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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
IN THE COURT OF COMMON PLEAS

L. Casey Manning, Circuit Judge

Appellate Case No. 2016-002043

Pearline Williams, Respondent

v.

Larita Hipp and Michelle Masaryk, Defendants,

Of Whom Michelle Masaryk is the Appellant.

APPELLANT'S PETITION FOR REHEARING

With this court's decision, a defendant's due process right to challenge the accusations against her is greatly diminished, and a court is given unfettered authority to increase a damages award without any shred of evidence to support such an increase. Such a holding is not supported by the facts of this case or the law of South Carolina.

This petition is filed pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules.

This court issued its decision February 13, 2019. *See Williams v. Masaryk*, 2019-UP-069. This petition is timely under Rule 221(a).

Appellant Masaryk respectfully resubmits the arguments from her brief. She additionally submits the court may have overlooked or misapprehended these points in its decision:

First, the court misapprehended the import of the factual similarities between this case and this court's decision in *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013). Rather the court distinguished this case from *Caldwell*, finding, "[u]nlike *Caldwell*, the affidavit in support of publication from Williams's attorney did not specifically state the search for Masaryk was limited to a county in which she was not a resident." However, the face of the affidavit from the process server in this case indicates he searched for Ms. Masaryk in Richland County, alone. The process server did not indicate Ms. Masaryk could not be found in this State, instead he stated "after due and diligent search, undersigned was unable to effect service." In essence, this court approves Ms. Williams's affidavit because it is less specific than the affidavit found invalid in *Caldwell*, though the two process servers committed the same fatal mistake—searching for a defendant in one county, rather than searching the state, as required by section 15-9-710 of the South Carolina Code. Such a holding undermines South Carolina's stated public policy favoring the resolution of cases on their merits, and presents grave due process concerns as to what protections parties are guaranteed in South Carolina's courts. *See Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (indicating South Carolina's public policy favors "the disposition of cases on their merits rather than on technicalities").

Second, the court overlooked the importance of this court's recent opinion in *Belle Hall Plantation Homeowners' Ass'n v. Murray*, 419 S.C. 605, 799 S.E.2d 310 (Ct. App. 2017). In *Belle Hall* this court found the plaintiff homeowners' association failed to strictly comply with the publication statute because the face of the affidavit demonstrated a failure to use due diligence in its attempted service on John A. Murray. *Id.* at 616, 799 S.E.2d at 315-316. Instead, the affidavit indicated the process server attempted service on John E. Murray. *Id.* Based on

plaintiff's failure to search for the correct person, as indicated on the face of the affidavit, this court found the judgment against John A. Murray should be set aside. *Id.* Similarly, the affidavit in this case, on its face, demonstrates due diligence was not used to locate Ms. Masaryk. The process server indicated attempted service at one location, one time. Such a search is not sufficient to satisfy the requirements of due process.

Third, the court overlooked the fact that an affidavit upon which it relied was not before the clerk of court when it made its decision on whether the process server used due diligence to determine if Ms. Masaryk could be found in the state as required by the statute. The only affidavit the circuit court relied on in issuing its Order for Service by Publication was the September 8, 2015 affidavit. In that affidavit, the process server indicated he attempted service at one location, one time, and did nothing else. Nearly one year later, on June 21, 2016, the process server executed another affidavit indicating he performed a "skip trace" using Ms. Masaryk's Richland County address and her birth date. Again, Respondent's process server did not expand his search outside of Richland County, but even if he did, any reliance on this later filed affidavit cannot save the faulty affidavit presented to the clerk of court in support of Respondent's motion for order by publication.

Fourth, the court misapprehended the danger inherent in its decision to the guarantees of due process in serving absent defendants. Given this court's decision, a process server can attempt service at one previous address for a defendant, and as long as that process server indicates she "after due and diligent search" could not locate the defendant, due process is assumed. Respondent does not assert any nefarious motives to counsel in this case; however, parties should be protected by requiring more than simply a statement that a process server used due diligence. The statute requires there be proof the process server used due diligence.

According to the court in *Caldwell*, a search restricted to one county is not due diligence.

Fifth, the court misapprehended Appellant's argument regarding the trial court's inconsistent findings. During the damages hearing in this case, Respondent's counsel requested damages of $25,000. The circuit court found damages of $25,000. Only after Respondent's counsel remembered a possible set-off, presumably from monies paid by the at-fault party, though no evidence to support such an assumption is in the record, did Respondent's counsel request the circuit court modify its factual damages finding to indicate $40,000 in damages. There was no further evidence presented. There were no motions for new trial *nisi additur* or reconsideration. Nevertheless, the circuit court issued a subsequent order awarding $45,000 in damages, more than Respondent requested. Simply put, Respondent's counsel realized he requested too little, and after the court made its initial factual finding, counsel asked for more.

This court found "the circuit court was within its discretion in filing an amended order correcting an 'oversight or omission' in writing in the requested damages amount." However, the circuit court's subsequent order did not result from an oversight or omission. Rather, the circuit court modified its order because Respondent's trial counsel requested more money after the circuit court made its findings.

"Generally, a clerical error is defined as a mistake in writing or copying." *Dion v. Ravenel*, 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App. 1994). "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 or judicial function." *Id.* "While a court may correct mistakes or clerical errors in its own process to make it conform to the record, it cannot change the scope of the judgment." *Id.* at 230, 449 S.E.2d at 254. The circuit court's decision to change its damages award after making a factual finding cannot be described as correcting a mistake. The circuit court's decision to

change its damages award is clearly a change in the scope of the judgment. Accordingly, Rule 60(a), SCRCP does not apply, and the circuit court should not be permitted to exercise its judicial function to add damages to the judgment absent new argument or facts.

For the foregoing reasons, this court should grant this petition for rehearing and issue an order withdrawing the February 13, 2019 order, place this case on the roster for oral argument, and reverse the circuit court's order.

Respectfully submitted,

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February 26 2019

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PROOF OF SERVICE

I hereby certify I have served the Appellant's Petition for Rehearing on February 26 2019, by depositing a copy in the U.S. Mail, postage prepaid, addressed to the following party of record:

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