THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry Gravely, Circuit Court Judge
Case No.: 2016-CP-23-06314

Appellate Case No. 2019-000190

Ascension Forensic, LLC,

Respondent,

v.

Patricia B. Clark,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This matter arises out of a judgment obtained by default by Respondent, Ascension Forensic, LLC (hereinafter "Ascension" or "Respondent"), against Appellant, Patricia Clark. Respondent agrees with Appellant's initial Statement of the Case relating to the procedural aspects of this matter. As noted by Appellant, Ms. Clark sought relief from the judgment and filed a Motion to Vacate Default Judgment on October 17, 2018. Ms. Clark sought relief under Rule 60(b)(4), claiming that Ascension, did not properly effect service. Her motion was denied by the trial court, after a hearing, and she now makes this argument on appeal.

A. Underlying Judgment

This matter began as a simple debt-collection matter. Ascension – owned by Marcus Hodge, an accountant – performed valuation services for Ms. Clark as part of a divorce action. See Complaint, ¶ 3. Ms. Clark signed a contract with Ascension agreeing to an hourly rate and she benefited from Mr. Hodge's work in her divorce. See id. at ¶ 3-4. Ms. Clark made a few payments, but then stopped, leaving Ascension with a balance of $39,300.00. See id. ¶ 6.

After reaching out to attempt to arrange a payment plan and receiving no response, Ascension filed suit on November 1, 2016. See Complaint. The Summons and Complaint was served at her residence through Ms. Clark's boyfriend on November 11, 2016. See Affidavit of Personal Service by Jesse Jones

B. Evasion of Service of Process in Subsequent Proceedings

Since being served, Ms. Clark has continuously – and very effectively – evaded service. Respondent's counsel has attempted to reach her in numerous ways – through phone calls, letters (both Return-Receipt Requested and regular mail), countless visits by process servers, and even hiring a private investigator. See Affidavit of Jay Anthony, ¶ 2. Ms. Clark not only refused to

respond to any of the letters or phone calls, but she also installed video cameras over her door and directed at the driveway, so as to evade service. See Affidavit of Jesse Jones, ¶ 4. The sale on her home was even thwarted by the existence of the underlying judgment. See Affidavit of Jay Anthony, ¶ 3. Because of her evasion, Respondent's counsel was not able to serve Ms. Clark with notice of supplemental proceedings – canceling multiple scheduled hearings before Judge Charles Simmons due to lack of service – and had to resort to filing a foreclosure action against her property. See id., ¶ 4. After her daughter mistakenly answered the door, thereby allowing Appellant to effect service of the foreclosure action, Ms. Clark filed this motion, claiming that she was wholly unaware of the underlying lawsuit and judgment.

C. Service of Process

Ms. Clark filed a Motion to Vacate Default Judgment on October 17, 2018, seeking relief pursuant to Rule 60(b)(4), SCRCP, on grounds that the service of the Summons and Complaint allegedly failed to comply with Rule 4(d)(1), SCRCP.

Service was made by Jesse Jones, a process server and state constable, who previously worked for thirty (30) years with the South Carolina Department of Probation and Parole. See Affidavit of Jesse Jones, dated 11/21/18, ¶ 1. Mr. Jones completed an Affidavit of Personal Service on November 11, 2016, stating that he had served the Summons and Complaint on November 10, 2016 at approximately 2:30PM "[b]y leaving a copy at said Defendant's dwelling house or usual place of abode, located at 519 Cliffview Court, Greer, SC 29650 with Michael, a person of suitable age and discretion residing therein. Michael identified himself as Defendant's boyfriend and affirmed that he resides with Defendant at that address." See Affidavit of Personal Service.

