

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Circuit Court

L. Casey Manning, Judge

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Case No. 2015-CP-40-05106  
Appellate Case No. 2016-002043

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**RECEIVED**

JUL 03 2017

**SC Court of Appeals**

Pearline Williams.....Respondent

v.

Larita Hipp and Michelle Masaryk..... Defendants,

Of Whom Michelle Masaryk is the.....Appellant.

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**FINAL BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

Table of Authorities.....ii

Statement of Issues on Appeal.....1

Statement of the Case.....1

Statement of the Facts.....3

Argument.....5

    I.    The Lower Court abused its discretion in denying Appellant’s Motion to Set  
        Aside Default Judgment.....6

    II.   The Lower Court abused its discretion in entering two different money  
        judgments against Appellant, causing prejudice to Appellant by choosing,  
        under the guise of *nunc pro tunc*, the greater of the two.....18

Conclusion.....21

Appendix A.....23

## TABLE OF AUTHORITIES

### Cases:

<i>Belle Hall Plantation Homeowner’s Association, Inc. v. Key</i> , Op. No. 002018 (S.C. Ct. App. Filed Feb. 8, 2017) (Shearouse Adv. Sh. No. 6 at 49.).....	14
<i>Brailsford v. Brailsford</i> , 380 S.C. 443, 669 S.E.2d 342 (Ct.App. 2008).....	20
<i>Bridges v. Wyandotte Worsted Co.</i> , 239 S.C. 37, 121 S.E.2d 300 (1961).....	6
<i>Caldwell v. Wiquist</i> , 402 S.C. 565, 741 S.E.2d 583 (Ct.App. 2013).....	6, 9, 10, 11, 12, 13, 14, 16
<i>Calvin Mem’l Corp. v. Requa</i> , 5 Cal.App.3d 345, 85 Cal.Rptr. 107 (1970).....	13
<i>Case v. Case</i> , 243 S.C. 447, 134 S.E.2d 394 (1994).....	20
<i>Centex Intern., Inc. v. South Carolina Dept. of Revenue</i> , 406 S.C. 132, 750 S.E.2d 65 (2013).....	8
<i>CFRE, L.L.C. v. Greenville County Assessor</i> , 395 S.C. 67, 716 S.E.2d 877 (2011).....	8
<i>Criterion v. Hoffman</i> , 258 S.C. 282, 188 S.E.2d 459 (1972).....	12
<i>Dion v. Ravenel, Eiserhardt Associates</i> , 316 S.C. 226, 449 S.E.2d 251 (Ct.App. 1994).....	19, 20
<i>Du Bose v. Du Bose</i> , 90 S.C. 87, 72 S.E. 645 (1991).....	13
<i>George v. Sullivan</i> , 909 F.2d 857 (6 <sup>th</sup> Cir. 1990).....	19
<i>Hamby v. Hamby</i> , 315 S.C. 518, 445 S.E.2d 656 (1994).....	10
<i>Hill v. Dotts</i> , 345 S.C. 304, 547 S.E.2d 894 (Ct.App.2001).....	6
<i>In re Kingsmore</i> , 295 B.R. 812, (S.C. Bnkruptcy 2002).....	10
<i>Ingle v. Whitlock</i> , 282 S.C. 391, 318 S.E.2d 367 (1984).....	17
<i>Jacob v. Roberts</i> , 223 U.S. 261, 32 S.Ct. 303, 56 L.Ed. 429 (1912) .....	16, 17
<i>Powers v. Powers</i> , 239 S.C. 423, 123 S.E.2d 646 (1962).....	9
<i>Ray v. Pilot Fire Ins. Co.</i> , 128 S.C. 323, 121 S.E. 779 (1924).....	13
<i>Riker v. Vaughn</i> , 23 S.C.187 (1885).....	12
<i>Seabrook Island Prop. Owners’ Ass’n v. Berger</i> , 365 S.C. 234, 616 S.E.2d 431 (Ct.App. 2005).....	6

<i>S.C. State Ports Auth. v. Jasper County</i> , 368 S.C.388, 629 S.E.2d 624 (2006).....	8
<i>Sloan v. Hardee</i> , 371 S.C. 495, 640 S.E.2d 457 (2007).....	7, 8
<i>Wehle v. South Carolina Retirement System</i> , 363 S.C. 394, 611 S.E.2d 240 (2005).....	9

Constitutions, Statutes and Rules:

U.S. Const. art. XIV.....	7, 16, 17, 18, 22
S.C. Const. art. I, § 3.....	7, 16, 17, 18, 22
S.C. Code Ann. § 15-9-710.....	6, 7, 8, 9, 10, 12, 16, 21
S.C. Code §15-9-740.....	7, 11
Rule 60(a), SCRCF.....	20
Rule 60(b)(4), SRCP.....	3

## STATEMENT OF ISSUES ON APPEAL

- I. THE LOWER COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT.
- A. The Lower Court, in three intertwined and connected ways, abused its discretion when it
- i. applied an erroneous legal and factual interpretation of S.C. Code Ann. § 15-9-710 not supported by the applicable common law precedent of *Caldwell v. Wiquist* and other state and federal appellate opinions, in violation of the doctrine of *stare decisis*;
  - ii. applied an erroneous legal interpretation of S.C. Code Ann. § 15-9-710 not supported by the plain, ordinary, and unambiguous text of the statute; and
  - iii. made factual conclusions not supported by admissible evidence and which prejudiced the Appellant.
- B. The Lower Court abused its discretion and thus violated Appellant's Constitutional due process rights when it failed to apply state and federal appellate opinions providing precedent for proper and meaningful service by publication, again in violation of doctrine of *stare decisis*.
- II. THE LOWER COURT ABUSED ITS DISCRETION IN ENTERING TWO DIFFERENT MONEY JUDGMENTS AGAINST APPELLANT, CAUSING PREJUDICE TO APPELLANT BY CHOOSING, UNDER THE GUISE OF *NUNC PRO TUNC*, THE GREATER OF THE TWO.

