(5)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

23134

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2014-CP-22-0280

Ernest Bliey,..... Appellant,

v.

Linda Robinson and Herringtons, LLC,..... Defendants,

Of Whom Herringtons LLC is the..... Respondent.

RECORD ON APPEAL

RECEIVED
NOV 30 2016
SC Court of Appeals

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CASE NO.: 2014-CP-22-00280
	)	
Ernest Bliey,	)	
	)	
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	
Linda Robinson and Herrington's, LLC,	)	
	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2015 JUL 15 PM 4:33
ALMA Y. WHITE
CLERK OF COURT

This matter came before this Common Pleas Court on Thursday, June 4, 2015 in Georgetown, South Carolina. Present were the Plaintiff and his attorney, David J. Miller of Merritt Webb Wilson & Caruso, PLLC. The Defendant, Herrington's, LLC was not present, despite being sent proper notice, and has never appeared in this action. Defendant, Linda Robinson, had previously settled with the Plaintiff, and has been dismissed from this action. All concerned parties had been properly noticed of this action.

BACKGROUND

The Court reviewed evidence in the form of the Pleadings and other documents, and heard testimony from the Plaintiff. This evidence revealed:

- The Plaintiff is a citizen and resident of Georgetown County, South Carolina.
- Defendant Herrington's, LLC is a corporation organized and existing pursuant to the laws of the State of South Carolina, and doing business in South Carolina, with its principle place of business in South Carolina.
- Defendant Herrington's, LLC is in default as they were properly served with the Summons and Complaint on April 22, 2014, and failed to Answer. This Defendant has never appeared in this action.
- Defendant Herrington's, LLC was properly noticed of this damages hearing, and failed to appear.
- Defendant Linda Robinson is a citizen and resident of Georgetown County, South Carolina and previously settled with Plaintiff.

- On or about December 18, 2011, Plaintiff was visiting his girlfriend, Defendant Robinson at her home in Georgetown County, South Carolina.

- While the Plaintiff was walking outside of Ms. Robinson's home, and while on her property, a hole opened up in Defendant Robinson's backyard on or about the area containing the septic tank.

- Defendant Herrington's, LLC was paid by Defendant Robinson to complete an inspection and work on the septic system at Defendant Robinson's residence. Defendant Herrington's, LLC completed the work.

- Plaintiff was walking in Defendant Robinson's backyard when he fell into the hole.

- As a result, the Plaintiff suffered injuries to his whole body, including, but not limited to a broken femur, which injury required surgery to repair, and which continues to cause Plaintiff pain and suffering and limitations to this day.

FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court finds that jurisdiction and venue are proper with this Court.

This Court finds that Defendant Herrington's, LLC failed to file an Answer, as required by the rules of civil procedure, or appear in this case. Defendant Herrington's, LLC is in default.

This Court finds that the Plaintiff sustained injuries from his fall into the hole negligently created by Defendant Herrington's, LLC.

This Court finds that the allegations contained in Plaintiff's Complaint are true and that Plaintiff is entitled to the requested relief.

Based on the above findings, the Court orders as follows:

Defendant Herrington's, LLC is in default and judgment shall be entered against Defendant Herrington's , LLC and in favor of the Plaintiff, Ernest Bliey in the amount of **$175,000.00** for the injuries sustained and pain and suffering caused by Defendant Herrington's, LLC's negligence.

2

This judgment shall be entered on the judgment roll in Georgetown County, and anywhere that Defendant Herrington's, LLC owns property or transacts business, and shall be valid as against the Defendant Herrington's, LLC for a period of ten (10) years.

IT IS SO ORDERED!

The Honorable W. Jeffrey Young

Sumter ~~Georgetown~~, South Carolina
30 June, 2015

3

STATE OF SOUTH CAROL[illegible]
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS

FORM 4
JUDGMENT [illegible] A CIVIL CASE

CASE NO. 2014 CP-22-00280

Ernest Bliey
PLAINTIFF(S)

Linda Robinson and Herrington's LLC
DEFENDANT(S)

Submitted by: James A. Merritt, Jr.	Attorney for : ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

FILED
GEORGETOWN COUNTY, S.C.
2015 SEP -9 PM 12:04
ALMA Y. WHITE
CLERK OF COURT

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Ernest Bliey	Herrington's, LLC	$175,000.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2156
Judge Code

27 Aug 2015
Date

For Clerk of Court Office Use Only

This judgment was entered on the 9th day of Sept, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 10th day of Sept, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Amanda Stark, Deputy
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2200280

Ernest Bliey	Linda Robinson	Herringtons LLC
PLAINTIFF(S)	DEFENDANT(S)	

Submitted by: Clerk of Court

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ ~~See attached order~~; (formal order to follow) ☐ Statement of Judgment by the Court:

FILED
GEORGETOWN COUNTY, S.C.
2016 FEB 26 PM 4:03
ALMA Y. WHITE
CLERK OF COURT

ORDER INFORMATION

Motion to Correct Clerical Mistake In Order by Attorney Saltzman Denied.
Motion to Vacate Relief from Judgment or Order Rule 60(b)(1) and (3) by Attorney Saltzman Denied.
Attorney Hogsette to Prepare Formal Order.

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge

may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	Judge Code	Date
	2148	2/25/2016

For Clerk of Court Office Use Only

This judgment was entered on **February** 26, **2016**, and a copy mailed first class or placed in the appropriate attorney's box on **February** 29, **2016**, to attorneys of record or to parties (when appearing pro se) as follows:

David J. Miller 2809 Webster Street Columbia, SC 29205
William M. Saltzman PO Box 24109 Columbia, SC 29224

ATTORNEY(S) FOR THE PLAINTIFF(S)

Hugh L. Willcox Jr. PO Box 1909 Florence, SC 29503
Alexander Stephens Hogsette PO Box 1909 Florence, SC 29503-1909

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter *Grace L. Hurley*

Jody C Bailey, Deputy
Alma Y. White - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
Ernest Bliey,	)	C/A NO. 2014-CP-22-00280
Plaintiff,	)	
vs.	)	**ORDER**
Linda Robinson and Herrington's, LLC	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2016 APR -8 PM 3:09
ALMA Y. WHITE
CLERK OF COURT

This matter is before the Court by way of Plaintiff Ernest Bliey's Motion to Correct Clerical Mistake and Motion to Vacate Relief from Judgment or Order, filed on November 17, 2015. The Court held a consolidated hearing on February 25, 2016. William Saltzman, Esq. appeared on behalf of Plaintiff, and Alexander Hogsette, Esq., appeared on behalf of Robert Dale Herrington, d/b/a Herrington's Construction,, LLC, and Herrington's, proposed Defendants named in Plaintiff's Motions. After careful review of the record, applicable case law, and the arguments advanced at the hearing, this Court denies Plaintiff's Motion to Correct Clerical Mistake and Motion to Vacate Relief from Judgment or Order for the reasons stated herein.

FACTS/PROCEDURAL HISTORY

According to the Complaint, Plaintiff alleges that on or about December 18, 2011, he was visiting Linda Robinson ("Robinson"), his girlfriend, at her home. Complaint, ¶s 5–9. Plaintiff asserts that, unbeknownst to him, a hole "opened up" in Robinson's backyard on or about her septic tank. Id. Plaintiff alleges that Robinson paid "Herrington's, LLC" to "complete an inspection and work on [Robinson's] septic system." Id. Presumably, during the same visit

Plaintiff asserts that he fell into this hole on or about the area containing Robinson's septic tank causing injuries to his whole body. Id.

Plaintiff commenced this personal injury action on March 28, 2014. Plaintiff, as the master of his complaint, named Robinson and "Herrington's, LLC" as Defendants. Plaintiff alleged in his Complaint that "Herrington's, LLC" is a "corporation organized and existing pursuant to the laws of the State of South Carolina." Comp. ¶3. Plaintiff served Robinson and Dale Herrington with the Summons and Complaint. Neither Robinson nor "Herrington's, LLC" filed an Answer or otherwise appeared. At some point on or before July 15, 2015, Robinson settled with Plaintiff and was dismissed from this action. "Herrington's, LLC" was found in default and the court entered judgment against "Herrington's, LLC" in the amount of One hundred seventy-five thousand and NO/100 ($175,000.00) dollars.

Thereafter, Plaintiff filed a Motion to Correct Clerical Mistake (hereinafter, "Motion to Correct") on October 15, 2015.[1] Plaintiff then filed an Affidavit of David Miller, on October 27, 2015, and a Memorandum in Support of Plaintiff's Motion to Correct, on November 2, 2015. Subsequently, Plaintiff filed, "as an alternative remedy to Plaintiff's outstanding [Motion to Correct]," a Motion to Vacate Relief from Judgment or Order (hereinafter, "Motion to Vacate") and Memorandum in Support on November 17, 2015.

STATEMENT OF LAW/ANALYSIS

Plaintiff filed motions pursuant to Rule 60(a) and Rule 60(b) of the South Carolina Rules of Civil Procedure. Rule 60(a) permits a party to request relief from judgment or order for clerical mistakes. Rule 60(a), SCRCP. Rule 60(b) permits a party to request relief from a

[1] At some point between June 20, 2015 and October 15, 2015, Plaintiff's attorney, David Miller, left the law firm of Merritt, Webb, Wilson & Caruso, PLLC. Plaintiff retained the services of Merritt Webb and William M. Saltzman assumed representation of Plaintiff. The two Motions before the Court were filed by Mr. Saltzman.

judgment or order due to, *inter alia*, mistake, inadvertence, surprise, or excusable neglect, or fraud, misrepresentation, or other misconduct of an adverse party. Rule 60(b), SCRCP. The Court will address each motion individually.

I. MOTION TO CORRECT CLERICAL MISTAKE

Plaintiff's Motion to Correct, pursuant to South Carolina Rule of Civil Procedure 60(a), requests this Court substitute Defendant "Herrington's, LLC" with "the 'proper party,' 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." Motion to Correct, 1. Plaintiff asserts that substitution of "Herrington's, LLC" for the aforementioned proposed defendants is proper pursuant to Rule 60(a) of the South Carolina Rules of Civil Procedure because naming "Herrington's, LLC" as a defendant was merely a clerical mistake. Id.

A motion to correct clerical mistakes pursuant to Rule 60(a) of the South Carolina Rules of Civil Procedure provides, in relevant part, that "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party . . ." A clerical error "is a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function." Ex parte J.P Strom, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000).

Generally, a clerical error is a mistake in writing or copying. Ex Parte Strom, 334 S.C. 605, 514 S.E.2d 599, 600 (Ct. App. 1999). It is an error resulting from a minor mistake or inadvertence, e.g. omitting an appendix from a document, typing an incorrect number, mistranscribing a word, or failing to log a call. BLACK'S LAW DICTIONARY 622 (9th ed. 2009).

"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. Ravenal, Eiserhardt Assocs., 316 S.C. 226, 230, 449 S.E.2d 251, 253–54 (Ct. App. 1994) (emphasis added).

In support of his position, Plaintiff relies on Tri-County Ice and Fuel v. Palmetto Ice. 303 S.C. 237, 399 S.E.2d 779 (1990). In Tri-County, the court addressed the issue of "whether a default judgment entered *against a trade name* can be amended to substitute the name of the corporation who owns and operates the business operating under the trade name." Id. (emphasis added). On or around August of 1986, plaintiff Tri-County Ice and Fuel ("Tri-County") desired to file suit against Palmetto Ice Company. However, Tri-County, despite prior business dealings and research, was unable to determine—through no fault of its own—that the named defendant, Palmetto Ice Company, was merely a trade name used by P&H Company, Inc. ("P&H"). Id. Subsequently, when Tri-County attempted to execute its default judgment it was informed—for the first time—that a corporate entity, P&H, owned and operated under the trade name of Palmetto Ice Company. Id.

Upon a Rule 60(a) motion, the court in Tri-County held that Palmetto Ice Company and P&H were "one in the same" for the purposes of this action. Id. at 239. The Tri-County court's justification was based upon its determination that the president of P&H

> "clearly knew that Tri-County intended to sue [P&H], but that Tri-County was under a misapprehension as to the identity of Palmetto Ice Company. [P& H's president] was also aware that Tri-County had no way of ascertaining that Palmetto Ice Company was a trade name, as [P&H] had not registered this assumed name with the Secretary of State."

Id. at 241. The court held that under the circumstances where a corporation has acquired a name by usage adjudication against the corporation by the name so acquired is valid and binding. Id. at 241 (citing Tunstall, 160 S.C. at 566, 159 S.E. at 389).

The case at bar is dissimilar from Tri-County in several respects. First, the court found Tri-County harmlessly named the wrong defendant. Indeed, Tri-County was able to establish that the defendant it named (Palmetto Ice Company) and the business it desired to name (P &H) were "one and the same for purposes of [that] action." Id. at 239. Additionally, the court also noted the responsibility all plaintiffs possess as "masters of their complaint," and held that the plaintiff was blameless in this respect as the correct name for the intended defendant was undiscoverable. Id.

Unlike in Tri-County, Plaintiff does not assert—nor has he offered any evidence—that "Herrington's, LLC" is a trade name used by any of the proposed defendants, and therefore, has not established the "Herrington's, LLC" and the proposed defendants are "one and the same." Indeed, despite Plaintiff's assertion in the Complaint that "Herrington's, LLC" is a corporate entity organized under the laws of this State (Comp. 3), "Herrington's, LLC" is not—nor has it ever been—a corporate entity recognized by the Secretary of State according to the Secretary of State's website.[2] Therefore, unlike Tri-County, Plaintiff offers no justification for the name used, why "Herrington's, LLC" is a clerical mistake when it was selected in contradiction to the alleged evidence known by the party, or why he should be allowed to substitute "Herrington's, LLC" for four business entities and add an unspecified number of individuals as defendants.

Indeed, in the Affidavit of David Miller, Plaintiff's former counsel admits that—prior to filing the lawsuit—he was aware of an individual's name and a potential trade name used by some of the proposed defendants that Plaintiff now wishes to attach the $175,000 judgment to, "Dale Herrington" and "Herrington's," respectively. Miller Aff. ¶3. However, instead of designating "Herrington's" or "Dale Herrington" as defendants, Plaintiff named the fictitious

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[2] The South Carolina Secretary of State allows the public to search all business filings online at www.soc.sc.gov.

"Herrington's, LLC" in direct contradiction to all the evidence available to him and without any justification. As such, it cannot be gainsaid that the proposed Defendants' identity was undiscoverable to him when drafting his complaint.

Principally, if the Court were to grant Plaintiff's requested relief, this would necessarily change the scope of the judgment in contradiction with Rule 60(a). The Court previously entered a default judgment against an alleged limited liability company, "Herrington's, LLC." Plaintiff, as the master of his own complaint, decided not to file suit against any individual defendants, despite allegedly knowing the name of at least one proposed defendant. Still, Plaintiff now comes before the Court seeking to attach this judgment against multiple defendants, including, but not limited to, "*its owners, in their individual capacity.*" Even during oral arguments, Plaintiff was still unable to articulate the individuals against whom he wished to attach a $175,000 judgment. As such, this Court declines to allow Plaintiff to attach a $175,000 judgment when it is unclear whom to substitute as the defendant.

The Court finds that naming "Herrington's, LLC" was not a clerical mistake. Moreover, Plaintiff's requested relief would improperly alter the scope of the judgment because he is attempting to substitute "Herrington's, LLC" by adding multiple businesses and individuals. Plaintiff's Motion to Correct is denied.

II. MOTION TO VACATE RELIEF FROM JUDGMENT OR ORDER

Plaintiff's alternative motion is one to vacate relief pursuant to Rule 60(b)(1) and (3) of the South Carolina Rules of Civil Procedure. Specifically, Plaintiff requests this Court to return this matter to status quo ante to allow Plaintiff to amend the pleadings and to serve the proper defendants.

a. RULE 60(B)(1)

Rule 60(b)(1) states that upon such terms as are just, the court may relieve a party or his legal representative from a final judgment because of mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(1), 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 Dadsden, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003). In a motion to vacate a judgment because of a mistake, the party must make a showing that failure to avoid the mistake was justified. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992).

In support of Plaintiff's Motion, he again claims that his former counsel mistakenly named "Herrington's, LLC" as a defendant instead of the proposed defendants. Motion to Vacate, 1. Plaintiff also claims that only after obtaining a default judgment against "Herrington's, LLC" did he learn that he did not name the correct defendants. Id. at 2. However, the evidence that Plaintiff relied upon when filing this lawsuit, eviscerates his claim of justifiable mistake. The former co-defendant—Plaintiff's girlfriend—provided Plaintiff with a copy of the check allegedly used to pay "Herrington's" (a proposed defendant), which was endorsed by "Dale Herrington" (also a proposed defendant), prior to the filing of this action. Plaintiff has not provided any justification for not naming "Herrington's," "Dale Herrington," or for failing to examine the public records on file with the Secretary of State. Instead, Plaintiff requests that the Court to allow him to do so after obtaining a $175,000 judgment in his favor. Moreover, as discussed above, Plaintiff has not presented any evidence that "Herrington's, LLC" is a trade name used by any of the proposed defendants. As such, this Court finds that naming "Herrington's, LLC" was not a justified mistake, inadvertent, or excusable neglect in light of the information known and/or available to Plaintiff when he filed suit.

b. RULE 60(B)(3)

Rule 60(b)(3) states that upon such terms as are just, the court may relieve a party from or his legal representative from a final judgment because of fraud, misrepresentation, or other misconduct of an adverse party. Rule 60(b)(3), SCRCP. Plaintiff contends that the proposed defendant's failure to answer or appear rises to the level or fraud, misrepresentation, or other misconduct contemplated by Rule 60(b)(3). Id. at 4. 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, 357 S.C. at 46, 590 S.E.2d at 504.

The record is devoid of any evidence to support Plaintiff's allegations that the proposed defendants, including but not limited to Dale Herrington, acted fraudulently in this matter. While Plaintiff asserts that a proposed defendant (Dale Herrington) was served with the Complaint, he has offered no evidence that Dale Herrington was authorized to accept service for "Herrington's, LLC" or that he knew Plaintff was asserting claims against him. Plaintiff, as discussed above, also failed to substantiate his allegations that the proposed defendants misrepresented the name of its/his/their business as "Herrington's, LLC." Rather, the evidence presented by Plaintiff establishes an entirely different conclusion.

As stated above, Plaintiff presented a check that was in his possession prior to filing his lawsuit that listed a business name and an individual that Plaintiff now wishes to name as defendants. Thus, the evidence Plaintiff presented in support of his allegation for fraud or misrepresentation is a representation (the check listing two of the proposed defendants) that Plaintiff also asserts is accurate. Plaintiff admittedly knew the names and identity of at least two of its proposed defendants prior to filing suit but chose not to name either as a defendant. Therefore, Plaintiff's argument that, through no fault of his own, the proposed defendants

deprived him of a fair hearing or opportunity to present his case fails. Plaintiff's Motion to Vacate is denied.

CONCLUSION

Plaintiff filed suit against "Herrington's, LLC." This was not an oversight, omission, or clerical mistake by Plaintiff. Plaintiff also had the burden of presenting evidence entitling him to relief under his Rule 60(b) motion to vacate judgment. This Court also finds it unclear whom Plaintiff wishes to individually name as defendants. Thus. to permit Plaintiff to substitute "Herrington's, LLC" with the proposed defendants, both known and unknown, would improperly expand the scope of the judgment. This Court further finds that Plaintiff has failed to meet his evidentiary burden necessary to vacate the judgment. Therefore, based upon the record, case law, and arguments advanced by the parties, the Court denies Plaintiff's Motion to Correct Clerical Mistake and Motion to Vacate Judgment.

AND IT IS SO ORDERED.

Benjamin H. Culbertson

Judge Benjamin H. Culbertson

This 14th day of March, 2016

Conway, South Carolina.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2200280

Ernest Bliey	Linda Robinson Herringtons LLC
PLAINTIFF(S)	DEFENDANT(S)
Submitted by: Clerk of Court	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☑ Statement of Judgment by the Court:

FILED
2014 JAN -4 AM 8:56
GEORGETOWN COUNTY
CLERK OF COURT

ORDER INFORMATION

Motion to Alter or Amend Judgment by Attorney Saltzman Denied

This order ☑ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

Benjamin H Culbertson | 2148 | May 2, 2016 ~~4/29/2016~~
Circuit Court Judge | Judge Code | Date

For Clerk of Court Office Use Only

This judgment was entered on ~~April~~ May 4, 2016, and a copy mailed first class or placed in the appropriate attorney's box on ~~April~~ May 4, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

David J. Miller 2809 Webster Street Columbia, SC 29205
William M. Saltzman PO Box 24109 Columbia, SC 29224

ATTORNEY(S) FOR THE PLAINTIFF(S)

Hugh L. Willcox Jr. PO Box 1909 Florence, SC 29503
Alexander Stephens Hogsette PO Box 1909 Florence, SC 29503-1909

ATTORNEY(S) FOR THE DEFENDANT(S)

Jennifer Lawrence, Deputy for

Court Reporter *Grace Hurley*

Alma Y. White - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
Plaintiff,	)	**SUMMONS**
vs.	)	**(Jury Trial Demanded)**
Linda Robinson and Herrington's, LLC,	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2014 MAR 28 PM 3:30
ALPHA Y. WHITE
CLERK OF COURT

TO: THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your answer on the subscribers at their offices, 1122 Lady Street, Fourth Floor, Post Office Box 11879, Columbia, SC 29211, within thirty (30) days after the service hereof, exclusive of the day of service; and if you fail to answer the Complaint within the time aforesaid, judgment by default for the relief demanded in the Complaint will be rendered against you.

Respectfully submitted by,

MERRITT, WEBB, WILSON AND CARUSO, PLLC

David J. Miller
Attorney for the Plaintiff
1122 Lady Street, Fourth Floor
Post Office Box 11879
Columbia, SC 29211
Telephone No.: (803) 255-0655
Facsimile No.: (803) 779-4822

Columbia, South Carolina
February ~~12th~~ March, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
	)	
Plaintiff,	)	
	)	**COMPLAINT**
vs.	)	**(Jury Trial Demanded)**
	)	
Linda Robinson and Herrington's, LLC,	)	
	)	
	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2014 MAR 28 PM 3:30
ALMA Y. WHITE
CLERK OF COURT

The Plaintiff, complaining of the Defendants, would respectfully show unto the Court:

JURISDICTION

1. The Plaintiff, Ernest Bliey, is a citizen and resident of the State of South Carolina, County of Georgetown.

2. Upon information and belief, the Defendant, Linda Robinson (hereinafter "Defendant Robinson"), is a citizen and resident of the State of South Carolina, County of Georgetown.

