

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JUN 20 2017

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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

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SC Court of Appeals

Pearline Williams Respondent,

v.

Larita Hipp and Michelle Masaryk Defendants,

of whom Michelle Masaryk is the Appellant.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

Respondent proposes re-stating the issues as follows:

- I. Whether the circuit court correctly refused to set aside a default judgment and an order allowing service by publication when there was no evidence of fraud or collusion and when no defect appeared—as precedent requires—on “the face of the record.”
- II. Whether the circuit court properly reviewed the transcript from the damages hearing and designated the court’s intended judgment as the proper judgment when the circuit court accidentally signed and entered two money judgments against a single defendant.

STATEMENT OF THE CASE

A. Abbreviated summary.

The plaintiff in this case seeks damages as the result of a car wreck. One of the defendants defaulted and has appealed the circuit court’s refusal to set the judgment aside.

The first issue is an attack on the due diligence finding in the order authorizing service by publication. The second issue arises out of the circuit court mistakenly entering two judgments against the defaulting defendant before designating one of them as correct.

B. Background of Default Judgment.

The order denying Appellant’s request to set the default judgment aside succinctly summarizes the background facts. See (R.pp.12-17). Respondent was involved in a car wreck with Appellant in December of 2014. (R.p.12). Respondent filed suit in August of 2015. *Id.*; see also (R.pp.22-24) (Respondent’s complaint).

Respondent promptly attempted to serve Appellant at the address on the accident report and on Appellant’s driver’s license. That address was an apartment. The process server’s affidavit of non-service explains the person residing in the unit did not know

Appellant, did not know her whereabouts, and had moved into the apartment six months ago. (R.p.25). The process server attempted service in September of 2015—the month after Respondent filed suit.

Two months later, in November of 2015, Respondent asked the clerk of court to order service by publication. Respondent supported this request with an affidavit from her lawyer and an affidavit from the process server. (R.pp.25-26).

The clerk issued an order of publication the same day. (R.p.3). The order required publication to appear in “The Columbia Star”—Respondent’s complaint alleged Appellant lived in Richland County, see (R.p.22, ¶3)—and it also required the pleadings to be placed in the mail to Appellant’s last known address. (R.p.3).

Respondent filed affidavits of default in February and March of 2016. (R.pp.28-29). The court issued two orders of default. (R.pp.4-5).

The circuit court conducted a damages hearing in March of 2016. Respondent explained her car was a total loss as a result of the wreck, presented evidence of medical bills, and explained she suffered permanent injuries. (R.pp.88-90).

At the conclusion of the damages hearing, Respondent’s counsel asked for a \$25,000 judgment, and then immediately asked to amend his request. (R.p.91). The court said it had “already filled in the blank” but requested another judgment form and explained the court would complete the form later. (R.p.91).

The circuit court entered two judgments against Appellant. One for \$25,000. (R.pp.6-8). The other for \$45,000. (R.pp.9-11.). Both judgments were entered in March of 2016.

C. Arguments Contesting Default & Rulings Below.

In April of 2016 Appellant moved to set the judgments aside. (R.pp.40-41). Appellant's written arguments appear in a memorandum filed after the circuit court conducted a hearing. (R.pp.44-57).

The record illustrates Appellant's non-service was due to the fact she did not update her address with the Department of Motor Vehicles. The address listed on Appellant's driver's license and the police report had been inaccurate from the start. Appellant was not living at this address at the time of the wreck, having moved from Richland County to Lexington County one month earlier. (R.p.35, ¶¶4-5). Things changed again after the wreck. By the time the lawsuit was filed, Appellant had moved out of South Carolina, from Lexington County to Maryland. (R.p.35, ¶2).

Appellant claimed to have notified the U.S. Postal Service of both moves and to have received mail forwarded from each address. (R.p.35, ¶6 & p.36, ¶9). Appellant's affidavit does not explain when (if ever) Appellant changed her address with the DMV.

Appellant offered two arguments to set the judgment aside.

First, she claimed the process server's affidavit did not contain enough factual support, voiding the order allowing service by publication. Appellant relied heavily on this Court's decision in *Caldwell v. Wiquist*, believing the cases were identical. (R.pp.47-53).

Appellant's second argument also relied extensively on *Caldwell*. Appellant claimed service by publication was insufficient to satisfy due process as well as a policy of resolving cases on the merits. (R.pp.53-56). As with the first argument, Appellant claimed the process server's affidavit was deficient and did not detail enough factual support.

The circuit court denied Appellant's motion to set the default judgment aside, finding Respondent's affidavits satisfied the service by publication statute. The court issued a six-page order that accurately summarized the background facts as well as the parties' arguments. (R.pp.12-17). The court had conducted a brief hearing in June of 2016, asking for proposed orders at the hearing's conclusion. (R.pp.104-114).

