

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2014-CP-22-00280

**RECEIVED**

NOV 04 2016  
SC Court of Appeals

Ernest Bley ..... Plaintiff,

v.

Linda Robinson and Herrington's, LLC ..... Defendants,

**INITIAL BRIEF OF RESPONDENT**

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**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE TRIAL COURT CORRECTLY REFUSE TO ALLOW PLAINTIFF TO ADD A NEW PARTY TO A JUDGMENT?**

## STATEMENT OF THE CASE<sup>1</sup>

On March 18, 2014, Ernest Bley ("Plaintiff") commenced this action naming Linda Robinson ("Robinson"), who was Plaintiff's girlfriend, and Herrington's, LLC as defendants regarding an injury allegedly occurring on December 18, 2011 at Robinson's home.

Neither Robinson nor Herrington's, LLC answered or appeared. Robinson settled with Plaintiff, and she was dismissed from the action. On July 15, 2015, Plaintiff moved for and obtained a default judgment against Herrington's, LLC in the amount of \$175,000.00.

On October 15, 2015, Plaintiff filed a pleading designated as a "Motion to Correct a Clerical Mistake in the Order." The pleading requested that the Trial Court substitute Herrington's, LLC with the following:

Herrington's Construction, aka Herrington's Construction Septic Tank and Land Cleaning, aka Herrington's Septic Tank and Land Cleaning, aka Herrington's, and its owners, in their individual capacity, to include Roger D. Herrington, aka Roger D. Herrington, Sr., aka Roger D. Herrington, I, aka Dale Herrington, aka Dale R. Herrington

On November 17, 2015, Plaintiff filed another pleading designated as a "Motion to Vacate Relief From Judgment or Order." This pleading asks for the same result as the previous motion. Roger Dale Herrington Sr., d/b/a Herrington's Construction, LLC and Herrington Construction (hereinafter collectively referred to as the "Respondent") appeared for the purpose of opposing the motions.

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<sup>1</sup> Plaintiff included disputed facts in the statement of the case section of his initial brief, and Respondent requests that the Court of Appeals adopt its Statement.

On February 25, 2016, the Honorable Benjamin H. Culbertson, Circuit Court Judge for the Fifteenth Judicial Circuit, Georgetown County (“Trial Court”) heard the motions. On the same date, the Trial Court issued a Form 4 Order denying the motions with a note that a formal order was to follow. On March 14, 2016, the Trial Court signed an Order denying the motions. The Order was filed on April 8, 2016.

On March 17, 2016, Plaintiff filed a motion to alter or amend pursuant to Rule 59(e), SCRCF. On April 20, 2016, Plaintiff filed a supplemental motion to alter or amend pursuant to Rule 59(e), SCRCF. The Trial Court denied the motions on May 4, 2016. Plaintiff served a Notice of Appeal on June 10, 2016.

## STATEMENT OF THE FACTS

On March 18, 2014, Plaintiff commenced this action. (Complaint; R\_\_\_\_). The Complaint alleges that on December 18, 2011, Plaintiff was visiting his girlfriend, Robinson, at her house, and he fell in a hole in the back yard. (Complaint, ¶¶ 5-9; R\_\_\_\_). The Complaint further alleges that Herrington's, LLC, completed an inspection and work on the septic system at the house. (Id.). The Complaint names Robinson and Herrington's, LLC as defendants. (Id.).

Before drafting and filing the Complaint, Plaintiff was in possession of a check his girlfriend, Robinson, made to "Herrington's" and which was endorsed by Dale Herrington. (Check Dated May 19, 2011; R\_\_\_\_). Plaintiff also presumably has access to South Carolina Secretary of State's website which provides records of limited liability company organized in the State. (Order dated March 14, 2016, p. 5; R\_\_\_\_).

Neither prior to March 28, 2014 nor after, was Herrington's, LLC an entity. A search of the Secretary of State's website would have revealed this fact. (Id.). The Complaint went so far as to allege that Herrington's, LLC was "a corporation organized and existing pursuant to the laws of the State of South Carolina." (Complaint, ¶ 3; R\_\_\_\_).

Plaintiff allegedly served his girlfriend and Dale Herrington with the Summons and Complaint. Neither Robinson nor Herrington's, LLC appeared or answered. (July 15, 2015, Order; R\_\_\_\_). Plaintiff, after apparently settling with his girlfriend, obtained a Default Judgment against Herrington's, LLC for \$175,000.00. (Id.).