3. Upon information and belief, Defendant Herrington's, LLC is a corporation organized and existing pursuant to the laws of the State of South Carolina, and doing business in South Carolina, with its principle place of business in South Carolina.

4. Accordingly, all parties, matters and things contained herein are within the jurisdiction of this Court.

FACTS

5. On or about December 18, 2011, Plaintiff was visiting his girlfriend, Defendant Robinson at her home in South Carolina.

6. Unbeknownst to the Plaintiff, a hole opened up in Defendant Robinson's backyard on

or about the area containing the septic tank.

7. Defendant Herrington's, LLC was paid by Defendant Robinson to complete an inspection and work on the septic system at Defendant Robinson's residence. Defendant Herrington's, LLC completed the work.

8. While visiting the Defendant Robinson, Plaintiff was in the backyard and fell into the hole.

9. As a result, the Plaintiff suffered injuries to his whole body.

FOR A FIRST CAUSE OF ACTION
(NEGLIGENCE, MALICIOUS, WILLFUL OR WANTON CONDUCT AND GROSS NEGLIGENCE)

10. The Plaintiff reiterates each and every allegation contained in Paragraphs 1 through 9 above as if repeated verbatim herein.

11. Defendant Herrington's, LLC, on or about the date and time in question, was hired to complete maintenance and repair work on the septic tank on Defendant Robinson's property.

12. Defendant Herrington's, LLC owed a duty to the Defendant Robinson and any other person(s), such as Plaintiff, entering upon her land to properly repair and maintain both the septic tank and the surrounding ground to prevent an unreasonable risk of harm.

13. Defendant Herrington's, LLC breached this duty by failing to properly replace the dirt and properly maintain the ground around the septic tank after completing the repair work was negligent, negligent per se, and reckless in one or more of the following particulars:

a. In failing to properly repair and maintain the septic tank and the surrounding ground area;

b. In creating an unreasonable risk of harm to those persons living upon and entering on the land;

Any and all of which Defendants knew, or should have known, was negligent, negligent per se, reckless, and posed a tremendous danger to all pedestrians and vehicular traffic in the area.

14. As a direct and proximate result of the negligent, reckless acts and omissions of Defendants, Plaintiff Bliey suffered damages, including, but not limited to:

a. Injuries to his body;

b. Past, present and future medical expenses;

c. Past, present and future loss of earning and earning capacity;

d. Permanent impairment;

e. Past, present and future pain and suffering; and,

f. Such other and further injuries as will be determined through discovery and/or evidence presented at trial.

15. Plaintiff's injuries were caused solely by the negligence of Defendants.

16. As a direct and proximate result of the negligent and reckless acts and omissions of Defendants, Plaintiff Bliey suffered severe injuries and is entitled to appropriate compensation and punitive damages for such injuries.

FOR A SECOND CAUSE OF ACTION
(PREMISES LIABILITY)

17. The Plaintiff reiterates each and every allegation contained in Paragraphs 1 through 16 above as if repeated verbatim herein.

18. Defendant Robinson owed Plaintiff a duty as a social guest on her property to:

a. Use reasonable care to discover him and avoid injury to him in carrying on activities upon her land; and

b. Use reasonable care him of any concealed dangerous conditions or activities known to her, or any change in the condition of her land which may be dangerous and which

22

she should reasonably be expected to discover.

19. Defendant Robinson knew or should have known of the septic tank work on her land and that it constituted a danger, specifically a concealed danger.

20. Therefore, Defendant Robinson had a duty to warn Plaintiff of the same.

21. Defendant Robinson failed to so warn the Plaintiff, and therefore breached her duty to Plaintiff.

22. As a direct and proximate result of this breach of duty by Defendant Robinson, the Plaintiff suffered injuries, as set forth above, including, but not limited to:

a. Injuries to his body;

b. Past, present and future medical expenses;

c. Past, present and future loss of earning and earning capacity;

d. Permanent impairment;

e. Past, present and future pain and suffering; and,

f. Such other and further injuries as will be determined through discovery and/or evidence presented at trial.

23. Plaintiff is informed and believes that he is entitled to compensation for his injuries including actual and punitive damages, and all those set forth below..

PRAYER FOR RELIEF

WHEREFORE, having fully complained herein, the Plaintiff demands a jury trial and prays for judgment against the Defendants for the following:

a. Actual Damages;

b. Punitive damages in an amount to be assessed by the jury;

c. Costs of this action;

d. Any applicable pre-judgment interest; and,

e. Such other and further relief as this Court may deem just and proper.

Respectfully submitted by,

MERRITT, WEBB, WILSON AND CARUSO, PLLC

David J. Miller
Attorneys for the Plaintiff
1122 Lady Street, Fourth Floor
Post Office Box 11879
Columbia, SC 29211
Telephone No.: (803) 255-0655
Facsimile No.: (803) 779-4822

Columbia, South Carolina
~~February~~ March 12th, 2014

IN THE COURT OF COMMON PLEAS OF THE STATE OF SOUTH CAROLINA FOR GEORGETOWN COUNTY

Ernest Bliey, Plaintiff/Petitioner vs. **Linda Robinson and Herrington's, LLC,** Defendant/Respondent	DOCKET NO: **14-CP-22-0280** AFFIDAVIT OF SERVICE OF: **Civil Action Coversheet; Summons; Complaint**

The undersigned, being first duly sworn, on oath deposes and says: That s(he) is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen, not an officer of a plaintiff corporation, not a party to nor interested in the above entitled action, has the authority to serve pleadings in the State named below, and is competent to be a witness therein.

On the **22nd day of April, 2014**, at **6:31 PM**, at the address of **2737 JOYNER SWAMP Road, GALIVANTS FERRY**, within the County of **Horry**, State of **South Carolina 29544**; this affiant served the above described documents upon **Herrington's LLC** by then and there personally delivering **1** true and correct copy(ies) thereof, by then presenting to and leaving the same with **Dale Herrington, OWNER, PERSON AUTHORIZED TO ACCEPT, who accepted service, with identity confirmed by verbal communication, a white male approx. over 65 years of age, 6'0"-6'2" tall, weighing 240-300 lbs with gray hair with glasses.**.

No Information was provided or discovered that indicates that the subjects served are members of the U.S. military.

DATED this 28 day of April, 2014.

Michael Dangerfield

Dangerfield Michael, HORRY, SC

SUBSCRIBED AND SWORN to before me this 28 day of April, 2014

Susan Dangerfield

NOTARY PUBLIC in and for the State of **South Carolina**
My Commission Expires: OCT 10 2022

FILED
GEORGETOWN COUNTY, S.C.
2014 MAY -2 AM 11:23
ALMA Y. WHITE
CLERK OF COURT

FOR: **Columbia S.C. Misc.**
REF: **Bliey v. Robinson & Herrington**

ORIGINAL AFFIDAVIT OF SERVICE

Tracking #: **30010742** CAE FIL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
	)	
Plaintiff,	)	
	)	**MOTION TO CORRECT A CLERICAL MISTAKE IN THE ORDER RULE 60(a)**
vs.	)	
	)	
Linda Robinson and Herrington's, LLC,	)	
	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2015 OCT 15 P 2:04
CLERK OF COURT

PLEASE TAKE NOTICE that Plaintiff, Ernest Bliey, moves this Court to correct a clerical mistake in the order, pursuant to Rule 60(a), South Carolina Rules of Civil Procedure. Specifically, the Plaintiff requests this Court to substitute Defendant Herrington's, LLC's with the proper party, 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 (collectively referred to as "Defendant Herrington Construction"). This Motion is made because Herrington's, LLC was mistakenly named as a Defendant instead of Defendant Herrington.

FACTS

A Summons and Complaint in the above-captioned action was filed on March 28, 2014, in the Office of the Clerk of Court for Georgetown County, South Carolina. Plaintiff mistakenly named Defendant Herrington's, LLC as a party. Defendant Herrington's, LLC was served personally, by personal service, on Mr. Dale Herrington ("Mr. Herrington") on April 22, 2014. The Affidavit of Service was filed with the Court on May 2, 2014. Defendant Herrington's, LLC and Mr. Herrington failed to respond to the pleadings and failed to provide the proper name of the Defendant entity involved in the lawsuit. A default judgment was subsequently filed in the amount of $175,000.00 on September 9, 2015.

Plaintiff is of the information and belief that Defendant Herrington Construction deceptively conducted business under several different trade names, and that Herrington's, LLC is not a limited liability company. The business actually operated as a sole proprietorship, partnership, or unincorporated association. Defendant Herrington Construction conducted business and held itself out to the public as Herrington's Construction, Herrington's Construction Septic Tank and Land Cleaning, Herrington's Septic Tank and Land Cleaning, Herrington's, Herrington's, LLC and Herrington's Construction, LLC. Defendant Herrington Construction even filed unrelated lawsuits in Horry County improperly as Herrington's Construction, LLC (*See* Herrington's Constr., LLC v. Blankenship, Case No. 2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015). Plaintiff is also of the information and belief that one the owners of the business is Roger D. Herrington, aka Dale Herrington, aka Dale R. Herrington, aka Roger D. Herrington, Sr., aka Roger D. Herrington, I. The business and Mr. Herrington share an address of 2737 Joyner Swamp Rd., Galivants Ferry SC, 29544.

After the instant lawsuit was filed, but before judgment was entered, a limited liability company named "Herrington's Since 1986, LLC" was formed in January 2015. There is reason to believe that the members of Herrington's Since 1986, LLC are the same as the individuals involved in the business in the instant case, as of the date of this lawsuit's underlying incident.

ARGUMENT

Due to Plaintiff's mistake in naming Defendant Herrington, LLC as a Defendant, the Plaintiff requests this court to correct Plaintiff's mistake by substituting Defendant Herrington's, LLC with the proper business's name, its trade names, the business's individual owners and their aliases as Defendants.

Under Rule 60(a), "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

In Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 399 S.E.2d 779 (S.C. 1990), the plaintiff sued the defendant for conversion under the name "Palmetto Ice Company," which was the defendant's unregistered trade name. The summons and complaint were served on the president of the business under the trade name. The defendant did not appear and default judgment was entered under the name Palmetto Ice Company. When the plaintiff attempted to execute the judgment, the defendant moved to vacate it on the grounds that Palmetto Ice Company was not a legal entity. The plaintiff moved to amend the default judgment to name P&H Company, the legal entity that operated under the name Palmetto Ice Company, as the defendant. The motion to amend was granted and the motion to vacate was denied.

In upholding the trial court's decision, the South Carolina Supreme Court recited the rule that:

> where a party is served by a wrong name, and the writ is served on the party intended to be served and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained by default against him in the erroneous name, he is concluded, and execution may be issued on the judgment in that name and levied upon the property and effects of the real defendant.

Tri-County Ice, 399 S.E.2d at 781 (quoting Waldrop v. Leonard, 22 S.C. 118 (S.C. 1885)). The court also relied on Tunstall v. Lerner Shops, Inc., 160 S.C. 557 (S.C. 1931), which held that:

> a mere misnomer of a corporation defendant in words and syllables is immaterial, and a judgment in the action will bind it if it is duly served with process or appears and does not plead the misnomer in abatement. As a general rule the misnomer of a corporation in a notice, summons, notice by publication, garnishment citation, writ of certiorari, or other step in a judicial proceeding is immaterial if it appears that it could not have been, or was not misled.

Id. More recently, the South Carolina Court of Appeals upheld the circuit court's grant of an amendment of judgment "allowing a default judgment to be amended to reflect C.L. Holdings,

LLC as the proper name of C.L. Holding." Davis-Daniels v. Pines Apts., L.P., 2009 S.C. App. Unpub. LEXIS 114 (S.C. Ct. App. Mar. 5, 2009). The unpublished opinion cited Rule 60(a), Tri-County Ice, and Lerner.

Here, Defendant Herrington Construction was operating as a sole proprietorship, partnership or other unincorporated entity as of the date of the incident. Defendant Herrington Construction held itself out to the public under several different trade names, including unregistered limited liability companies. The Plaintiff mistakenly named Defendant Herrington, LLC as Defendant rather than the business's proper trade name.

Service on one of the business's owners, Mr. Herrington, was sufficient to confer personal jurisdiction over the business and the other partners or participants. "Process served on any agent of any unincorporated association doing business in this State under the name and style by which it is usually known shall be sufficient to make such association a party in any court of record in the county in which such agent may be served." S.C. Code Ann. § 15-9-330; see Rule 4(d)(3), SCRCP. A judgment against an unincorporated association, partnership or sole proprietorship is enforceable against the unincorporated association partnership or sole proprietorship and the individual partners or participants.

> "On judgment being obtained against an unincorporated association under process served as provided in § 15-9-330 final process may issue to recover satisfaction of such judgment, and any property of the association and the individual property of any copartner or member thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment."

S.C. Code Ann. § 15-35-170. As such, Defendant Herrington Construction is liable for the default judgment because Defendant Herrington Construction's agent, Mr. Herrington, was served properly, failed to plead and had a default judgment entered. This Court should correct the Plaintiff's mistake by substituting Defendant Herrington's, LLC with Defendant Herrington Construction, pursuant to Rule 60(a), SCRCP, because Plaintiff mistakenly named the incorrect party due to Defendant Herrington Construction's deceptive use of multiple trade names.

WHEREFORE, Plaintiff prays that the Court correct the Order by substituting Defendant Herrington's, LLC with the proper party, 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, and aka Dale R. Herrington.

Respectfully submitted by,

MERRITT WEBB WILSON & CARUSO, PLLC

William M. Saltzman
P.O. Box 24109
Columbia, SC 29224
Telephone No.: (803) 255-0655
Facsimile No.: (803) 779-4822
Attorney for Plaintiff

Columbia, South Carolina
October 8, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**AFFIDAVIT OF DAVID J. MILLER**
	)	
Linda Robinson and Herrington's, LLC,	)	
	)	
Defendants.	)	

FILED
2015 OCT 27 A 11:55
AMA
CLERK OF COURT

PERSONALLY, appeared before me, David J. Miller, who being first duly sworn, deposes and says:

1. While employed by Merritt Webb Wilson & Caruso, PLLC, I represented the Plaintiff, Ernest Bliey, in this lawsuit.

2. I researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's, LLC.

3. There was evidence that Defendant Herrington's, LLC went by the name "Herrington's," as shown by a check issued by Defendant Linda Robinson, payable to the order of "Herrington's," which was endorsed and deposited by Mr. Dale Herrington. See the attached, Exhibit "A."

4. I prepared the Summons and Complaint on behalf of the Plaintiff.

5. I named Defendant Herrington's, LLC as a Defendant in the Summons and Complaint.

6. The Summons and Complaint were filed with the Georgetown Clerk of Court on March 28, 2014.

7. On April 22, 2014, a process server served the Summons and Complaint on Mr. Herrington, as the agent for Defendant Herrington's, LLC.

8. Mr. Herrington and Defendant Herrington's, LLC failed to file an Answer and a default judgment was filed by this court on September 9, 2015.

9. I reasonably believed we sued the correct party, and but for the owners' apparent failure to maintain corporate formalities, I would have named the correct party initially. Further, had the Defendant answered, I would have been timely informed of this confusion.

10. I believe it is unfair to allow the true defendants to escape judgment herein by using a misleading corporate name for a non-corporate entity and/or by not answering the complaint timely so as to inform me that the party had not been properly named herein.

11. Since we served the person who was responsible for the actions of this non-incorporated business they were on notice of the claim from the start, and but for their decision not to make an appearance or correct the name in the caption, they would have been properly named.

FURTHER AFFIANT SAYETH NOT

David J. Miller

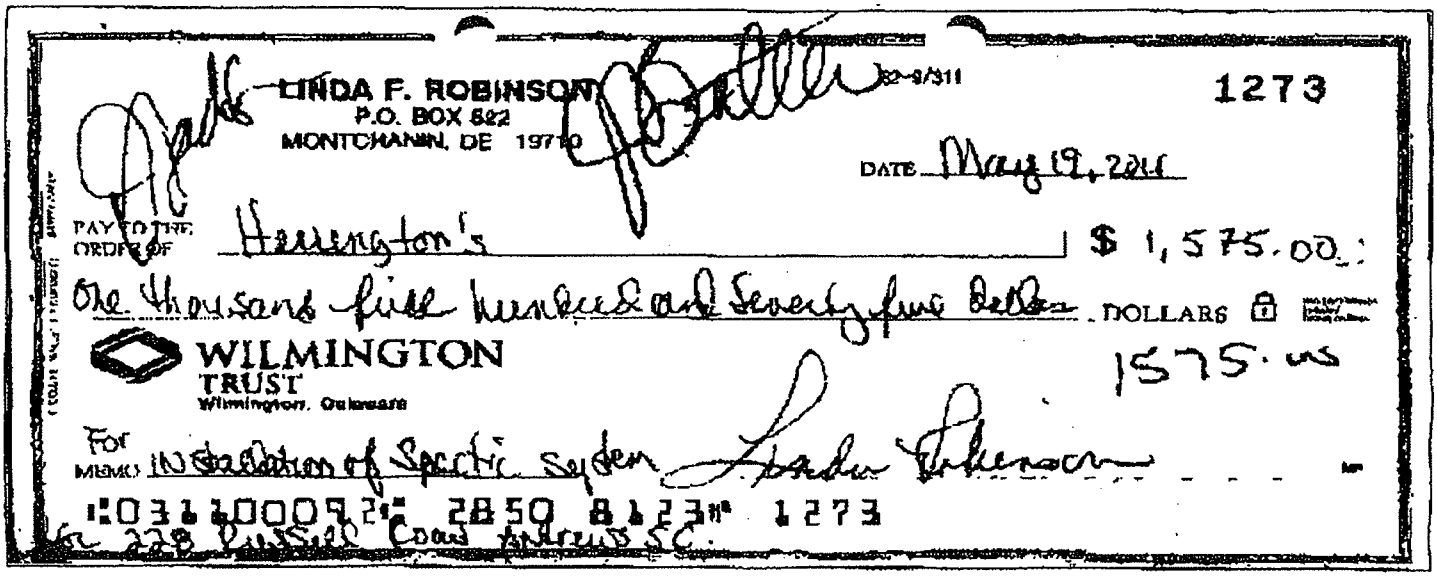
Sworn To Before Me
this 22 day of October 2015

NOTARY PUBLIC FOR S.C.
My Commission Expires: 10-24-16

32

2014-CP-22-00280

Exhibit "A"



LINDA F. ROBINSON
P.O. BOX 522
MONTCHANIN, DE 19710

82-9/311

1273

DATE May 19, 2011

PAY TO THE ORDER OF Herrington's $ 1,575.00

One thousand five hundred and Seventy five Dollars DOLLARS

WILMINGTON TRUST
Wilmington, Delaware

1575.00

For MEMO Installation of Spectic system

⑆031100092⑆ 2850 8123⑈ 1273

for 228 Russell Cove Andrews SC

Check to spectic Tank
Contractor

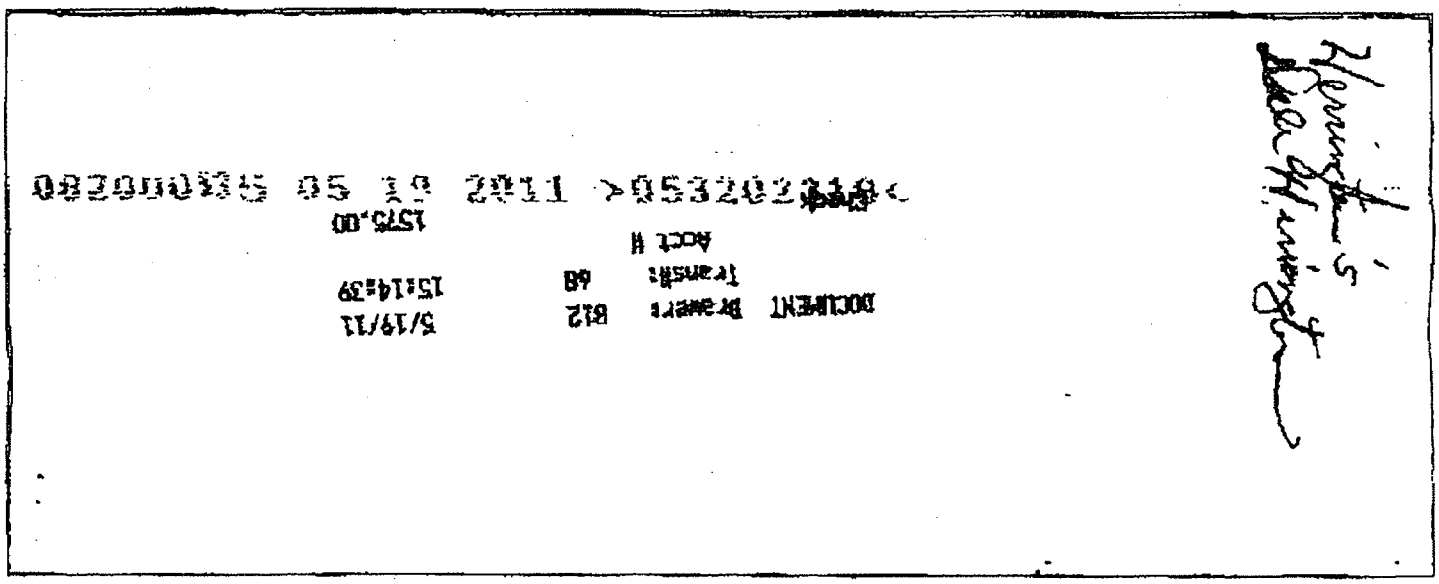
082000315 05 19 2011 >053202318<

1575.00

Acct #

DOCUMENT Brawer: B12 5/19/11
Transit: 68 15:14:39

Herrington's
Linda Herrington



Account:28508123 Serial:0 Amount:$1,575.00 Sequence:698522785 TR:31100092 TranCode:1273 APID:11 SubType:0 BankNum:1
Date:05/20/2011 GL:- Endpoint:0 Pocket:0 Run:24 RIC:- EIP:0 BatchID:0 BOFDRT:53202318 BOFDDate:20110519

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
	)	
Plaintiff,	)	**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO CORRECT CLERICAL MISTAKE IN THE ORDER RULE 60(a)**
	)	
vs.	)	
	)	
Linda Robinson and Herrington's, LLC,	)	
	)	
Defendants.	)	

FILED
2015 NOV -2 A 10:33
CLERK OF COURT

The Plaintiff, Ernest Bliey, respectfully submit this Memorandum in Support of Plaintiff's Motion to Correct Clerical Mistake in the Order, Rule 60(a).

