THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

C. Stephen Bennett, Special Referee

Circuit Case No.: 2017-CP-27-115

Appellate Case No.: 2018-001955

Richard L. Winslow and Charmayne Winslow,.....Respondents,

v.

Matthew W. Hudson, Waste Pro USA, Inc., and Waste Pro of South Carolina, Inc.....Defendants.

Of Which, Matthew W. Hudson is the .....Appellant.

APPELLANT'S AMENDED INITIAL BRIEF

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March 27, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Rules of Civil Procedure:

Secondary Sources:

STATEMENT OF ISSUES ON APPEAL

I. THE SPECIAL REFEREE ERRED AS A MATTER OF LAW WHEN HE DENIED APPELLANT'S MOTION TO VACATE DEFAULT JUDGMENT PURSUANT TO RULE 60(B)(1), SCRCP, BECAUSE APPELLANT DEMONSTRATED HE HAD NO NOTICE OF THE LAWSUIT, ANY SERVICE OF THE LAWSUIT, OR THE DEFAULT DAMAGES HEARING UNTIL AFTER ENTRY OF THE DEFAULT JUDGMENT AND BECAUSE APPELLANT DEMONSTRATED A MERITORIOUS DEFENSE.

II. THE SPECIAL REFEREE ERRED AS A MATTER OF LAW WHEN HE DENIED APPELLANT'S MOTION TO VACATE DEFAULT JUDGMENT PURSUANT TO RULE 60(B)(3), SCRCP, BECAUSE APPELLANT DEMONSTRATED THAT RESPONDENT INTENTIONALLY FAILED TO SERVE THE LAWSUIT ON THE WASTE PRO DEFENDANTS (APPELLANT'S EMPLOYER AT THE TIME OF THE ACCIDENT) AND INTENTIONALLY FAILED TO NOTIFY THE WASTE PRO DEFENDANTS AND ITS INSURER OF THE LAWSUIT, ENTRY OF DEFAULT, OR THE DAMAGES HEARING.

III. THE SPECIAL REFEREE ERRED AS A MATTER OF LAW WHEN HE DENIED APPELLANT'S MOTION TO VACATE DEFAULT JUDGMENT BECAUSE THE SERVICE OF PROCESS AS PERMITTED BY S.C. CODE ANN. §§ 15-9-350 TO 15-9-380 VIOLATES THE PRIVILEGES AND IMMUNITY CLAUSE AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION UNDER THESE FACTS.

STATEMENT OF THE CASE

This appeal comes from default damages awards of $1,957,444.66 to Respondent Richard Winslow for personal injury and punitive damages and $3,000.00 to Respondent Charmayne Winslow for property damage and punitive damages against Appellant (Matthew W. Hudson) arising from a November 4, 2015 automobile accident in Jasper County, South Carolina. Order of Judgment dated October 13, 2017. On November 4, 2015, the sanitation vehicle driven by Hudson (and owned by his then employer, Defendant Waste Pro of South Carolina, Inc., who was sued but never served with the lawsuit) collided at a low speed with the rear of the vehicle driven by Richard Winslow, which then bumped into a third vehicle. Photographs of the Winslow vehicle provided by Winslow showed minor damage.

Winslow Vehicle Photographs. All drivers left the scene after the investigating officer completed the investigation, and Winslow did not complain of injury at the scene. Affidavit of Matthew Hudson, ¶ 11-12. Charmayne Winslow owned the vehicle driven by Richard Winslow.

On March 20, 2017, Richard Winslow and Charmayne Winslow filed the lawsuit for Richard's personal injuries and Charmayne's property damage with the Jasper County, South Carolina Court of Common Pleas against Hudson, Waste Pro of South Carolina, Inc. and Waste Pro USA, Inc. Complaint. The lawsuit filing came 502 days after the accident. The Complaint alleged that Winslows resided in Berkeley County, South Carolina (Complaint, ¶¶ 1-2), that Hudson (upon information and belief) resided in Chatham County, Georgia (Complaint, ¶ 3), and that the accident occurred in Beaufort County, South Carolina (Complaint, ¶ 11). Nevertheless, the Complaint asserted venue in Jasper County based on the asserted principal place of business for Defendant Waste Pro of South Carolina, Inc. of Jasper County. Even though named as defendants in the lawsuit, the Winslows never served Waste Pro USA, Inc. or Waste Pro of South Carolina, Inc. at any point during this saga, but those defendants entered a voluntary appearance on August 9, 2018, shortly before the hearing on Hudson's motion to vacate the default judgment. Answers of Waste Pro USA, Inc. and Waste Pro of South Carolina, Inc.