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

This is an appeal of the lower court's denial of Appellant's Motion to Set Aside a Default Judgment. Respondent Williams filed a Summons and Complaint in Richland County on August 20, 2015, alleging personal injury and property damage as a result of the alleged combined

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<sup>1</sup> Although this Statement of the Case does contain reference to ultimately "contested matters," the timeline and procedure of the matter is taken directly from the Richland County Court file. However, in not arguing the contested matters in this section, Appellant does not waive her exception to or appeal of any procedural matters detailed; the fact such procedural matters occurred does not, as argued, make them legally correct.

negligence of Appellant Masaryk and the co-defendant, Larita Hipp. (R.pp. 20-24.) Ms. Hipp is a not a party to this appeal, having settled with the Respondent early in the proceedings. (R.pp. 86, ll. 9-12; p. 91, ll. 8-12.) After filing her Summons and Complaint, Respondent engaged a private process server to attempt personal service on Appellant. On November 13, 2015, Respondent's attorney filed an Affidavit requesting service by publication. (R.p. 26) An Affidavit of Non-Service executed by the process server, which memorialized the attempt of personal service at Appellant's 1300 Longcreek Dr., Columbia, SC apartment, was filed September 8, 2015. (R.p. 25) An Order for Service by Publication was signed and filed by the Richland County Clerk of Court on November 13, 2015. (R.p. 3)

An Affidavit from the *Columbia Star* was filed December 15, 2015, stating the Notice of Summons filed in Respondent's action was published in the *Columbia Star* on November 27, December 4, and December 11, 2015. (R.p.27.) Thereafter, two almost identical Affidavits of Default were filed by the Respondent on February 26, 2016 and March 8, 2016. (R.p. 28; R.p. 29.) Orders of Default executed by the Court were filed on February 26, 2016 and March 8, 2016. (R.p. 4; R.p. 5.) These Orders were also almost identical.

Notice of the damages hearing was sent by certified mail, regular delivery to Appellant at 1300 Longcreek Dr., Apt. 713, Columbia, SC 29210. (R.p.87, ll. 8 – 18; R.pp. 99 – 102.)

An Order Awarding Damages by default against Appellant was executed by the lower court on March 21, 2016. (R.pp. 6 - 8.) It was file stamped March 21, 2016. This Order sets the amount of damages against Appellant at \$25,000. (R.p. 8.) A second Order Awarding Damages by default against Appellant was executed by the lower court on March 22, 2016. (R.pp. 9 - 11.) It was file stamped on March 23, 2016. This second Order sets the amount of damages at \$45,000, \$20,000 more than in the first Order. (R.pp. 11.)

Finally, a Form 4 Judgment in a Civil Case was executed by the lower court on March 22, 2016. (R.p. 19.) It was file stamped March 28, 2016. This Form 4 sets the amount of damages against Appellant at \$45,000.00.

Appellant filed a Motion and an Amended Motion to Set Aside the Default Judgment based on Rule 60(b) SCRP on April 5, 2016 and as Amended on May 5, 2016. (R.pp. 40 - 41; R.pp. 42 - 43.) A hearing on the issues raised in Appellant's Motion and Amended Motion was held June 27, 2016. (R.p. 103.) An Order Denying Appellant's Motions was filed on July 22, 2016. (R.pp.12 - 17.) This Order was received by Appellant's counsel on July 25, 2016. Appellant served a Rule 59(e) Motion to Alter or Amend and accompanying Memorandum on August 4, 2016. (R.pp. 67 - 82.) An Order denying Appellant's Motion to Alter or Amend was filed on September 14, 2016. (R.p. 18.) Appellant filed her Notice of Appeal September 29, 2016.

### **STATEMENT OF THE FACTS**

The primary issue on appeal is whether Respondent's affidavit of non-service (showing only a single attempt at personal service and no more) provided sufficient information to the Court so it could conclude Respondent had used due diligence to find Appellant in South Carolina so it could allow service by publication. The second issue is whether the entry of separate orders setting damages was arbitrary when the only new information provided to support the second order was that the damages might be subject to an offset.

The following facts, outside of the procedural timeline detailed above, are relevant:

Respondent's attorney's affidavit requesting service by publication was based on a single attempt of personal service. The process server's Affidavit of Non-Service filed September 8, 2016<sup>2</sup> reads:

Service of Process on: Michelle Masaryk

Address of Service: 1300 Longcreek Dr., Apt. 713, Columbia, SC 29210

Date and time of Non-Service: 9-2-2015, 6:19 p.m.

After due and diligent search, undersigned was unable to effect service.

Documents...

Comments: Resident stated, he does not know defendant, his/her whereabouts or contact information. He moved into apartment 6 months ago.

The Affidavit submitted by Respondent's attorney, filed November 13, 2015, contains even less information. It states in relevant part:

... that he is the attorney for the Plaintiff in the above-captioned case, after due diligence, the Defendant cannot be found and that the Defendant is a proper party..., and that this Affidavit is made for the purposes of serving Defendant by publication.

The following facts presented at the damages hearing March 22, 2016 are relevant: One, Respondent had already settled with the defendant Larita Hipp. (R.p. 86, ll. 9-12.) Notice of the damages hearing was sent by certified mail, regular delivery to Respondent at 1300 Longcreek Dr., Apt. 713, Columbia, SC 29210. (R.p. 87, ll. 8-18; R.pp. 99 - 102.) Last, the Respondent's damages request, made orally before the court, was inflated from \$25,000 to \$45,000 on the sole grounds that "There's another defendant in another settlement outside of the 25 [thousand dollars], it's going to be a total judgment. I think there might be some offset. Could I ask the Court award \$40,000." (R.p. 91, ll. 8-18.)