FACTS

On or about December 18, 2011, Plaintiff was visiting his girlfriend, Defendant Linda Robinson ("Defendant Robinson") at her home in Georgetown County, South Carolina. Plaintiff was walking in Defendant Robinson's backyard, when unbeknownst to Plaintiff, he fell into an open hole in the ground in the area where the septic tank was located. Defendant Herrington's LLC was hired and paid by Defendant Robinson to complete an inspection and work on the septic tank system at Defendant Robinson's residence. Plaintiff suffered injuries to his whole body as a result of his fall.

Plaintiff subsequently retained David J. Miller, Esq. of the law office of Merritt, Webb, Wilson and Caruso, PPLC to pursue negligence and premises liability causes of action against the Defendants. Mr. Miller researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's, LLC. Miller Aff. ¶ 2. There was evidence that Defendant Herrington's, LLC went by the name "Herrington's," as shown by a check issued by Defendant Linda Robinson, payable to the order of "Herrington's," which was endorsed and deposited by Mr. Dale Herrington. Miller Aff. ¶ 3. Mr. Miller mistakenly named Defendant Herrington's, LLC as a Defendant in the Summons and Complaint.

The Summons and Complaint was filed on March 28, 2014 in the Office of the Clerk of

Court for Georgetown County, South Carolina. Defendant Robinson was served and subsequently dismissed from the lawsuit on September 15, 2014 after reaching a settlement agreement. Joint Stipulation for Dismissal with Prejudice as to Def. Linda Robinson. Defendant Herrington's, LLC was served personally, by personal service, on Mr. Dale Herrington ("Mr. Herrington") on April 22, 2014. The Affidavit of Service was filed with the Court on May 2, 2014. Defendant Herrington's, LLC and Mr. Herrington failed to respond to the pleadings and failed to provide the proper name of the Defendant entity involved in the lawsuit. Plaintiff's Motion for Default Judgment and an Affidavit of Default were filed with the Court on November 10, 2014. On June 5, 2015, the Court filed a Form 4 Order granting a Motion for a Damages Hearing in lieu of Plaintiff's Motion for Default Judgment. On July 15, 2015, the Court filed an Order approving the damages in the amount of $175,000.00 against Defendant Herrington's, LLC. On September 9, 2015, the Court filed a Form 4 Order granting the default judgment against Defendant Herrington's, LLC in the amount of $175,000.00.

In the investigation of the Defendant Herrington's LLC's assets for purposes of collecting the judgment, it was discovered for the first time that the business operated under several different trade names and that the work at issue in the lawsuit was probably not performed by the particular entity that was sued. Plaintiff is of the information and belief that Defendant Herrington's, LLC deceptively conducted business under several different trade names, and that Herrington's, LLC is not a limited liability company. Rather, the business operated as a sole proprietorship, partnership, or unincorporated association. Defendant Herrington's LLC conducted business and has held itself out to the public as 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 include Roger D. Herrington, aka Roger D. Herrington, Sr., aka Roger D. Herrington, I, aka Dale Herrington, aka Dale R. Herrington (collectively referred to as "Defendant Herrington Construction"). Defendant Herrington Construction has also filed unrelated lawsuits in Horry County improperly as Herrington's

Construction, LLC (*See* Herrington's Constr., LLC v. Blankenship, Case No. 2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015). The business and Mr. Herrington share an address of 2737 Joyner Swamp Rd., Galivants Ferry SC, 29544.

After the instant lawsuit was filed, but before judgment was entered, a limited liability company named "Herrington's Since 1986, LLC" was formed in January 2015. There is reason to believe that the members of Herrington's Since 1986, LLC are the same as the individuals involved in the business in the instant case, as of the date of this lawsuit's underlying incident.

ARGUMENT

This Court should correct Plaintiff's clerical mistake in naming Defendant Herrington, LLC as a Defendant by substituting Defendant Herrington's, LLC with the proper business's name, its trade names, the business's individual owners and their aliases as Defendants in the Order.

Under Rule 60(a), "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders."

In Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 399 S.E.2d 779 (S.C. 1990), the plaintiff sued the defendant for conversion under the name "Palmetto Ice Company," which was the defendant's unregistered trade name. The summons and complaint were served on the president of the business under the trade name. The defendant did not appear and default judgment was entered under the name Palmetto Ice Company. When the plaintiff attempted to execute the judgment, the defendant moved to vacate it on the grounds that Palmetto Ice Company was not a legal entity. The plaintiff moved to amend the default judgment to name P&H Company, the legal entity that operated under the name Palmetto Ice Company, as the

defendant. The motion to amend was granted and the motion to vacate was denied.

In upholding the trial court's decision, the South Carolina Supreme Court recited the rule that:

> where a party is served by a wrong name, and the writ is served on the party intended to be served and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained by default against him in the erroneous name, he is concluded, and execution may be issued on the judgment in that name and levied upon the property and effects of the real defendant.

Tri-County Ice, 399 S.E.2d at 781 (quoting Waldrop v. Leonard, 22 S.C. 118 (S.C. 1885)). The court also relied on Tunstall v. Lerner Shops, Inc., 160 S.C. 557 (S.C. 1931), which held that:

> a mere misnomer of a corporation defendant in words and syllables is immaterial, and a judgment in the action will bind it if it is duly served with process or appears and does not plead the misnomer in abatement. As a general rule the misnomer of a corporation in a notice, summons, notice by publication, garnishment citation, writ of certiorari, or other step in a judicial proceeding is immaterial if it appears that it could not have been, or was not misled.

Id. More recently, the South Carolina Court of Appeals upheld the circuit court's grant of an amendment of judgment "allowing a default judgment to be amended to reflect C.L. Holdings, LLC as the proper name of C.L. Holding." Davis-Daniels v. Pines Apts., L.P., 2009 S.C. App. Unpub. LEXIS 114 (S.C. Ct. App. Mar. 5, 2009). The unpublished opinion cited Rule 60(a), Tri-County Ice, and Lerner.

Here, Defendant Herrington Construction was operating as a sole proprietorship, partnership or other unincorporated entity as of the date of the incident. Defendant Herrington Construction held itself out to the public under several different trade names, including unregistered limited liability companies. The Plaintiff mistakenly named Defendant Herrington, LLC as Defendant rather than the business's proper trade name.

Service on one of the business's owners, Mr. Herrington, was sufficient to confer personal jurisdiction over the business and the other partners or participants. "Process served on any agent of any unincorporated association doing business in this State under the name and style by which it is usually known shall be sufficient to make such association a party in any court of record in the county in which such agent may be served." S.C. Code Ann. § 15-9-330;

see Rule 4(d)(3), SCRCP. A judgment against an unincorporated association, partnership or sole proprietorship is enforceable against the unincorporated association partnership or sole proprietorship and the individual partners or participants.

> "On judgment being obtained against an unincorporated association under process served as provided in § 15-9-330 final process may issue to recover satisfaction of such judgment, and any property of the association and the individual property of any copartner or member thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment."

S.C. Code Ann. § 15-35-170. As such, Defendant Herrington Construction is liable for the default judgment because Defendant Herrington Construction's agent, Mr. Herrington, was served properly, failed to plead and had a default judgment entered.

Furthermore, but for the business owners' apparent failure to maintain corporate formalities, Plaintiff would have named the correct party initially. Also, had the Defendant answered, Plaintiff would have been timely informed of this confusion in the trade names.

Therefore, pursuant to Rule 60(a), SCRCP, the Plaintiff respectfully requests this Court to correct the clerical mistake in the Order by substituting Defendant Herrington's, LLC with the proper party, 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, and aka Dale R. Herrington.

Respectfully submitted by,

MERRITT WEBB WILSON & CARUSO, PLLC

William M. Saltzman
P.O. Box 24109
Columbia, SC 29224
Telephone No.: (803) 255-0655
Facsimile No.: (803) 779-4822
Attorney for Plaintiff

Columbia, South Carolina
October 27, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	C/A NO. 2014-CP-22-00280
Ernest Bliey,	)	
Plaintiff,	)	**PROPOSED DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO CORRECT CLERICAL MISTAKE**
vs.	)	
Linda Robinson and Herrington's, LLC	)	
Defendants.	)	

Roger Dale Herrington Sr., d/b/a Herrington's Construction, LLC and Herrington's Construction (collectively, the "proposed Defendants"), by and through the undersigned legal counsel, hereby files this Response in Opposition of Plaintiff's Motion to Correct pursuant to Rule 60(a) of the South Carolina Rules of Civil Procedure. Specifically, the proposed Defendants assert that Plaintiff lacks legal justification for the relief requested.

BACKGROUND

Plaintiff Ernest Bliey ("Plaintiff") represented by David J. Miller, Esq., filed suit against Defendant Linda Robinson and "Herrington's, LLC," on March 28, 2014.[1] Plaintiff alleged in his Complaint that "Herrington's, LLC" is a "corporation organized and existing pursuant to the laws of the State of South Carolina." Comp. ¶3. The alleged events giving rise to this lawsuit occurred on or about December 18, 2011. Id. ¶ 5. Plaintiff claims that while visiting his girlfriend, Defendant Robinson, at her home, he was injured when he fell into a hole proximately caused by work performed by "Herrington's, LLC." Id.

FILED
GEORGETOWN COUNTY, S.C.
2015 DEC -3 P 12:42
ALMA Y. WHITE
CLERK OF COURT

[1] Presently, William Saltzman, Esq. of Merritt, Webb, Wilson & Caruso, PLLC represents Plaintiff.

the Court amend the judgment by substituting "Herrington's, LLC" with "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." Motion at 1 (emphasis added). Plaintiff asserts that substitution of "Herrington's, LLC" for the latter is proper pursuant to Rule 60(a) because naming "Herrington's, LLC" as a defendant was merely a clerical mistake. Id.

STATEMENT OF LAW

A motion to correct clerical mistakes pursuant to Rule 60(a) of the South Carolina Rules of Civil Procedure provides, in relevant part, that "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party . . ." A clerical error "is a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function." Ex parte J.P Strom, 343 S.C. 257, 264, 539 S.E.2d 699, 702 (2000).

Generally, a clerical error is a mistake in writing or copying. Ex Parte Strom, 334, S.C. 605, 514 S.E.2d 599, 600 (Ct. App. 1999). 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 or amend the record if the mistake or omission by counsel is "the result of exercise of judicial function." Dion v. Ravenal, Eiserhardt Assocs., 316 S.C.226, 449 S.E.2d 251, 253–54 (Ct. App. 1994).

DISCUSSION

In support of his position, Plaintiff relies on Tri-County Ice and Fuel v. Palmetto Ice. 303 S.C. 237, 399 S.E.2d 779 (1990).[2] In Tri-County, the court addressed the issue of "whether a default judgment entered *against a trade name* can be amended to substitute the name of the corporation who owns and operates the business operating under the trade name." Id. (emphasis added). On or around August of 1986, Plaintiff Tri-County Ice and Fuel ("Tri-County") desired to file suit against Palmetto Ice Company. However, Tri-County, despite prior business dealings and research, was unable to determine—through no fault of its own—that the named defendant, Palmetto Ice Company, was merely a trade name used by P & H Company, Inc. ("P & H"). Id. Subsequently, when Tri-County attempted to execute its default judgment it was informed for the first time that a corporate entity, P & H, owned and operated under the trade name of Palmetto Ice Company. Id.

Upon a Rule 60(a) motion, the court in Tri-County held that Palmetto Ice Company and P & H were "one in the same" for the purposes of this action. Id. at 239. In doing so, the court cited to a previous South Carolina Supreme Court case wherein the holding stated that the misnomer of a corporation is immaterial if it appears that it could not have been or was not misleading. Id. at 240 (citing Tunstall v. The Lerner Shops, Inc., 160 S.C. 557, 562, 159 S.E. 386, 388 (1931)). The Tri-County court continued by stating that the president of P & H "clearly knew that Tri-County intended to sue [P & H], but that Tri-County was under a misapprehension as to the identity of Palmetto Ice Company. [P & H's president] was also aware that Tri-County had no way of ascertaining that Palmetto Ice Company was a trade name, as [P & H] had not

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2 On September 10, 2015 the Chief Justice of the South Carolina Supreme Court, The Honorable Jean H. Toal, issued an Order, "Re: Civil Motions Pilot Program." 2015-09-10-01. This Order, effective October 1, 2015, required that all written motions "shall be filed and served with a supporting memorandum of law. . . Affidavits and other materials supportive of the motion shall be filed and served with the motion." Id. Plaintiff filed the instant Motion on October 15, 2015. Subsequently, Plaintiff filed an Affidavit of David Miller and a Memorandum in Support of this Motion, dated October 27th and November 2nd, respectively. Pursuant to the Chief Justice's Order, Plaintiff's Memorandum and Affidavit were untimely filed and served.

registered this assumed name with the Secretary of State." Id. at 241. The court held that under these circumstances—where a corporation has acquired a name by usage—an adjudication against it by the name so acquired is valid and binding. Id. at 241 (citing Tunstall, 160 S.C. at 566, 159 S.E. at 389.

The case at bar is dissimilar from Tri-County in several respects. First, the court found that plaintiff in Tri-County harmlessly named the wrong defendant and that the correct name for the intended defendant was undiscoverable. Id. Notably, unlike in Tri-County and Tunstall, in Plaintiff does not assert that "Herrington's, LLC" is a trade name used by Roger Dale Herrington Sr., d/b/a Herrington's Construction, LLC and/or Herrington's Construction. Indeed, "Herrington's, LLC" is not—nor has it ever been—a corporate entity recognized by the Secretary of State according to the Secretary of State's website.[3] Unlike the plaintiff in Tri-County, Plaintiff offers no justification for the name used.

Assuming *in arguendo* that the Court considers Plaintiff's Memorandum and Affidavit, these documents further support the proposed Defendants' position. In the Affidavit of David Miller, counsel for Plaintiff admits that he was aware of an individual's name and a potential trade name used by the proposed Defendants, "Herrington's" and "Dale Herrington." However, instead of naming "Herrington's," "Dale Herrington," and/or Roger Dale Herrington, Plaintiff obfuscated this matter by naming the fictitious "Herrington's, LLC" in direct contradiction to all the evidence available to him and without any justification. Plaintiff's most recent Motion to vacate this judgment because of Plaintiff's own mistake, inadvertence, or neglect further supports Defendant's position.

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[3] The South Carolina Secretary of State allows the public to search all business filings online at www.soc.sc.gov.

Finally, if the Court were to grant Plaintiff's requested relief, these proposed Defendants assert that it would change the scope of the judgment. The Court previously entered a default judgment against a limited liability company, "Herrington's, LLC." Plaintiff, as the master of his own Complaint, decided not to file suit against an individual defendant despite allegedly knowing an specific individual's name. Nevertheless, Plaintiff now comes before the Court seeking to attach this judgment against Roger Dale Herrington Sr., d/b/a Herrington's Construction, LLC, and Herrington's Construction, *and its owners, in their individual capacity.* As such, Plaintiff is attempting to attach this judgment against multiple individuals, including, but not limited to Roger Dale Herrington. This necessarily amounts to an improper request because it substantially alters the scope of the instant judgment and is prejudicial to the proposed Defendants. Therefore, the proposed Defendants respectfully request the Court deny Plaintiff's Motion.

CONCLUSION

Plaintiff has failed to state any legal justification in support of the Motion to Correct Clerical Mistake pursuant to Rule 60(a) of the South Carolina Rules of Civil Procedure. Therefore, Roger Dale Herrington Sr., d/b/a Herrington's Construction, LLC and Herrington's Construction respectfully request this Court deny Plaintiff's Motion as it amounts to an improper attempt to substitute a party after entry of judgment and would improperly alter the scope of the instant judgment.

[Signature page to follow]

WILLCOX, BUYCK & WILLIAMS, P.A.

BY: _____

Hugh Willcox, # 006116
Alexander S. Hogsette, #101244
PO Box 1909
Florence, SC 29503
(843) 662-3258 – Tel.
(843) 662-1342 – Fax.
ATTORNEYS FOR PROPOSED DEFENDANTS

DECEMBER 2, 2015.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
	)	
Plaintiff,	)	**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO CORRECT CLERICALMISTAKE**
	)	
vs.	)	
	)	
Linda Robinson and Herrington's, LLC,	)	
	)	
Defendants.	)	

FILED
2015 DEC 18 P 3:00
ALICIA [illegible]
CLERK OF COURT
GEORGETOWN COUNTY, S.C.

The Plaintiff, Ernest Bliey, respectfully submits this Reply to Defendants' Response in Opposition to Plaintiff's Motion to Correct Clerical Mistake and states as follows:

This Court should correct Plaintiff's clerical mistake in naming "Herrington, LLC" as a Defendant by substituting "Herrington's, LLC" with the proper business's name, its trade names, the business's individual owners and their aliases (collectively referred to as Defendant Herrington's Construction) as Defendants in the Order.

I. A Clerical Mistake was Made in Naming the Herrington's, LLC as a Defendant

Plaintiff's attorney, David Miller, of Merritt, Webb, Wilson & Caruso, PLLC, made a clerical mistake in naming "Herrington's, LLC" as a Defendant. Mr. Miller researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's Construction. Miller Aff. ¶ 2. [1] There was evidence that Herrington's, LLC went by the name "Herrington's," as shown by a check issued by Defendant Linda Robinson, payable to the order of "Herrington's," which was endorsed and deposited by Mr. Dale Herrington ("Mr. Herrington"). Miller Aff. ¶ 3. Mr. Miller then mistakenly named Herrington's, LLC as a Defendant in the Summons and Complaint. Miller Aff. ¶ 5.

1 Defendants argue that Plaintiff untimely filed and served the Affidavit of David Miller in connection with Plaintiff's Motion to Correct Clerical Mistake. On September 10, 2015, the Chief Justice of the South Carolina Supreme Court, The Honorable Jean H. Toal, issued an Order, "Re: Civil Motions Pilot Program." 2015-09-10-01. This Order, effective October 1, 2015, allows "[t]he moving party to file and serve a reply memorandum of law not later than 10 days after service of the opposing memorandum, materials, or affidavits. Affidavits and other supporting material shall be attached to the reply." In the event this Court does not consider the Affidavit of David Miller that Plaintiff previously filed, Plaintiff now offers and files the Affidavit of David Miller with the instant Plaintiff's Reply to Defendants' Response in Opposition to Plaintiff's Motion to Correct Clerical Mistake, as allowed by the Order of Re: Civil Motions Pilot Program." 2015-09-10-01. (See Exhibit "1").

Under Rule 60(a), SCRCP, "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. A clerical error "...is a mistake or omission by a clerk, counsel, judge or printer, which is not the result of exercise of judicial function." Ex Parte Strom, 334 S.C. 257, 264, 539 S.E.2d 699, 702 (2000). "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, Eisenhardt Assocs., 316 S.C. 226, 230, 449 S.E.2d 251, 253-54 (Ct.App.1994).

Here, Plaintiff's counsel made a clerical error by mistakenly naming "Herrington's, LLC" as a Defendant in the lawsuit. The error was made as an oversight in the preparation of the pleadings. Plaintiff's counsel's clerical error was not the exercise of judicial function because the error was made at the initiation of the lawsuit. The error was not realized until after the default judgment was entered.

The scope of the judgment will not change if it is amended in naming Defendant Herrington's Construction as the correct Defendant. The amount of the judgment will remain at $175,000.00. Amending the Order to name of Defendant Herrington's Construction will provide the proper parties to be included in the lawsuit, as Plaintiff initially intended. Defendant Herrington's Construction was notified of the lawsuit when Mr. Herrington was served with the Summons and Complaint. Defendant Herrington's Construction knew or should have known that they were the intended Defendants named in the lawsuit, mistakenly named as "Herrington's, LLC." Instead, Defendant Herrington's Construction neglected the Summons and Complaint, failed to correct Plaintiff's mistake in naming Herrington's, LLC and neglected the lawsuit in general until the instant motion was filed. Accordingly, this Court should amend the Order to correct Plaintiff's counsel's clerical error.

II. Defendants Failed to Abate the Mistake

Plaintiff would have realized the clerical error prior to the entry of Order if Defendant

Herrington's Construction answered the pleadings and/or informed Plaintiff of the error. "Where a party is served by a wrong name, and the writ is served on the party intended to be served and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained by default against him in the erroneous name, he is concluded, and execution may be issued on the judgment in that name and levied upon the property and effects of the real defendant." Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 399 S.E.2d 779, 781 (S.C. 1990). As a general rule the misnomer of a corporation in a notice, summons, notice by publication, garnishment citation, writ of certiorari, or other step in a judicial proceeding is immaterial if it appears that it could not have been, or was not misled." Id.

In Tri-County, the defendant's president clearly knew that the plaintiff intended to sue the corporation, but plaintiff was under the misapprehension as to the identity of defendant. Id. at 782. Defendant chose not to correct the misnomer, but rather ignored the pleadings and "...rely on it to attack the validity of the judgment." Id. After the default judgment was entered, the court found that amending the judgment to name the proper party "...was no so extensive as to substitute a new defendant, but was merely a correction of a clerical mistake in the name of the corporation" and that defendant was not "...misled to their prejudice as to the nature of the lawsuit." Id.

Here, after mistakenly naming "Herrington's, LLC" as a Defendant in the lawsuit, Plaintiff served the pleadings, by personal service, on Mr. Herrington, its believed owner and operator, on April 22, 2014. The Affidavit of Service was filed with the Court on May 2, 2014. The lawsuit was clearly intended for Defendant Herrington's Construction even though "Herrington's, LLC" was the named Defendant. Defendant Herrington's Construction then failed to appear and plead the misnomer in abatement. Defendant Herrington's Construction likely decided not to abate the misnomer they knew that if a default judgment was entered against "Herrington's, LLC," Plaintiff would not have a viable claim to execute the judgment against the intended parties, Defendant Herrington's Construction. As a result, Defendant Herrington's

Construction should not get relief due to their failure to inform or correct Plaintiff of the clerical error. Just like in Tri-County, amending the Order in naming Defendant Herrington's Construction is proper because Defendant Herrington's Construction has not been misled to their prejudice as to the nature of the lawsuit.