The Winslows never served Hudson personally with the lawsuit, and Hudson had zero notice or knowledge of the lawsuit, default, or default judgment until months after the entry of the staggering default judgments against him. Affidavit of Hudson, ¶ 2. The Winslows purported to serve Hudson by service upon the South Carolina Department of Motor Vehicles, pursuant to S.C. Code Ann. § 15-9-350, as described in the following paragraph.

On April 6, 2017, the SCDMV mailed a letter with a copy of the Summons and Complaint addressed to Hudson at "5013 Ogeechee Road, Apartment 19, Savannah, Georgia 31405-2505," which was the address for Hudson listed on the accident report. April 6, 2017 mailing. The Winslows' counsel provided that address to the SCDMV and did not do any investigation to determine Hudson's

location, even though by that point it had been 519 days since the accident. Further, the Complaint is silent about what steps, if any, the Winslows took to determine what formed Winslows' "belief" that Hudson resided in Chatham County, Georgia when the Winslows filed the lawsuit on March 20, 2017. The record shows Hudson did not live in Chatham County at the time of the lawsuit's filing. Affidavit of Hudson, ¶ 9. Accordingly, Hudson did not receive the April 6, 2017 mailing from the SCDMV because he moved from that address before the Winslows filed the lawsuit and neither the Winslows, their counsel, nor SCDMV made any attempt to locate Hudson or forward the complaint to him. Affidavit of Hudson, ¶ 2.

On May 11, 2017, the SCDMV sent Winslows' attorney a letter that indicated the mailing to Hudson was returned "Return to Sender Unclaimed Unable to Forward." May 11, 2017 mailing. The SCDMV letter indicated SCDMV would mail the notice and lawsuit to Hudson at that same address "by open mail." Id. The SCDMV letter to Winslows' attorney included the certified mail receipt card addressed to Hudson that was not signed or acknowledged by Hudson. Id.

On August 10, 2017, the Winslows moved for an entry of default against Hudson, which included an "Affidavit of Default" signed by Winslows' counsel. August 10, 2017 motion. The Jasper County Clerk of Court entered default against Hudson on that same date. Entry of Default. Judge Carmen Mullen signed an "Order of Default and Order of Reference" against Hudson on August 30, 2017. Order of Default and Order of Reference. Winslows' counsel did not serve either of the Waste Pro defendants with either the Affidavit of Default against Hudson, the entry of default entered by the Jasper County Clerk of Court, or the Order of Default and Order of Reference signed by Judge Mullen.

On September 26, 2017, the Winslows filed a "Notice of Damages Hearing" and purported to mail that Notice (with attachments) to Hudson at the same address that the SCDMV had notified counsel previously was not a valid address for Hudson (5013 Ogeechee Road, Apartment 19, Savannah, Georgia 31405-2505). September 26, 2017 mailing. The Winslows did not serve this Notice upon the Waste Pro defendants. The Winslows' counsel filed the September 26, 2017 mailing

to Hudson on October 13, 2017. October 13, 2017 filing. The Winslows' counsel did not serve this October 13, 2017 filing upon either of the Waste Pro defendants.

On October 12, 2017, the Special Referee (Steve Bennett) held the default damages hearing, and the Special Referee ordered judgment against Hudson for actual damages of $978,722.93 and punitive damages of $978,722.33 (total: $1,957,444.66) for Richard Winslow and actual damages of $1,500.00 and punitive damages of $1,500.00 (total: $3,000.00). Order of Judgment dated October 13, 2017. The Special Referee assessed punitive damages based on the allegation that Hudson "[chose] to look at his mobile electronic device while operating a large commercial sanitation vehicle." Id., ¶¶ 31-34. Hudson denied using his cell phone or any mobile device at the time of the accident. Affidavit of Hudson, ¶ 10. Richard Winslow produced medical bills of $203,722.33 at the hearing, but no medical expert testified.

Winslows' counsel filed the "Order of Judgment" on October 13, 2017 and then faxed a copy of the filed Judgment on November 13, 2017 to the insurance carrier for Waste Pro of South Carolina, Inc. Affidavit of Nicole Perez, ¶ 6. That fax was the first notice to the carrier or to Waste Pro that Winslow had filed a lawsuit, had obtained a default against Hudson, or had scheduled a default damages hearing. Id. The Winslows never mailed the default judgment to Hudson or took any step to notify Hudson of the default judgment. Hudson first learned of the injury/damage claims or judgment on December 11, 2017 when contacted by counsel hired for him by Waste Pro's insurer. Affidavit of Hudson, ¶ 2.

Hudson timely filed a "Notice of Motion and Motion to Vacate Default Judgment" on January 19, 2018. Notice of Motion and Motion to Vacate Default Judgment and September 19, 2018 Supplemental Memorandum (requested by Special Referee). The Special Referee held a hearing on the motion on September 6, 2018 and issued a written Order on October 5, 2018 denying the motion. Order Denying Defendant Matthew W. Hudson's Motion to Vacate Default Judgment. Winslow timely filed this appeal on November 2, 2018.