The Affidavits of Ms. Kim Cuervo and the Appellant, Ms. Michelle Masaryk, were filed with Respondent's Memorandum in Support of Amended Motion to Set Aside Default Judgment

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<sup>2</sup> The process server filed a second Affidavit on June 21, 2016. Its relevancy and admissibility are disputed. Our argument regarding this is found below at footnote 3.

and properly before the lower court. (R.pp. 30 – 34; R.pp. 35 - 37.) Ms. Cuervo was the community manager for The Hollows Apartments, at 1300 Longcreek Dr., when Appellant moved out. (R.p. 30, ¶¶ 1, 2, 3.) Ms. Cuervo’s affidavit shows that Appellant left her forwarding address with the apartment management and that Ms. Cuervo used it to forward a final bill to Appellant at her new Lexington County apartment. (R.p. 30, ¶¶ 5, 6; R.p. 31, ¶¶ 7, 9; R.pp. 32 – 34.) More pointedly, the address for the Appellant’s new Lexington County apartment, 101 Saluda Pointe Drive, Apt. 225, Lexington, SC, 29072, was still in The Hollows’ database as of the date of her affidavit, June 8, 2016. (R.p. 31, ¶ 8, R.p. 34.) Ms. Cuervo avers she does not recall anyone coming to the on-site complex office to inquire about how to get in contact with Appellant. (R.p. 31, ¶ 10.)

The Affidavit of Ms. Masaryk (Appellant) confirms she had moved from 1300 Longcreek Drive to 101 Saluda Pointe Drive 28 days before the accident at issue. (R.p. 35, ¶¶ 3, 4, 5.) Appellant avers she completed an online change of address form with the United States Postal Service when she moved. (R.p. 35, ¶¶ 6; R.p. 36, ¶ 9.) Appellant also avers that she left her new contact information with a) The Hollows apartment complex, b) the Saluda Pointe apartment complex, c) her South Carolina employer, Richland District Two/Forest Lake Elementary, d) Time Warner cable company, and e) SCE&G. (R.p. 36, ¶¶ 7, 9, 10, 11, 12; R.p. 37, ¶ 13.) Appellant did in fact receive mail forwarded by the USPS as a result of her change of address registration. (R.p. 35, ¶ 6; R.p. 36, ¶ 10.)

## ARGUMENT

### Standards of Review

The power to set aside a default is exercised within the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of

law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.

*Hill v. Dotts*, 345 S.C. 304, 307, 547 S.E.2d 894, 896 (Ct.App.2001)(citations omitted).

...the trial court's exercise of discretionary power, as well as its judgment as to matters more precisely defined in the law, is subject to appellate review; and [that] the term "abuse of discretion" as used in such cases has no opprobrious implication and means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of the appellant, and therefore, in the circumstances, amounted to an error of law.

*Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (S.C. 1961).

Similarly, as to the decision to admit or exclude evidence,

The trial judge's decision (as to admission of evidence) will not be reversed on appeal unless it appears he clearly abused his discretion and the objecting party was prejudiced by the decision.

*Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 242, 616 S.E.2d 431, 435 (Ct.App. 2005)(parenthetical added).

I. THE LOWER COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT.

A. The Lower Court, in three intertwined and connected ways, abused its discretion when it

- i. applied an erroneous legal and factual interpretation of S.C. Code Ann. § 15-9-710 not supported by the applicable common law precedent of *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583(Ct.App. 2013), and other state and federal appellate opinions, in violation of the doctrine of *stare decisis*;
- ii. applied an erroneous legal interpretation of S.C. Code Ann. § 15-9-710 not supported by the plain, ordinary, and unambiguous text of the statute; and
- iii. made factual conclusions not supported by admissible evidence and which prejudiced the Appellant.

S.C. Code § 15-9-710 governs when service by publication may be had. The prefatory language of § 15-9-710 states:

When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof, the clerk of court of common pleas, the master, or the probate judge of the county in which the case is pending and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a proper party to an action relating to real property in this State, the court, judge, clerk, master, or judge of probate may grant an order that the service be made by publication of the summons in any one or more of the following cases: ... (Emphasis added.)

To emphasize, for a court to grant an order for service by publication, the party seeking such an order must show the court the facts supporting his claim that the person to be served cannot, after due diligence, be found within South Carolina.

Despite the plain language of the statute and the absence of a showing of diligence, the Lower Court (Judge Manning) found that “Plaintiff’s affidavit of non-service on Defendant includes all necessary facts concerning the process server’s efforts to locate the Defendant and supports a finding of due diligence by the process server in his attempts to locate Defendant in South Carolina.” (R.p. 18, ¶ 2.) The Lower Court also specifically held, “Plaintiff’s affidavit requesting service by publication provided documentation of due diligence and complied with all the statutory requirements set forth in S.C. Code §15-9-740” and “S.C. Code §15-9-710.” (R.p. 18, ¶¶ 3 & 6.)

Of course, we submit that the record belies that finding, since the record provides no facts at all to support a finding that Respondent exercised any diligence in attempting to locate and serve the Appellant within South Carolina, complied with S.C. Code §15-9-710 or S.C. Code §15-9-740 (the service-by-publication statutes), properly obtained an Order of Publication, or afforded Appellant with her Constitutional right to due process. U.S. Const. art. XIV; S.C. Const. art. I, § 3.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.” *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457,

459 (2007). “When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.” *Id.* In interpreting a statute, “[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” *Id.* at 499, 640 S.E.2d at 459. Further, “the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.” *S.C. State Ports Auth. v. Jasper County*, 368 S.C.388, 398, 629 S.E.2d 624, 629 (2006). Accordingly, we “read the statute as a whole” and “should not concentrate on isolated phrases within the statute. *CFRE, L.L.C. v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

*Centex Intern., Inc. v. South Carolina Dept. of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (S.C. 2013)(citations in original).