In her Motion to Vacate, Appellant claimed that service was ineffective "because no person named Michael was residing with her at her address at the time of the service on November 10,

2016." See Motion to Vacate, p.1. Appellant filed two affidavits with her Motion – the Affidavit of Patricia B. Clark and the Affidavit of Michael Thorstad. See id. In these affidavits, Ms. Clark and Mr. Thorstad made various claims. Notably, Ms. Clark claimed that she had no notice of the underlying lawsuit until her daughter was served with the foreclosure matter in September 2018. See Affidavit of Patricia Clark, ¶ 2. Mr. Thorstad claimed that, while he and Ms. Clark "used to be boyfriend and girlfriend" they had broken up by the time he received the papers in November 2016. See Affidavit of Michael Thorstad, ¶ 2. He further stated in the affidavit that he was present at Ms. Clark's residence on the day that he was served because he was there to pick up a piece of furniture to deliver to one of Ms. Clark's clients. See id. at ¶ 3. He acknowledged speaking to Jesse Jones, but said in the affidavit that he believed him to be a contractor with an estimate for a job. See id. at ¶ 4, 6. Mr. Thorstad claimed to have told Mr. Jones that he "was her boyfriend" – in the past-tense – and that he denied that he lived at the residence. See id., ¶ 4. When he was handed a white envelope by Mr. Jones, Mr. Thorstad stated in his affidavit that he simply "threw it in the trash can because I thought it was an estimate for a job or something . . . ." See id. at ¶ 6.

Respondent then submitted its own brief and affidavits. Much of the content of the affidavits, and the exhibits referenced, relate to the extraordinary efforts taken by Respondent to communicate with and to serve Ms. Clark with various matters and notices relating to the underlying lawsuit.

On the day of her hearing, Ms. Clark appeared in court with her counsel. See Transcript of Record. Also present was Michael Thorstad. See id. At the outset of the hearing, Appellant's counsel stated that he would like to call Mr. Thorstad to provide live testimony. See Tr., p.4, ll. 7-10. The Court expressed reluctance to allow Mr. Thorstad to add to his affidavit, commenting, "[w]ell, I've reviewed the affidavits in this matter, so . . . ." See id., p.4, ll. 11-12. Yet, Appellant's

counsel pressed for the opportunity to put Mr. Thorstad on the stand, arguing, "if it's a credibility issue because of the conflict in the affidavits, we'd like to offer Mr. Thorstad's testimony." See id., p.5, ll. 5-7. The Court was courteous enough to allow it.

Mr. Thorstad then took the witness stand and, on direct examination, he provided testimony that mostly mirrored his affidavit, with some added detail. Regarding the papers, he testified:

> I proceeded to back into the driveway and was pissed off and everything, and opened up the garage door to get the furniture out. And I just was not in a very good mood at that time, and I just didn't want to be in the middle of anything. I just dropped it in the trash can right there.

See Tr., p.8, ll. 14-19. Asked why he would do such a thing, Mr. Thorstad explained, "[b]ecause I just – we'd already broken up. I just didn't want to do anything. We weren't talking together really, but we were – I would do little – a tiny little thing for her, but I wasn't really communicating with her. So – and I just didn't know what the hell it was, so I just threw it in there." See id., p.8-9, ll. 21-25, 1.

Appellant's counsel then began to ask Mr. Thorstad about documents he had brought with him "that you feel support your testimony" regarding his residence. See Tr., p.9, ll. 21-25. Respondent's counsel objected, as the documents had not been previously provided and had not been included with the affidavit. See id., p.10, ll. 2-7. In response, Appellant's counsel stated that he had only been provided the documents by Mr. Thorstad that morning. See id., p.10, ll. 8-9. The Court replied, "[s]till, we've got to go by the rules. You want us to apply the rules, we've got to go by the rules." See id., p.10, ll. 10-11. Appellant's counsel responded: "Okay. All right." See id., p.10, l. 12. However, Appellant's counsel then elicited testimony from Mr. Thorstad regarding the documents he had brought with him, referencing the utility bills, tax returns, and driver's license. See id., p.10, ll. 14-24.

On cross-examination, Mr. Thorstad began having trouble with his testimony:

Lie No. 1

In Paragraph 7 of the Affidavit, Mr. Thorstad stated: "I notice that on the affidavit filed in this case by the process server he says my name was Michael. Someone else must have told him that *because he never asked me and I never told him my name.*" See Affidavit of Thorstad, ¶ 7 (emphasis added). However, in his testimony, Mr. Thorstad testified as follows:

Q. The process server that you encountered did not ask you your name?

A. I don't know.

Q. All right. You don't know or he did not ask you?

A. I really don't remember. I can remember parts of it.

Q. All right. Well, you say in your affidavit: He never asked me and I never told him my name. And now you're telling me you don't know. Which is true?