STATEMENT OF FACTS

On the date of the November 4, 2015 incident, Hudson lived in the Savannah, Georgia area and was a Georgia resident. Affidavit of Hudson, ¶¶ 5-7. When the Winslows filed the lawsuit on March 20, 2017 (502 days after the incident), Hudson lived at 1388 North Pine Tree Boulevard, Lot 22, Thomasville, Georgia 31792 and his Georgia driver's license as of March 20, 2017 listed this address. Affidavit of Hudson, ¶¶ 4, 9. Hudson also lived at the Thomasville, Georgia address on his driver's license on April 6, 2017 when SCDMV mailed the service letter to his old address (519 days after the accident). Id.

Hudson had no knowledge about any lawsuit, was never personally served with any lawsuit, and had no notice that any lawsuit or default judgment had been sought or obtained against him until contacted by the undersigned on December 11, 2017. Affidavit of Hudson, ¶ 2. Further, Hudson did nothing to evade service, and Winslow has not even hinted at any impropriety by Hudson in avoiding or ignoring service. Affidavit of Hudson, ¶¶ 13.

In addition, nothing at the scene of the incident put Hudson on notice of any potential bodily injury claim because Winslow conversed with Hudson, did not claim injury, did not limp in any manner, and drove away from the scene after law enforcement completed its investigation. Affidavit of Hudson, ¶¶ 11-12. Hudson stopped working for Waste Pro of South Carolina, Inc. in January 2016. Affidavit of Hudson, ¶ 14.

ARGUMENT

The Special Referee committed errors of law when he did not vacate the default judgment (a) pursuant to Rule 60(b)(1) of the South Carolina Rules of Civil Procedure; (b) pursuant to Rule 60(b)(3) of the South Carolina Rules of Civil Procedure; and/or (c) because the service of process as permitted by S.C. Code Ann.§§ 15-9-350 to 15-9-380 violates the Privileges and Immunity Clause and the Due Process Clause of the United States Constitution under these facts.

I. THE SPECIAL REFEREE ERRED AS A MATTER OF LAW WHEN HE DENIED APPELLANT'S MOTION TO VACATE DEFAULT JUDGMENT PURSUANT TO RULE 60(B)(1), SCRCP, BECAUSE APPELLANT DEMONSTRATED HE HAD NO NOTICE OF THE LAWSUIT, ANY SERVICE OF THE LAWSUIT, OR THE DEFAULT DAMAGES HEARING UNTIL AFTER ENTRY OF THE DEFAULT JUDGMENT AND BECAUSE APPELLANT DEMONSTRATED A MERITORIOUS DEFENSE.

Hudson never received any copy of the Summons and Complaint and did not know about any lawsuit or default until notified on December 11, 2017 by counsel. In addition, Winslows did not take any effort to locate Hudson's correct address after Winslows received notice from the South Carolina Department of Motor Vehicles that the address submitted by Winslows for service was not valid.

In considering motions to vacate under Rule 60(b), SCRCP, courts must consider the following: (1) promptness of the motion to vacate; (2) reasons for the default judgment; and (3) prejudice to other parties if the default judgment is vacated. N.H. Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (citing Harry M. Lightsey, Jr. & James F. Flanagan, South Carolina Civil Procedure 82 (1985)). In addition, the movant must present evidence of a meritorious defense in order to prevail on the motion. Thompson v. Hammond, 299 S.C. 116, 382 S.E.2d 900 (1989). Hudson moved promptly after learning about the default judgment, and the Winslows did not challenge the timeliness of the motion to vacate the default judgment.

Reasons for relief from default may include "mistake, inadvertence, surprise or excusable neglect" under Rule 60(b)(1), SCRCP, or "misrepresentation [] or other misconduct of an adverse party" under Rule 60(b)(3), SCRCP. A motion for relief pursuant to Rule 60(b), SCRCP, is addressed to the trial judge's sound discretion and will not be disturbed absent abuse of discretion. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E.2d 779 (1990). An abuse of discretion arises, however, when the trial judge was controlled by an error of law or when his order was based on factual conclusions that were without evidentiary support. Id., 399 S.E.2d at 782. Such error occurred in this case.

A. Hudson demonstrated the required "surprise or excusable neglect" to support his motion pursuant to Rule 60(b)(1) under the facts of this case.

Rule 60(b)(1), SCRCP, provides relief to a party from a final judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect." Under the current facts, the Special Referee committed an error of law because Hudson's lack of notice of the lawsuit and default can only be described as "surprise" or "excusable neglect."