The Lower Court abused its discretion when it in essence re-wrote Section 15-9-710 to read: “... [defendant] cannot, after due diligence, be found *at the last known address listed in the traffic report or on the defendant's driver's license, ....*” The process server’s affidavit shows she limited her initial (pre-service-by-publication request) due diligence search for Ms. Masaryk to her last known address. The process server, in the only factual paperwork filed with the Richland County Clerk of Court by November 2015, states only that he went only to Ms. Masaryk's address as it appeared on the accident report.

Recognizing the affidavit of service was insufficient, Respondent filed a second affidavit of the process server after the order of publication was entered. Even if this second affidavit were admissible evidence, which Ms. Masaryk maintains it is not<sup>3</sup>, the information provided therein shows only that his Google search allegedly left him with no information other than Ms.

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<sup>3</sup> Ms. Masaryk objects and takes exception to the Affidavit of the process server filed June 21, 2016. It is an attempt to retroactively supplement the information that might have been appropriate to include in Respondent’s Affidavits filed in support of the request for service by publication back in November 2015. However, not only is the information still inadequate under the *Caldwell* standards (quality of attempted service means as much, and in some instances, more than quantity), but the lower court’s inclusion of it as an actual finding of fact relevant to the determination of whether Respondent’s Affidavit’s complied with the law back in November 2015 led the lower court to factual findings that are without evidentiary support. This is an abuse of discretion that was manifestly prejudicial to the Appellant.

Masaryk's last known address. So, even with this late-created evidence, Respondent is still left with one effort to serve Appellant prior to requesting service by publication, solely at her last known address.

Due diligence aside, S.C. Code §15-9-710 obviously contemplates by its plain and literal wording a State-wide search *before* asking the court for an order of publication.

The case of *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583 (Ct.App. 2013), is highly instructive. There the Court of Appeals detailed Supreme Court opinions that required strict compliance (that is, plain and ordinary, but literal construction of) with the service-by-publication statutes. *See, pp. 11-12 below; Caldwell*, 402 S.C. at 572, 741 S.E.2d at 587. The Lower Court's interpretation of S.C. Code §15-9-710 that allows a plaintiff to limit her initial (pre-service-by-publication request) search for a defendant to that person's last known address erroneously fails to apply and follow the doctrine of *stare decisis* as it applies specifically to statutes and legislative intent:

The doctrine of *stare decisis* enjoys particular efficacy in the context of challenges concerning the construction of statutes and determination of legislative intent. As noted by the Court:

It is manifestly in the public interest that the law remain permanently settled. Especially is this so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it.

*Wehle v. South Carolina Retirement System*, 363 S.C. 394, 403, 611 S.E.2d 240, 244 (S.C. 2005), *quoting*, *Powers v. Powers*, 239 S.C. 423, 427, 123 S.E.2d 646, 647 (S.C. 1962).

The Lower Court, in denying Appellant's motions, not only did not use the plain and ordinary language of the specific statute(s), but it also did not follow the case law interpreting how statutes are to be construed by our courts in general. This is an error of law.

The Lower Court also disregarded the doctrine of *stare decisis* as it applies to intermediate appellate opinions specifically. *Caldwell* is a published South Carolina Court of

Appeals opinion from 2013 that has not been negatively treated in any way by the South Carolina Supreme Court or the Court of Appeals. As the South Carolina Bankruptcy Court stated in *In re Kingsmore*,

The Court of Appeals decision was effective when it was entered, and a decision by an intermediate appellate court in South Carolina is the law of South Carolina unless that decision is subsequently reversed or overruled.

*In re Kingsmore*, 295 B.R. 812, 816-817 (S.C. Bnkruptcy 2002), *citing Hamby v. Hamby*, 315 S.C. 518, 445 S.E.2d 656, 657 (S.C. 1994).

The Lower Court committed an error of law in not applying the plain, ordinary, and unambiguous language of S.C. Code §15-9-710 and an error of law in not following the precedent of *Caldwell*. These abuses of discretion require that the Lower Court's refusal to set aside of the default judgment be reversed.

The opinion of *Caldwell* is not only applicable to Appellant's legal arguments: It is so parallel with this appeal in the nature and quality of its facts <sup>4</sup> that it is controlling precedent as well.

The *Caldwell* Court held expressly that an affidavit requesting service by publication that fails to support with facts its statement that the sought-after defendant could not be located within the State after alleged due diligence, constitutes a jurisdictional failure to comply with the requirements of the statute, rendering the resulting default judgment void. *Caldwell*, 402 S.C. 565, 741 S.E.2d 583 (Ct.App. 2013).

Mr. and Mrs. Caldwell each filed a Summons and Complaint in Beaufort County alleging property damage and personal injury sustained in a motor vehicle accident the proximate cause of which allegedly was Wiquist's negligence. The Caldwells delivered the Summonses and

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<sup>4</sup> *Caldwell* so closely parallel in substance to those of this matter that we have prepared a chart showing how easily one can be exchanged for the other. *See* Appendix A to this Brief.

Complaints (one for each plaintiff) to the Beaufort County Sheriff's Department for service upon Wiquist. *Id.*, 402 S.C. at 568, 741 S.E.2d at 585. The Sheriff's Department thereafter "executed affidavits of non-service on Wiquist at her last known address that was listed on the traffic collision report, providing the explanation: "ADDRESS VACANT." *Id.* (Emphasis added.) The record in *Caldwell* further showed that the "Caldwells did not attempt to serve Wiquist with the summonses and complaints by mail directed to the address for Wiquist that was listed on the traffic collision report." *Id.*

The Caldwells then filed affidavits requesting service by publication, and the Clerk of Court for Beaufort County entered orders for service by publication. Affidavits were later filed stating that the required notice was published in the local newspapers, and motions for default judgments and default hearings followed. Default judgments and damages were entered in favor of the Caldwells. Wiquist received notice of the default hearings after the mailed notice of the hearings was forwarded to her then-current address by the US Postal Service. *Id.*, 402 S.C. at 568 - 569, 741 S.E.2d at 585.