A. I don't know if he did tell me. I mean, I don't think he did at all.

See Tr., p.18, ll. 15 – 24.

Lie No. 2

Mr. Thorstad was also dishonest about the end of his relationship with Ms. Clark, which they had cited as proof of the lack of service, claiming they had broken up in September 2016 – just two months before the service of process:

Q. All right. When was that that you broke up?

A. About September of '16.

Q. Okay. So two months before the process server saw you at her residence?

A. Correct.

Q. Okay. Who broke up with who?

A. She broke up with me.

Q. Okay. Now when did that happen?

A. I just don't remember. I mean, it was just I was in a downward spiral, and I was not – I was not in a happy place.

Q. Okay. Well, it's important, obviously, for our case to know when you broke up. So you don't' remember exactly how it happened?

A. No. I don't know. I know I broke up with her in September.

Q. All right. You broke up with her? I thought you said she broke up with you.

A. Well. We broke up, you know. She broke up. We broke up. We broke up.

See Tr., p.14, ll. 4-23.

Lie No. 3

Mr. Thorstad was also dishonest about other facts regarding his relationship with Ms. Clark, when Respondent's counsel asked him about his testimony on direct that he and Ms. Clark had "started dating in '14":

Q. All right. You said you started dating Ms. [Clark] in 2014?

A. Yes.

Q. You didn't have any relationship with her before 2014?

A. No physical relationship. We knew each other, but I didn't date her.

Q. Okay. Did your name come up in her divorce proceedings?

A. I think so, yeah.

Q. Okay. Why would it come up in her divorce proceedings if you didn't have any relationship before 2014?

A. Because – because we were supposedly committing adultery.

Q. Okay. Were you, in fact, committing adultery?

A. No – yeah.

Q. Yes?

A. Yes.

Q. Okay. So you just told me that you didn't have any physical relationship before 2014, but now you're telling me that's not true.

A. It wasn't too physical, no.

Q. Okay. So yes or no, were you having a physical relationship before 2014.

A. No. Just a little before '14.

Q. All right. So when you told me a minute ago that you didn't have any physical relationship before 2014, that was not true; is that correct?

A. Correct.

Q. All right. We're here on your affidavit this morning, Mr. Thorstad. You're giving sworn testimony here that impacts this case that my client has been working on for two years now, so I need you to tell us the truth this morning.

See Tr., p.11-13, ll. 17-25, 1-25, 1.

Inconsistencies

Mr. Thorstad admitted on cross that he had stayed overnight at the residence while he and Ms. Clark were dating and that – at the time he was served – he still had access to the house (which was in a gated community) through the garage code. See Tr., p.15, ll. 9-13. And Mr. Thorstad was questioned as to why he would throw out papers that he simply believed to be an estimate from a contractor:

Q. Okay. And how is it that you guys broke up and you'd been broken up for two months but you were still helping her out?

A. Because I still would help her. I mean, I was like in love with her, so I would do anything.

Q. You'd do anything for her?

A. Well, I wouldn't – I mean, I would do errands for her because she just – she was doing two jobs at one time at that time, and I just – she needed help. Even though I was a very bad person and, you know, I still would have – do some things if she needed it.

Q. Still care for her today?

A. No.

Q. No. Okay. But you cared for her at the time, and you cared for her enough to help her out because she was so busy, right?

A. Right.

Q. All right. So you still wanted her to succeed, do well with her business.

A. Yeah.

Q. Isn't that why you delivered furniture to her house?

A. Yeah. Because she was doing two jobs at once so she asked me to deliver one or – one or two things once in a while.

Q. Okay. So then you get this envelope from a process server, Jesse Jones, and you believe that it's an estimate, right?

A. Well, he was in a beat-up truck, and he didn't say who he was. And he just handed me the envelope whenever I said, No, I don't live here.

Q. I understand. But you said in your affidavit you believed it to be an estimate, right?

A. Well, she wanted – I knew at the time that she had some problems in her house previous that she had been trying to get contractors to come over. And I didn't know because it was like 2:00 in the afternoon when I came over there.

Q. Okay. So you cared so much for her that you were trying to help her out delivering furniture, but she gets an estimate for – what you believe to be an estimate for work in her house, and you decide to just throw that away.