After obtaining the Default Judgment, Plaintiff filed a motion asking the Trial

Court to expand the scope of the Judgment and add the following list of persons:

Herrington's Construction, aka Herrington's Construction Septic Tank and Land Cleaning, aka Herrington's Septic Tank and Land Cleaning, aka Herrington's, and its owners, in their individual capacity, to include Roger D. Herrington, aka Roger D. Herrington, Sr., aka Roger D. Herrington, I, aka Dale Herrington, aka Dale R. Herrington

On February 25, 2016, the Trial Court heard Plaintiff's two motions. (Transcript of Hearing, dated February 25, 2016; R\_\_\_\_). Plaintiff failed to present any evidence that Herrington's, LLC was Respondent's trade name, and Plaintiff could not even identify with certainty who should have been named as defendant. (Id. at p. 6-7; R\_\_\_\_). The Trial Court denied the motions, and Plaintiff moved to reconsider. Another hearing was held on April 28, 2016. (Transcript of Hearing, dated April 28, 2016; R\_\_\_\_). The Trial Court denied the motion to reconsider through a Form 4 Order dated May 4, 2016. (Form 4 Order dated May 4, 2016; R\_\_\_\_). This appeal followed.

## ARGUMENT AND CITATION OF AUTHORITY

### STANDARD OF REVIEW

“Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge.” Raby Const., L.L.P. v. Orr, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004)(citing Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)).

“The trial judge’s decision will not be disturbed on appeal unless there is a clear showing of abuse of discretion.” Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988). An appellant must demonstrate that the trial judge was “controlled by some error of law or where his orders, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988).

#### **I. THE TRIAL COURT CORRECTLY REFUSED TO ADD PARTIES TO A DEFAULT JUDGMENT.**

##### **A. Adding an individual non-party to a Default Judgment impermissibly expands the scope of the Judgment and is more than correcting a “clerical mistake.”**

Rule 60(a), SCRCF, authorizes a court to correct “clerical mistakes in judgments.” Generally, a clerical mistake is defined as a mistake in writing or copying. Dion v. Ravenel, Eiserhardt Associates, 316 S.C. 226, 230, 449 S.E.2d 251, 253–54 (Ct. App. 1994)(referencing *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.

A court may correct mistakes or clerical errors in its own process, but it cannot “change the scope of the judgment.” Id. Rule 60 provides for a party’s “relief *from* a judgment” not the enforcement of a judgment against non-parties. Ex parte S.C. Dep’t of Revenue, 350 S.C. 404, 408, n. 1, 566 S.E.2d 196, 198, n. 1 (Ct. App. 2002).

In Dion, a plaintiff, who was a mortgagee foreclosing on real property, asked a trial court to add language in the legal description set forth in a foreclosure decree. Id. at 228, 252. The trial court agreed and added language to the legal description. Id. The South Carolina Court of Appeals reversed holding that the legal description was the description provided by plaintiff and leaving the requested language out was not a mistake committed by the trial court. Id. at 230, 254. In addition, adding the language, the Court of Appeals reasoned, would in essence reform the mortgage, and it held that Rule 60(a) is not properly used to obtain such relief. Id.

Similarly, in Tunstall v. Lerner Shops, the South Carolina Supreme Court held a court may amend a judgment only to correct a minor mistake to a defendant’s name if the variation “is not such as to indicate a different entity.” 160 S.C. 557, 159 S.E. 386, 389 (1931). In Ex parte S.C. Dep’t of Revenue, the South Carolina Court of Appeals refused to allow a plaintiff to use Rule 60 to add a non-party to a judgment. 350 S.C. at 408, n. 1, 566 S.E.2d at 198, n. 1.

Plaintiff’s request in this case to add Respondent individually to the Default Judgment violates the limitations set forth in Tunstall and Ex parte S.C. Dep’t of

Revenue, which are not to substitute a “different entity” or add a non-party to a judgment and in Dion which is to not expand the scope of a judgment. Tunstall, 159 S.E. at 389, Ex parte S.C. Dep't of Revenue, 350 S.C. at 408, n. 1, 566 S.E.2d at 198, n. 1. and Dion, 316 S.C. at 230, 449 S.E.2d at 253–54.

Plaintiff relies heavily on Tri-County Ice & Fuel Co. v. Palmetto Ice Co. to support his claim. 303 S.C. 237, 399 S.E.2d 779 (1990). However, in Tri-County Ice, the South Carolina Supreme Court limited its holding to allowing a plaintiff to substitute a corporate entity as defendant for a trade name. Id. at 238, 780. In this case, Plaintiff asked the Trial Court to substitute an individual for an alleged corporate entity, which is the opposite of what was allowed in Tri-County Ice.

Moreover, in Tri-County Ice, the Supreme Court noted that plaintiff had no way of knowing that the defendant was not the proper party. Id. at 241, 782. Here, Plaintiff was in possession of a check Robinson made payable to “Herrington’s” and endorsed by “Dale Herrington.” (Check made payable to Herrington’s dated May 19, 2011; R\_\_\_\_). Plaintiff purposely chose not to name Dale Herrington and then changed his mind after obtaining a Default Judgment.