Wiquist argued the orders of service by publication did not comply with S.C. Code §15-9-740 (companion statute also addressing service by publication). The Court of Appeals, in agreeing the Caldwells failed to comply with the mandatory requirements of the service-by-publication statutes, recognized and acknowledged it has traditionally been held that "where a party contests the validity of an order of publication based on a lack of diligence in attempting to locate the party, ... the trial court is 'without authority to overrule the finding of the clerk of court.'" *Id.*, 402 S.C. at 569, 741 S.E.2d at 585 – 586 (citation omitted). The Court, however, distinguished *Caldwell* from other opinions, noting that in those cases, the affidavits requesting service by publication "included at least *some* facts concerning efforts to locate the defendant" in

the State of South Carolina. *Id.*, 402 S.C. at 570, 741 S.E.2d at 586 (emphasis in original). The Court of Appeals then analyzed the affidavits requesting service by publication filed by the Caldwells to demonstrate their deficiencies.

First, the Caldwells' affidavits stated: "The Defendant who is a non-resident of Beaufort County, South Carolina, cannot be served a copy of the Summons in Beaufort County, and it is necessary to serve her by publication." *Id.*, 402 S.C. at 571, 741 S.E.2d at 587. Second, the affidavits requesting service by publication did not contain any statements<sup>5</sup> regarding due diligence undertaken to find the defendant in the State of South Carolina, only in the county of Beaufort. *Id.* As a result of these deficiencies in the affidavits requesting service by publication, the Court of Appeals found that the Caldwells' affidavits were "facially defective" under S.C. Code § 15-9-710. *Id.*

The Court of Appeals then analyzed several South Carolina opinions requiring strict compliance with publication statutes in order for service by publication to be valid.<sup>6</sup> These opinions include *Riker v. Vaughn*, 23 S.C.187, 189 (1885)(South Carolina Supreme Court finds failure of the plaintiff to secure an order for service by publication, the only statutory method upon which a non-resident minor could be made a party defendant, rendered service fatally

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<sup>5</sup> The Lower Court's Order Denying Appellant's Motion to Alter or Amend seems to state that, because Respondent's process server's affidavit of non-service included the phrase "due diligence," her factual situation is so markedly different from the *Caldwell* opinion (where the phrase was never used) that it is not only distinguishable, it is controlling. The Order also states that the *Caldwell* court overturned the default judgment "due to the Plaintiffs' failure to state any facts regarding service and due diligence." Both of these statements are erroneous.

<sup>6</sup> The Supreme Court and the Court of Appeals have consistently held that strict compliance with statutory requirements is a condition precedent necessary for jurisdiction (the power of a court to grant or deny a requested relief) to attach. *See, for example, Criterion v. Hoffman*, 258 S.C. 282, 188 S.E.2d 459 (S.C.1972), for an analysis and holding that procedural requirements prescribed by uninsured motorist statute are mandatory, and strict compliance with those requirements is a prerequisite to recovery.

incomplete, even though the minor defendant acknowledged service); *Du Bose v. Du Bose*, 90 S.C. 87, 89, 72 S.E. 645, 646 (1991)(South Carolina Supreme Court finds order of publication was invalid because it was not signed by the clerk on the front as required by the publication statute, noting the “rule that the statutory requirements as to constructive service by publication must be strictly carried out”)(emphasis added.); and *Ray v. Pilot Fire Ins. Co.*, 128 S.C. 323, 324, 121 S.E. 779, 779-780 (1924)(South Carolina Supreme Court finds affidavit requesting service by publication was “fatally defective, under the North Carolina law, on its face, in that it [did] not show that due diligence was used to find the defendant” within the state). The Court of Appeals also reviewed opinions of other jurisdictions, including North Carolina, Florida, Maryland, Mississippi, and California, which all held that not only was strict compliance with statutes governing service by publication and due diligence required, but that “[a]ffidavits devoid of averments of facts showing that due diligence was exercised to make service have consistently been held to be insufficient, and orders for service by publication based (upon such affidavits) have uniformly been held to have been beyond jurisdiction and void.” *Quoting from, Calvin Mem'l Corp. v. Requa*, 5 Cal.App.3d 345, 85 Cal.Rptr. 107, 113 (1970). The *Caldwell* Court then stated:

While not controlling, we find these cases persuasive. Based on the foregoing, we find the affidavit must include some factual basis upon which the court issuing the order of service by publication can find that the defendant cannot, after due diligence, be found within the state. It is the existence of this factual basis that our appellate courts have found make the order for service by publication unreviewable, absent fraud or collusion. Accordingly, the trial court erred as a matter of law in denying Wiquist’s motions to set aside default judgment because the affidavits requesting service by publication did not meet the statutory requirements, and were therefore, facially defective.

*Caldwell*, 402 S.C. at 574-575, 741 S.E.2d at 588 (emphasis added).<sup>7</sup>

In the case at bar, the Court's file shows there was one attempt at personal service, by a private process server, reflected in the Affidavit of Non-Service filed September 8, 2016. Respondent's Affidavit of Non-Service is **in substance no different** from the Affidavit of Non-Service executed by the Beaufort County Sheriff's Department in *Caldwell*, stating they went to the address on the collision report and no one (not the Defendant, and no one with her contact information) was there at that address.<sup>8</sup> There is no evidence in the Court's file here demonstrating that personal service was attempted in any other way before the affidavit requesting service by publication was filed. Appellant's position regarding the process server's affidavit filed June 21, 2016 is that it is not admissible in 2016 to support something more properly done in November 2015. The June 2016 Affidavit is simply not relevant to proving that the Clerk of Court, who issued the order of service by publication, was "satisfied" in November 2015 that Appellant could not be found in South Carolina. The statutes allowing service by publication simply do not allow courts to accept such information after the order is granted. To

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<sup>7</sup> The Court of Appeals recently broadened its holding in *Caldwell* in the opinion of *Belle Hall Plantation Homeowner's Association, Inc. v. Keys*, Op. No. 002018 (S.C. Ct. App. Filed Feb. 8, 2017)(Shearouse Adv. Sh. No. 6 at 49.) In *Belle Hall*, the plaintiff sought and was granted an Order for Service by Publication, even though the supporting documents showed service was attempted on the wrong person. The Court of Appeals held it was not error for the master to find that the service by publication was "grossly negligent." The Court reiterated *Caldwell's* precedent that affidavits requesting service by publication which are facially defective and do not comply with the publication statute will not be sustained even in the absence of fraud or collusion. *Id.*, at 56. In the *Belle Hall* case, Belle Hall's affidavit was facially defective because it demonstrated attempted service on the wrong person – John E. Murray, instead of John A. Belle. Therefore, Hall's failure to comply with the publication statute's requirements was fatal.