A. Well, yeah. Because I didn't want to get in the middle of all her personal problems. I mean, it was just ---

Q. Well, you're not getting in the middle. You're taking an estimate ---

A. I didn't know if it was or wasn't. I think it was. I mean, I couldn't tell. The guy was just – I don't know.

Q. But you said in your affidavit that you believed it was an estimate, right? That's what you thought it was.

A. I thought it could have been something like that, yes.

Q. (As read) I thought it was an estimate for a job or something, and I didn't want to get in the middle of things, right?

A. Right.

Q. That's what you believed.

A. Uh-huh.

Q. All right. So help me with how you're trying to help her, but then you take an estimate that she wanted and you just throw it in the trash. Why does that make any sense?

A. Because I wasn't in a good place at that time. I did something. I shouldn't have done it. And I thought I shouldn't have thrown away the paperwork after knowing what it was two years later.

See Tr., pp. 15 – 18, ll. 18-25, 1-25, 1-25, 1-9.

After considering the affidavits, briefs, and testimony, the Court denied the Motion to Vacate. In ruling against the Appellant, the Court noted that he did not find Mr. Thorstad credible. See Order, p. 3. Appellant filed a Motion to Reconsider, which was denied. See Order Denying Motion to Reconsider. Appellant then appealed.

STANDARD OF REVIEW

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006), citing Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). The standard of review, therefore, is limited to determining whether there was an abuse of discretion. See id. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on

factual conclusions that are without evidentiary support. See id. at 551, 663 S.E.2d at 503, citing Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

"Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal." RRR, Inc. v. Toggas, 378 S.C. 174, 182, 662 S.E.2d 438, 442 (Ct. App. 2008), citing Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003).

DISCUSSION

I. THE COURT PROPERLY FOUND THAT THE DEFENDANT AND MR. THORSTAD LACKED CREDIBILITY AND DEFENDANT DID NOT MEET HER BURDEN

It is undisputed that Appellant, as the moving party, bears "the burden of *presenting evidence* proving the facts essential to entitle her to relief." See BB&T, 369 S.C. at 552, 633 S.E.2d at 503 (emphasis added). Moreover, as Appellant's counsel admitted at the hearing, case law makes clear that an officer's return of the process creates a legal presumption of proper service. See Fassett v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct. App. 2005). This cannot be impeached by the mere denial of service by the Appellant – she must present *evidence* to prove she is entitled to relief. See id. at 47, 610 S.E.2d at 844.

The evidence presented by Appellant at the hearing to overcome this burden and presumption consisted of two affidavits, as well as Mr. Thorstad's live testimony. Of course, the judge is not required to accept the evidence presented by the moving party without question, but is instead required to weigh the evidence. That is precisely what Judge Gravely did here – considering the credibility of the affiants in assessing the merits of the Appellant's motion.

After considering the affidavits, and viewing the testimony of Mr. Thorstad firsthand, the Court determined that Ms. Clark and Mr. Thorstad lacked credibility. Regarding Mr. Thorstad, the Court wrote:

> In considering Mr. Thorstad's testimony, the Court did not find it credible in several respects. Details in his statement were not consistent throughout his testimony and varied from his Affidavits in several respects. At the hearing, Mr. Thorstad testified that he had never resided at Defendant's house, but in his affidavit, he specifically stated that he was "not living at 519 Cliffview Court . . . on or about the date the process server's affidavit of November 10, 2016" but doesn't state that he never resided there. His reason for throwing the paper in the trash did not seem credible and his whole demeanor did not lend credibility to his testimony, especially when cross-examined by Plaintiff's counsel about his prior relationship with the Defendant. On cross-examination, Mr. Thorstad contradicted himself on the details about his conversation with the process server.

See Order, p.3. The Court also noted Ms. Clark's history of evading service, which spoke to her credibility. See Order Denying Motion to Reconsider, p.2. After all, Ms. Clark claimed – incredibly – that the first she was aware of the underlying lawsuit was in September 2018, nearly two years after the suit was filed and after numerous letters, visits from process servers, and notes taped to her door. See Affidavit of Patricia Clark, ¶ 2. The Court plainly did not abuse its discretion in finding that the meager evidence offered by Appellant – the self-serving testimony of Ms. Clark and Mr. Thorstad – was insufficient to meet the burden, given the lack of credibility behind the written and oral testimony.