III. Defendant Herrington's Construction was Deceptive in Using Several Names

Plaintiff's clerical error was aided by Defendant Herrington's Construction's use of several names. In Tri-County, the court found that "...a default judgment entered against a defendant in the name under which a business is being operated may be amended by changing the name of the defendant to the name of the corporation which operates the business." Id.

Prior to the commencement of the lawsuit, Plaintiff's counsel, Mr. Miller, researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's Construction. Miller Aff. ¶ 2. Plaintiff had not had any prior dealings with Defendant Herrington's Construction. Plaintiff's counsel then named "Herrington's, LLC," as a Defendant, in error. Miller Aff. ¶ 5.

In the investigation of "Herrington's LLC's" assets for purposes of collecting the judgment, it was discovered for the first time that Defendant Herrington's Construction was the proper party to the lawsuit and that Defendant Herrington's Construction operated under several different names. Defendant Herrington's Construction held itself out to the public as Herrington's Construction, aka Herrington's Construction Septic Tank and Land Cleaning, aka Herrington's Septic Tank and Land Cleaning, aka Herrington's. Defendant Herrington's Construction has also filed unrelated lawsuits in Horry County improperly as Herrington's Construction, LLC, (See Herrington's Constr., LLC v. Blankenship, Case No. 2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015). Herrington's Construction, LLC is not a registered LLC with the South Carolina Secretary of State. Also, its individual owners

include Roger D. Herrington, aka Roger D. Herrington, Sr., aka Roger D. Herrington, I, aka Dale Herrington, aka Dale R. Herrington.

Defendant Herrington's Construction operated and held themselves out under numerous names, some of which were false, such as Herrington's Construction, LLC. Plaintiff's counsel made a good faith effort in researching the proper name for Defendant Herrington's Construction and was unsuccessful. Plaintiff's counsel then mistakenly named Herrington's, LLC as a party.

Even if Plaintiff's counsel intentionally named Herrington's, LLC as a party, Defendant Herrington's Construction operated under a false LLC of Herrington's Construction, LLC. Herrington's, LLC and Herrington's Construction, LLC can be considered synonymous because Mr. Herrington filed lawsuits on behalf Herrington's Construction, LLC and Mr. Herrington has acknowledged his business going by the name "Herrington's," as evidenced by his acceptance of a check issued by Defendant Linda Robinson. This Court should find that Herrington's Construction, LLC, "Herrington's, LLC" and Defendant Herrington's Construction are one in the same for purposes of its operation.

CONCLUSION

Therefore, Plaintiff's clerical error should be corrected by amending the Order to reflect Defendant Herrington's Construction as the proper Defendant because Plaintiff's counsel mistakenly named "Herrington's, LLC" to the pleadings, Defendant Herrington's Construction failed to abate the mistake and also used deceptive means in concealing its true identity. An amendment of the Order will not improperly alter the scope of the judgment.

Respectfully submitted by,

MERRITT WEBB WILSON & CARUSO, PLLC

William M. Saltzman
P.O. Box 24109
Columbia, SC 29224
Telephone No.: (803) 255-0655
Facsimile No.: (803) 779-4822
Attorney for Plaintiff

Columbia, South Carolina
December 15, 2015

50

2014-OP-22-00280

Exhibit "1"

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**AFFIDAVIT OF DAVID J. MILLER**
	)	
Linda Robinson and Herrington's, LLC,	)	
	)	
Defendants.	)	

PERSONALLY, appeared before me, David J. Miller, who being first duly sworn, deposes and says:

1. While employed by Merritt Webb Wilson & Caruso, PLLC, I represented the Plaintiff, Ernest Bliey, in this lawsuit.

2. I researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's, LLC.

3. There was evidence that Defendant Herrington's, LLC went by the name "Herrington's," as shown by a check issued by Defendant Linda Robinson, payable to the order of "Herrington's," which was endorsed and deposited by Mr. Dale Herrington. See the attached, Exhibit "A."

4. I prepared the Summons and Complaint on behalf of the Plaintiff.

5. I named Defendant Herrington's, LLC as a Defendant in the Summons and Complaint.

6. The Summons and Complaint were filed with the Georgetown Clerk of Court on March 28, 2014.

7. On April 22, 2014, a process server served the Summons and Complaint on Mr. Herrington, as the agent for Defendant Herrington's, LLC.

8. Mr. Herrington and Defendant Herrington's, LLC failed to file an Answer and a default judgment was filed by this court on September 9, 2015.

9. I reasonably believed we sued the correct party, and but for the owners' apparent failure to maintain corporate formalities, I would have named the correct party initially. Further, had the Defendant answered, I would have been timely informed of this confusion.

10. I believe it is unfair to allow the true defendants to escape judgment herein by using a misleading corporate name for a non-corporate entity and/or by not answering the complaint timely so as to inform me that the party had not been properly named herein.

11. Since we served the person who was responsible for the actions of this non-incorporated business they were on notice of the claim from the start, and but for their decision not to make an appearance or correct the name in the caption, they would have been properly named.

FURTHER AFFIANT SAYETH NOT

David J. Miller

Sworn To Before Me
this 22 day of October 2015

NOTARY PUBLIC FOR S.C.
My Commission Expires: 10-24-16

Exhibit "A"

LINDA F. ROBINSON
P.O. BOX 622
MONTCHANIN, DE 19710

82-9/311

1273

DATE May 19, 2011

PAY TO THE ORDER OF Herrington's $ 1,575.00

One thousand five hundred and Seventy five dollars DOLLARS

1575.00

WILMINGTON TRUST
Wilmington, Delaware

For MEMO Installation of Spectic system

⑆031100092⑆ 2850 8123⑈ 1273

GL 228 Russell Road Andrews SC

Check to spectic Tank
Contractor

08200035 05 19 2011 >053202318<

1575.00

Acct #

DOCUMENT Drawer: 812 5/19/11
Transit: 68 15:14:39

Herrington's
Dale Herrington

Account:28508123 Serial:0 Amount:$1,575.00 Sequence:698522785 TR:31100092 TranCode:1273 APID:11 SubType:0 BankNum:1
Date:05/20/2011 GL:- Endpoint:0 Pocket:0 Run:24 RIC:- EIP:0 BatchID:0 BOFDRT:53202318 BOFDDate:20110519

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
	)	
Plaintiff,	)	
	)	**PLAINTIFF'S MOTION TO VACATE**
vs.	)	**RELIEF FROM JUDGMENT OR ORDER**
	)	**RULE 60(b)(1) and (3)**
Linda Robinson and Herrington's, LLC,	)	
	)	
Defendants.	)	

PLEASE TAKE NOTICE that Plaintiff, Ernest Bliey, moves this Court to vacate the Order of September 9, 2015, pursuant to Rule 60(b)(1) and (3), South Carolina Rules of Civil Procedure, as an alternative remedy to Plaintiff's outstanding Motion to Correct Clerical Mistake in the Order, Rule 60(a), filed on October 15, 2015. Specifically, Plaintiff requests this Court to return this case to the status quo ante in order for Plaintiff to amend the pleadings by naming and serving the proper Defendants, pursuant to Rule 15(c), SCRCP. The basis of this motion is as follows: (1) there exists good cause to set aside the judgment; (2) a mistake, inadvertence and/or excusable neglect occurred in naming Defendant Herrington's, LLC as a party; and (3) an adverse party commit fraud, misrepresentation or other misconduct to induce the improper party naming. This Motion is supported by a memorandum of law and affidavit, filed herewith. Further, it is believed that the actual, but unnamed party had timely notice of this claim.

Respectfully submitted by,

MERRITT WEBB WILSON & CARUSO, PLLC

FILED
GEORGETOWN COUNTY, S.C.
2015 NOV 17 AM 11:28
ALMA Y. WHITE
CLERK OF COURT

William M. Saltzman
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Attorney for Plaintiff

Columbia, South Carolina
November 11, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
	)	
Plaintiff,	)	
	)	**PLAINTIFF'S MEMORANDUM**
vs.	)	**IN SUPPORT OF MOTION TO VACATE**
	)	**RELIEF FROM JUDGMENT OR ORDER**
Linda Robinson and Herrington's, LLC,	)	**RULE 60(b)(1) and (3)**
	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2015 NOV 17 AM 11:28
ALMA Y. WHITE
CLERK OF COURT

The Plaintiff, Ernest Bliey, respectfully submits this Memorandum in Support of Plaintiff's Motion to Vacate, Relief from Judgment or Order, Rule 60(b)(1) and (3).

FACTS

On or about December 18, 2011, Plaintiff was visiting his girlfriend, Defendant Linda Robinson ("Defendant Robinson") at her home in Georgetown County, South Carolina. Plaintiff was walking in Defendant Robinson's backyard, when unbeknownst to Plaintiff, he fell into an open hole in the ground in the area where the septic tank was located. Defendant Herrington's, LLC was hired and paid by Defendant Robinson to complete an inspection and work on the septic tank system at Defendant Robinson's residence. Plaintiff suffered injuries to his whole body as a result of his fall.

Plaintiff subsequently retained David J. Miller, Esq. of the law office of Merritt, Webb, Wilson and Caruso, PLLC to pursue negligence and premises liability causes of action against the Defendants. Mr. Miller researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's, LLC. Miller Aff. ¶ 2. There was evidence that Defendant Herrington's, LLC went by the name "Herrington's," as shown by a check issued by Defendant Linda Robinson, payable to the order of "Herrington's," which was endorsed and deposited by Mr. Dale Herrington. Miller Aff. ¶ 3. Mr. Miller mistakenly named Defendant Herrington's, LLC as a Defendant in the Summons and Complaint.

The Summons and Complaint in the above-captioned action was filed on March 28,

2014, in the Office of the Clerk of Court for Georgetown County, South Carolina. Defendant Herrington's, LLC was served personally, by personal service, on Mr. Dale Herrington ("Mr. Herrington") on April 22, 2014. The Affidavit of Service was filed with the Court on May 2, 2014. Defendant Herrington's, LLC and Mr. Herrington failed to respond to the pleadings and failed to provide the proper name of the Defendant entity involved in the lawsuit. A default judgment was subsequently filed in the amount of $175,000.00 on September 9, 2015.

After obtaining the default judgment against Defendant Herrington's, LLC, Plaintiff became aware that Herrington's, LLC was not a viable entity. Plaintiff is now of the information and belief that Defendant Herrington's, LLC deceptively conducted business under several different trade names, and that Herrington's, LLC is not a limited liability company. The business actually operated as a sole proprietorship, partnership, or unincorporated association. Defendant Herrington's, LLC conducted business and held itself out to the public as Herrington's Construction, Herrington's Construction Septic Tank and Land Cleaning, Herrington's Septic Tank and Land Cleaning, Herrington's, Herrington's, LLC and Herrington's Construction, LLC (collectively referred to as "Defendant Herrington's Construction"). Defendant Herrington's Construction even filed unrelated lawsuits in Horry County improperly as Herrington's Construction, LLC (*See* Herrington's Constr., LLC v. Blankenship, Case No. 2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015). Plaintiff is also of the information and belief that one the owners of the business is Roger D. Herrington, aka Dale Herrington, aka Dale R. Herrington, aka Roger D. Herrington, Sr., aka Roger D. Herrington, I ("Mr. Herrington"). The business and Mr. Herrington share an address of 2737 Joyner Swamp Rd., Galivants Ferry SC, 29544.

After the instant lawsuit was filed, but before judgment was entered, a limited liability company named "Herrington's Since 1986, LLC" was formed in January 2015. There is reason

to believe that the members of Herrington's Since 1986, LLC are the same as the individuals involved in the business in the instant case, as of the date of this lawsuit's underlying incident.

Plaintiff has an outstanding Motion to Correct Clerical Mistake in the Order, Rule 60(a), filed on October 15, 2015, which is an alternative remedy to Plaintiff's instant Motion to Vacate.

ARGUMENT

Pursuant to Rule 60(b)(1) and (3), SCRCP, the Plaintiff requests this Court vacate the judgment against Defendant Herrington's, LLC due to Plaintiff's mistake, inadvertence and/or excusable neglect in naming the incorrect party in the Complaint and due to Defendant Herrington's Construction and Mr. Herrington's fraud, misrepresentation or other misconduct which induced the incorrect party naming. "On motion and upon 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: (1) mistake, inadvertence, surprise, or excusable neglect;...(3) fraud, misrepresentation, or other misconduct of an adverse party;.... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." Rule 60(b), SCRCP.

I. The Judgment should be vacated pursuant to Rule 60(b)(1), SCRCP

Plaintiff named the incorrect defendant as a result of a mistake, inadvertence, or excusable neglect. Plaintiff's attorney, Mr. Miller, researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's, LLC. Miller Aff. ¶ 2. There was evidence that Defendant Herrington's, LLC went by the name "Herrington's," as shown by a check issued by Defendant Linda Robinson, payable to the order of "Herrington's," which was endorsed and deposited by Mr. Dale Herrington. Miller Aff. ¶ 3. Mr. Miller mistakenly named Defendant Herrington's, LLC as a Defendant in the Summons and Complaint.

Shortly after obtaining the default judgment, Plaintiff realized the judgment was entered against a non-existent entity, and the true party to the lawsuit was Defendant Herrington's Construction and Mr. Herrington. Plaintiff's action in naming the incorrect party, Defendant Herrington's, LLC, to the lawsuit was a result of a mistake, inadvertence or excusable neglect. As such, it is proper for this Court to vacate the judgment under Rule 60(b)(1) and allow Plaintiff to name the correct Defendant to the lawsuit by amending the pleadings, pursuant to Rule 15(c).

II. The Judgment should be vacated pursuant to Rule 60(b)(3)

Defendant Herrington's Construction and Mr. Herrington's failure to Answer, appear in the lawsuit and correct the incorrect party named in the lawsuit, rise to the level of fraud, misrepresentation, or other misconduct that warrants this Court to vacate the judgment. A judgment may be vacated due to extrinsic fraud under Rule 60(b)(3), SCRCP. Raby Const., L.L.P., 358 S.C. at 20, 594 S.E.2d at 483; Jamison v. Ford Motor Co., 373 S.C. 248, 273, 644 S.E.2d 755, 768 (Ct.App.2007). Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." Hilton Head Ctr. of S.C. v. Public Serv. Commn., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Id.

Here, Defendant Herrington's, LLC was served personally, by personal service, on Mr. Herrington on April 22, 2014. Mr. Herrington knew that the Summons and Complaint concerned his business, Defendant Herrington's Construction. Rather than filing an Answer or contacting the Plaintiff's attorney about the lawsuit or the misnamed party to which he was served, Mr. Herrington and Defendant Herrington's Construction decided to ignore the lawsuit, fail to file an Answer and fail to attend any of the case's hearings. Mr. Herrington and Defendant Herrington's Construction ignored the lawsuit because they knew an incorrect and non-existent party was named, meaning that a judgment would not be entered against the proper parties, Mr. Herrington and Defendant Herrington's Construction. Accordingly, the default judgment

was filed on September 9, 2015 against Defendant Herrington's, LLC, just as Mr. Herrington and Defendant Herrington's Construction planned. Mr. Herrington and Defendant Herrington's Construction fraud is extrinsic because they induced Plaintiff into not being able to present his case and obtain the needed information to name the proper parties for the case.

Furthermore, Defendant Herrington's Construction and Mr. Herrington misrepresented the true name of their business to the Plaintiff and the public. Defendant Herrington's Construction used multiple trade names in an attempt to mislead Plaintiff and the public as to the true name of its business. This misrepresentation of the business's true name aided in Plaintiff's naming the incorrect party in the Complaint. As a result, Defendant Herrington's Construction and Mr. Herrington should not benefit from such misconduct by deceptively avoiding being named in the lawsuit and on the subsequent judgment.

CONCLUSION

Plaintiff requests this Court to vacate the Order of September 9, 2015, pursuant to Rule 60(b)(1) and (3), SCRCP, as an alternative remedy to Plaintiff's outstanding Motion to Correct Clerical Mistake in the Order, Rule 60(a), filed on October 15, 2015. Granting the instant Motion to Vacate is proper because (1) There exists good cause to set aside the judgment; (2) a mistake, inadvertence and/or excusable neglect occurred in naming Defendant Herrington's, LLC as a party; and (3) an adverse party commit fraud, misrepresentation or other misconduct to induce the improper party naming. Plaintiff requests this Court to return this case to the status quo ante in order for Plaintiff to amend the pleadings by naming and serving the proper Defendants, pursuant to Rule 15(c), SCRCP.

Respectfully submitted by,

MERRITT WEBB WILSON & CARUSO, PLLC

William M. Saltzman
P.O. Box 24109
Columbia, SC 29224
Telephone No.: (803) 255-0655
Facsimile No.: (803) 779-4822
Attorney for Plaintiff

Columbia, South Carolina
November 11, 2015

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GEORGETOWN)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,)	
Plaintiff,)	**AFFIDAVIT OF DAVID J. MILLER**
vs.)	
Linda Robinson and Herrington's, LLC,)	
Defendants.)	

PERSONALLY, appeared before me, David J. Miller, who being first duly sworn, deposes and says:

1. While employed by Merritt Webb Wilson & Caruso, PLLC, I represented the Plaintiff, Ernest Bliey, in this lawsuit.

2. I researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's, LLC.

3. There was evidence that Defendant Herrington's, LLC went by the name "Herrington's," as shown by a check issued by Defendant Linda Robinson, payable to the order of "Herrington's," which was endorsed and deposited by Mr. Dale Herrington. See the attached, Exhibit "A."

4. I prepared the Summons and Complaint on behalf of the Plaintiff.

5. I named Defendant Herrington's, LLC as a Defendant in the Summons and Complaint.

6. The Summons and Complaint were filed with the Georgetown Clerk of Court on March 28, 2014.

7. On April 22, 2014, a process server served the Summons and Complaint on Mr. Herrington, as the agent for Defendant Herrington's, LLC.

8. Mr. Herrington and Defendant Herrington's, LLC failed to file an Answer and a default judgment was filed by this court on September 9, 2015.

9. I reasonably believed we sued the correct party, and but for the owners' apparent failure to maintain corporate formalities, I would have named the correct party initially. Further, had the Defendant answered, I would have been timely informed of this confusion.

10. I believe it is unfair to allow the true defendants to escape judgment herein by using a misleading corporate name for a non-corporate entity and/or by not answering the complaint timely so as to inform me that the party had not been properly named herein.

11. Since we served the person who was responsible for the actions of this non-incorporated business they were on notice of the claim from the start, and but for their decision not to make an appearance or correct the name in the caption, they would have been properly named.

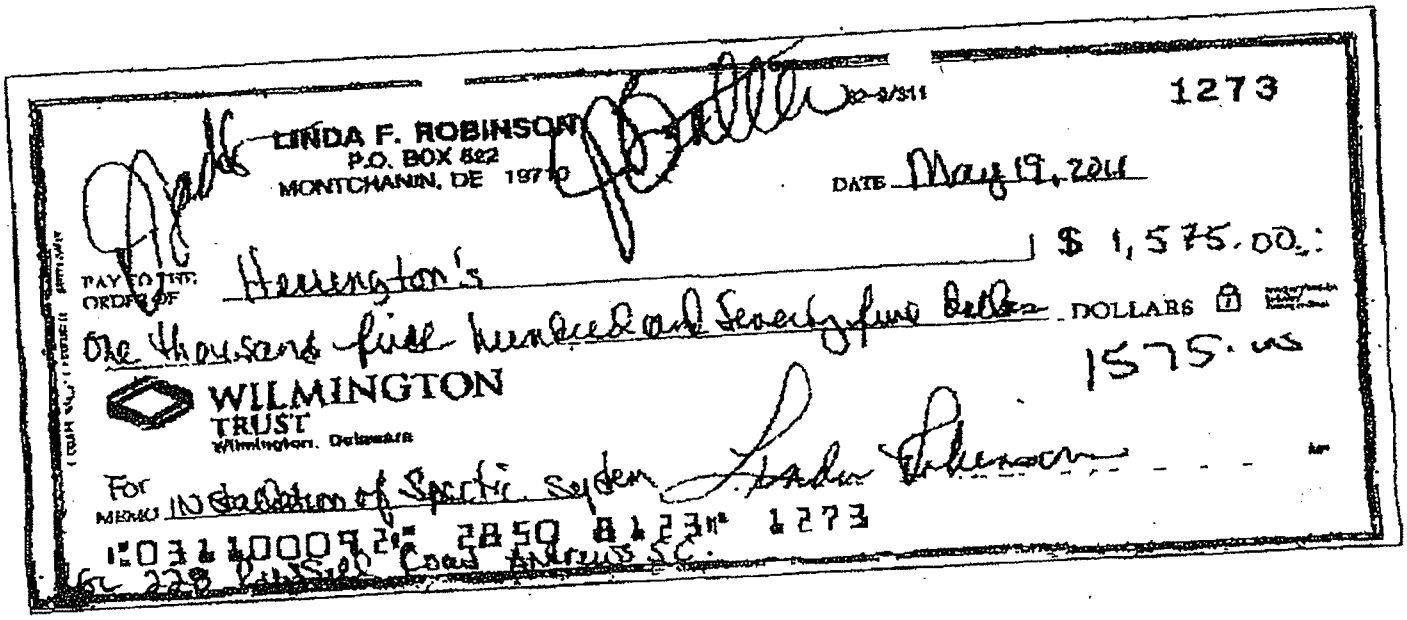
FURTHER AFFIANT SAYETH NOT

David J. Miller

Sworn To Before Me
this 22 day of October 2015

NOTARY PUBLIC FOR S.C.
My Commission Expires: 10-24-16

Exhibit "A"