Also, prejudice against Respondent should be assumed based on the false allegation in the Complaint that Herrington’s, LLC was “a corporation organized and

existing pursuant to the laws of the State of South Carolina.” In the face of the allegation, Respondent had no duty to volunteer as defendant and contest the action.<sup>2</sup>

Plaintiff requested much more than to correct a mere misnomer in a name. Therefore, the Trial Court properly applied its discretion to deny the motions under Rule 60(a).<sup>3</sup>

**B. Plaintiff's knowledge that Herrington's, LLC did not exist prevents his claim for relief under Rule 60(b)(1) and (3).**

On motion and upon such terms that are just, a court may relieve a party from a final judgment for:

(1) mistake, inadvertence, surprise or excusable neglect; or (3) fraud, misrepresentation, or other misconduct of an adverse party.

Rule 60(b)(1) and (3), SCRCP. A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003).

Generally, the neglect of either the attorney of a party or party prevents the party from relief under Rule 60(b)(1). Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009); *see also* Rouvet v. Rouvet, 388 S.C. 301, 309–10, 696 S.E.2d 204, 208 (Ct. App. 2010). Plaintiff knew through the public records that Herrington's, LLC, did not exist. Moreover, Plaintiff failed to provide the Trial Court

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<sup>2</sup> In addition, Plaintiff failed to present any evidence to the Trial Court that Respondent was the correct party. The Trial Court directly questioned Plaintiff on this issue, and he offered only conjecture on who he believed the proper party was. (February 25, 2016, Hearing Transcript, p. 6-7 and April 28, 2016, Hearing Transcript, p. 7-8; R. \_\_\_\_\_).

<sup>3</sup> Plaintiff's argument regarding standing of Respondent to contest the action concedes the point that amending the Default Judgment to add Respondent not only violates Rule 60(a) but violates Respondent's due process rights.

any excusable justification for naming Herrington's, LLC as defendant as opposed to Respondent, who he now seeks to add. This inexcusable negligence disqualifies Plaintiff from relief under Rule 60(b)(1).<sup>4</sup> The Trial Court properly exercised its discretion in denying Plaintiff's motion.

In addition, Rule 60(b)(3) authorizes a court to relieve a party from an order or judgment for "fraud, misrepresentation, or other misconduct of an adverse party." To obtain relief under Rule 60(b)(3), the moving party must demonstrate extrinsic fraud. Raby Const., L.L.P., 358 S.C. at 20, 594 S.E.2d at 483. Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." Id. at 19, 483.

Plaintiff provides no evidence that Respondent either committed any fraudulent act or made any misrepresentation to him regarding this lawsuit.<sup>5</sup> Rather, Plaintiff's premise is that Respondent's failure to respond to a summons and complaint which does not name him as defendant is fraud. However, "a party may not prevail on a Rule 60(b)(3) motion on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct." Id. at 21, 484.

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<sup>4</sup> Plaintiff concedes this point in his Brief. Brief of Appellant, Section 1(B), p. 9-10.


<sup>5</sup> The Facebook posts were presented for the first time in a Motion to Alter or Amend under Rule 59(e), and are not properly before this Court. See Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). Regardless, the Facebook posts do not explain Plaintiff's decision not to name Respondent as a defendant in the Complaint and do not amount to fraud committed by Respondent against Plaintiff.

Plaintiff's knowledge that Herrington's, LLC, was not a legal entity defeats his claim for relief under Rule 60(b)(3). Moreover, Plaintiff was unable to provide any evidence that Respondent committed fraud causing Plaintiff to name Herrington's, LLC as defendant. Consequently, the Trial Court properly exercised its discretion to deny Plaintiff's motion.

### CONCLUSION

The Trial Court properly exercised its discretion in refusing to grant relief under Rule 60(a) or (b). Consequently, Respondent requests that the Court of Appeals deny the appeal and affirm the Trial Court's decision.

November 2, 2016



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**SC Court of Appeals**

Case No. 2014-CP-22-00280

Ernest Bley ..... Plaintiff,

v.

Linda Robinson and Herrington's, LLC ..... Defendants,

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**PROOF OF SERVICE**

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I certify that on November 2, 2016, I served the **Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal** on the *Appellant*, through his attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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By:



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November 2, 2016

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RE: Ernest Bliely v. Linda Robinson  
Case No.: 2014-CP-22-00280  
**Appellate Case No. 2016-001275**  
Our File No. 16079.16658

Dear Ms. Kitchings:

Enclosed is an original and one copy of **Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal and Proof of Service** in reference to the above-captioned matter.

Please file the originals and return a clocked copy to us in the envelope provided for your convenience.

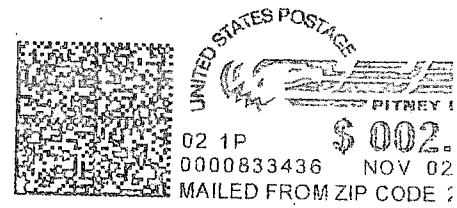
Yours very truly,

*Walker H. Willcox*

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