S.C. Code Ann. §§ 15-9-350-380 and Rule 4(d)(7), SCRCP, provide a mechanism whereby a plaintiff can serve a non-resident driver through the South Carolina Department of Motor Vehicles. However, these statutes do not contemplate the mechanism by which the SCDMV ascertains the out-of-state address to which the process is mailed. Moreover, the statutes do not address the scenario when the address supplied to the SCDMV is not the defendant's correct address at the time of attempted service.[1] In the present case, Hudson did not live at the address where SCDMV mailed the letter because he had moved during the 17 months between the accident and the filing of the lawsuit. Moreover, his proper address at the time of the attempted service could have been ascertained by obtaining a copy of his Georgia Driver's License. Thus, Hudson did not "refuse to accept and receipt for certified mail" as contemplated by S.C. Code Ann. § 15-9-380, so no event occurred that allowed for service by open mail. Instead, the Winslows provided the DMV an unverified address, which resulted in Hudson never receiving any notification about the lawsuit or service of the Summons and Complaint. The default and the default judgment in this case resulted from no act by Hudson other than he moved during the 500+ days between the accident and the lawsuit and because the Winslows made no effort to locate him.

In Cousar v. M&R Carriers 1, Inc., 2016 WL 3087008 (D.S.C. filed June 2, 2016), the Honorable Henry M. Herlong of the United States District Court for the

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[1]The rule enabling service on an individual via certified mail does address the scenario when the address of the defendant is incorrect: "Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. . . .If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules." Rule 4(d)(8), S.C.R.C.P.

District of South Carolina District Court set aside an entry of default under identical circumstances. In that case, a defendant alleged he never received the Summons and Complaint due to the DMV having mailed the papers to the wrong address. Judge Herlong based his finding of "good cause" under Rule 55(c), FRCP, to set aside the default on the basis that the defendant had acted promptly once discovering the default issue and that "it is unclear who ultimately bears responsibility for the South Carolina Department of Motor Vehicles having an improper mailing address on file for [Defendant] and for the mishandling of this service of process as well."

Further, in Cox v. Sprung's Transport & Movers, Ltd., 407 F. Supp.2d 754 (D.S.C. 2006), that court also set aside an entry of default involving attempted service by mail from the SCDMV. That court noted that the applicable statute (S.C. Code Ann. § 15-9-370) required the defendant's return receipt because "[t]he statute requires that the defendant's return receipt be obtained which indicates the legislature's concern that a defendant actually receive notice of litigation." Id. The Winslows did not produce any return receipt signed by Hudson in this lawsuit. Thus, the failure of the Special Referee to vacate the default judgment because of the lack of a signature by Hudson on the return receipt acknowledging his actual receipt of the litigation constituted an error of law.

While the standards for relief under Rule 55(c), FRCP (or Rule 55(c), SCRCP) and Rule 60(b), SCRCP, are not identical, the facts of the current case clearly demonstrate that a defendant who has no knowledge of a lawsuit and who has not taken any act to evade or ignore service should be given a chance to defend the lawsuit on its merits, regardless of the standard employed for relief. Hudson did not play any role with the SCDMV not having his current address at the time of the attempted service of the lawsuit. Hudson clearly met the more rigorous standard imposed by Rule 60(b) because he never received any notice of any lawsuit or default before the default judgment. The terms "surprise" and "excusable neglect" clearly describe Hudson's "role" with the default judgment.

Our courts have held that the rules governing services of process serve at

least two purposes: they confer personal jurisdiction on the court **and assure the defendant of reasonable notice of the action**. B.B. & T. v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006) (emphasis added); Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 693 S.E.2d 27 (Ct. App. 2010). As discussed in those cases, while exact compliance with the rules is not required to effect service of process, our courts must inquire whether the Winslows sufficiently complied with the rules such that the defendant had notice of the proceedings. Id. In this case, the Winslows did not take any efforts to locate Hudson, did not provide an accurate address for him, did not conduct any search, or provide a different address to SCDMV after the post office returned the original mailing. Specifically, no evidence exists that the Winslows gave a second address to SCDMV after they received notice about the lack of receipt by Hudson or that the Winslows hired a private investigator who gave SCDMV any additional information about Hudson.

The Special Referee's order denying the motion to vacate the default judgment also included erroneous interpretations of case law cited by the Winslows. The case Sundown Operating Co., Inc. v. Intedge Ind., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009) dealt with a fact pattern that included the defaulting party having actual knowledge of the lawsuit and service of the lawsuit, which is not the case under the current facts. Also, the case of Cook v. Fed. Ins. Co., 263 S.C. 575, 211 S.E.2d 881 (1975) did not involve any discussions about relief pursuant to Rule 60(b), SCRCP, because the claim arose before the adoption of the South Carolina Rules of Civil Procedure and involved elements of the 1962 Code of Laws of South Carolina. In addition, the defaulting party (the uninsured motorist carrier, Federal Insurance Company) actually was served with the lawsuit before any default was entered and chose not to appear to defend. Moreover, the uninsured driver (McDaniel) did not contest the manner of service upon him, which is certainly the opposite of the current facts. Interestingly, no reported South Carolina appellate decisions cite this case for the proposition argued by the Winslows' attorney and adopted by the Special Referee.