LINDA F. ROBINSON
P.O. BOX 822
MONTCHANIN, DE 19710

82-9/311

1273

DATE May 19, 2011

PAY TO THE ORDER OF Herrington's $ 1,575.00

One thousand five hundred and Seventy five Dollars DOLLARS

1575.00

WILMINGTON TRUST
Wilmington, Delaware

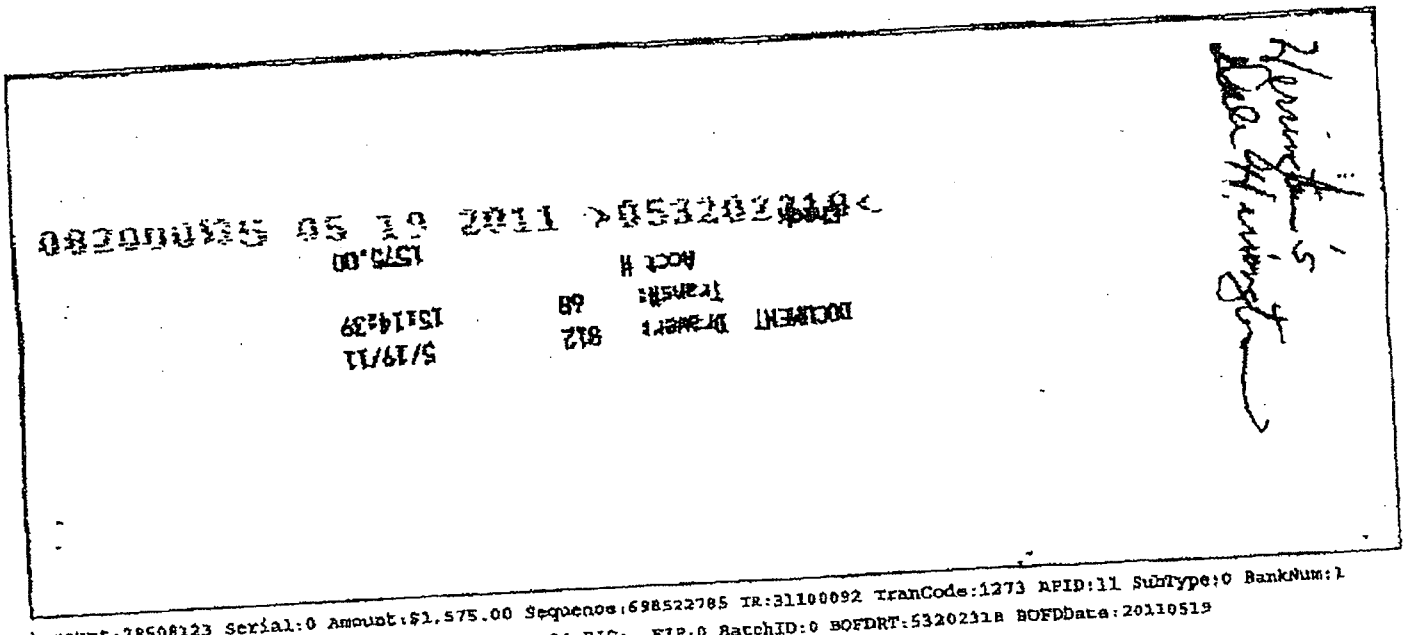
For MEMO Installation of Spectic system

⑆031100092⑆ 2850 8123⑈ 1273

GC 228 Russell Road Andrews SC

Check to spectic Tank contractor

Herrington's
Linda Herrington



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	C/A NO. 2014-CP-22-00280
	)	
Ernest Bliey,	)	
	)	
Plaintiff,	)	**PROPOSED DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE**
	)	
vs.	)	
	)	
Linda Robinson and Herrington's, LLC	)	
	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2015 DEC 15 PM 2:57
CLAIRA Y. WHITE
CLERK OF COURT

Roger Dale Herrington Sr., d/b/a Herrington's Construction (collectively, the "proposed Defendants"), by and through the undersigned legal counsel, hereby files this Response in Opposition of Plaintiff's Motion to Vacate pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. Specifically, the proposed Defendants assert that Plaintiff lacks legal justification for the relief requested.

BACKGROUND

Plaintiff Ernest Bliey ("Plaintiff") represented by David J. Miller, Esq., filed suit against Defendant Linda Robinson and "Herrington's, LLC," on March 28, 2014.[1] The alleged events giving rise to this lawsuit occurred on or about December 18, 2011. Comp. ¶ 5. Plaintiff claims that while visiting his girlfriend, Defendant Robinson, at her home, he was injured when he fell into a hole proximately caused by work performed by "Herrington's, LLC." Id.

A default judgment in the amount of one hundred seventy five thousand ($175,000.00) dollars was entered against "Herrington's, LLC." In Plaintiff's instant Motion, Plaintiff requests the Court vacate the judgment against "Herrington's, LLC," return this matter to its status quo

[1] Presently, William Saltzman, Esq. of Merritt, Webb, Wilson & Caruso, PLLC represents Plaintiff.

ante, and permit Plaintiff to amend the pleadings by naming the "proper Defendants." Motion at 5.

STATEMENT OF LAW

A motion to vacate pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure provides, in relevant part, that on motion the court may relieve a party from a final judgment, order, or proceeding from the following reasons: (1) mistake; (2) fraud; or (3) misrepresentation, or other misconduct of an adverse party. Plaintiff requests the Court vacate the judgment because "Mr. Miller mistakenly named Defendant Herrington's, LLC as a Defendant" instead of Herrington's Construction and Dale Herrington and/or because Dale Herrington and Herrington's Construction allegedly committed fraud and misrepresented the "true name of its business." Motion, I–II.

I. Mistake

Plaintiff asserts that naming "Herrington's, LLC" as a defendant was a mistake. A party "must make a showing that failure to avoid the mistake [is] justified." Coleman v. Dunlap, 306 S.C, 491, 494, 413 S.E.2d 15, 17 (1992). Plaintiff, however, admits that prior to filing the lawsuit he was in possession of a copy of a check his girlfriend—Defendant Linda Robinson—issued to "Herrington's," which was "endorsed and deposited by Mr. Dale Herrington." As such, it is clear that Plaintiff, as the master of his complaint, chose not to name an individual defendant other than Linda Robinson.

Furthermore, in determining whether to vacate a default judgment, the Court must consider the prejudice to the other party. Rouvet v. Rouvet, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010). Here, Dale Herrington would be greatly prejudiced if the Court were to vacate a judgment against "Herrington's, LLC" and allow Plaintiff to name him individually in a

lawsuit were he potentially would not be permitted to assert several affirmative defenses; including, but not limited to, statute of limitations and laches. As such, the proposed Defendants respectfully request the Court deny Plaintiff's Motion to Vacate.

II. Fraud and/or Misrepresentation

Plaintiff also asserts that his Motion to Vacate is proper due to the fraud and misrepresentations perpetrated by the proposed Defendants. In doing so, Plaintiff boldly asserts that the proposed Defendants fraudulently hatched a plan to avoid a judgment against them. Motion, 4–5. Plaintiff offers no evidence of these allegations.

Assuming *in arguendo* these allegations are correct, it is well-established that "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." Raby Const., L.L.P. v. Orr, 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004). Here, Plaintiff previously admitted that he knew the correct name of the individual defendant at the time he filed his lawsuit. Plaintiff acknowledged that the other defendant, Linda Robinson, was his girlfriend and he had access to her checks prior to filing his lawsuit. Plaintiff also asserted in his complaint that "Herrington's, LLC" is a "corporation organized and existing pursuant to the laws of the State of South Carolina", Comp. ¶3, indicating Plaintiff had access to and/or knew to examine the Secretary of State's records prior to filing his lawsuit. As such, Plaintiff had both access and/or knowledge, and therefore, relief under this Rule should be denied.

Plaintiff also asserts that the proposed Defendants misrepresented themselves to Plaintiff as the basis for his instant motion. Again, Plaintiff boldly asserts that the proposed Defendants intentionally used multiple trade names in an attempt to mislead Plaintiff and the public as to the

true name of its business. Notably, Plaintiff never asserts—nor can he—that the proposed Defendants used the name "Herrington's, LLC." Plaintiff contends that this "misrepresentation of the business's true name aided in Plaintiff's naming the incorrect party in the Complaint." Again, this argument fails because Plaintiff did not name as a defendant a trade name of the proposed Defendants, much less Mr. Herrington's name, individually, which he knew of prior to filing his lawsuit.

Conclusion

The proposed Defendants, for the foregoing reasons, respectfully request the Court deny Plaintiff's requested relief. Specifically, the proposed Defendants assert that Plaintiff's argument lacks legal justification and the requested relief would be greatly prejudicial to the proposed Defendants.

WILLCOX, BUYCK & WILLIAMS, P.A.

BY: _____

Hugh Willcox, #006176
Alexander S. Hogsette, #101244
PO Box 1909
Florence, SC 29503
(843) 662-3258 – Tel.
(843) 662-1342 – Fax.
ATTORNEYS FOR PROPOSED DEFENDANTS

DECEMBER 14, 2015.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
	)	
Plaintiff,	)	**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE**
	)	
vs.	)	
	)	
Linda Robinson and Herrington's, LLC,	)	
	)	
Defendants.	)	

FILED
2015 DEC 28 P 3:51
ALICIA [illegible]
CLERK OF COURT
GEORGETOWN COUNTY, S.C.

The Plaintiff, Ernest Bliey, respectfully submits this Reply to Defendants' Response in Opposition to Plaintiff's Motion to Vacate and states as follows:

Plaintiff requests this Court to grant the instant Motion to Vacate, as an alternative remedy to Plaintiff's outstanding Motion to Correct Clerical Mistake in the Order, and return this case to the status quo ante in order for Plaintiff to amend the pleadings by naming and serving the proper Defendants, which is 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 (collectively referred to as "Defendant Herrington's Construction"). Granting this Motion to Vacate is proper because (1) there exists good cause to set aside the judgment; (2) a mistake, inadvertence and/or excusable neglect occurred in naming "Herrington's, LLC" as a party; and (3) an adverse party commit fraud, misrepresentation or other misconduct to induce the improper party naming.

I. Mistake

Plaintiff's counsel made a mistake by naming "Herrington's, LLC" as a Defendant in the lawsuit rather than naming Defendant Herrington's Construction. A party "...must make a showing that failure to avoid the mistake [is] justified." Coleman v. Dunlap, 306 S.C. 491, 495,

413 S.E.2d 15, 17 (1992). Plaintiff's error was made as an oversight in the preparation of the pleadings and Defendant Herrington's Construction's misrepresentation of their true identity.

Defendant Herrington's Construction argues that Plaintiff chose not to name Mr. Dale Herrington ("Mr. Herrington") as an individual Defendant because Plaintiff had access to a copy of a check issued by Defendant Linda Robinson to "Herrington's" and endorsed by Mr. Herrington, and Plaintiff then did not name Mr. Herrington to the lawsuit. Defs.' Resp. at 2. Defendant Herrington's Construction does not contest that Plaintiff made a mistake in naming "Herrington's, LLC."

Plaintiff's counsel, Mr. David, Miller, researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's Construction. Miller Aff. ¶ 2. Plaintiff did not have any prior dealings with Defendant Herrington's Construction. Plaintiff's counsel then named "Herrington's, LLC," as a Defendant, in error. Miller Aff. ¶ 5.

Defendant Herrington's Construction operated and held themselves out under numerous names. Defendant Herrington's Construction also reserved the name "Herrington's Construction, LLC" with the South Carolina Secretary of State and filed unrelated lawsuits in Horry County as "Herrington's Construction, LLC." (See Herrington's Constr., LLC v. Blankenship, Case No. 2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015).

Plaintiff was unable to avoid making the mistake in naming "Herrington's, LLC" because Defendant Herrington's Construction used so many different business names to the extent that Plaintiff could not determine the true name of the business. As such, Plaintiff's mistake is justified. Also, even if Plaintiff's counsel intentionally named "Herrington's, LLC" rather than "Herrington's", Plaintiff was justified in doing so, as Defendant Herrington's Construction operated and held itself out as "Herrington's Construction, LLC." "Herrington's, LLC" and

"Herrington's Construction, LLC" can be considered synonymous because Mr. Herrington filed lawsuits on behalf "Herrington's Construction, LLC" and Mr. Herrington has acknowledged his business going by the name "Herrington's," as evidenced by his acceptance of a check issued by Defendant Linda Robinson.

As it concerns naming Mr. Herrington individually as a Defendant, Plaintiff is of the information that Defendant Herrington's Construction's business actually operated as a sole proprietorship, partnership, or unincorporated association at the time of the underlying incident. Accordingly, Mr. Herrington is not insulated from the liability of his business and is individually liable. Mr. Herrington's use of different names of the business and holding the business out as an LLC made it unclear as to who the proper party was in filing the action. Plaintiff would have named Mr. Herrington individually had Defendant Herrington's Construction not obscured the true name and entity structure of the business.

Defendant Herrington's Construction also argues that Mr. Herrington would be prejudiced if the judgment was vacated and Mr. Herrington was individually named in lawsuit because he would not be able to assert several affirmative defenses. Defs.' Resp. at 2-3. Defendant Herrington's Construction argument fails because vacating the judgment and amending the pleadings would bring the lawsuit back to the status quo ante. Mr. Herrington would be allowed to assert the same affirmative defenses as he would have at the onset of lawsuit. As such, no prejudice to Mr. Herrington would occur.

Furthermore, Plaintiff would have realized the mistake in naming "Herrington's, LLC" as a party had Defendant Herrington's Construction answered the pleadings and/or informed Plaintiff of the error. Defendant Herrington's Construction was notified of the lawsuit when Mr. Herrington was served with the Summons and Complaint. Defendant Herrington's Construction knew or should have known that they were the intended Defendants named in the lawsuit, mistakenly named as "Herrington's, LLC." Instead, Defendant Herrington's

Construction neglected the Summons and Complaint, failed to abate Plaintiff's mistake in naming "Herrington's, LLC" and disregarded the lawsuit in general until Plaintiff filed a Motion to Correct Clerical Mistake in the Order, which is pending. As such, Plaintiff's mistake in naming "Herrington's. LLC" as a Defendant is proper grounds to vacate the Order.

II. Fraud and/or Misrepresentation

Defendant Herrington's Construction argues that Plaintiff offers no evidence that Defendant Herrington's Construction commit fraud or misrepresentation which would warrant the granting of this Motion to Vacate. Defs.' Resp. at 3-4. This argument fails because there is evidence that Defendant Herrington's Construction hatched a plan to avoid the judgment.

First, Defendant Herrington's Construction obscured their true name and business entity structure by using several names, including "Herrington's Construction, LLC." Second, Defendant Herrington's Construction failed to abate Plaintiff's mistake in naming "Herrington's, LLC" as a party. Third, Defendant Herrington's Construction completely neglected and disregarded the lawsuit until Plaintiff filed a Motion to Correct Clerical Mistake in the Order, which is pending. Defendant Herrington's Construction disregarded the lawsuit because they knew the incorrect party was named. Finally, after the instant lawsuit was filed, but before judgment was entered, a limited liability company named "Herrington's Since 1986, LLC" was formed in January 2015. There is reason to believe that the members of "Herrington's Since 1986, LLC" are the same as the individuals involved in the business in the instant case, as of the date of this lawsuit's underlying incident. The creation of "Herrington's Since 1986, LLC" gives off the appearance that Defendant Herrington's Construction was attempting to avoid judgments and creditors. As such, there is substantial evidence that Defendant Herrington's Construction fraudulently and/or misrepresented their true identity in an attempt to avoid the judgment.

Defendant Herrington's Construction boldly asserts that Plaintiff admit "...he knew the correct name of the individual defendant at the time he filed the lawsuit." Defs.' Resp. at 3.

Plaintiff made no such admission. While Plaintiff may have been in possession of a copy of a check issued to "Herrington's" by Defendant Linda Robinson, endorsed by Mr. Herrington, Plaintiff made no such admission that Plaintiff knew that Mr. Herrington was the correct name of the individual Defendant at the time of the lawsuit's filing. Plaintiff had no contact or dealings with Defendant Herrington's Construction and any information Plaintiff received about Defendant Herrington's Construction was given by Defendant Linda Robinson. Plaintiff relied on the information that Defendant Linda Robinson, but was unable to know how accurate the information was since Plaintiff did not have any dealings or contact with Defendant Herrington's Construction. If Defendant Herrington's Construction proceeded in answering the Complaint and complied with discovery, Plaintiff would have had the opportunity to gather the correct information regarding Defendant Herrington's Construction true identity. Unfortunately, Defendant Herrington's Construction chose not to participate in the litigation, in an attempt to induce a judgment against a non-existing entity and avoid any liability.

Defendant Herrington's Construction also asserts that Plaintiff cannot show that Defendant Herrington's Construction used the name "Herrington's, LLC." Defs.' Resp. at 4. While Defendant Herrington's Construction may not have specifically operated as "Herrington's, LLC," it did operate as "Herrington's Construction, LLC." (See Herrington's Constr., LLC v. Blankenship, Case No. 2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015). "Herrington's, LLC" and "Herrington's Construction, LLC" can be considered synonymous because Mr. Herrington filed lawsuits on behalf "Herrington's Construction, LLC" and Mr. Herrington has acknowledged his business going by the name "Herrington's," as evidenced by his acceptance of a check issued by Defendant Linda Robinson. As such, "Herrington's Construction, LLC", "Herrington's, LLC" and Defendant Herrington's

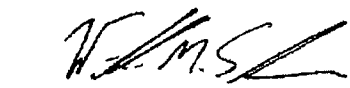
Construction are one in the same for purposes of its operation. This Court should find that Defendant Herrington's Construction's fraud and misrepresentation of their names warrants the vacating of the Order so this case can be returned to the status quo ante in order for Plaintiff to amend the pleadings by naming and serving the proper Defendants.

CONCLUSION

Plaintiff requests this Court to vacate the Order of September 9, 2015, pursuant to Rule 60(b)(1) and (3), SCRCP, as an alternative remedy to Plaintiff's outstanding Motion to Correct Clerical Mistake in the Order, Rule 60(a), filed on October 15, 2015. Plaintiff's mistake in naming "Herrington's, LLC" as a Defendant and Defendant Herrington's Construction fraud and/or misrepresentation in obscuring their true identities are proper grounds to vacate the Order.

Respectfully submitted by,

MERRITT WEBB WILSON & CARUSO, PLLC



William M. Saltzman
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Columbia, SC 29224
Telephone No.: (803) 255-0655
Facsimile No.: (803) 779-4822
Attorney for Plaintiff

Columbia, South Carolina
December 22, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
Plaintiff,	)	**PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT RULE 59(e)**
vs.	)	
Linda Robinson and Herrington's, LLC,	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2016 MAR 17 PM 2:20
ALMA K. WHITE
CLERK OF COURT

PLEASE TAKE NOTICE that Plaintiff, Ernest Bliey, moves pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure for this Court to reconsider and amend its Order filed on February 26, 2016 denying Plaintiff's Motion to Correct Clerical Mistake in the Order and Motion to Vacate. "A party may wish to file a [59(e)] motion when [the party] believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (S.C. 2004).

Plaintiff now respectfully requests this Court to reconsider its Order in regard to the finding that a clerical mistake was not made. In doing so, Plaintiff requests this Court to correct the underlying Order of September 9, 2015 by substituting Defendant Herrington's, LLC with the proper party, 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 (collectively referred to as "Defendant Herrington's Construction").

In the alternative, Plaintiff requests this Court to reconsider its Order in regard to finding that there was no mistake or fraud that would warrant vacating the underlying Order of September 9, 2015 and that such relief would be prejudicial to Defendant Herrington's

Construction. In doing so, Plaintiff requests this Court to return this case to the status quo ante in order for Plaintiff to amend the pleadings by naming and serving Defendant Herrington's Construction, pursuant to Rule 15(c), SCRCP.

At the hearing of February 25, 2016, this Court requested Defendant Herrington's Construction's counsel to prepare a proposed formal order for this Court's review and signature. The Form 4 Order, filed on February 26, 2016, was received by Plaintiff's counsel on March 2, 2016 stating "formal order to follow." However, Defendant Herrington's Construction's counsel has not yet prepared the proposed formal order for this Court. Plaintiff respectfully submits this Motion to Alter or Amend without the benefit of a substantive formal order. Plaintiff also reserves the right to amend this Motion to Alter or Amend once the formal order is filed.

RECONSIDERATION OF PLAINTIFF'S MOTION TO CORRECT CLERICAL MISTAKE IN THE ORDER

I. This Court should reconsider its finding that there was no clerical mistake in naming Herrington's, LLC as a Defendant.

Plaintiff's attorney, David Miller, of Merritt, Webb, Wilson & Caruso, PLLC, made a clerical mistake in naming "Herrington's, LLC" as a Defendant. Mr. Miller researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's Construction. Miller Aff. ¶ 2. There was evidence that Herrington's, LLC went by the name "Herrington's," as shown by a check issued by Defendant Linda Robinson, payable to the order of "Herrington's," which was endorsed and deposited by Mr. Dale Herrington ("Mr. Herrington"). Miller Aff. ¶ 3. Mr. Miller then mistakenly named Herrington's, LLC as a Defendant in the Summons and Complaint. Miller Aff. ¶ 5.

Under Rule 60(a), SCRCP, "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. A clerical error "...is a mistake or omission by a clerk, counsel, judge or printer, which is

not the result of exercise of judicial function." Ex Parte Strom, 334 S.C. 257, 264, 539 S.E.2d 699, 702 (S.C. 2000). "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, Eisenhardt Assocs., 316 S.C. 226, 230, 449 S.E.2d 251, 253-54 (Ct.App.1994).

Here, Plaintiff's counsel made a clerical error by mistakenly naming "Herrington's, LLC" as a Defendant in the lawsuit. The error was made as an oversight in the preparation of the pleadings. Plaintiff's counsel's clerical error was not the exercise of judicial function because the error was made at the initiation of the lawsuit. The error was not realized until after the default judgment was entered.

The scope of the judgment will not change if it is amended in naming Defendant Herrington's Construction as the correct Defendant. The amount of the judgment will remain at $175,000.00. Amending the Order to name of Defendant Herrington's Construction will provide the proper parties to be included in the lawsuit, as Plaintiff initially intended. Defendant Herrington's Construction was notified of the lawsuit when Mr. Roger Herrington was served with the Summons and Complaint. Defendant Herrington's Construction knew or should have known they were the intended Defendants named in the lawsuit, mistakenly named as "Herrington's, LLC." Instead, Defendant Herrington's Construction neglected the Summons and Complaint, failed to correct Plaintiff's mistake in naming Herrington's, LLC and neglected the lawsuit in general until Plaintiff's Motion to Correct Clerical Mistake in the Order was filed. Accordingly, this Court should correct Plaintiff's counsel's clerical error.