The facts of this case are similar to those of Fassett, supra. There, a defendant sought relief under Rule 60(b) claiming that he was not properly served when a process server left papers with his wife at their home. See Fassett, 264 S.C. at 49, 610 S.E.2d at 845. Like the alleged break-up in this case, the defendant in Fassett submitted affidavits in which he claimed that he had separated from his wife and moved out of the home just before the process was served. See id. at 45. He therefore claimed that he was not served as his dwelling place or usual place of abode, per Rule 4.

The Court of Appeals upheld the denial of the defendant's attempt for relief. The Court first noted the legal presumption of proper service and noted: "[The Defendant] bore the burden of proving he had established a new dwelling place, and his mere assertion that he no longer resided at the [Residence] was not enough to overcome the presumption of proper service." See id. at 49, 610 S.E.2d at 845.

Like Fassett, Appellant presented only self-serving affidavits and testimony at the hearing on her motion.[1] This meager evidence is insufficient to overcome the presumption of proper service and to meet her burden under Rule 60(b), particularly considering that the trial judge found the affiants not credible. The Court therefore properly denied the motion and plainly did not abuse its discretion.

Given the sparse evidence presented by Defendant, and the obvious credibility problems of the affiants, as found by the trial court. The Court correctly held that Defendant had no met her burden under Rule 60(b), SCRCP. See RRR, Inc., 378 S.C. at 182, 662 S.E.2d at 442 (credibility determination of finding of fact entitled to great deference on appeal).

II. PROCESS SERVER'S AFFIDAVIT DID CREATE A PRESUMPTION OF COMPLIANCE

Appellant argues that the process server's affidavit in this matter did not establish a presumption of compliance with Rule 4(d)(1), as the affidavit "contains no facts of which Mr. Jones actually had personal knowledge regarding whether Thorstad resided at Clark's residence at

[1] Respondent will address later in this brief the documents Appellant sought to introduce, which were properly excluded by the trial court. However, it is worth noting here that the documents provided by Mr. Thorstad provided little support to his testimony, as they demonstrated only that he maintained another residence, not that he did not reside with Ms. Clark at the time of service. As the trial judge noted, Appellant produced no independent evidence to establish that Mr. Thorstad was not living with her at the time, such as photographs, affidavits of friend or neighbors, or phone records. See Order, p.4.

the time of service." See Initial Brief of Appellant, p.4. This position misunderstands both the evidence and the law.

Appellant cites to Richardson Constr. v. Meek Eng. & Constr., Inc. for the proposition that where a motion for relief is based upon the court's lack of jurisdiction due to a failure to serve the Summons, "[s]uch relief *when warranted*, is not discretionary but a matter of right." 274 S.C. 307, 309, 262 S.E.2d 913, 915. This is a "red herring," as the language does nothing to change the framework set forth above, and employed by the trial court. Respondent readily agrees that if Appellant had established through its evidence that the pleadings were not served in compliance with Rule 4, then the trial court would have no other option but to grant Appellant's motion. In fact, Respondent's counsel agreed with that premise during arguments at the hearing. See Tr., p.25-26, ll. 23-25, 1-5.

However, this does not relieve Appellant of her burden and the Richardson case *does not* say that the presumption of proper service does not arise in situations like this one, where the Appellant merely claims that service was not proper. Again, the Fassett case is instructive. There, a Court of Appeals panel which included now-Justices Beatty and Kittredge considered a situation where the moving party claimed that service did not comply with Rule 4 because he had separated from his wife and moved out of the residence just prior to service. In its analysis, the Court expressly began with the legal presumption of proper service.

The question before the trial court was therefore the one framed in Section I of this brief – beginning with a legal presumption of proper service, and considering that the Appellant bore the burden of presenting evidence to prove the facts essential to entitle her to relief – did Appellant

meet that burden? The trial court properly concluded that she did not, and it cannot be shown that his decision constituted an abuse of discretion.[2]

III. AMPLE EVIDENCE SUPPORTS THE TRIAL COURT'S RULING

Appellant argues that the trial court's denial of Appellant's motion was based on factual conclusions without evidentiary support. To consider this claim, we must simply ask whether there is any evidence to support a finding that Mr. Thorstad resided at Ms. Clark's residence at the time of service.