Moreover, the Special Referee also denied the motion to vacate the default on

an incorrect factual assertion from the Winslows' counsel. In the Order, the Special Referee wrote: "The use of an allegedly correct address still does not guarantee actual receipt by a defendant. For example, in this case, Plaintiff sent service of a subsequent lawsuit to Hudson at the address he states is correct and it was returned as refused. (Aff. of Carr)." That assertion is incorrect. Hudson did not "refuse" the subsequent lawsuit, which was a declaratory lawsuit action filed by the Winslows. The objective evidence shows that the complaint in that matter was sent to UPS and UPS left a note on the residence saying a package is available for pickup and then the package was returned from the UPS facility. At no time did Hudson refuse service. Transcript of September 6, 2018 hearing, page 61, line 2-page 62, line 24 and Exhibit 18.

B. Hudson presented appropriate evidence of a "meritorious defense."

Under South Carolina law, a party is not required to show an absolute defense in order to establish a meritorious defense. Mictronics, Inc. v. South Carolina Dept. of Revenue, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). "[A] meritorious defense may not be perfect nor one which can be guaranteed to prevail at trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." Id. As Chief Justice Toal noted on this issue, "In my view, the key inquiry is merely whether the materials submitted to the trial court reflect, in any way, that a contest on the merits might render different results than the result reached by the default judgment." McClurg v. Deaton, 395 S.C. 85, 716 S.E.2d 887 (2011) (writing in dissent of the majority view that the issue of a meritorious defense was not preserved).

Most courts that have considered this issue have reasoned that disputes about the appropriateness of the damages award granted by default judgment should be resolved on the merits. See Augusta Fiberglass Coatings, Inc. v. Fodor Contract. Corp., 843 F.2d 808 (4th Cir. 1988); Cook v. Rowland, 49 P.3d 262 (Ak.

2002); Beal v. State Farm Mut. Auto. Ins. Co., 729 P.2d 318 (Ariz. Ct. App. 1986); Oberkonz v. Gosha, No. 02AP-237, 2002 WL 31320242 (Ohio Ct. App. Oct. 17, 2002); Syphard v. Vrable, 751 N.E.2d 564 (Ohio Ct. App. 2001); Ferguson & Co. v. Roll, 776 S.W.2d 692, 699 (Tex. Ct. App. 1989).

In the present matter, Hudson contested the elements of causation and damages. In this case, the defenses as to proximate cause and damages, if successful, would bar or reduce Winslow's claim, thus constituting a meritorious defense. Hudson (and the Waste Pro defendants, if they remain in the case) should have the opportunity to defend these claims and have a jury determine whether these bills were causally related to the accident and, if so, what the proper award should be. As stated in Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991), the fact that testimony is not contradicted directly does not render it undisputed because the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation remain questions to be resolved by the trier of fact.

In his Affidavit, Hudson noted, in relevant part:

> 10. I was not on my cell phone or any mobile device at the time of the November 4, 2015 incident.
>
> 11. After the November 4, 2015 incident, Richard Winslow conversed with me and did not claim any injury. He showed no signs of injury and did not limp in any manner.
>
> 12. Richard Winslow drove away from the scene after law enforcement completed its investigation into the November 4, 2015 incident.

Affidavit of Matthew Hudson. Further, the Affidavit of Hudson's counsel also establishes a meritorious defense about damages and the improper venue where the matter was heard. That Affidavit states, in relevant part:

> 2. Defendant Hudson has a meritorious defense to the damages claimed by Winslows in this lawsuit. The evidence to be presented at any trial would include Defendant Hudson's testimony that he was not on a cell phone or any mobile device

at the time of the November 4, 2015 incident. Further, the evidence would show that Richard Winslow conversed with Defendant Hudson after the impact and did not claim any injury. Defendant Hudson would testify that Richard Winslow showed no signs of injury, did not limp in any manner, and drove away from the scene after law enforcement completed its investigation into the November 4, 2015 incident. Those facts, combined with the photographs of the vehicle showing minimal impact damage, would support a meritorious defense that the November 4, 2015 incident was not a proximate cause of the injuries claimed by Richard Winslow. That testimony, combined with the low speed impact, would also support a meritorious defense to the punitive damage claims alleged by Winslows. Based on my experience, the amount of damages awarded to Winslows in this case at a jury trial would be significantly lower than what was awarded under the default judgment. I also think the punitive damage claim would fail as a matter of law if Defendant Hudson was not using a cell phone or mobile device at the time of the accident, which he stated in his Affidavit.