II. This Court should reconsider its finding that Defendant Herrington's Construction did not have a duty to abate Plaintiff's mistake.

Plaintiff would have realized the clerical error prior to the entry of the September 9, 2015 Order if Defendant Herrington's Construction answered the pleadings and/or informed Plaintiff of the error. "Where a party is served by a wrong name, and the writ is served on the party

intended to be served and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained by default against him in the erroneous name, he is concluded, and execution may be issued on the judgment in that name and levied upon the property and effects of the real defendant." Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 399 S.E.2d 779, 781 (S.C. 1990). As a general rule the misnomer of a corporation in a notice, summons, notice by publication, garnishment citation, writ of certiorari, or other step in a judicial proceeding is immaterial if it appears that it could not have been, or was not misled." Id.

In Tri-County, the defendant's president clearly knew that the plaintiff intended to sue the corporation, but plaintiff was under the misapprehension as to the identity of defendant. Id. at 782. Defendant chose not to correct the misnomer, but rather ignored the pleadings and "...rely on it to attack the validity of the judgment." Id. After the default judgment was entered, the court found that amending the judgment to name the proper party "...was no so extensive as to substitute a new defendant, but was merely a correction of a clerical mistake in the name of the corporation" and that defendant was not "...misled to their prejudice as to the nature of the lawsuit." Id.

Here, after mistakenly naming "Herrington's, LLC" as a Defendant in the lawsuit, Plaintiff served the pleadings, by personal service, on Mr. Roger Herrington, its believed owner and operator, on April 22, 2014. The Affidavit of Service was filed with the Court on May 2, 2014. The lawsuit was clearly intended for Defendant Herrington's Construction even though "Herrington's, LLC" was the named Defendant. Defendant Herrington's Construction then failed to appear and plead the misnomer in abatement. Defendant Herrington's Construction likely decided not to abate the misnomer they knew that if a default judgment was entered against "Herrington's, LLC," Plaintiff would not have a viable claim to execute the judgment against the intended parties, Defendant Herrington's Construction. As a result, Defendant Herrington's Construction should not get relief due to their failure to inform or correct Plaintiff of the clerical

error. Just like in Tri-County, amending the Order in naming Defendant Herrington's Construction is proper because Defendant Herrington's Construction has not been misled to their prejudice as to the nature of the lawsuit.

III. This Court should reconsider its finding that Defendant Herrington's Construction was not deceptive in using several names.

Plaintiff's clerical error was aided by Defendant Herrington's Construction's use of several names. In Tri-County, the court found that "...a default judgment entered against a defendant in the name under which a business is being operated may be amended by changing the name of the defendant to the name of the corporation which operates the business." Id.

Prior to the commencement of the lawsuit, Plaintiff's counsel, Mr. Miller, researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's Construction. Miller Aff. ¶ 2. Plaintiff had not had any prior dealings with Defendant Herrington's Construction. Plaintiff's counsel then named "Herrington's, LLC," as a Defendant, in error. Miller Aff. ¶ 5.

In the investigation of "Herrington's LLC's" assets for purposes of collecting the judgment, it was discovered for the first time that Defendant Herrington's Construction was the proper party to the lawsuit and that Defendant Herrington's Construction operated under several different names. Defendant Herrington's Construction held itself out to the public as Herrington's Construction, aka Herrington's Construction Septic Tank and Land Cleaning, aka Herrington's Septic Tank and Land Cleaning, aka Herrington's. Defendant Herrington's Construction has also filed unrelated lawsuits in Horry County improperly as Herrington's Construction, LLC, (See Herrington's Constr., LLC v. Blankenship, Case No. 2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015). Herrington's Construction, LLC is

not a registered LLC with the South Carolina Secretary of State. Also, its individual owners include Roger D. Herrington, aka Roger D. Herrington, Sr., aka Roger D. Herrington, I, aka Dale Herrington, aka Dale R. Herrington.

Defendant Herrington's Construction operated and held themselves out under numerous names, some of which were false, such as Herrington's Construction, LLC. Plaintiff's counsel made a good faith effort in researching the proper name for Defendant Herrington's Construction and was unsuccessful. Plaintiff's counsel then mistakenly named Herrington's, LLC as a party.

Even if Plaintiff's counsel intentionally named Herrington's, LLC as a party, Defendant Herrington's Construction operated under a false LLC of Herrington's Construction, LLC. Herrington's, LLC and Herrington's Construction, LLC can be considered synonymous because Mr. Herrington filed lawsuits on behalf Herrington's Construction, LLC and Mr. Herrington has acknowledged his business going by the name "Herrington's," as evidenced by his acceptance of a check issued by Defendant Linda Robinson. This Court should find that Herrington's Construction, LLC, "Herrington's, LLC" and Defendant Herrington's Construction are one in the same for purposes of its operation.

RECONSIDERATION OF PLAINTIFF'S MOTION TO VACATE

In the event this Court does not reconsider its denial of Plaintiff's Motion to Correct Clerical Mistake in the Order, as an alternative remedy, Plaintiff requests this Court to reconsider its denial of Plaintiff's Motion to Vacate. Plaintiff requests this Court vacate the September 9, 2015 judgment against Defendant Herrington's, LLC due to Plaintiff's mistake, inadvertence and/or excusable neglect in naming the incorrect party in the Complaint and due to Defendant Herrington's Construction and Mr. Herrington's fraud, misrepresentation or other misconduct which induced the incorrect party naming. "On motion and upon 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: (1) mistake, inadvertence, surprise, or excusable neglect;...(3) fraud,

misrepresentation, or other misconduct of an adverse party;.... The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." Rule 60(b), SCRCP.

I. This Court should reconsider its finding that there was no mistake.

Plaintiff's counsel made a mistake by naming "Herrington's, LLC" as a Defendant in the lawsuit rather than naming Defendant Herrington's Construction. A party "...must make a showing that failure to avoid the mistake [is] justified." Coleman v. Dunlap, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992). Plaintiff's error was made as an oversight in the preparation of the pleadings and Defendant Herrington's Construction's misrepresentation of their true identity.

Defendant Herrington's Construction argued that Plaintiff chose not to name Mr. Dale Herrington ("Mr. Herrington") as an individual, as Plaintiff had access to a copy of a check issued by Defendant Linda Robinson to "Herrington's" and endorsed by Mr. Herrington, and Plaintiff then did not name Mr. Herrington to the lawsuit. Defendant Herrington's Construction does not contest that Plaintiff made a mistake in naming "Herrington's, LLC."

However, Plaintiff's counsel, Mr. Miller, researched the names of the Defendants and was unable to locate a definitive name used by Defendant Herrington's Construction. Miller Aff. ¶ 2. Plaintiff did not have any prior dealings with Defendant Herrington's Construction. Plaintiff's counsel then named "Herrington's, LLC," as a Defendant, in error. Miller Aff. ¶ 5.

Defendant Herrington's Construction operated and held themselves out under numerous names. Defendant Herrington's Construction also reserved the name "Herrington's Construction, LLC" with the South Carolina Secretary of State and filed unrelated lawsuits in Horry County as "Herrington's Construction, LLC." (See Herrington's Constr., LLC v. Blankenship, Case No.

2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015).

Plaintiff was unable to avoid making the mistake in naming "Herrington's, LLC" because Defendant Herrington's Construction used so many different business names to the extent that Plaintiff could not determine the true name of the business. As such, Plaintiff's mistake is justified. Also, even if Plaintiff's counsel intentionally named "Herrington's, LLC" rather than "Herrington's", Plaintiff was justified in doing so, as Defendant Herrington's Construction operated and held itself out as "Herrington's Construction, LLC." "Herrington's, LLC" and "Herrington's Construction, LLC" can be considered synonymous because Mr. Herrington filed lawsuits on behalf "Herrington's Construction, LLC" and Mr. Herrington has acknowledged his business going by the name "Herrington's," as evidenced by his acceptance of a check issued by Defendant Linda Robinson.

As it concerns naming Mr. Herrington individually as a Defendant, Plaintiff is of the information that Defendant Herrington's Construction's business actually operated as a sole proprietorship, partnership, or unincorporated association at the time of the underlying incident. Accordingly, Mr. Herrington is not insulated from the liability of his business and is individually liable. Mr. Herrington's use of different names of the business and holding the business out as an LLC made it unclear as to who the proper party was in filing the action. Plaintiff would have named Mr. Herrington individually had Defendant Herrington's Construction not obscured the true name and entity structure of the business. Plaintiff also had no reasonable way of determining the other owners of Defendant Herrington's Construction.

This Court found that Defendant Herrington's Construction would be prejudiced if the judgment was vacated and Mr. Herrington and the other owners were individually named in lawsuit because they would not be able to assert several affirmative defenses. This assertion is

not so because vacating the judgment and amending the pleadings would bring the lawsuit back to the status quo ante. Mr. Herrington and the other owners would be allowed to assert the same affirmative defenses as they would have at the onset of lawsuit. As such, no prejudice to Mr. Herrington or the other owners would occur.

Furthermore, Plaintiff would have realized the mistake in naming "Herrington's, LLC" as a party had Defendant Herrington's Construction answered the pleadings and/or informed Plaintiff of the error. Defendant Herrington's Construction was notified of the lawsuit when Mr. Herrington was served with the Summons and Complaint. Defendant Herrington's Construction knew or should have known they were the intended Defendants named in the lawsuit, mistakenly named as "Herrington's, LLC." Instead, Defendant Herrington's Construction neglected the Summons and Complaint, failed to abate Plaintiff's mistake in naming "Herrington's, LLC" and disregarded the lawsuit in general until Plaintiff filed a Motion to Correct Clerical Mistake in the Order. As such, this Court should reconsider its denial of the Plaintiff's Motion to Vacate and find that Plaintiff's mistake in naming "Herrington's. LLC" as a Defendant is proper grounds to vacate the Order.

II. This Court should reconsider its finding that there was no fraud and/or misrepresentation.

This Court erred in finding Defendant Herrington's Construction did not commit fraud and/or misrepresentation which would warrant the granting of the Motion to Vacate. This Court should reconsider its decision because there is evidence that Defendant Herrington's Construction hatched a plan to avoid the judgment.

First, Defendant Herrington's Construction obscured their true name and business entity structure by using several names, including "Herrington's Construction, LLC." Second, Defendant Herrington's Construction failed to abate Plaintiff's mistake in naming "Herrington's, LLC" as a party. Third, Defendant Herrington's Construction completely neglected and

disregarded the lawsuit until Plaintiff filed a Motion to Correct Clerical Mistake in the Order, which is pending. Defendant Herrington's Construction disregarded the lawsuit because they knew the incorrect party was named. Finally, after the instant lawsuit was filed, but before judgment was entered, a limited liability company named "Herrington's Since 1986, LLC" was formed in January 2015. There is reason to believe that the members of "Herrington's Since 1986, LLC" are the same as the individuals involved in the business in the instant case, as of the date of this lawsuit's underlying incident. The creation of "Herrington's Since 1986, LLC" gives off the appearance that Defendant Herrington's Construction was attempting to avoid judgments and creditors. As such, there is substantial evidence that Defendant Herrington's Construction fraudulently and/or misrepresented their true identity in an attempt to avoid the judgment.

This Court should also reconsider its finding that Plaintiff knew the correct name of the individual defendant, in Mr. Herrington, at the time Plaintiff filed the lawsuit, but chose not to name Mr. Herrington. While Plaintiff may have been in possession of a copy of a check issued to "Herrington's" by Defendant Linda Robinson, endorsed by Mr. Herrington, Plaintiff did not know that Mr. Herrington was the correct name of the individual Defendant at the time of the lawsuit's filing. Plaintiff had no contact or dealings with Defendant Herrington's Construction and any information Plaintiff received about Defendant Herrington's Construction was given by Defendant Linda Robinson. Plaintiff relied on the information that Defendant Linda Robinson, but was unable to know how accurate the information was since Plaintiff did not have any dealings or contact with Defendant Herrington's Construction. If Defendant Herrington's Construction proceeded in answering the Complaint and complied with discovery, Plaintiff would have had the opportunity to gather the correct information regarding Defendant Herrington's Construction true identity. Unfortunately, Defendant Herrington's Construction chose not to participate in the litigation, in an attempt to induce a judgment against a non-existing entity and avoid any liability.

Furthermore, this court should reconsider its finding that Plaintiff could not show that Defendant Herrington's Construction used the name "Herrington's, LLC." While Defendant Herrington's Construction may not have specifically operated as "Herrington's, LLC," it did operate as "Herrington's Construction, LLC." (See Herrington's Constr., LLC v. Blankenship, Case No. 2013CV261100796, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 17, 2014) and Herrington's Constr., LLC v. Verta, Case No. 2014CV261100982, Horry Cnty. 15th Jud. Cir. Pub. Index (Aynor Magis. Ct. February 16, 2015). "Herrington's, LLC" and "Herrington's Construction, LLC" can be considered synonymous because Mr. Herrington filed lawsuits on behalf "Herrington's Construction, LLC" and Mr. Herrington has acknowledged his business going by the name "Herrington's," as evidenced by his acceptance of a check issued by Defendant Linda Robinson. As such, "Herrington's Construction, LLC", "Herrington's, LLC" and Defendant Herrington's Construction are one in the same for purposes of its operation. This Court should reconsider its decision and find that Defendant Herrington's Construction's fraud and misrepresentation of their names warrants the vacating of the Order so this case can be returned to the status quo ante in order for Plaintiff to amend the pleadings by naming and serving the proper Defendants.

CONCLUSION

Plaintiff requests this Court to reconsider its Order denying Plaintiff's Motion to Correct Clerical Mistake in the Order and Motion to Vacate. This Court should alter or amend its Order denying Plaintiff's Motion to Correct Clerical Mistake in the Order by finding there was a clerical mistake and it is proper to correct the Order of September 9, 2015 by naming Defendant Herrington's Construction as the Defendants.

In the alternative, this Court should alter or amend its order denying Plaintiff's Motion to Vacate by finding: (1) there exists good cause to set aside the judgment; (2) a mistake, inadvertence and/or excusable neglect occurred in naming Defendant Herrington's, LLC as a

party; (3) an adverse party commit fraud, misrepresentation or other misconduct to induce the improper party naming; and (4) that this case to the status quo ante in order for Plaintiff to amend the pleadings by naming and serving the proper Defendant Herrington's Construction, pursuant to Rule 15(c), SCRCP.

Respectfully submitted by,

MERRITT WEBB WILSON & CARUSO, PLLC

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Attorney for Plaintiff

Columbia, South Carolina
March 10, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. 2014-CP-22-00280
Ernest Bliey,	)	
	)	
Plaintiff,	)	
	)	**PLAINTIFF'S SUPPLEMENTAL MOTION TO ALTER OR AMEND JUDGMENT RULE 59(e)**
vs.	)	
	)	
Linda Robinson and Herrington's, LLC,	)	
	)	
Defendants.	)	

FILED
2016 APR 27 AM 8:52
BETTY Y. WHITE
CLERK OF COURT

PLEASE TAKE NOTICE that Plaintiff, Ernest Bliey, supplements his Motion to Alter or Amend Judgment to address to formal Order filed on April 8, 2016. The formal Order was received by mail on April 18, 2016.

This Court should correct the following errors contained in the formal Order:

1. The first sentence on page 1 of the Order should reference that the Plaintiff's Motion to Correct Clerical Mistake was made on October 15, 2015.
2. The second sentence on page 1 ironically names the incorrect proposed Defendant as "Robert Dale Herrington."
3. The second sentence on page 1 has two commas in "Herrington's,, LLC" rather than one.
4. The second paragraph of page 8 misspells the word "Plaintiff" as "Plaintff."

This Court should correct the following factual errors in the formal Order:

1. Page 6 of the Order states that Plaintiff was unable to articulate the individuals against whom Plaintiff wished to attach the judgment. This is taken out of context because Plaintiff had no way of knowing who the individual Defendants were unless Herrington's provided the names voluntarily or through discovery. Herrington's has not disclosed the names of the individual owners, other than Mr. Roger Dale Herrington. However, after

further investigation, Plaintiff is of the information that Mr. Roger Dale Herrington's relative, Mr. Keith Herrington, was an owner of Herrington's, as evidenced by the Facebook page of Herrington's since 1986, LLC. See attached, Exhibit "A."

2. The Order also misrepresents that no evidence was presented showing Herrington's, LLC is a trade name used by the proposed Defendants. The proposed Defendants admit their business operates under the names "Herrington's Construction, LLC" and "Herrington's." Plaintiff offered evidence that a combination of the two trade names and/or a shortening of the name "Herrington's Construction, LLC" leads to the name "Herrington's, LLC." The proposed Defendants operated under so many trade names, that "Herrington's, LLC" can easily be considered a derivative trade name of the proposed Defendants' business. Also, after further investigation, Herrington's since 1986, LLC's Facebook page reveals that it previously operated under the name Herrington's, LLC as recent as October 7, 2012. See attached, Exhibit "B."

3. The Order claims that the "...record is devoid of any evidence to support Plaintiff's allegations that the proposed Defendants...acted fraudulently in this matter." Plaintiff established, and the proposed Defendants admit that the proposed Defendants operated under the name "Herrington's Construction, LLC" without properly filing as a limited liability company with the South Carolina Secretary of State. Mr. Roger Dale Herrington also purposefully ignored the instant lawsuit by not contacting Plaintiff's attorney or filing an Answer, despite the fact the Complaint made allegations of negligence against a trade name that had substantially the same name as his business's trade name, a type of business that was the same as his, where the incident took place at a location where his business had performed services. Mr. Herrington, as agent of his business, and on behalf of the

other individual owners purposefully ignored the lawsuit until the instant Motions were made, which attempted to include the proper parties, because the proposed Defendants knew that the lawsuit and default judgment, as issued, would not attach to them due to the incorrectly named Defendant, Herrington's, LLC.

Furthermore, it is not proper for the proposed Defendants to have any standing in the Motion to Vacate because they are not yet parties to the lawsuit. The Motion to Vacate does not concern the proposed Defendants. In Narruhn v. Alea London, Ltd., the court held that a non-party did not have standing to make a Rule 60 motion, based on the plain language of the rule, which states that the court may review a party or its legal representative from a final judgment or order. Narruhn v. Alea London, Ltd., 404 S.C. 337, 745 S.E.2d 90 (2013). The court held that, based on this specific language, a non-party could not seek relief under Rule 60. Id. As such, the proposed Defendants should not be allowed to contest the Motion to Vacate because the proposed Defendants are not yet a party to the underlying Order of September 9, 2015.

WHEREFORE, Plaintiff requests this Court to reconsider its Order denying Plaintiff's Motion to Correct Clerical Mistake in the Order and Motion to Vacate. This Court should alter or amend its Order by granting Plaintiff's Motion to Correct Clerical Mistake in the Order by finding there was a clerical mistake and it is proper to correct the Order of September 9, 2015 by naming Defendant Herrington's Construction as the Defendants, or in the alternative, this Court should alter or amend its order denying Plaintiff's Motion to Vacate by finding: (1) there exists good cause to set aside the judgment; (2) a mistake, inadvertence and/or excusable neglect occurred in naming Defendant Herrington's, LLC as a party; (3) an adverse party commit fraud, misrepresentation or other misconduct to induce the improper party naming; and (4) that this case to the status quo ante in order for Plaintiff to amend the pleadings by naming and serving

the proper Defendant Herrington's Construction, pursuant to Rule 15(c), SCRCP. If this Court does not reconsider its denial of the Motion to Correct Clerical Mistake and Motion to Vacate, this Court should correct the errors in the Order and correct the factual errors in the Order filed on April 8, 2015.

