THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY
COURT OF COMMON PLEAS

Frank D. Addy, Jr., Circuit Court Judge

Case No. 2016-CP-10-3696

MARGARET CARR, Respondent

v.

TW GRAHAM and COMPANY, LLC, Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Respondent, a former employee of Appellant, filed a Complaint for retaliatory termination. The Appellant was never served with the Summons and Complaint. The Respondent mailed the Summons and Complaint to the address of the registered agent for the Appellant per the South Carolina Secretary of State. The Summons and Complaint were returned as undeliverable because the registered agent had moved to another residence. The Respondent retained a process server, and the process server made one attempt to serve the registered agent of the Appellant, but the Appellant's restaurant was closed that afternoon. The process server issued an Affidavit of non-service the following day. Based upon that server's unsuccessful effort to serve the Appellant's agent, the Respondent obtained an Order for Publication for the Summons and Complaint. The Summons and Complaint were published in the Post and Courier. The Appellant did not file an Answer.

On June 13, 2017, the Respondent obtained an Order of Default against Appellant in the amount of $11,863.60. The registered agent for the Appellant received the Order of Judgment on March 23, 2018.

On May 24, 2018, the Appellant through its agent filed a Motion to Set Aside the Judgment and Default. Appellant's Motion was heard on August 23, 2018. The presiding judge denied the Appellant's Motion, and a Form 4 Order was filed on August 24,

2018.

On September 17, 2018, the Appellant filed its Notice of Appeal on the Respondent. Also, the Appellant filed its Amended Notice of Appeal on September 28, 2018.

STANDARD OF REVIEW

A circuit court's findings regarding the issue of relief from a judgment will not be disturbed on appeal absent an abuse of discretion. "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." BB&T v. Taylor, 369 S.C. 548, __, 633 S.E.2d 501, 503 (2006).

FACTS

The Appellant TW Graham and Company, LLC operates a restaurant in McClellanville, SC. On or about August 17, 2015, the Respondent was hired on a trial basis to work for the Appellant. The Respondent worked for two weeks, however, she did not report to work on September 3, 2015, and she did not contact Patrick Runey, the owner of the Appellant. Mr. Runey terminated the Respondent from her job. (R.pp. 60-61).

The Respondent filed a Complaint on July 19, 2016 on the basis of retaliation for filing a worker's compensation claim. (R.pp. 29-33). Respondent through her attorney sent via certified mail, return receipt requested, a filed copy of the Summons and Complaint to the Appellant's registered agent, Patrick Runey, at 3722 Channel View Ct., Mt. Pleasant, SC 29466. The certified mail

was returned as undeliverable.

On August 9, 2016, the process server for Respondent contacted Mr. Runey to arrange for service of the Summons and Complaint. (R.p. 45). Mr. Runey informed the process server that he could not leave his restaurant and drive approximately forty minutes to Mt. Pleasant to accept the service of the Summons and Complaint. Mr. Runey requested that the process server meet him at the restaurant, and he stated to the process server that he would accept the service of the Summons and Complaint at the restaurant.(R.pp. 60-61). Per the affidavit of the process server, he went to the restaurant of the Appellant's at 4:00p.m. on August 9, 2016, but the restaurant was closed.(R.p. 45) The restaurant was scheduled to reopen at 5:30p.m.(R.p. 58). The next day the attorney for the Respondent requested the process server to return the documents.(R.p. 45). The process server did not make any further attempt to serve Mr. Runey.(R.pp. 60-61).

On September 15, 2016, Respondent's attorney filed a Motion to serve the Appellant by publication, and an Order to serve by publication was signed on the same day by the clerk for the Charleston County Clerk of Court.(R.p. 34; R.p. 2). The Affidavit of Publication was filed at the Charleston County Clerk of Court on October 18, 2016.(R.p. 46).