The first, and most obvious piece of evidence is Mr. Thorstad's statement to Mr. Jones that he did, in fact, reside at the residence. Appellant objects to this statement as hearsay. First, this argument was not made to the trial judge and therefore is not preserved for argument to this Court. In fact, when Appellant's counsel argued to the trial judge that there was no evidence in the record that constituted evidence that Mr. Thorstad resided at the residence at the time of service, the Court replied, "How about the affidavit of Mr. Jones?" See Tr., p.23, ll. 23-25. Appellant's counsel responded that "he really gives no facts other than his assertion that has been contradicted here today by Mr. Thorstad that Mr. Thostad affirmed that he lived there." See Tr., p.24, ll. 3-5. As hearsay was not raised to the trial court, it cannot be raised for the first time here, in an attempt to exclude evidence. See Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006)

[2] Appellant's arguments regarding the requirement of personal knowledge in affidavits is another "red herring." Rule 4(g) requires that a person other than a Sheriff or his deputy provide a proof of service in affidavit form. The Rule requires that the document "state the date, time and place of such service and, if known, the name and address of the person actually served at the address of such person . . . ." Mr. Jones reported the date, time, place, and name of the person served ("Michael"), as well as the information Michael relayed. This complied with the Rule. If a process server could only report things of which he had independent knowledge, then a process server could never report a name given to him by a person during service.

(providing an issue must be raised to and ruled upon by the circuit court to be preserved for appellate review).

Second, even if this issue were preserved for review, the statement is not hearsay. Rule 801, SCRE, addresses hearsay and subsection (d) expressly describes that statements which are not hearsay: "A statement is not hearsay if . . . (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony . . . ." As Mr. Thorstad took the stand at the hearing, the statement made to Mr. Jones is not hearsay and was properly considered by the Court.

This statement by Mr. Thorstad alone constitutes evidence to support the Court's finding. However, this is especially compelling when considered with the other evidence, namely that Mr. Thorstad admitted to having dated Ms. Clark for a period stretching back even into 2014 (at least two years prior to the alleged move-out date), that he admitted to having stayed overnight, that he had access to the home (which is located within a gated community), and that he was at the residence during the day without Ms. Clark being present. Considering all of this, it certainly cannot be said that the Court's finding was without evidentiary support.

IV. EXCLUSION OF MR. THORSTAD'S DOCUMENTS DID NOT CONSTITUTE AN ERROR OF LAW

Appellant contends that the Court committed an error of law in refusing to allow the introduction of documents offered for the first time during Mr. Thorstad's testimony at the hearing.[3] The Court's ruling was proper. Moreover, even assuming *arguendo* that the documents

[3] This issue is not preserved on appeal as Appellant provided no basis at the hearing for why the documents should be allowed. In response to the Court's statement that "we've got to go by the rules" Appellant's counsel replied, "Okay. All right." See Tr., p.10, ll. 2-12. Moreover, the documents were not proffered to the Court. Respondent disagrees with Appellant's assertion that the Court refused to "allow defendant's counsel to offer them to the witness, even for authentication purposes . . . ." See Motion to Reconsider, p.2. That request was not made.

should have been considered, Appellant was not prejudiced as Mr. Thorstad testified about the documents.

A. Ruling Was Proper

Appellant initially sought to present evidence to the Court through affidavits, and submitted these affidavits with her Motion to Vacate. These included an Affidavit from Mr. Thorstad, which could have referenced the documents which have now been presented, as they all came from Mr. Thorstad. These documents could have been referenced within the affidavit and attached. Had this been done, Plaintiff would have had notice of the documents and would have been able to reply. Rule 6(e), SCRCP, addresses affidavits submitted in support of a motion and requires that such affidavits be served on opposing counsel not later than ten days before the time of the hearing. The reason for this requirement is so that Plaintiff may respond with reply affidavits. Mr. Thorstad and Ms. Clark failed to provide those documents to their counsel until the day of the hearing and, therefore, admission of the documents would have been a complete surprise to Plaintiff's counsel and left Plaintiff with no opportunity to rebut the evidence.