The court found Respondent presented ample evidence indicating due diligence in attempting to locate and serve Appellant. (R.p.16, ¶1). The court also found Respondent's compliance with the service by publication statute satisfied due process. (R.p.16, ¶5). The court noted it had issued two judgments against Appellant, then stated it had reviewed the record and determined the \$45,000 judgment was the correct judgment. (R.p.13). The court filed this order in July of 2016, about a month after the hearing.

Appellant filed a timely motion to reconsider the order. (R.pp.67-80). The circuit court denied reconsideration without conducting a hearing. (R.p.18).

ARGUMENT

Appellant's first issue attacks the due diligence finding in the order allowing service by publication. This Court should affirm because longstanding precedents explain an order allowing service by publication is final unless there is fraud, collusion, or a defect appearing on "the face of the record." None of those apply here. Fraud and collusion are not even alleged, and there is no facial defect given the Supreme Court's holding that conclusory affidavits are sufficient.

The second issue arises out of the circuit court mistakenly signing and entering two judgments against the defaulting defendant. The law allows a court to amend a judgment on

its own initiative as long as the amendment is timely. The second judgment acted as a timely amendment, and the record plainly discloses the court intended the second judgment to be the proper judgment. Here again, this Court should affirm.

I. The circuit court correctly refused to set aside the default judgment and the order allowing service by publication because there was no evidence of fraud or collusion and there was no defect on “the face of the record.”

Service by publication is authorized by section 15-9-710 of the South Carolina Code (Supp. 2016). The statute’s third subsection allows service by publication “when the defendant is a resident of this State and after a diligent search cannot be found.”

An order authorizing service by publication may be issued by a circuit judge, a master, a probate judge, or the clerk of the court of common pleas. *Id.* The statute explains a party is to support a request for such an order with affidavits. See § 15-9-710(a).

a. Once the issuing officer is satisfied, the decision ordering service by publication is final absent fraud or collusion.

In *Wachovia v. Player*, the Supreme Court said there was no support for the argument that the court could review whether the process server had used due diligence. 341 S.C. 424, 429, 535 S.E.2d 128, 130 (2000). In *Montgomery v. Mullins*, this Court noted a trial court cannot overrule the issuing officer’s decision that the defaulting party could not be found. 325 S.C. 500, 506, 480 S.E.2d 467, 470 (Ct. App. 1997). In *Ingle v. Whitlock*, the Supreme Court noted the statute does not specify the facts or quantity of evidence necessary to satisfy the officer who orders publication. 282 S.C. 391, 392, 318 S.E.2d 367, 368 (1984). Absent fraud or collusion, the due diligence finding sticks.

The key cases articulating this rule are *Yarbrough v. Collins* and *Yates v. Gridley*. *Yates* is the older of the two, and *Yarbrough* explains *Yates* rejected the argument that a publication affidavit is insufficient if it contains “only conclusory statements.” *Yarbrough*, 293 S.C. 290, 292, 360 S.E.2d 300, 301 (1987) (citing *Yates*, 16 S.C. 496, 500 (1882)). The circumstances in *Yarbrough* echo the circumstances presented here: The dispute was whether the order authorizing service by publication was invalid if the supporting affidavit “failed to set forth any facts showing that due diligence had, in fact, been exercised.” *Yarbrough*, 293 S.C. at 292, 360 S.E.2d at 301. The Supreme Court held it was error to consider the “sufficiency” of the supporting affidavits, additionally noting that even when the order of publication contains factual statements that are different from the supporting affidavit, those differences will not necessarily constitute a jurisdictional defect supporting a collateral attack on the judgment. *Id.* at 293, 360 S.E.2d at 301.

These decisions preclude any attack on the sufficiency of the due diligence finding in the order authorizing Appellant’s service by publication. There is no allegation the order was procured by fraud or collusion. As was true in *Player*, *Yarbrough*, and *Montgomery*, Appellant’s basic argument is that if Respondent had tried harder, Respondent would have found her. The circuit court does not have the power to review this sort of claim. Absent fraud or collusion, the due diligence finding stands.

b. A court will refuse to enforce a judgment if a defect appears on the face of the record, but there is no defect here.

This Court’s decision in *Caldwell v. Wiquist* is governed by a different principle. The court presumes that what should have been done *was* in fact done, but a court will refuse to

enforce a judgment if the lack of jurisdiction for the judgment “appears on the face of the record.” The facial deficiency in *Caldwell* related to the defaulting defendant’s county of residence: The affidavit disclosed the extent of attempted service was that the Beaufort County Sheriff’s department had attempted to serve a non-Beaufort County Resident inside Beaufort County. 402 S.C. 565, 571, 741 S.E.2d 583, 587 (Ct. App. 2013). This Court explained the affidavits were defective “because they state the Caldwells tried to serve a non-resident of Beaufort County only in Beaufort County.” *Id.* at 571, 741 S.E.2d at 587. That was a legal deficiency apparent on the record’s surface.