On December 20, 2016, Respondent's attorney filed a Motion for Entry of Default on the basis that the Appellant did not file an Answer.(R.pp.37-38). An Order of Default was issued on February 22, 2017.(R.p. 34). An Order for Damages in the amount of $11,863.60 was rendered against the Appellant on June 14,

2017.(R.pp. 5-6). Patrick Runey as the registered agent for the Appellant did not receive a notice of the Order for damages until March 23, 2018 via process service.(R.pp. 60-61; R. p. 57).

On May 24, 2018, the Appellant filed a Motion to Set Aside Judgment and Default.(R.p. 41-42). The Appellant's Motion was heard on August 23, 2018. The presiding judge denied the Appellant's Motion under the belief that the registered agent attempted to evade service of the Summons and Complaint. The presiding judge issued a Form 4 Order on August 23, 2018. (R.p. 1).

On September 17, 2018, the Appellant served its Notice of Appeal on the Respondent. On September 28, 2018, the Appellant filed its Amended Notice of Appeal.

ARGUMENT AND AUTHORITY

ARGUMENT I

DID THE TRIAL COURT ERR IN CONCLUDING THE COURT HAD OBTAINED PERSONAL JURISDICITON OF THE APPELLANT PER RULE 60(b)(4)SCRCP.

Per Rule 60(b)(4)SCRCP, the court may relieve a party from a final judgment, order, or proceeding on the basis the judgment is void because the court acted without acquiring personal jurisdiction of the defendant. "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 349 S.E.2d 659 (Ct. App. 2002). It is axiomatic that a judgment is void if a

court acts without personal jurisdiction. BB&T v. Taylor, 633 S.E.2d 501, 503 (S.C. 2006). "A court generally obtains personal jurisdiction by the service of a summons." Id. The court has to consider whether the "plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." Id.

The proper method to achieve service of process upon a limited liability company in South Carolina is enumerated in S.C. Code Ann. §33-44-111(1996). The limited liability company is to appoint an agent for service of process per S.C. Code Ann. §33-44-111(a). If the "agent for service of process cannot with reasonable diligence be found at the agent's address, the Secretary of State is an agent of the company upon whom process, notice, or demand may be served." S.C. Code Ann. §33-44-111(b). Such statute allows other means of service as provided by law. S.C. Code Ann. §33-44-111(e).

The Respondent contended that she exercised due diligence in her attempt to serve the Appellant, which is disputed. However, it is indisputable that the Respondent failed to serve the Summons and Complaint to the Appellant through the South Carolina Secretary of State per S.C. Code Ann. §33-44-111(1996).

Another mean of service of process upon a domestic corporation is set forth in S.C. Code Ann. §15-9-210(1976). In S.C. Code Ann. §15-9-210(c), if the registered agent for the corporation cannot be served with reasonable diligence per statute or rule, then a moving party can submit an affidavit to the clerk of court for common pleas to seek an order that the

corporation is to be served by registered or certified mail, return receipt requested, addressed to the office of the secretary of the corporation at its principal office.

Alternatively, a party can pursue the service of process through publication. The party has to show that the registered agent for the domestic corporation, after due diligence, cannot be located within this State per S.C. Code Ann. §15-9-740(1976). The order of publication shall direct that the publication be made in a newspaper at least once a week for three weeks, and such publication shall be in the newspaper that is most likely to give notice to the defendant. More importantly, the same statute requires the court, judge or clerk to state in the order of publication that a copy of the summons shall be mailed to the person at his place of residence.

The Respondent obtained an Order of Publication from the Charleston County Clerk of Court to publish the Summons in the Post and Courier newspaper once a week for three weeks. The Order was defective because it did not direct the Respondent to mail a copy of the summons to the Respondent.(R.p. 2). The Respondent failed to mail a copy of the Summons to the Appellant after she had obtained the Order of Publication. Consequently, neither the Respondent nor the clerk for the Charleston County Clerk of Court complied with S.C. Code Ann. §15-9-740.