Respectfully submitted by,

MERRITT WEBB WILSON & CARUSO, PLLC

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Attorney for Plaintiff

Columbia, South Carolina
April 20, 2016

2014-CP-22-00280

Exhibit A

Herrington's since 1986 LLC
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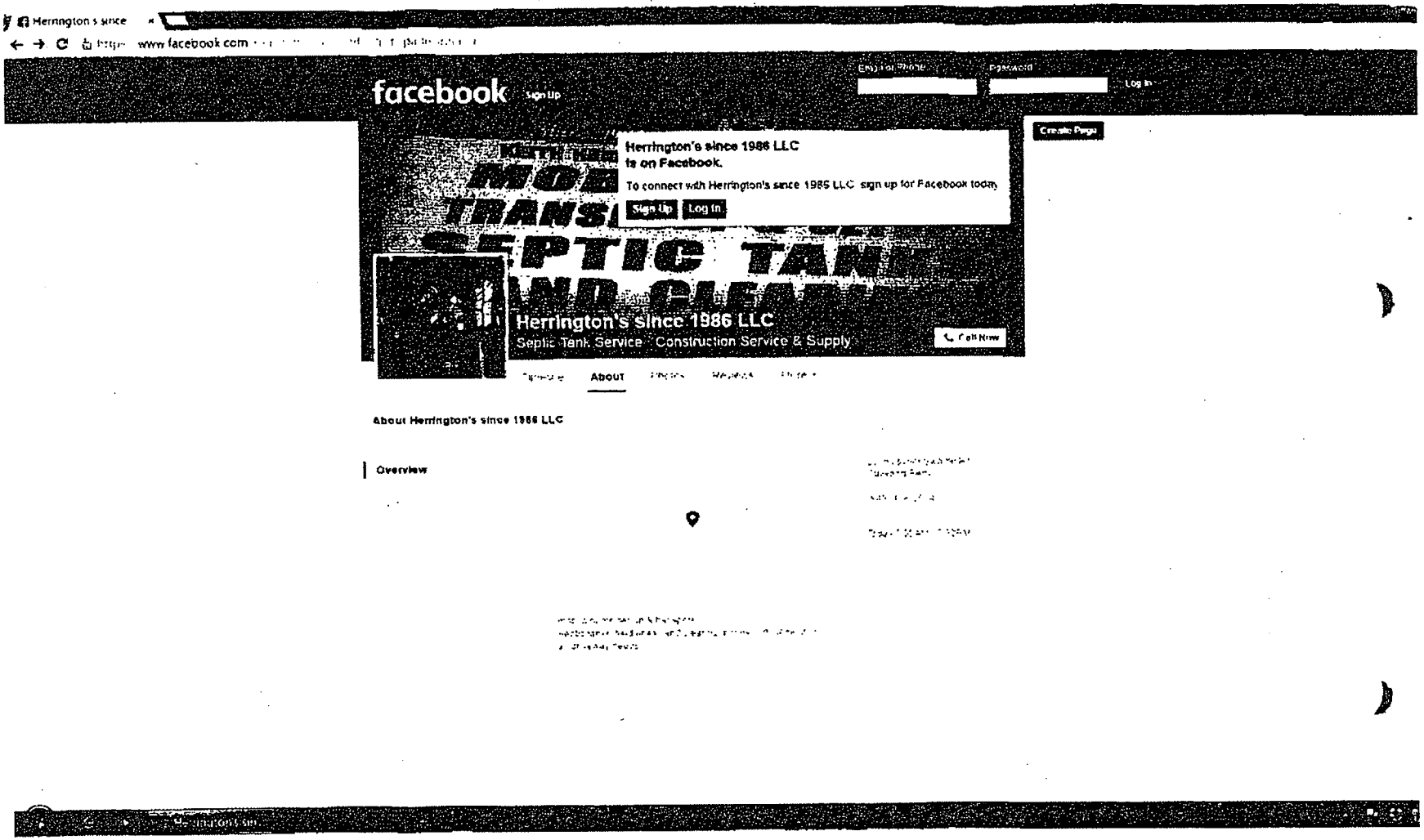
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Septic Tank Service · Construction Service & Supply
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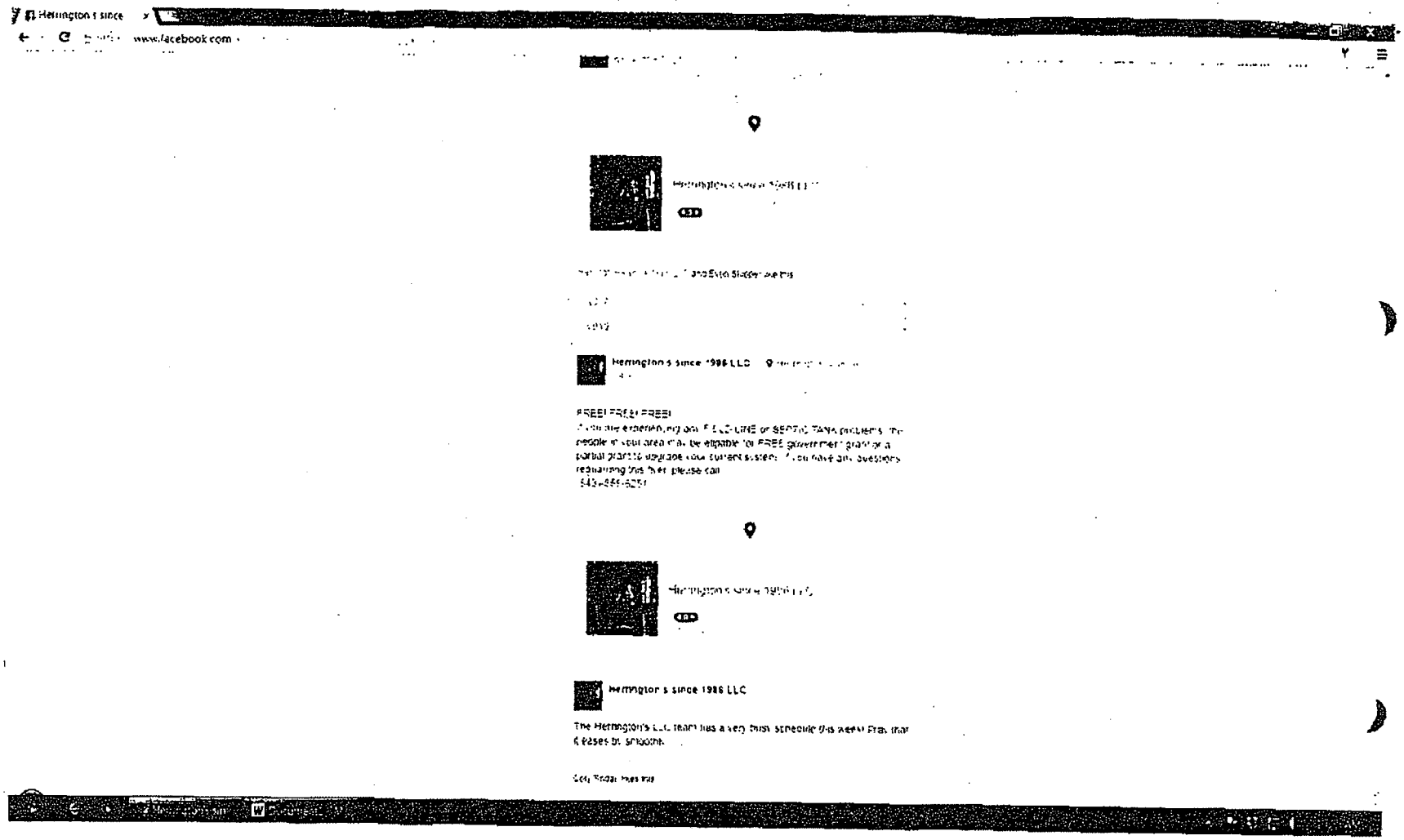
About
About Herrington's since 1986 LLC
Overview

2014-CP-22-00280

Exhibit B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FREE! FREE! FREE!
Herrington's since 1986 LLC
The Herrington's LLC team has a very busy schedule this week! Pray that it goes by smooth.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	C/A NO. 2014-CP-22-00280
Ernest Bliey,	)	
Plaintiff,	)	**PROPOSED DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO RECONSIDER**
vs.	)	
Linda Robinson and Herrington's, LLC	)	
Defendants.	)	

FILED
GEORGETOWN COUNTY, S.C.
2016 APR 28 AM 9:02
ALMA Y. WHITE
CLERK OF COURT

Roger Dale Herrington, d/b/a Herrington's Construction, LLC and Herrington's (collectively, the "proposed Defendants"), by and through the undersigned legal counsel, hereby files this Response in Opposition of Plaintiff's Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Specifically, the proposed Defendants assert that Plaintiff lacks legal justification for the relief requested.

BACKGROUND

Plaintiff Ernest Bliey ("Plaintiff"), represented by David J. Miller, Esq., filed suit against Defendant Linda Robinson and "Herrington's, LLC," on March 28, 2014.[1] The alleged events giving rise to this lawsuit occurred on or about December 18, 2011. Comp. ¶ 5. Plaintiff claims that while visiting his girlfriend, Defendant Robinson, at her home, he was injured when he fell into a hole proximately caused by work performed by "Herrington's, LLC." Id.

A default judgment in the amount of one hundred seventy five thousand ($175,000.00) dollars was entered against "Herrington's, LLC." Plaintiff's then filed a Motion to Correct

[1] Presently, William Saltzman, Esq. of Merritt, Webb, Wilson & Caruso, PLLC represents Plaintiff.

Clerical Mistake on October 15, 2015, and Motion to Vacate Relief from Judgment or Order, filed on November 17, 2015. This Court held a consolidated hearing for these Motions on February 25, 2016. The Court denied Plaintiff's requests for relief in an Order filed on April 8, 2016 (hereinafter, "Order"). This matter is now before the Court on Plaintiff's Motion to Alter or Amend Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.[2]

STATEMENT OF LAW

A motion to alter or amend judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure is a vehicle by which a party may request the court to alter or amend its previous decision. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 21–22, 602 S.E.2d 772, 778–79 (2004). The purpose of Rule 59(e) is to request the judge to reconsider matters properly encompassed in its previous decision Id.; See, e.g., Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Indeed, a Rule 59(e) Motion is used to request the court address and to preserve for appeal an issue that was previously raised but not ruled upon by the court. Talley v. S.C. Higher Educ. Tuition Grants Comm. 289 S.C. 483, 347 S.E.d2d 99 (1986); Nelums v. Cousins, 304 S.C. 306, 403 S.E.2d 681 (Ct. App. 1991); TRIAL HANDBOOK FOR SOUTH CAROLINA LAWYERS § 36:5.

A party may also file a 59(e) motion when the court rules upon an issue that was not raised by the party. See Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) (when the appellant receives an order that the respondent would be granted certain relief not previously raised, the appellant must move, pursuant to Rule 59(e) to alter or amend the judgment to "preserve the record for appeal."); TRIAL HANDBOOK FOR SOUTH CAROLINA LAWYERS § 36:5 ("The reason is that if the party injured by the ruling makes the

[2] The Proposed Defendants do not object to the Court amending its Order to correct the clerical errors referenced in Paragraphs 1–4 of Plaintiff's Supplemental Motion to Alter or Amend Judgment, dated April 20, 2016.

motion, the trial court may agree and change the ruling, obviating the need to appeal."). However, a party cannot use a 59(e) motion to present an issue he could have raised prior to judgment but did not. Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994).

DISCUSSION

The Proposed Defendants respectfully request this Court deny Plaintiff's Motion to Reconsider.

Plaintiff initially requests that this Court reconsider its decision that Plaintiff was not entitled to relief under its Motions to Correct Clerical Mistake and Vacate Judgment . Motion to Alter or Amend, March 17, 2016. In support of Plaintiff's position, he cites issues previously argued, which the Court addressed in its Order. Because Plaintiff previously raised these arguments and the Court addressed them in its Order, this request is improper and the Court should deny the request relief.

Subsequently, Plaintiff provided a Supplemental Motion to Alter or Amend Judgment, dated April 20, 2016. In further support of Plaintiff's Motion to Alter or Amend, he takes exception with four parts of the Court's Order.

First, Plaintiff asserts the Court took his inability to articulate the individuals against whom Plaintiff wished to attach the judgment out of context. Supplemental Motion, ¶ 1. In doing so, Plaintiff asserts that "[he] had no way of knowing who the individual Defendants were unless Herrington's provided the names voluntarily or through discovery." Id. However, in the next sentence Plaintiff states that "after further investigation" Plaintiff believes that a Keith Herrington, an alleged relative of Roger Dale Herrington, is an owner of Herrington's Since 1986, LLC. Id. In support of this assertion, Plaintiff offers inadmissible screenshots from a

Facebook page. These screenshots are allegedly of posts dated February 9, 2015—a year prior to the consolidated hearing on Plaintiff's motions and prior to the entry of default against Herrington's, LLC. This "factual evidence" was available to Plaintiff prior to the Court's consolidated hearing but was not previously raised. As such, this "factual evidence" is not properly before the Court.

Plaintiff then asserts that the Court should reconsider its decision that "Herrington's, LLC" was not a trade name used by the proposed defendants. In support of this request, Plaintiff attempts to present new, inadmissible evidence in the form of additional Facebook posts from Herrington's since 1986, LLC. Id. at ¶ 2. Again, this "factual evidence" is not properly before the Court and should not be considered as it was available to Plaintiff prior to the hearing but not presented to the Court.

In addition to improperly raising arguments not previously litigated before this Court, Plaintiff's Supplemental Motion also attempts to re-litigate issues that the Court addressed in its Order. As stated previously, a Rule 59(e) motion is improper if a party merely raises a disagreement with the Court's decision. Indeed, a mere disagreement with the court's decision regarding a party's argument is matter for the court of appeals. Therefore, any attempt to re-litigate matters addressed by the Court's Order is improper and should not be considered by the Court.

Finally, Plaintiff—for the first time—asserts that the proposed Defendants do not have standing to object to his Motion to Vacate. Id. at p. 3. The case law establishes, however, that a party cannot use a Rule 59(e) motion to present an issue he could have raised prior to judgment but did not. Anderson, 313 S.C. 497, 443 S.E.2d 399. As such, the proposed Defendants assert

that Plaintiff waived any objection on the issue of standing by not raising this matter prior to entry of the Order.

CONCLUSION

The proposed Defendants, for the foregoing reasons and those advanced during the hearings on this matter, respectfully request the Court deny Plaintiff's requested relief. Specifically, the proposed Defendants assert that Plaintiff's argument lacks legal justification and improperly attempts to raise new issues not previously before the Court.

WILLCOX, BUYCK & WILLIAMS, P.A.

BY: _____

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ATTORNEYS FOR PROPOSED DEFENDANTS

APRIL 27, 2016.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2014-CP-22-280

Ernest Bliey,

Plaintiff,

vs.

Linda Robinson, et al.,

Defendants.

Transcript of Record

February 25, 2016

B E F O R E:

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S:

William M. Saltzman, Esquire
Attorney for Plaintiff

Alexander S. Hogsette, Esquire
Attorney for Defendants

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

(There were no exhibits marked during the hearing.)

(On the record, February 25, 2016.)

THE COURT: All right. Next is 2014-CP-22-280. This is Ernest B-L-I-E-Y versus Linda Robinson and Herringtons, LLC. According to my roster the matter is before the Court on a motion to correct a clerical mistake and a motion to vacate judgment. All right. Please give the court reporter your names and who you represent.

MR. SALTZMAN: Yes, Your Honor. My name is William Saltzman, and I represent the Plaintiff Ernest Bliey.

MR. HOGSETTE: And Your Honor, my name is Alexander Hogsette, and I represent the proposed Defendants that Mr. Saltzman has named in his motion to correct and in his motion to vacate.

THE COURT: All right. Well, then I guess we need to hear I guess it would be the Plaintiff's motion first; is that correct?

MR. SALTZMAN: Your Honor, they're, they're both the Plaintiff's motion. There's a lot of overlap with these two motions. I don't know if you want to hear them simultaneously or do them separate, whatever your preference.

THE COURT: I don't know. You all tell -- I don't even know what the case is about or what you're asking. So go ahead and let me hear from you.

MR. SALTZMAN: Yes, Your Honor, may it, may it please the Court? To give some of the background of this case, the

Plaintiff, Ernest Bliey, was visiting the house of Defendant, Linda Robinson. He was walking around her backyard, and he essentially fell into a hole in the backyard that was created by a septic tank company, which is the Defendant in this case. In doing so, he suffered serious bodily injury, and upon having that bodily injury, he hired my law firm that I work for, the Law Office of Merritt, Webb, Wilson and Caruso. His attorney on that case was David Miller. David Miller, formerly of my office, he did his investigation, tried to research to see who the septic tank company was that had placed that, that hole in the, in, in the place for the purpose of filing a lawsuit for premises liability and negligence. The only real evidence that we had of the name of it, of this company was through a check that Defendant Robinson had provided the Plaintiff, and I believe we'd submit that to the court by way of an exhibit in our motion. The check was made out to a business called Herringtons. It was then endorsed by a Dale Herrington. So upon that information, Mr. Miller proceeded to draft the summons and complaint when in doing so he mistakenly named Herringtons LLC as the, as the -- as a Defendant in this case. Apparently this septic tank business went by numerous names and by the names of Herringtons Construction, Herringtons Construction and Septic Tanks, Herringtons, Herringtons LLC. There was numerous names and there was also really no -- nothing definite as far as who

the owners of this business were. I mean, we're of the belief that it was Dale Herrington who come to find out has multiple aliases as well. He goes by Roger Herrington, Dale Roger Herrington, Dale Herrington, Sr., Dale Herrington, I. So based on this information that Mr. Miller had he filed the summons and complaint and named Herringtons LLC as the Defendant and he -- and Mr. Dale or Roger Dale Herrington was served the summons and complaint by personal service which he accepted. Mr. Herrington then did not file an answer, did not say whether or not there was any proper party that was or whether it was the proper party or improper party named. He just simply ignored the lawsuit, upon which the Plaintiff filed the motion for default judgment, which was eventually granted and that was -- and to back up a little bit, the summons and complaint was filed back in -- it was the spring of 2014, service was done, I believe, in late April 2014, actually it was April 22nd, 2014, and the default judgment was entered September 9th, 2015. There was never any objections from, from Mr. Herrington or this or his septic, septic tank business until we filed these motions, and in our motions we're asking to -- the court to correct the clerical mistake that was done in the order in naming the -- this Herringtons LLC, rather we -- the Plaintiff's asking that the, that the complaint read or have the judgment read default entered -- default judgment entered against whatever these numerous

Defendant's companies are such as --

THE COURT: Well, I mean, you got to tell me what you're asking for. What is it --

MR. SALTZMAN: Okay. Well, it's --

THE COURT: If you're saying it's a clerical mistake, what does it say and what was the clerical mistake?

MR. SALTZMAN: And that it was -- that Herringtons LLC was named as the Defendant rather upon further review Herringtons LLC is not a -- an organization through the Secretary of State and that --

THE COURT: So he named Herringtons LLC without confirming that it was an incorporated business with the Secretary of State?

MR. SALTZMAN: Of -- apparently that's what Mr. Miller did, but at the same time the Defendant was using multiple business names and actually the Defendant had filed lawsuits in Horry County under the name of Herringtons Construction LLC. So they -- the business was holding itself out as an LLC to the general public.

THE COURT: Okay.

MR. SALTZMAN: So really what we're asking as far as the clerical error or clerical mistake is concerned is that we have the, the order amended to have the proper Defendants named in that order, have the judgment --

THE COURT: What are those? What are the proper named

Defendants?

MR. SALTZMAN: The proper named Defendants and there's multiple aliases here. So there is Herringtons Construction, Herringtons Construction Septic Tank and Land Cleaning, Herringtons Septic Tank and Land -- I'm sorry, Herringtons Septic Tank and Land Cleaning, Herringtons, and Herringtons Construction LLC as well as any of its owners and the only one that we have any reason to believe is the owner is, is Mr. Roger Herrington, and any other business owners that would be part of, of the business.

THE COURT: All right.

MR. SALTZMAN: So that's, that's just part of it, Your Honor.

On top of that, as, as an alternative remedy if, if, you know, if we can't get the order corrected to have the proper Defendants named then we would ask for -- to have the, the judgment vacated and return the case to its status quo ante where essentially we get those proper Defendants named, and having those proper Defendants named then Mr. Herrington or his business they'll be able to, you know, just more, more or less we'll hit the reset button on the case and, and start over from the beginning and of course have any statute of limitations tolled against those parties.

THE COURT: All right.

MR. SALTZMAN: So that, that's the other issue there.

Oh, as far as the other Defendant, we also have reason to believe that during in 2015 then Mr. Herrington did finally create an LLC with the South Carolina Secretary of State's Office. I think it goes by the name of, I think it's Herringtons Construction of 1986 LLC. So we believe he may have transferred some assets around.

THE COURT: All right. Thank you.

MR. SALTZMAN: So and that's basically the, the reason why we're, we're asking for, you know, the clerical mistakes to be corrected or the order to be vacated. It's mostly because the mistake was done by Mr. Miller from our office in naming Herringtons LLC rather than all of these other aliases or trade names and, you know, as far as the -- as well as to have the, the motion or have the order vacated, have it done because of the -- any fraud or deception that was done by the Defendants here by failing to abate any mistake. There was no answer that was done that would have corrected the issue. Discover -- discovery was never done which would have corrected the issue.

THE COURT: I mean, did you all ever serve any discovery on the Defendant?

MR. SALTZMAN: No discovery was served because no answer was ever given.

THE COURT: Okay. All right.

MR. SALTZMAN: All right. Thank you, Your Honor.

THE COURT: All right. Mr. Hogsette.

MR. HOGSETTE: Thank you, Your Honor, and I'll, I'll take these motions, if it pleases the court, in the order in which Mr. Saltzman has presented them. That would be starting with the motion to correct a clerical mistake, Your Honor, the, the court has been fairly clear about this. A clerical error is a mistake or an omission by a clerk, counsel, judge or printer that is not the result or exercise of a judicial function. Your Honor, we would point out as it appeared Your Honor intimated in his questioning earlier that this was not a mistake. This was not we misspelled Herringtons or we misspelled LLC. It appears that Mr. Miller named Herringtons LLC with no justification. As they said, they had a check, Your Honor, that was made out to Herringtons. They had it endorsed by a Dale Herrington. They did not name Dale Herrington. They did not name Herringtons. They assumed that that was an LLC. In the complaint they actually say that Herringtons LLC is a duly organized business under the Secretary of State of South Carolina. A search on the South Carolina State's -- Secretary of State's website shows that Herringtons LLC according to their records has never been a legal entity in the State of South Carolina. So Your Honor, we would assert this is not a mistake. The Plaintiff had the burden of doing the research and naming the party, and they just appeared to take a shortcut and add LLC to the back of

Herringtons without going to the Secretary of State's website and actually looking up any of that information. Your Honor, if they had, they would have probably seen that Herringtons Construction or Herringtons LLC is not a business. Your Honor, again, or as a second point --

THE COURT: But I mean, so you're saying they just made it up, that Roger Herrington never said his business was Herrington LLC?

MR. HOGSETTE: The Plaintiff has offered no evidence that Herringtons LLC was ever a business name operated by Dale Herrington, Roger Dale Herrington or his sons that he did business with. What we have here is that and I, and I honestly I don't know what Mr. Miller was doing. Again, this, I know this was not Mr. Saltzman that drafted the complaint, but I see no evidence of a Herringtons LLC or a reason to name a Herringtons LLC. There are other businesses incorporated under the Secretary Of State's website that include the name Herringtons that seem to be involved in some kind of construction that are not associated with my client, Your Honor, or the proposed Defendants. Those businesses are in Georgetown and Horry County. This is not a business that's in Greenville or something like that. Your Honor, I'd also like to point out that the rule also says that when you're going to correct a clerical mistake it cannot be done to expand the, the scope of the judgment, and Your Honor, we would argue that

this absolutely expands the scope of the judgment. In the initial complaint in which they drafted, they went after what they thought was a business, an LLC knowing Dale Herrington potentially could have been a party. They chose not to sue the individual. They chose just to sue an LLC. Now they're asking the court according to it -- according to their motion to change Herringtons LLC to Herringtons Construction, Herringtons Construction Septic Tank and Land Cleaning, Herringtons Septic Tank and Land Cleaning, a/k Herringtons, its owners, in their individual capacity to -- also in their individual capacity to include Roger Herrington, Roger D. Herrington, Sr., Roger D. Herrington, Dale Herrington, Dale R. Herrington. Your Honor, when the judge entered a default judgment in this case against an LLC I can presume that he didn't think he was issuing a judgment of $175,000 against an individual. Now the Plaintiff is asking to name an individual. They're asking to go after other unknown people. So they're asking potentially to name spouses or business partners that never got notice of this lawsuit, Your Honor. So we would think that that is a great expansion of the scope of this judgment, LLC, now a bunch of different business, Roger Herrington, my client and other potential people as well, Your Honor, and they're asking that to be a judgment. They're not asking that to go back to the status quo ante on that. They want $175,000 against people that have no idea

about this lawsuit.