<sup>8</sup> Kim Cuervo avers in her Affidavit Appellant's contact information was available in The Hollows' database as recently as June 8, 2016. A quick walk by the process server from apartment 713 to the complex office would have at least informed the Respondent of the existence of additional contact information, even if more effort would be needed to secure it.

read this allowance into the statute, or somehow otherwise permit the admission of this after-created evidence, is an error of law and an abuse of the lower court's discretion resulting in manifest prejudice to Appellant. The Lower Court's inclusion of the June 2016 Affidavit as a finding of fact led directly to its erroneous conclusion that Respondent complied with the service by publication statute's strict requirements.

Respondent's Affidavit requesting service by publication states, "The Defendant cannot be found ..." It does not even reach the Caldwell's inadequate reference that Wiquist could not be found in the county of last known address.

The Order for Service by Publication states importantly, "... that said publication shall be inserted in '**The Columbia Star**', a daily newspaper of the County of Richland,<sup>9</sup> State of South Carolina, not less than once a week for three (3) consecutive weeks." (Emphasis in original.)

Again, Respondent's Affidavit requesting service by publication is **in substance no different** from the Caldwell's Affidavits that stated Wiquist could not be served in Beaufort County (because she could not be served at her last known address). It had no factual statements showing what acts of due diligence were undertaken to find Appellant in the State of South Carolina, as opposed to the county of her last known address. In fact, Respondent's Affidavit itself contains less "information" in this regard than did the Caldwell's'.

Like the Caldwell's documentation, Respondent's affidavits are facially defective because they give no factual basis "upon which the court issuing the order of service by publication [could] find that the defendant cannot, after due diligence, be found within the state."

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<sup>9</sup> It appears the *Columbia Star* is distributed almost exclusively in Richland County, although there are a few zip codes overlapping into Lexington County, per its "newsstand location" PDF, the tab for which is found at [http://www.thecolumbiastar.com/news/2016-06-17/Front\\_Page](http://www.thecolumbiastar.com/news/2016-06-17/Front_Page). The *Columbia Star* is not a state-wide publication.

Respondent's failure to comply strictly with the statutory requirements of due diligence mandated by S.C. Code §15-9-710 means that the court lacked authority to enter either an Order allowing service by publication or an Order awarding damages. So the default judgment must be set aside as void.

- B. The Lower Court abused its discretion and violated Appellant's Constitutional due process rights when it failed to apply state and federal appellate opinions providing precedent for proper and meaningful service by publication, again in violation of doctrine of *stare decisis*.

The *Caldwell* Court explicitly recognized in its remaining analysis that requiring strict compliance with the factual due diligence requirements of S.C. Code § 15-9-710 is woven together with two deeper principles: one, this State's policy to resolve matters on the merits, and two, the Plaintiff's responsibility to comply with the Constitutional requirements of due process. *Id.*, 402 S.C. at 575-577, 741 S.E.2d at 588-589; U.S. Const. art. XIV; S.C. Const. art. I, § 3. The lower court's Order denying Masaryk's Rule 59(e) Motion to Alter or Amend completely glosses over the issue of Constitutional Due Process and the prejudice to Appellant's due process of proper service and notice rights. U.S. Const. art. XIV; S.C. Const. art. I, § 3. The Order states, "Defendant cites and relies on multiple cases including *Roberts* [*Jacob v. Roberts*, 223 U.S. 261, 267, 32 S.Ct. 303, 305-306, 56 L.Ed. 429 (1912)] supporting the argument that Plaintiff must take multiple steps and sufficient steps to locate the Defendant," and then goes on to find simply that because Respondent filled out the form, the substance of what was (not) done does not matter. This vague result, however, overlooks the precedent ("multiple cases") that gives examples of what steps can actually constitute due diligence and afford a defendant where he cannot be served personally. The Lower Court committed an error of law in not applying this precedent.

For example, the Lower Court disregarded the factual precedent set by opinions like *Jacob v. Roberts*, which detailed that the Affidavit requesting service by publication in that case listed

inquiry of neighbors, nineteen county officers, three state officers, sheriffs, county clerks, county and state tax collectors, assessors, and postmasters. *Jacob v. Roberts*, 223 U.S. 261, 267, 32 S.Ct. 303, 305-306, 56 L.Ed. 429 (1912). Based on the evidence of these extensive efforts, the *Jacob* court *did* find that the defendants in that case were afforded due process; the list included in the affidavit requesting service by publication showed clearly that meaningful due diligence was undertaken. U.S. Const. art. XIV; S.C. Const. art. I, § 3.

Another opinion in which the court *did* find that due diligence was shown, as required, in the affidavit requesting service by publication is *Ingle v. Whitlock*, 282 S.C. 391, 318 S.E.2d 367 (S.C. 1984). There the Supreme Court held that the affidavit submitted satisfied the Clerk of Court, and the Supreme Court found no error where the

... affidavit attached to the petition [requesting service by publication] recited that the professional process server diligently attempted to locate [defendant] at his last known address and another address; contacted mail carriers who delivered mail to [defendant]; contacted [defendant's] stepmother; made several neighborhood inquiries and contacted Duke Power Company, Spartanburg Water Works and Correctional Release Center, all to no avail.

