

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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AUG 12 2019

SC Court of Appeals

APPEAL FROM ALLENDALE COUNTY  
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No.: 2019-000849

Louise Fishburne ..... Respondent

v.

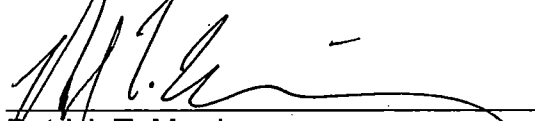
Lutheran Services for the Aging, Inc., Lutheran Family Services in the Carolinas, and  
Lutheran Services for the Aging, Inc. and Lutheran Family Services in the Carolinas  
d/b/a Lutheran Services Carolinas..... Appellant

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**INITIAL BRIEF OF APPELLANT**

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in the  
Carolinas, Inc. and Lutheran Services  
Carolinas

August 7, 2019

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## TABLE OF AUTHORITIES

### CASES:

BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006)

McCall v. IKON, 363 S.C. 646, 611 S.E.2d 315 (Ct.App. 2005)

Rouvet v. Rouvet, 388 S.C. 301, 696 S.E.2d 204, 208 (Ct. App. 2010)

Sundown Operating Co. v. Intedgelndus., Inc., 383 S.C. 601, 607, 681, S.E.2d 885, 888 (2009)

### SOUTH CAROLINA RULES OF CIVIL PROCEDURE:

Rule 4(d)(8)

Rule 5(a)

Rule 52

Rule 55(c)

Rule 59(e)

Rule 60(b)

## STATEMENT OF ISSUES ON APPEAL

Did the Circuit Court err in denying Appellant's Motion to Set Aside both the Entry of Default and the Award of Default Damages, under Rule 55(c) and Rule 60(b), in that:

- I. The fact of service upon Defendant LFSC of Plaintiff's Summons and Complaint was not made to appear by Affidavit or otherwise;
- II. Default should not have been granted as to LFSC with NO Certificate of Service on file at the time of the Entry of Default or Default Judgment.
- III. The Certificate of Service as to LSA on file with the Clerk, was not in compliance with Rule 4(d)(8), SCRCP and should not have been the basis of a default entry.
- IV. The Entry of Default and the Default Judgment are void.
- V. Attempted Notice of Damages Hearings was Ineffective.

## **STATEMENT OF THE CASE**

Plaintiff filed a Summons and Complaint on May 16, 2017 with the Allendale County Clerk of Court's office naming three (3) Defendants: Lutheran Services for the Aging, Inc., (a North Carolina Non-Profit Corporation), (hereinafter "LSA"), Lutheran Family Services in the Carolinas (a North Carolina Non-Profit Corporation authorized by the South Carolina Secretary to conduct business in South Carolina), (hereinafter "LFSC") and both Corporations doing business as Lutheran Services Carolinas (LSC).

The next filings in this matter held or noted by the Clerk of Court are the May 21, 2018, "Notice of Motion and Motion for Default Judgment", an "Affidavit of Steven D. Murdaugh", and an unsigned "Entry of Default". This Motion and the Entry of Default assert that Lutheran Family Services in the Carolinas and the other Defendants were served the Summons and Complaint "via service of process" on April 24 2017, and by "certified mail" on June 27, 2017". The affidavit assigns these two dates to separate Defendants, asserting that Lutheran Family Services in the Carolinas (LFSC) was served on April 24, 2017, and Lutheran Services for the Aging (LSA) on June 27, 2017.

Subsequently, on July 11, 2018, a Certificate of Service dated June 20, 2017, (a year prior) notes service on LSA with attached U.S Postal Service documentation noting delivery on June 27, 2017, a week after the

date of the Certificate of Service. The accompanying green card shows no receipt signature.

An Entry of Default was filed on July 18, 2018, and again on July 26, 2018, both signed electronically by the clerk of court. Both signed Entries of Default repeat that LFSC was served on April 24, 2017, before the complaint was filed on May 16, 2017.

A damages hearing had been scheduled for August 13, 2018, at 10:00 a.m. at the office of J. Morgan Kearse in Allendale, South Carolina. On the day of the hearing, Mr. Kearse had a medical emergency and was unable to conduct the hearing. A damages hearing was held on August 20, 2018, at 2:00 p.m. at the office of J. Morgan Kearse in Allendale, South Carolina, without Appellants. On September 4, 2018, Special Referee J. Morgan Kearse issued a Damages Order awarding Respondent a Judgment against Appellants in the amount of \$188,400.00. The Judgment was filed with the Allendale County Clerk of Court on September 12, 2018.

