.

Also, the Chas Defendants waited more than 30 days from when they say they became aware of the judgment against them in this case to make this motion. (R. pp. ___; affidavits of Chases.) If they had been served on the date they say they found out about the judgment, they *still* would be in default of this action. None of their timing in this matter is reasonable.

CONCLUSION

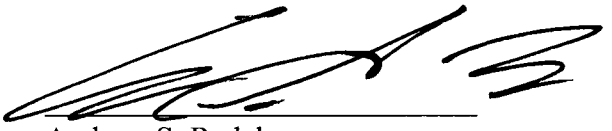
The Chases complain that they were living in Charleston during the whole time the suit was pending, but, like the appellants in Gladden v. Chapman, 106 S.C. 486, 91 S.E. 796, 798 (1917), who protested being what they saw as wronged by a judgment procured on service by publication,

> they were not altogether without fault. Their conduct, in remaining absent from the state so long, without communicating with their relatives or friends here, made it possible; and they have no just ground to complain because the court declines to correct the wrong done them by doing a greater wrong to the [Plaintiff], and, in so doing, set a mischievous precedent.

Price could not help it if the Chases went on an extended trip, causing the trail of addresses for them to go cold, or used multiple names or name variations, increasing the difficulty of finding them through the information available, nor can he help it if they did not read the newspaper, which would have informed them of the pendency of this suit against them.

Judge Harrington did not abuse her discretion in denying the Chases' motion for relief from the judgment. Her decision to deny that motion should be affirmed.

Respectfully submitted,



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November 23, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Judge

RECEIVED
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SC Court of Appeals

Common Pleas Case No. 2010-CP-10-6239
Appellate Case No. 2015-000940

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

v.

Todd Chas, Jacara Chas, Marsh Winds Owners Association, Inc. a/k/a Marsh Winds Horizontal Property Regime, and The Marshland Communities, LLC, Defendants,

Of whom Todd Chas and Jacara Chas are the.....Appellants.

PROOF OF SERVICE

I certify that I served the foregoing initial brief of respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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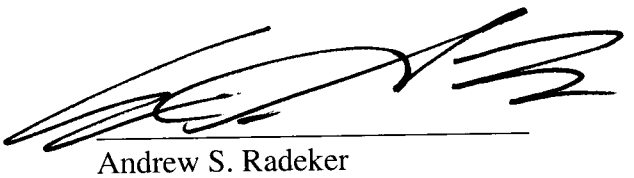

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