3. Further, the medicals bills submitted by Winslow Richard Winslow show medical treatment at facilities located in Beaufort County, Charleston County, Berkeley County, and Dorchester County. The bills do not show any medical treatment in Jasper County. Further, the accident occurred in Beaufort County, Winslows lived in Berkeley County, and Defendant Hudson (the only defendant served in this lawsuit) resided in Georgia. Thus, I think South Carolina law would require venue to be moved from Jasper County under these facts (and would require venue to be changed if Winslows ever serve any of the other defendants). Thus, Defendant Hudson has a meritorious defense based on improper venue.

4. As an additional meritorious defense, I note that the judgment from the Special Referee vastly exceeded the demand made by Winslows' attorney to the insurance carrier.

Affidavit of David S. Cobb.

Clearly, Hudson presented a meritorious defense about the personal injury claims of Richard Winslow and the punitive damage claims from both, based on his specific testimony that he was not using a mobile device at the time of the accident,

which was the only basis cited by the Special Referee when he awarded punitive damages. In addition, the Winslows initial demand was less than half of what the Special Referee awarded. The failure of the Special Referee to vacate the default judgment based on these arguments amounted to an error of law.

II. THE SPECIAL REFEREE ERRED AS A MATTER OF LAW WHEN HE DENIED APPELLANT'S MOTION TO VACATE DEFAULT JUDGMENT PURSUANT TO RULE 60(B)(3), SCRCP, BECAUSE APPELLANT DEMONSTRATED THAT RESPONDENT INTENTIONALLY FAILED TO SERVE THE LAWSUIT ON THE WASTE PRO DEFENDANTS (APPELLANT'S EMPLOYER AT THE TIME OF THE ACCIDENT) AND INTENTIONALLY FAILED TO NOTIFY THE WASTE PRO DEFENDANTS OR ITS INSURER OF THE LAWSUIT, THE ENTRY OF DEFAULT, OR THE DAMAGES HEARING.

Under the current facts, the Special Referee committed an error of law in not vacating the default judgment pursuant to Rule 60(b)(3), SCRCP. Grounds for relief under Rule 60(b)(3), SCRCP, existed after Winslow's counsel started settlement negotiations with the insurer, filed suit against the insured without notifying the insurer, and continued communications with the insurer as if no suit had been filed. See McClurg v. Deaton, 380 S.C. 563, 573, 671 S.E.2d 87, 92-93 (Ct. App. 2008). As the attached Affidavit indicated, Winslows' attorney made a $950,000 demand that the insurance carrier received on March 6, 2007 and then did not respond to telephone messages in September 2017 and October 2017 asking about the claim. Affidavit of Nicole Perez.

In addition, Hudson also moved for relief pursuant to Rule 60(b)(3) because the Winslows never served the lawsuit on Hudson's former employer (Waste Pro of South Carolina, Inc.) or the other corporate defendant named in the lawsuit. Further, the Winslows did not serve those defendants with any Notice of Default or Notice of Damages Hearing as required by Rule 5 of the South Carolina Rules of Civil Procedure. Yet, the Winslows' attorney faxed the default award to Waste Pro's insurance adjuster as the first notice of the judgment. Id.¶ 6.

Rule 5(a), SCRCP, required Winslow to serve copies of the default motion and order and the damages hearing on the Waste Pro defendants. Specifically, Rule 5(a) mandates: "Unless otherwise ordered by the court because of numerous defendants or other reasons, all **(1) written orders; ... (3) written motions, other than ones which may be heard ex parte; (4) written notices; ... and (11) other similar papers shall be served upon each of the parties of record.**" (emphasis added).

The Winslows' failure to notify the Waste Pro defendants about the pendency of the lawsuit supported relief from the default because of the implicit misrepresentation (and the Rule 60(b)(1) elements of "excusable neglect") involved with the conscious decision not to inform a party defendant about actions taken in the case that will be used to attempt to collect a judgment from that party, as is the case with this matter. South Carolina law recognizes that a Winslow should not take advantage of a party (or an entity from whom it intends to seek payment) by concealing the litigation and causing a default judgment to be entered. *See generally* 46 AM JUR. 2D Judgments § 235 (2008). For example, our Supreme Court has held that an insurance carrier "stands in the shoes" of a defendant in certain situations. In Edwards v. Ferguson, 254 S.C. 278, 175 S.E.2d 224 (1970), despite participating in settlement discussions with the liability carrier, Winslow's attorney did not inform the carrier about a filed lawsuit until after Winslow obtained a default judgment. The Supreme Court reversed the trial court's refusal to set aside the default on the grounds that "the entire record in this case convinces us that the trial judge abused his discretion in failing to vacate the judgment." Id. at 283, 175 S.E.2d at 226; see also Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988) (surveying South Carolina cases and noting that courts are less reluctant to set aside a default judgment when a party has been misled).

In McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), the South Carolina Court of Appeals determined that certain actions failing to properly disclose the existence of a filed lawsuit justified setting aside a default judgment pursuant to the Rule 60(b)(1) elements of "mistake, inadvertence, surprise or

excusable neglect." While the court ultimately upheld the default judgment because it found the defendants had not preserved any meritorious defense argument, of particular note in this opinion was the dissent by then Judge Kaye Hearn's, in which she noted that while there was no duty "technically" to notify the carrier of the filing of the lawsuit, counsel's actions did call into question notions of fair play. Id. at 582, 671 S.E.2d at 97. Judge Hearn concluded:

> I fully recognize that this court has not been asked to adopt a bright-line rule with respect to service of complaints on carriers where settlement negotiations have been ongoing; nevertheless, counsel's actions in continuing to uphold the appearance of settlement negotiations while simultaneously pursuing a default judgment without notice to Zurich, when coupled with the evidence of a meritorious defense as to damages, certainly warrants the grant of New Prime and Deaton's Rule 60(b) motion.
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> Id. at 584, 671 S.E.2d at 98.

Under the current facts, the Winslows chose to make the Waste Pro entities defendants in the lawsuit, and, as such, the Winslows were required to give those defendants timely notice of the default motions and orders. That failure required the Special Referee to vacate the default judgment, and the failure to do so amounted to an error of law.

III. THE SPECIAL REFEREE ERRED AS A MATTER OF LAW WHEN HE DENIED APPELLANT'S MOTION TO VACATE DEFAULT JUDGMENT BECAUSE THE SERVICE OF PROCESS AS PERMITTED BY S.C. CODE ANN. §§ 15-9-350 TO 15-9-380 VIOLATES THE PRIVILEGES AND IMMUNITY CLAUSE AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION UNDER THESE FACTS.

Article IV § 2 of the United States Constitution provides, in relevant part, that "[t]he Citizens of each State shall be entitled to all privileges and immunities of citizen in the server states." In Toomer v. Witsell, the Supreme Court of the United States noted that the clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." 334

U.S. 385, 395 (1948). Further, case law shows the Clause, "bar[s] a State from penalizing the citizens of other States by subjecting them to heavier taxation merely because they are such citizens or by discrimination against citizens of other States in the pursuit of ordinary livelihoods in competition with local citizens." Toomer, 334 U.S. at 408 (1948) (Frankfurter, J., concurring). The Clause bars discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. Id., at 396. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. Id.

A non-resident who operates a motor vehicle in South Carolina is statutorily deemed to have appointed the Director of the Department of Motor Vehicles as his true and lawful attorney for receipt of service of process for any accident or collision the non-resident may be involved in. S.C. Code Ann. § 15-9-350 (2005). A Winslow need only serve process upon the Director of the Department of motor vehicles by depositing with him a copy of the service and the appropriate fee. S.C. Code Ann. § 15-9-370 (2005). The Director of the Department of Motor Vehicles in turn mails a copy of the notice of service and a copy of the summons and complaint to the non-resident via certified mail. When the address given to the DMV is correct, service of process functions as intended. The issue arises, however, when the address is either incorrect or mailing cannot be otherwise completed. Section 15-9-380 outlines the procedure for this situation; however, the statute provides no answer other than to simply try again by open mail – an even less reliable method than required the first time. A logical alternative to the statute would be to permit service by publication once the certified mail has been returned undeliverable. Even if Service by Publication is seen as a method of last resort, it is an alternative method. Attempting service by two different methods is better than attempting service twice via the same defective method and provides a greater chance that Defendants will actually receive notice rather than "empty" service under section 15-9-380.

To hold a defendant in default when service has been made through this statute is to allow what the rules of civil procedure in South Carolina specifically prohibit in other scenarios. Rule 4(d)(8), SCRCP, provides that "[s]ervice pursuant to this paragraph shall not be the basis for the entry of a default or a default judgment by a default unless the record contains a return receipt showing the acceptance by the defendant. . . if delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules." Thus nonresident motorists are deemed to be properly served in South Carolina where South Carolina residents are given added protection. At present, the only way to avoid this unequal status is to become a resident. For both businesses and individuals, this involves paying taxes to the State in some form or another.