Your Honor, as for the second motion, the motion to vacate, he asks that you vacate it for a mistake. The, the law in Coleman versus Dunlap which is in our brief, Your Honor, 306 S.C. 91 a Supreme Court case from '92, a party must make a showing that failure to avoid the mistake was justified, and again, this goes back to what I said in our last, in our last response, Your Honor, that the mistake here we don't believe was justified. The mistake they're claiming wasn't justified. A search of the Secretary of State's website would have shown that Herringtons LLC has not been and to this day is not an LLC duly organized under the State of South Carolina. What they would have found potentially is other businesses in which Mr. Herrington was involved in, and they could have named the right party. As Mr. Saltzman points out he, he tries to put this on the Defendant and his duty, but Your Honor, there's also duty that the Plaintiff has in doing the research and naming the right party. This was not a case in which this was the midnight hour and the statute of limitations was about to run. They still had several months prior to the statute of limitations running in which they could have done more research, Your Honor. Instead it seems that Mr. Miller just fabricated a LLC based off a check that they had. Additionally, Your Honor, they say that no discovery was done in this case, Your Honor, but according to

them they had a check from the other Co-Defendant that had Herringtons, that had Dale Herrington on it. They simply could have named those people in the complaint and they did not. Again, Your Honor, he says that fraud and misrepresentation should be a reason to vacate. The case law that we cited in our memorandum, Your Honor, says that it's well established that a party may not prevail on this type of motion on the basis of fraud where he or she has access to the disputed information or has knowledge of inaccuracies in the opponent's representations at the time of the alleged misconduct. Prior to filing their lawsuit, they had a check, they had knowledge of who was the right party to sue or they could have least named Dale Herrington. They affirmatively chose not to, Your Honor, and that's why we ask that you deny the motions and the relief requested.

THE COURT: All right.

MR. HOGSETTE: Thank you.

THE COURT: Anything in reply?

MR. SALTZMAN: Yes, Your Honor. As far as expanding the scope of the judgment, Defendants claim that by amending or correcting the order to name these other parties would expand the scope of the judgment that's, it's not really expanding the scope of the judgment. These are the parties that would have been responsible either way. I mean, what the Defendants are trying to do here is to try to play on a mere technicality

where for example if the word LLC was not used in, in the complaint then, then we would have been able or the Plaintiff would have been able to, to get this judgment against that business entity, again, and against its owners, and it cites some case law. There's the, the case of Tri-County Ice and Fuel Company versus Palmetto Ice Company, and one, one of the rules that was set forth in that case it states that where a party is served by a wrong name, and the writ is served on the party intended to be served and he fails to appear and plead the misnomer, I'm sorry, misnomer in abatement, and suffers judgment to be obtained by default against him in the erroneous name, he is concluded, and execution may be issued on the judgment in that name and levied upon the property and effects of the real Defendant. In that case of Tri-County Ice simply the wrong business name was, was named, it was a different trade name, they had been operating under a different or the -- there was a -- I think there was some other higher up company that owned the subsidiary, the wrong business name was named and the court wound up amending the order and get the -- and they had the proper party named on that judgment, and the -- in that case, just like the case here, the main representative of that party was served and that party just sat on their hands, didn't do anything to, to file an answer, didn't do anything about the case, just, just like the case here. So for that reason --

THE COURT: But I mean, if you had named Herringtons Construction, whatever, named the proper party, you're saying he still would have gone into default?

MR. SALTZMAN: At that point, I mean, I, I can't really say. I don't, I don't even know for sure when we got an answer from Mr. Herrington as to why he just sat on his hands and did not answer the complaint. From the best we can probably guess is he saw that, "Oh, I don't have an LLC. So they named the wrong party. I'm just going to let this slide and this'll go away, they got the wrong party," rather than abating the issue here, pointing out, "Hey, this isn't the proper name or, you know, this is improper service," and he, he must have known what this, what this action was about. This is a property in which his company did business for. So for him to merely kind of sit idly by in hopes of, you know, having a judgment being entered against some non-entity or some business that doesn't have any assets to collect on, you know, he's more or less shirking his responsibilities to his business and, and himself or any of his business owners. This is something that easily could have been addressed. He could have contacted the Plaintiff's attorney. He could have even contacted the court and just simply said, "Yeah. This is -- you got the wrong person," but rather just sat idly by, did nothing, and for that reason the Defendants here, Mr. Herrington, Herringtons Construction, they shouldn't be able

to simply get by on this technicality and avoid this judgment that was brought against him when they easily could have rectified the situation very early in this, Your Honor. Thank you.

THE COURT: All right.

MR. HOGSETTE: Very briefly, Your Honor.

THE COURT: All right.

MR. HOGSETTE: The reasons why this case is dissimilar from the case cited by Plaintiff's counsel is, one, in that Tri-County case, Tri-County named a trade name used by the Defendant. Here they did not use a trade name used by the Defendant or they have not produced any evidence of that. Second, in that case it narrowed the scope of the judgment. It went from a doing business as to an LLC. So it went from all the, the Defendants owners potentially being liable individually, their own assets, their extra cars, extra land, all that kind of stuff to just the assets of the LLC. So it narrowed the scope, and third, the court was very clear in pointing out that in that case there was nothing that the Plaintiff did wrong. There was no way the court said that they could have figured out who the proper party was to name. In this case, Your Honor, we don't have that. We have clear evidence that they've admitted to that they had a check that had the right parties they could have named, but they didn't. Again, Your Honor, we argue that there's a duty on the

Plaintiff in this case to do their research and to figure out who it was. This was not a mistake. This was not fraud on behalf of our client, and this would greatly expand the scope of the judgment, and for those reasons we'd ask that you deny their motions. Thank you.

THE COURT: All right.

All right. Mr. Saltzman, I am going to deny your motions. I think it does expand the judgment. I definitely don't think that you're entitled to substitute them as a clerical mistake. This is not a clerical mistake. If it was a motion to substitute parties I don't -- the problem I'm having is I don't even know who you want to substitute. I don't even know the names of the parties you're wanting to name as Defendants. I know you've gone down a list, but then you said as well as any members, shareholders, individuals and things like that. So I don't even know who you're wanting to substitute. So I'm going to deny both motions. All right.

MR. SALTZMAN: Thank you, Your Honor.

THE COURT: All right.

MR. HOGSETTE: I assume you want me to draft the motion, Your Honor, and send it to opposing counsel and to the court?

THE COURT: Well, I, I was just going to do a Form 4 unless --

MR. HOGSETTE: Fair enough. That's fine with me, Your Honor.

THE COURT: -- unless you want a formal order. Do you want a formal order?

MR. SALTZMAN: Yes, please, Your Honor.

THE COURT: All right. Mr. Hogsette, if you would prepare a formal order.

MR. HOGSETTE: Yes, Your Honor.

THE COURT: Let me think about this now on the -- but -- on the motion to vacate the judgment you've got a judgment against a non-entity. So it's a void judgment, but if I vacate the judgment -- the statute of limitations has already run; right?

MR. SALTZMAN: That's our belief, Your Honor.

THE COURT: Okay.

MR. HOGSETTE: Yes, Your Honor.

MR. SALTZMAN: Your Honor, if I may, that's why we're asking to bring the case back to the status quo ante and just have the property parties. I mean, the proper parties are already noticed of the case. It's just simply the name of the party would just need to be changed.

THE COURT: Well, you don't even tell me who the parties are.

MR. SALTZMAN: Well, that's kind of been the problem since day one, Your Honor.

THE COURT: Yeah, and so I can't do that. Just put it denying both motions.

MR. SALTZMAN: But I mean, we --
THE COURT: Okay. No. This has been --
MR. HOGSETTE: Thank you, Your Honor.
MR. SALTZMAN: -- Your Honor, what we'd ask is --
THE COURT: -- been -- the accident occurred, what, seven years ago, six years ago?
MR. SALTZMAN: 2000 -- December 2011.
THE COURT: Okay. So four, over four years ago, and you say you still don't know who the -- all the parties are. So I'm going to deny the motions. All right.
MR. SALTZMAN: Your Honor, Your Honor, it, it would be Herringtons Construction as a they're either a partnership or sole proprietorship. That would simply be the name. They used so many different trade names.
THE COURT: Well, I mean, you can't wait four and a half years and after you get a default judgment and then say we want to substitute these parties but we're still not sure who all of them are. So I'm just going to deny the motions.
MR. SALTZMAN: All right.
THE COURT: If you'd prepare the order.
MR. HOGSETTE: Yes, Your Honor.
MR. SALTZMAN: Thank you, Your Honor.
THE COURT: All right. Thank you.
(Adjourned.)

C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the Hearing held in the case of Ernest Bliey versus Linda Robinson, et al., held in the Court of Common Pleas for Georgetown County, Georgetown County Courthouse, Georgetown, South Carolina, on February 25, 2016.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Grace L. Hurley

Grace L. Hurley, CVR-CM-M
Official Reporter

August 4, 2016.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF GEORGETOWN) 2014-CP-22-280

Ernest Bliey,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	April 28, 2016
	)	
Linda Robinson, et al.,	)	
	)	
Defendants.	)	

B E F O R E:

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

A P P E A R A N C E S:

William M. Saltzman, Esquire
Attorney for Plaintiff

Alexander S. Hogsette, Esquire
Attorney for Defendants

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

(There were no exhibits marked during the hearing.)

(On the record, April 28, 2016.)

THE COURT: All right. Next is 2014-280. All right. This is 2014-CP-22-280, Ernest Bliey versus Linda Robinson and Herrington LLC. According to my roster the matter is before the court on a Motion to Alter or Amend Judgment. Please give the court reporter your names and who you represent.

MR. SALTZMAN: Yes, Your Honor. My name is Attorney William Saltzman. I represent the Plaintiff, Mr. Ernest Bliey.

MR. HOGSETTE: And I am Alexander Hogsette here on behalf of the proposed Defendants.

THE COURT: All right. And this is Plaintiff's motion?

MR. SALTZMAN: Yes, Your Honor.

THE COURT: All right. Let me hear from you then, Mr. Saltzman.

MR. SALTZMAN: All right. Good morning, Your Honor. We're here today to ask that you reconsider a recent denial of two motions that we made. One was a motion to correct an order from September -- from 2015 that was entered or as an alternative measure to vacate that same judgment. In the motion to correct we had asked you to -- if we could correct the order in order to show the proper Defendants that we believed should have been in the order, the names -- the Defendant that was named was Herringtons LLC. However, we, we requested that it be corrected to show the proper Defendants

in this case, which was a Mr. Roger Dale Herrington, Herringtons, Herringtons Since 1986 LLC, Herringtons Construction, multiple aliases that the proposed Defendants used, and the motion to vacate we ask that as an alternative measure. If you weren't going to grant the motion to correct, see if we could vacate the order and have us -- bring us back to the status quo ante on the case in order for us to amend the pleadings and get those right parties named to the case.

Some of the background of the case is the, the lawsuit was brought in 2014 for a personal injury that occurred back in December 2011 where the Plaintiff was on his girlfriend's property. He fell into a hole that allegedly was created by the Defense in this, by the proposed Defendants that is. Lawsuit was brought. Attorney David Miller from my office is the one that prepared the pleadings. He apparently made a mistake in naming Herringtons LLC rather than also naming all these other aliases which at that time were not apparently known to Mr. Miller. Then after that the proposed Defendant here and the lawsuit was served on a Mr. Dale Herrington who was believed to be the agent of this septic tank company. There was no -- no answer was made. There was no, no response whatsoever. A default judgment was subsequently ordered and this past year order was issued in September 2015 granting $175,000 judgment against Herringtons LLC. Then after the fact, we realized that there was some other names that was

being used by the Defendants which we believe were used as a way to try to put up a smoke screen to try to avoid any potential lawsuits, judgments, just to pretty much use whatever name that they wanted as they saw fit. Ultimately you, you had denied our motions to correct and denied the motions to, to vacate. So now we've brought this motion to alter or amend that order. Now we're asking you to, to reconsider first with the, the issue of correcting the, the clerical mistake. We're asking the court today for you to reconsider the finding that there was no clerical mistake in naming Herringtons LLC as a Defendant. This apparently was an oversight by Mr. Miller. There was a lot of --

THE COURT: That's -- and I, I recall that. It was a -- it was a -- it wasn't a clerical mistake. He just misidentified a party altogether. He said it was a limited liability corporation under the name of Herringtons LLC and as I understand there is no Herringtons LLC. I mean, I think, you know, if -- what, what is the clerical mistake? Clerical mistake means that it's a scrivener's error.

MR. SALTZMAN: Okay. Either he, he had meant to just put, I guess either Herringtons that was the evidence that he had at the time. There was a check that was written out to Herringtons by -- that's really only the evidence that we had of, of Herringtons being involved in digging this hole is a check was written by the Plaintiff's girlfriend made out to

Herringtons. We just pretty much --

THE COURT: Where did LLC come from?

MR. SALTZMAN: Well, the -- actually we, we did a little further digging and there was -- there's a Facebook page that's used by Herringtons Since 1986 LLC and dating back to 2012 there's actually use of the, of the trade name Herringtons LLC in that Facebook page. So I can't exactly say what Mr. Miller was thinking at the time. I guess there is a possibility that he had gone by, by that Facebook page or he was just simply mistaken in, in using the word LLC.

THE COURT: But I mean he never checked with the Secretary of State as to whether or not it was a registered corporation or anything or do you know?

MR. SALTZMAN: I believe the name may have been reserved. I don't believe it was actually issued as an LLC.

THE COURT: Okay. All right. Anything further?

MR. SALTZMAN: Also, Your Honor, to consider the motion to vacate and the motion to vacate -- beg the court's indulgence one moment -- it's asking you to, to reconsider a finding that there was really no, no fraud in this either. Mr. Herrington, who would have, after seeing the pleadings would have known exactly which type of -- where the property was. He, he did the job himself or had -- at least had some of his agents do the job. I mean, by reading the pleadings he would have known exactly who, who the intended party was. He

didn't do anything to try to abate any type of mistakes.

THE COURT: Does he have to?

MR. SALTZMAN: I'm sorry?

THE COURT: I mean, does he have to do that? He got served with pleadings that names Herringtons LLC as a Defendant, and it's -- the allegation is that the Defendant Herrington LLC is a corporation organized and existing pursuant to the laws of the State of South Carolina and doing business in South Carolina. So if he's -- I mean, what, what obligation does he have to come to the Plaintiff and say, "Look, I'm not an LLC. I'm an individual. You need to sue me individually rather than suing this corporation that doesn't even exist"?

MR. SALTZMAN: Your Honor, he at least could have given us the courtesy of letting us know, "Hey, you've got the wrong party. Go look for someone else that you're -- who the intended party is." I mean, he was still served with, with the pleadings and took no further action, and furthermore he, he has admitted that he was operating a company called Herringtons Construction LLC without having an LLC registered with the, with the South Carolina Secretary of State. He's even filed lawsuits under the name Herringtons Construction LLC so.

THE COURT: So who do you think -- who, who should be the proper party? What's, what is the proper Defendant?

MR. SALTZMAN: The proper Defendant would be Herringtons Construction LLC, Herringtons -- they -- since the lawsuit was filed, I believe, in 2015, they start -- they then started a new entity called Herringtons Since 1986 LLC. We believe that could be just a new name that this company is going by now. I also believe I think it's a Keith Herrington which I believe is a relative of Mr. Roger Dale Herrington. I believe he's the owner operator as evidenced by a Facebook page of theirs.

THE COURT: All right. Anything further?

MR. SALTZMAN: One moment, please. Oh, yes, as far as the -- furthermore, for the motion to vacate we're also asking that this court, that this court take into account that in order to contest a motion to vacate they need to have standing to do so. The proposed Defendants technically right now are not parties to the suit. So for that reason they should not even be allowed to contest the motion to vacate.

THE COURT: All right.

MR. SALTZMAN: Thank you.

THE COURT: All right. Mr. Hogsette, let me hear from you.

MR. HOGSETTE: Thank you, Your Honor. As you know, we're here under Rule 59(e) of the South Carolina Rules of Civil Procedure. Rule 59(e) is entitled motion to alter or amend. Now, commonly I think the Supreme Court has noted that

commonly that is referred to also as a motion to reconsider, but the purpose of Rule 59(e) is to take up two issues that a party might have with a court's final judgment. The first one being that they raised an argument concerning an issue that the court ruled upon but didn't address that part of the argument, and what they're asking for as we saw earlier with Gene Connell's case here, Your Honor, they're asking that the court clear up for the record on appeal whether or not the court made a ruling on that part of the argument, if they think it's essential to that issue, they would just like the court to say whether or not the court considered that in coming up with their decision.

The other example of using a 59(e) would be when the court rules upon an issue that was never even raised by a party. Again, if the party had no idea that the court was going to rule that way because they never raised that argument it gives them a chance to object to that so that that is something they can appeal later on. A Rule 59(e) motion is not intended for the court to go back over and rehear the argument again, to give that Plaintiff or that party the proverbial second bite of the apple and that's what's happening here, Your Honor. The Plaintiff has submitted a motion to alter or amend and then a supplemental motion to alter or amend. Both, about 90 percent of both of those deal with arguments that were previously raised in this very

courtroom. Your Honor considered those arguments when he made the ruling. The order is extensive and it goes into in-depth discussions about that. Furthermore, your order states that you made your ruling considering all of the arguments made -- advanced during hearings as well as the case law and the briefs of the parties. So it is our position, Your Honor, that all of those arguments that the party previously raised at the hearing are not properly before you because you considered those in your ruling and you ruled against them. This is not something that he can bring up just because he disagrees with it. That's for the Court of Appeals. As for the, the new Facebook, inadmissible hearsay Facebook, this is not an evidentiary hearing. He doesn't, again, doesn't get to submit new evidence that he could have submitted the first time, Your Honor. The, the Facebook pages were apparently out there. He says that they did some more digging and they found some more people. This is the first time we've heard of a Keith Herrington. In his original motion to correct a clerical mistake I think it's important, Your Honor, that his proposed Defendants are Herringtons Construction, Herringtons Construction Septic Tank and Land Cleaning, Herringtons Septic Tank and Land Cleaning, Herringtons, its owners in their individual capacity to include Roger D. Herrington, Roger D. Herrington, Sr., Roger D. Herrington, I, Dale Herrington, Dale R. Herrington. Your Honor, again, I think you properly ruled

the first time that when looking at these proposed Defendants this was not a clerical mistake. As he admits they had the check with Roger -- Dale Herrington written on the back of it, and Herringtons on the front of it. They could have sued Herringtons. They could have sued Dale Herrington. Instead they made up a fictitious entity, Herringtons LLC, alleged that it was duly organized under the laws in the State of South Carolina, which it was not and it has never been. There is no even reservation of the name Herringtons LLC, and this is the first time we're hearing of the standing argument as well, Your Honor. So we believe that all of those are not properly before you. We request that -- respectfully request that you deny the motion for reconsideration on those grounds and on the grounds that are contained in our brief. Thank you, Your Honor.

THE COURT: All right. Anything in reply?

MR. SALTZMAN: Very brief, Your Honor. The, the case of Elam versus South Carolina Department of Transportation found that it's proper for a 59(e) motion where it's believed that the court has misunderstood or failed or failed to fully consider an argument. Really what our position is there might have been a misunderstanding or all the arguments weren't fully considered. Thank you.

THE COURT: All right. Thank you.

All right. I'm going to deny the motion for

reconsideration. I, I don't think this is a clerical error. I don't know where the information came from that says that it is a corporation organized and existing under the laws of the State of South Carolina and doing business in South Carolina, but that was what was pled and it -- it's not a clerical error where I can change that to about three or four different defense names also known as or aliases or individuals. I can't do that. So I'm going to deny the motion. All right.

MR. SALTZMAN: Thank you, Your Honor.

MR. HOGSETTE: Thank you, Your Honor.

THE COURT: Thank you.

MR. SALTZMAN: What about the motion to vacate?

THE COURT: Well, I mean, if you want me to vacate the judgment because there's no Herringtons LLC I can do that, but it's not going to -- you don't get a new trial. You're going to have to re-plead, re-serve, get the names of the Defendants that you want in the lawsuit and start over from scratch. I mean, you're not going to be able to proceed in this lawsuit, but I mean, I agree, you've got a judgment against, a default judgment against something that doesn't exist, but I agree, I mean, under -- I, I follow -- I do follow your argument where the judgment's not against them, so they don't have standing to oppose the motion to vacate. If you want me to vacate the judgment I'll vacate the judgment, but that'll be the end of the case. I don't know if you want to keep a judgment against

Herringtons LLC or just have the judgment vacated and case ended.

MR. SALTZMAN: Your Honor, as a head's up, if it was going to be vacated we would then bring a motion to, to amend the pleadings.

THE COURT: Yeah. Well, then, no, I'm not going to do that because -- I mean, you're going to have to re-serve -- I mean, if I vacate the judgment it'll just be because Herringtons LLC does not exist, there is no viable Defendant in this case, case over. You can re-file, re-serve or do whatever you want. I mean, as I understand what's happened here you sued what you thought was a corporations, it wasn't a corporation, you got a default judgment and then when you tried to collect on the default judgment you found out that there wasn't a corporation at all. Is that correct?

MR. SALTZMAN: That is correct, Your Honor.

THE COURT: Yeah. So I think you're going to have to go back, re-file, re-serve and start from ground one.

MR. SALTZMAN: Thank you, Your Honor.

THE COURT: All right. What do you want me to do with the judgment, leave it in place or vacate it?

MR. SALTZMAN: Well, I mean, if we vacate we ask that we put the case back to the status quo ante so we could serve the proper parties.

THE COURT: I'm not going to do that.

MR. SALTZMAN: Okay.

THE COURT: I'm just going to leave the -- I'll leave -- I'm going to deny the reconsideration. We'll just leave it in place and you can appeal that and they'll decide. That'll give you an issue on appeal. If I'm wrong I'm wrong, and they say I should have vacated it and let you amend your pleadings then that's what we'll do, but right now I'm just going to deny it. Okay.

MR. SALTZMAN: Fair enough. Thank you, Your Honor.

THE COURT: All right. Thank you.

(Adjourned.)

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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