*Id.*, 282 S.C. at 392, 318 S.E.2d at 368.

The requirement that service by publication be allowed only after a plaintiff has made and demonstrated a true and meaningful due diligence search for a defendant is inextricably intertwined with Constitutional due process and this State's and this Country's age-old policy of resolving cases on the merits. U.S. Const. art. XIV; S.C. Const. art. I, § 3. One leads to the other and to the other. A meaningful and diligent attempt to locate a defendant heightens the possibility that the defendant will indeed be found, even if not at the last known address on the collision report. Further an in-depth inquiry has the potential to unearth that person, that tidbit of information that would set the searching plaintiff on the right path to finding, and thus properly serving, a defendant. A defendant has the Constitutional right to be heard in matters brought against him, and the only way a

defendant may exercise that Constitutional right is by being given timely notice of that opportunity. When a plaintiff tries to serve a defendant essentially only in the county of the defendant's last known address, and then makes a facially deficient and defective affidavit (one that does not factually support any meaningful effort to make personal service) requesting service by publication, and then makes that service by publication in a local newspaper that is 95% limited to the defendant's county of last known address, there can be no doubt and no argument that Respondent has created her own reality of non-service<sup>10</sup> and that Appellant's Constitutional rights to be heard and defend have been violated.

Opinions like *Ingle* and *Jacob* are not simply "multiple cases" that can be ignored. They are opinions of the highest appellate courts in South Carolina and our nation. They are the precedent that the doctrine of *stare decisis* requires courts coming after them to look to and follow. It was in recognizing and analyzing cases like *Ingle*, *Yates*, *Wachovia Bank* (all from South Carolina and cited in *Caldwell*), and numerous additional opinions from other, like-minded jurisdictions, that the *Caldwell* court came to its conclusion that a factual basis in the affidavit is necessary to constitute due process. U.S. Const. art. XIV; S.C. Const. art. I, § 3.

II. THE LOWER COURT ABUSED ITS DISCRETION IN ENTERING TWO DIFFERENT MONEY JUDGMENTS AGAINST APPELLANT, CAUSING PREJUDICE TO APPELLANT BY CHOOSING, UNDER THE GUISE OF *NUNC PRO TUNC*, THE GREATER OF THE TWO.

We now reach the issue of whether the entry of a second order setting (increasing) damages was arbitrary when the only new information provided to support the second order was that the damages might be subject to an offset.

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<sup>10</sup> Respondent's failure to conduct a meaningful due diligence and her reliance on that "reality" becomes even more pointed when one considers the fact that Respondent mailed the notice of the damages hearing by certified mail, regular delivery to Respondent at 1300 Longcreek Dr., Apt. 713, Columbia, SC 29210. (R.p. 87, ll. 8 – 18; R.pp. 100 - 102.) Certainly by the time of the hearing notice Respondent knew Appellant no longer resided there.

The Court entered three different orders awarding damages to the Respondent, although two are in the same amount. An Order Awarding Damages by default against Appellant was executed by the Lower Court on March 21, 2016. It was file stamped March 21, 2016. This first Order sets the amount of damages against Appellant at \$25,000. A second Order Awarding Damages by default against Appellant was executed by the Lower Court on March 22, 2016. It was file stamped on March 23, 2016. This second Order sets the amount of damages against Appellant at \$45,000.00, \$20,000.00 more than in the first Order. Finally, a Form 4 Judgment in a Civil Case was executed by the Lower Court on March 22, 2016. It was file stamped March 28, 2016. This Form 4 sets the amount of damages against Appellant at \$45,000.00.

The Lower Court concluded in its Order Denying Masaryk's Rule 59(e) Motion to Alter or Amend that the \$45,000 award was the "correct" one, stating

[u]pon review of the record, a clerical error occurred resulting in multiple Orders being recorded and granting damages against Defendant Masaryk. The Order date stamped March 23, 2016 in the amount of Forty-five Thousand Dollars (\$45,000.00) is the binding and correct Order and judgment as reflected in the transcript. (Order, p. 2.)

While the Lower Court did not specifically state it was concluding that the larger (and later) award of \$45,000 was *nunc pro tunc* to the first award, this is the legal doctrine that would control this scenario.

Briefly stated, the purpose of a *nunc pro tunc* order is not to change or alter an order or judgment actually made. ... *Nunc pro tunc* 'is merely descriptive of the inherent power of the court to make its records speak the truth – to record that which was actually done, but omitted to be recorded.

*George v. Sullivan*, 909 F.2d 857 (6<sup>th</sup> Cir. 1990)(citations omitted).

The South Carolina Court of Appeals addressed *nunc pro tunc* orders in the context of Rule 60(a) in *Dion v. Ravenel, Eiserhardt Associates*, 316 S.C. 226, 449 S.E.2d 251 (Ct.App. 1994). There the legal description in the Judgment of Foreclosure omitted an explicit description

of an easement giving the highland owners access to a marshland causeway. Two years after the initial judgment of foreclosure was signed and recorded, the highland owners filed a motion for a “corrective Master’s deed” to include a causeway description. Inclusion of the causeway would adversely affect the mortgage of the marshland owner. Nonetheless, the master entered a supplemental order including a lengthy description of a causeway easement, to the benefit of the highland owners. It was argued the master erred in amending the judgment of foreclosure pursuant to Rule 60(a), SCRCF, that there was no clerical error or “typo” in the original description, and that instead the Master actually altered the original judgment. The Court stated:

Generally, a clerical error is defined as a mistake in writing or copying. As applied to judgments and decrees, it is a mistake or omission by a clerk, counsel, judge, or printer which is not the result of exercise of judicial function. 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.

*Id.*, 316 S.C. at 230, 449 S.E.2d at 253-254 (citations omitted).