Finally, the Due Process Clause, as applied to the States through the Fourteenth Amendment, proscribes the States from depriving "any person of life, liberty, or property, without due process of law." Default judgments entered for failure, *after proper service*, to answer within the time allowed do not violate due process. Central Operating Co. v. Utility Workers of America, AFL-CIO, 491 F.2d 245, 252 (4th Cir. 1974) (emphasis added). However, when it is obvious that the method of service will not or cannot provide adequate notice to the defendant then it cannot be a proper method of service. "Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice *reasonably calculated*, under all circumstances, to apprise parties of the pendency of the action and afford them and opportunity to present their objections. Mullane, 339 U.S. at 314 (emphasis added).

South Carolina Courts have found that its rules governing services of process serve at least two purposes: to confer personal jurisdiction on the court and to assure the defendant of reasonable notice of the action. B. B. & T. v. Taylor, 633 S.E.2d 501 (S.C. 2006); Mull v. Ridgeland Realty, LLC, 693 S.E.2d 27 (S.C. Ct. App.

2010). The basis for the default judgment obtained in this case comes from notices sent twice to the same addresses despite the Winslows' knowledge that Hudson would not receive mail there and thus would not be made aware of the lawsuit.

Where a person is believed to reside at an address but certified mail is returned undeliverable and with no forwarding address available, the only conclusion to be drawn is that the person no longer receives mail at that address. It has often been said that the definition of insanity is doing the same thing over and over again, but expecting different results.2 The statute offers no resolution to this problem other than to try and try again, even when the facts presented indicate a likelihood of failure. This does not and cannot measure up to the required standards of due process. The failure by the Special Referee to grant relief to Hudson under these facts constituted an error of law.

CONCLUSION

It is precisely because of issues such as those set forth above that "[p]ublic policy favors the disposition of cases 'on their merits rather than on technicalities.'" Mictronics, Inc. v. South Carolina Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). Moreover, our Supreme Court has long held that the entry of default is a harsh and drastic action which is disfavored except in extreme circumstances. Lewis v. CORE, Inc., 275 S.C. 556, 274 S.E.2d 287 (1981). Here, the Record lacks any evidence that Hudson was ever served with the lawsuit, ever received the lawsuit, and ever was afforded an opportunity to defend this lawsuit. Moreover, the evidence reveals that the Winslows' never informed Waste Pro of South Carolina, Inc., Waste Pro USA, Inc., or the insurer about the lawsuit or default until after its hand-picked Special Referee granted them a judgment.

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2 Although this has been popularly attributed to Albert Einstein, Narcotics Anonymous more than likely originated the phrase. See Alice Calaprice, The Ultimate Quotable Einstein, 474 (Princeton University Press); see also Narcotics Anonymous, Basic Text Approval Form, 11 (1981) available at www.nauca.us/wp-content/uploads/2015/04/1981-11-Basic-Text-Approval-Form-White.pdf (last visited August 21, 2018).

In addition, Hudson timely moved for relief from default approximately four weeks after first learning of the lawsuit and default judgment, and the Winslows cannot claim any prejudice by having a jury trial resolve their claims as they demanded in the Complaint. Thus, relief from the default judgment was warranted, and the Special Referee committed an error of law by failing to grant that motion. Hudson showed no history of dilatory action, he was not responsible for any delay or the lack of service of the Summons and Complaint, he presented compelling evidence to establish meritorious defenses, and the Winslows will suffer zero to minimal prejudice. For the foregoing reasons, the Order of the Special Referee must be reversed, the default judgment should be set aside, and the matter remanded for a jury trial on the merits.

Respectfully submitted,

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March 27, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

C. Stephen Bennett, Special Referee

Circuit Case No.: 2017-CP-27-115

Appellate Case No.: 2018-001955

Richard L. Winslow and Charmayne Winslow,.....Respondents,

v.

Matthew W. Hudson, Waste Pro USA, Inc., and Waste Pro of South Carolina, Inc.....Defendants.

Of Which, Matthew W. Hudson is the .....Appellant.

PROOF OF SERVICE

On March 27, 2019, I mailed a copy of **Appellant's Amended Initial Brief and Appellant's Amended Designation of Matter** to:

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March 27, 2019

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Re: **Richard L. Winslow and Charmayne Winslow v. Matthew W. Hudson, Waste Pro USA, Inc., and Waste Pro of South Carolina, Inc.**
Appellate Docket No.: 2018-001955
TP File No.: 55000.342

Dear Ms. Kitchings:

We enclose the original and a copy of Appellant's Amended Initial Brief, Appellant's Amended Designation of Matter to be Included in the Record on Appeal, and proof of service. Please file the original and return a filed copy in the enclosed envelope. If you have any questions or need additional information, please call me at your convenience. With kind regards,

TURNER PADGET

David S. Cobb

DSC/hah
enclosures
cc: Patrick W. Carr (with enclosures)
Benjamin B. Davis (with enclosures)

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