"To obtain jurisdiction of a defendant by publication it is elementary that the affidavit for order of publication must comply with the provisions of [the statute]. Affidavits devoid of averments of facts showing that due diligence was exercised to

make service have consistently been held to be insufficient, and orders for service by publication based [upon such affidavits] have uniformly been held beyond jurisdiction and void." Caldwell v. Wiquist, 402 S.C. 565, 573-574, 741 S.E.2d 583, 588 (Ct. App. 2013). The Court in Cantwell held the "affidavit must include some factual basis upon which the court issuing the order of service by publication can find that the defendant cannot, after due diligence, be found within the state." Id. (emphasis added).

The Affidavit of Non-Service failed to indicate that the process server engaged in due diligence to locate the registered agent for the Appellant.(R.p. 45). Further, the Affidavit is void of any reference that the process server could not locate the registered agent within the State. In fact, the process server did not even use the words "due diligence" in the affidavit. Furthermore, the process server expressed that the registered agent did not live at the address given.(R.p. 45). Yet, the affidavit is silent on whether the process server reviewed the Charleston County website to determine the present location of the registered agent for the Appellant. Had the process server engaged in such research, he would have located the existing address of the registered agent for the Appellant.

Patrick Runey, the registered agent for Appellant, operates TW Graham and Company in McClellanville, SC. When Mr. Runey spoke to the process server on August 9, 2017, he told the process server that he is always at the restaurant so he would accept the service of the Summons and Complaint at the restaurant.(R.pp. 60-61). The restaurant lists the hours of operation, and its webpage

lists the hours of operation so the process server could have attempted the service when the restaurant was open.(R.p. 58).

The Court in Caldwell made the point that the process server's affidavit did not contain any information on whether or not the defendant could be located within the State. Also, the Court noted the affidavit did "not contain any statements regarding the due diligence undertaken and, in fact, do not even contain the phrase "due diligence." Caldwell, 402 S.C. at 571-572, 741 S.E.2d at 587.

Respondent's attorney sent via certified mail the Summons, Complaint, Motions and Order of Default to the Appellant at 3722 Channel View Court, Mt. Pleasant, SC, which was the address of the Appellant's register agent per the South Carolina Secretary of State. Respondent's attorney mailed the documents to such address with the knowledge that the Appellant's register agent did not reside at such address per the affidavit of the process server.(R.p. 45). More importantly, Respondent's attorney knew the Appellant's agent could be served with the Summons, Complaint, and other legal documents at 810 Pinckney Street, McClellanville, South Carolina.(R.p. 45; R.pp. 60-61). Also, the Respondent could have served the Summons and Complaint upon the South Carolina Secretary of State as the agent of the Appellant per S.C. Code Ann. §33-44-111(b)which the Respondent failed to pursue.

The presiding judge at the hearing for the Appellant's motion to set aside the default judgment opined that the Respondent's attorney "tried numbers of other address for

the company, and they came up dry."(R.p. 24, lines 12-14). Nothing in the record supports that inaccurate statement of facts. Respondent mailed documents to one address that being 3722 Channel View Drive, Mt. Pleasant, SC, notwithstanding, the fact that the documents were returned as "undeliverable".(R.pp. 49-50; R.p. 51; R.p. 47; R.pp. 52-53). The Respondent's attorney mailed one letter and documents to another address that being at the restaurant of the Appellant, and such mail enclosed a copy of the Order of Default. (R.pp. 52-53). Therefore, the presiding judge's conclusion was factually incorrect.

Further, the presiding judge believed that Mr. Runey on behalf of the Appellant had a duty to research the pending case on the website of the Charleston County Clerk of Court.(R.p. 24, line 15- p. 25, line 3). In essence, the presiding judge shifted the burden of due diligence from the Respondent to the Appellant.