Appellant cites to Rule 6, SCRCP, noting that under the Rule "Appellant could have served a reply affidavit at any time before the hearing, but instead chose to offer live testimony." See Initial Brief of Appellant, p.9. First, the plain language of the Rule allows for a reply *affidavit* only – not live testimony. For whatever reason – presumably because Mr. Thorstad provided the documents to Appellant's counsel only on the morning of the hearing – no affidavit was provided, and the documents were not included in the initial affidavit. Second, the plain language of the

Rule allows for reply affidavits "at any time *before the hearing.*" Rule 6(d), SCRCP (emphasis added).[4] Appellant met neither of these requirements, and so cannot find support in the Rule.

B. No Prejudice

Even assuming, for the sake of argument, that the documents should have been admitted, Appellant was not prejudiced by the exclusion. Mr. Thorstad was allowed to testify about each document and provide the same information as if the documents had been introduced. See Tr., p.10, ll. 14-24. As the Court made clear in the Order Denying Appellant's Motion to Reconsider, this evidence was not compelling.

Given that Defendant initially submitted evidence by affidavits, the Court properly excluded the last-minute evidence, the admission of which would run counter to Rule 6 and basic fairness to both parties. Nonetheless, the Court provided Defendant the courtesy of calling Mr. Thorstad, who testified as to the essence of what is set forth in the documents. Therefore, not only was the Court's ruling proper, but Defendant suffered no prejudice.

V. NO ERROR REGARDING STATEMENTS OFFERED BY RESPONDENT

Appellant raises objections in her brief to various "out of court statements" which may have been relied upon by the trial court. There is no merit to this argument.

To begin with, Appellant admits that she does not know whether, or to what extent, the Court relied on any of the four documents to which she objects, in determining that she evaded service of process. The Court's order makes no reference to specific documents. Furthermore, it should be noted that Appellant's counsel objected to only two documents at the hearing – the statements within Respondent Counsel's Affidavit regarding the conversation with the realtor, and

[4] It should be noted again that the trial judge initially declined to allow live testimony, noting that he had been provided affidavits. However, Appellant's counsel stated that if the main issue before the Court was credibility of the witnesses, he would like to offer Mr. Thorstad live.

the private investigator exhibit. See Tr., p. 23, ll. 10-22. Appellant may not now object to additional documents. See Johnson v. Sonoco Prod. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider.").

It should also be noted that Appellant comments repeatedly in her brief about witnesses who did not appear to testify at court. See, e.g., Initial Brief of Appellant, p.3 ("Jones did not testify at the hearing."); p.9 ("There were many out of court statements in both the memorandum and the affidavits supposedly made by person[s] who were not present at the hearing to testify."). *Both parties* presented affidavits and the trial judge was prepared to decide the case on the affidavits, as is typically done in a Rule 60 hearing. On the morning of the hearing, Appellant's counsel requested to call Mr. Thorstad live – presumably for the purpose of introducing the records Mr. Thorstad had brought just that morning. The Court was under no obligation to allow his testimony, but did so. But there is nothing improper about consideration of testimony provided in the form of affidavits. Had Appellant's counsel wanted live testimony, that request could have been made and Mr. Jones subpoenaed. Indeed, Ms. Clark herself testified only by affidavit.

With regard to the substance of the documents objected to, there was nothing improper in their consideration, if the Court did indeed consider them. Each of the four documents is addressed in turn:

(1) The conversation with the realtor referenced in the Affidavit of Jay Anthony is not hearsay, as the statement of the realtor was not offered for the truth of the matter asserted. We are not interested in this matter in whether the statement that the realtor's clients were interested in buying Ms. Clark's house, or her statement that she was interested in selling, was true. The statement was not offered for the truth of the matter

asserted, but to show that Ms. Clark was on notice of the lawsuit as the judgment held up the sale.

(2) Jesse Jones's statement that he believes that cameras were installed by Ms. Clark is based on his personal knowledge. Mr. Jones states that he made numerous service attempts on Ms. Clark and, "[a]t some point in between my service attempts" Ms. Clark had video cameras installed. His belief that the cameras were installed to evade service is based on his personal knowledge from making numerous visits to the residence, attempting to serve Ms. Clark.

(3) Ben Dodd's statement that he believed Ms. Clark was evading service was also based on his personal knowledge. Mr. Dodd made numerous service attempts on the home, left notes, rang the doorbell, and observed cars in the driveway. His belief was supported by his personal knowledge.