The parties had vigorously argued whether the causeway was actually contemplated for inclusion in the original order, and the Court held there was “no evidence of an ‘oversight’ or ‘omission’ (as contemplated by Rule 60(a), SCRCF) resulting in the exclusion of the causeway in the original description.” *Id.* As such, the Court held the master’s supplemental order did not correct a clerical mistake and was therefore improper. *Id.*

Under South Carolina law,

[a]n oral order of the court is not final and binding until reduced to writing, signed by the judge, and delivered for recordation.

*Brailsford v. Brailsford*, 380 S.C. 443, 451-452, 669 S.E.2d 342, 346 (Ct.App. 2008), citing *Case v. Case*, 243 S.C. 447, 134 S.E.2d 394 (S.C. 1994).

Here, the first Order Awarding Damages is the “correct” judgment.<sup>11</sup> It was executed by the judge on March 21, 2016, and recorded by the Clerk of Court on March 21, 2016. At that point, the first Order became a final Order. The subsequent orders are mischaracterized as “clerical error,” but that is impossible. The amount of damages in the three orders is all handwritten in by the hearing judge. These are not typographical errors. Even if they were, the fact there are three separately filed Orders/Judgments with different amounts would still not rise to the level of a scrivener’s error for this reason: The damages hearing judge, as the finder of fact and determiner of the applicable law, “exercises his judicial function” to determine the amount of damages to which he believes a plaintiff is entitled. The initial damages award is the result of the exercise of judicial assessment. All the Orders awarding Default Judgment Damages should be voided, as to pick one Order (amount) over the other is both arbitrary and manifestly unjust. The subsequent orders, the \$45,000 orders, cannot alter or change the scope of the first Order. To determine to the contrary is an error of law.

### CONCLUSION

The Lower Court abused its discretion when it committed errors of law and made findings of fact not supported by the admissible evidence in its Order denying the Appellant’s Rule 59(e) Motion to Alter or Amend. The Order Denying Ms. Masaryk’s Motions to Set Aside Default Judgment errs in its findings and conclusions primarily because S.C. Code §15-9-710 is not interpreted according to its plain and ordinary, but literal language, and is not interpreted according to the precedent of South Carolina and federal courts, and because the case law precedent relating to affidavits requesting service by publication has not been followed according

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<sup>11</sup> Of course, Appellant’s position is that default judgment against her, in any amount, is void due to the facially defective Affidavits for Order of Publication, which divested the Lower Court of the jurisdictional power to grant damages, period.

to the doctrine of *stare decisis*. Respondent's Affidavits in support of her request for an Order of Service by Publication were facially defective and violated Appellant's Constitutional due process rights, pursuant to *Caldwell*, and the Lower Court was without jurisdiction to issue an order awarding Respondent default damages. U.S. Const. art. XIV; S.C. Const. art. I, § 3. To fail to void the default judgment and damages awards based on the lower court's erroneous findings of fact and conclusions of law imposes a manifest injustice on Appellant, violates her Constitutional due process rights, and violates this State's concurrent policy to resolve cases on their merits. *Id.* The entry of a default judgment and subsequent award(s) is void, and the Orders of the Lower Court should be reversed.

Respectfully submitted,



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July 3, 2017

**APPENDIX A**

<b>Caldwell v. Wiquist</b>	<b>Williams v. Masaryk</b>
Plaintiffs deliver Summonses and Complaints to Beaufort County Sheriff's Department (BCSD) for service upon Wiquist.	Respondent delivers Summons and Complaint to private process server Weaghtington for service upon Masaryk.
BCSD attempt service and "thereafter execute affidavits of non-service on Wiquist at her last known address that was listed on the traffic collision report, providing the explanation: "ADDRESS VACANT" <i>Caldwell</i> , 741 S.E.2d at 585	Process Server Weaghtington attempts service and thereafter executes an affidavit of non-service on Masaryk at her last known address, as listed on the traffic report, 1300 Longcreek Dr., Apt. 713, Columbia, SC 29210, providing the comment: "Resident stated, he does not know defendant, his/her whereabouts or contact information."
Record shows Plaintiffs "did not attempt to serve Wiquist with the summons and complaint by mail directed to the address that was listed for Wiquist on the traffic collision report." <i>Id.</i>	Record shows Respondent did not attempt to serve Masaryk with the summons and complaint by mail directed to the address that was listed for Masaryk on the traffic collision report.
Plaintiffs then file affidavits requesting service by publication on Wiquist and the Clerk of Court for Beaufort County entered orders for service by publication. <i>Id.</i>	Respondent then files an affidavit requesting service by publication on Masaryk and the Clerk of Court for Richland County entered orders for service by publication.
Plaintiffs' affidavits requesting service by publication state: "The Defendant who is a non-resident of Beaufort County, South Carolina, cannot be served a copy of the Summons in Beaufort County, and it is necessary to serve her by publication." <i>Id.</i> 741 S.E.2d at 587.	Respondent's affidavit requesting service by publication states, in relevant part: "Personally appeared before me, Jerry Reardon, ... and that he is the attorney for Plaintiff in the above-captioned case, that after due diligence, the Defendant cannot be found and that the Defendant is a proper party..., and that this Affidavit is made for the purposes of serving Defendant by publication."
The <i>Caldwell</i> opinion does not state if the Clerk of Court for Beaufort County directed in which publications the service by publication notice was to appear, but S.C. Code §15-9-740 states that the publication in which the notice is to appear is "to be designated by the officer before whom the application is made."	Respondent's Order for Service by Publication states, "...that said publication be inserted in <b>'The Columbia Star'</b> , a daily newspaper of the County of Richland, State of South Carolina..." (bold in original Order).
Affidavits are later filed stating that the required notice was published in <i>The Island Packet</i> and <i>The Beaufort Gazette</i> , and ultimately default judgment damages are awarded to the Plaintiffs.	Affidavits are later filed stating that the required notice was published in <i>The Columbia Star</i> , and ultimately default judgment damages are awarded to the Respondent.