Additionally, the court in Caldwell stated that its "decision to reverse the trial court's refusal to set aside the default judgment is consistent with the policy of our state to resolve cases on the merits. To avoid resolving litigation by default, strict compliance with the publication statutes is appropriate." Id., 402 S.C. at 576, 741 S.E.2d 588. The court cited Rochester v. Holiday Magic, Inc., 253 S.C. 147, 152, 169 S.E.2d 387,390(1969)for the proposition that the "statute applicable to vacating default judgment 'should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits.'" Id.

Respondent's failure to comply with S.C. Code Ann.

§§15-9-210, 15-9-740, and 33-44-111 precluded due process for the Appellant. As stated in Caldwell, the court is to promote and strive for disposition of the Respondent's case on the merits; therefore, this court should reverse the erroneous finding of facts and conclusion of law of the presiding judge and to order that the Order for Default Judgment and Order for Damages shall be set aside, and to remand the case for a hearing on the merits.

ARGUMENT II

DID THE TRIAL JUDGE ERR IN REFUSING TO SET ASIDE THE DEFAULT JUDGMENT AGAINST APPELLANT PER RULE 60(b) SCRCP.

The default judgment against the Appellant is to be set aside per the criteria of Rule 60(b) SCRCP.

The court has to consider four relevant factors in deciding whether or not to set aside default judgment per Rule 60(b) as follows: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties." McClurg v. Deaton, 380 S.C. 563, _, 671 S.E.2d 87, 93 (Ct. App 2008).

Patrick Runey, the registered agent for Appellant, did not receive a filed copy of the Order for Damages until March 23, 2018. (R.pp. 60-61). Upon receiving the filed copy of the Order for Damages, Mr. Runey contacted the O'Neill Law Firm to pursue the motion to set aside the default judgment.

The third criteria that being the show of meritorious

defense does not require proof that the defendant "would prevail on the merits, but only that his defense is meritorious." McClurg, 671 S.E.2d at 93-94. The Appellant only has to show that its defense 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. at 94 (quoting Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978)).

The Respondent claimed Mr. Runey fired her because she pursued a worker's compensation claim. Mr. Runey dismissed the Respondent on the basis she did not notify him that she could not work, which caused the restaurant to be short staffed. (R.pp. 60-61).

Per S.C. Code Ann. §41-1-80(1976), an employer can argue absence from work as an affirmance defense in an action for retaliation to seek worker's compensation. Furthermore, the Respondent did not file for worker's compensation until December 8, 2015, which was almost four months after she was terminated from her job with the Appellant. Such facts show the Appellant has a meritorious defense.

The Respondent will not suffer prejudice if this court sets aside the default judgment since the Respondent can still pursue her lawsuit against the Appellant. More important, both parties can have their day in court.

CONCLUSION

For the foregoing reasons, Judge Addy's Form 4 Order dated

August 23, 2018 should be reversed and the case should be remanded to the Charleston County Clerk of Court for a hearing on the merits.

Respectfully submitted,

June 17, 2019

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CERTIFICATE OF COUNSEL

The undersigned attorneys for Appellant hereby certify that the Appellant's Final Brief complies with Rule 211(b) of the South Carolina Appellant Court Rules.

June 24, 2019

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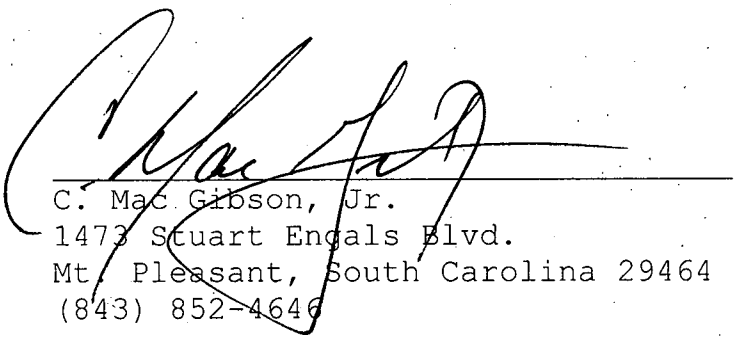

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