(4) The report of the private investigator, Kevin Walters, did include an Affidavit of Non-Service relating to his efforts to serve Ms. Clark, which are detailed in the report.

Finally, even assuming *arguendo* that one or a portion of a document should not have been considered, numerous other documents and affidavits established Ms. Clark's evasion of service of process. Consequently, Appellant is not prejudiced.

VI. THE EVIDENCE IS OVERWHELMING REGARDING MS. CLARK'S EVASION OF SERVICE OF PROCESS

Finally, Appellant contends that it was an error for the Court to consider Ms. Clark's history of evading service of process in determining whether she had met her burden under Rule 4(d)(1). Ye the trial judge expressly explained that this was not the context in which he examined Clark's evasion of process. This argument was also raised in Appellant's Motion to Reconsider and the Court directly addressed the point in its order denying the motion, stating: "the history of the

defendant's action in appearing to evade service, was only considered as to evaluating the Defendant's credibility and intent in this matter." See Order Denying Motion to Reconsider, p.2. Credibility of a witness is, of course, not only relevant, but of paramount importance in a matter such as this, involving competing testimony. Appellant's counsel admitted as much at the hearing. See Tr., p.5, ll. 5-7 ("So if it's a credibility issue because of the conflict in the affidavits, we'd like to offer Mr. Thorstad's testimony."). Given this, there is plainly no error in law in considering the evasion of process for this limited purpose. After all, Ms. Clark stated, under oath, in her affidavit that the first she became aware of the underlying lawsuit was in September of 2018. When this statement is compared against the affidavits and documents submitted by Respondent, it does not stand up.

Furthermore, Appellant attempts to assail the evidence under the guise of the "error of law" standard. See Initial Brief of Appellant, p.10 ("None of the affidavits filed by Respondent and referred to in the argument above show an effort to evade service by Appellant."). However, the Court's determination regarding evasion of service is a finding, and the standard is therefore whether that finding is supported by any evidence. It is simply not reasonable to suggest that the numerous affidavits and documents submitted by Respondent do not provide some evidentiary support for such a finding.

CONCLUSION

As the moving party on a Motion to Vacate, and faced with an Affidavit of Service, Appellant had the burden *to present evidence* to justify relief, and to overcome the presumption to service. The trial court properly found that the evidence she presented was not compelling, and not credible. Therefore, the Court properly denied Appellant's motion and that decision should be

affirmed. Respondent further requests that the Court affirm the result based on any ground(s) appearing in the Record, pursuant to Rule 220(c), SCACR.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT

June 7, 2019
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry Gravely, Circuit Court Judge
Case No.: 2016-CP-23-06314

Appellate Case No. 2019-000190

Ascension Forensic, LLC,

Respondent,

v.

Patricia B. Clark,

Appellant.

CERTIFICATE OF SERVICE

I, Kenneth Jay Anthony, counsel for Respondent, certify that I have served the written Initial Reply Brief of Respondent on counsel for Appellant, by depositing a copy of same in the United States mail, postage prepaid, addressed as follows:

M. Lee Daniels, Jr.
M. LEE DANIELS, JR., P.C.
1200 Woodruff Road, Suite A-3
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This 7th day of June 2019.

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June 7, 2019

South Carolina Court of Appeals
V. Claire Allen, Deputy Clerk
1220 Senate Street
Columbia, SC 29201

RE: ***Ascension Forensic, LLC vs. Patricia Clark***
Case No.: 2016-CP-23-06314; Appellate Case No. 2019-000190

Dear Ms. Allen:

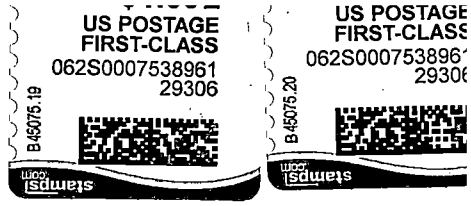
Enclosed please find the original and one (1) copy of Respondent's Reply to Initial Brief and Designation of Matter in the above-referenced matter to be included in the Records, and Proof of Service of Same.

Thank you for your assistance.

With Best Regards,

K. Jay Anthony

KJA:jw
Enclosure
cc: M. Lee Daniels, Esq. w/ enclosures



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