An early recognition of this principle appeared in *Fouche v. Royal Indemnity Company*. See 217 S.C. 147, 155, 60 S.E.2d 73, 76 (1950). The principle was also acknowledged in *Yarbrough* when the Supreme Court noted factual inconsistencies do not always constitute jurisdictional defects. 293 S.C. at 293, 360 S.E.2d at 301.

This Court applied this principle in *Miles v. Lee* and *Belle Hall Plantation Homeowner’s Association v. Murray*. Both cases involved situations where the affidavit indicated the plaintiff attempted to serve someone *other than* the person to be served by publication. *Belle Hall*, Op. No. 5467 (S.C. Ct. App. filed Feb. 8, 2017) (Shearouse Adv. Sh. No. 6 at 49); *Miles*, 319 S.C. 271, 460 S.E.2d 423 (Ct. App. 1995). The deficiency in those instances is obvious—the affidavits “purport[] to show due diligence in ascertaining the whereabouts” of someone who is not the person being served by publication. *Miles*, 319 S.C. at 274, 460 S.E.2d at 425. The plaintiff searched diligently, but for the wrong person.

This case is not like those cases. Appellant’s Richland County address appeared on Appellant’s driver’s license and on the police report. The process server’s affidavit reflects

attempted service at that address. Unlike *Caldwell*, the affidavit does not contain an inconsistency. This affidavit, and the affidavit of Respondent's counsel, attest to a diligent attempt at service. (R.pp.25-26).

It is also worth noting that the order granting service by publication explained a copy of the summons and complaint would be mailed to Appellant's last known address. (R.p.3) This is required by statute. See S.C. Code Ann. § 15-9-740 (Supp. 2016). This Court acknowledged in *Miles* that the court presumes what should have been done was done. 319 S.C. at 274, 460 S.E.2d at 425. Appellant testified by affidavit she received mail forwarded from her former addresses. (R.p.35, ¶6 & p.36, ¶9). Appellant's affidavit does not disclose when (if ever) she changed her address with the Department of Motor Vehicles to an address other than the Richland County address.

The affidavits attest due diligence. This is controlled by *Yarbrough*, not *Caldwell*.

c. Appellant's due process challenge and her objection to the process server's supplemental affidavit are foreclosed by precedent.

Appellant argues allowing service by publication violates her right to due process. The Supreme Court addressed the due process clause in *Player*, rejecting the argument that due process required reviewing whether the process server actually exercised due diligence by stating "we perceive no constitutional problem here." 341 S.C. at 429, 535 S.E.2d at 130.

Appellant also argues the circuit court could not consider the process server's supplemental affidavit. See (R.pp.38-39). *Dow v. Bolden* seems to have considered such evidence, noting attorneys for both sides "submitted affidavits in support of their respective contentions." 245 S.C. 321, 324, 140 S.E.2d 473, 474 (1965).

II. The circuit court correctly treated the second judgment as the proper judgment. The second judgment acted as timely amendment made on the court's initiative and the record establishes this judgment was the intended judgment.

Rule 59 of the South Carolina Rules of Civil Procedure allows ten (10) days for the court to amend a judgment on its own motion. The Supreme Court has acknowledged this, explaining in *Leviner v. Sonoco Products Company* “the trial judge has only ten days from entry of judgment to alter or amend an earlier order on his own initiative absent a ‘reservation’ of jurisdiction in the form order.” 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000).

The circuit court issued one judgment on March 21, 2016 and a second judgment on March 23, 2016. The date of the March 21 judgment appears to be inaccurate given that the hearing transcript and the order itself indicate the damages hearing occurred the next day—March 22. See (R.pp.6-8) and (R.pp.83-90). That oddity aside, the March 23 judgment constitutes a timely amended judgment under Rule 59 and *Leviner*.

This conclusion is bolstered by a cursory review of the damages hearing transcript, where Respondent's counsel immediately corrected his requested damages amount. (R.p.91). The order below explicitly indicates the first judgment was entered by mistake. (R.p.13). The second judgment is proper, both under the law related to amended judgments and because it properly reflects the court's intent.

CONCLUSION

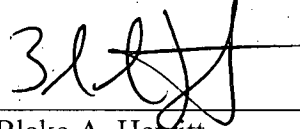
An order allowing service by publication is final unless there is fraud, collusion, or a defect appearing on “the face of the record.” None of those apply here. Also, the law

allows a court to amend a judgment on its own initiative as long as the amendment is timely.

This amended judgment was timely and expresses the circuit court's intent. This Court should affirm.

June 14, 2017

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Blake A. Hewitt', is written over a horizontal line.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies
with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme
Court Order regarding personal data identifiers.

Respectfully submitted,



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