Defendants jointly filed a Motion to Set Aside Default Under Rules 55(c)<sup>1</sup> and Rule 60(b), SCRCP, on November 27, 2018. This motion was argued before the Honorable Perry M. Buckner, III on January 30, 2019. At that hearing, respondent produced additional affidavits purporting service on certain entities in 2017. The Court requested proposed Orders from each side.

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<sup>1</sup> Per the Court's Order, earlier references to Rule 55(d) SCRCP are treated hereafter as applying to Rule 55(c) SCRCP.

The Court denied Defendants' motion by Order of March 4, 2019. Defendants motioned to reconsider that Order on March 14, 2019, and the Court denied that motion on April 22, 2019.

This appeal then followed.

## ARGUMENTS

A “good cause” standard under Rule 55(c) of the SCRPC applies where a party seeks to be relieved from an entry of default. Sundown Operating Co. v. IntedgelIndus., Inc., 383 S.C. 601, 607, 681, S.E.2d 885, 888 (2009). Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b) of the SCRPC. Id. at 608, 681 S.E.2d at 888. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the “good cause” standard established in Rule 55(c). Id. at 608, 681 S.E.2d at 888. Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. Rouvet v. Rouvet, 388 S.C. 301, 696 S.E.2d 204, 208 (Ct. App. 2010). The party requesting relief in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief. BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006).

### **I. The fact of service upon Defendant LFSC of Plaintiff's Summons and Complaint was not made to appear by Affidavit or otherwise.**

In its November, 2018 Motion to set aside default, Appellant LFSC asserts that it should be relieved from default judgment because they were never served with the Summons and Complaint. Pursuant to Rule 4(d)(1), SCRPC, mandates service shall be made upon a Corporation.

by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the

defendant.

Defendant LFSC submitted the affidavit of Myra N. Griffie, which states that she is the Chief Operating Officer of Defendant LFSC. Myra N. Griffith's affidavit further states that LFSC has never been served with a Summons and Complaint in this case. On the day of the hearing, Plaintiff presented to the Court an Affidavit of Service dated June 22, 2017, signed by Process Server Angela Adams, certifying that she personally served Bethany Vause, who identified herself as the South Carolina Executive Director and who is also listed as the Registered Agent for LFSC with the South Carolina Secretary of State. While Plaintiff argues that, pursuant to Rule 4(d) of the SCRCP, the Affidavit of Service upon Bethany Vause, the Registered Agent for LFSC, by Process Server Angela Adams is proper notice, this claimed service was nowhere in the record, and nowhere before the Court before the day of Defendants' Motion Hearing.

Per Rule 6(d) SCRCP, this Affidavit is not properly before the Court. Appellants argue that this late submission should be ignored. The only evidence properly in the record at the Entry of Default, the Damages Hearing and the Hearing on Defendants' Motion To Set Aside the Default is the impossible date of service upon LFSC of April 24, 2017, a month before the Complaint was filed in May, 2017. Defendant LFSC has here demonstrated evidence of "mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct" of an adverse party.

**II. Default should not have been granted as to LFSC without any Certificate of Service on file at the time of the Entry of Default or Default Judgment.**

Defendant LFSC argues that it should be relieved from default judgment

because Plaintiff failed to file a Certificate of Service with the Court. Rule 4(g) SCRPC requires in part that “[t]he person serving the process shall make proof of service thereof promptly and deliver it to the officer or person who issued same.” SCRPC 4 (g). The rule further requires that if service is made by “any other person, he shall make affidavit thereof.” SCRPC 4(g). “The proof of service shall state the date, time and place of such service and, if known, the name and address of the person actually served at the address.” SCRPC 4(g). “Failure to make proof of service does not affect the validity of the service,” but Respondent first attempted to make such proof of service, improperly, on the date of the hearing.

Even if the Court were to accept this untimely Affidavit of Angela Adams claiming service on “Lutheran Services”, Rule 55 SCRPC requires the fact of service be made to appear to the Clerk as a precondition to an Entry of Default. Here, there was no Certificate of Service on LFSC or any credible date of service upon LFSC made to appear. Default was entered improperly; Defendants have demonstrated the particularized conditions of Rule 55 to set aside default.

In the Court’s Order Denying Defendants’ Motion to Set Aside, it referenced the pre-filing service date as a scrivener’s error. However, the April 24, 2017, date in the original Plaintiff Attorney Affidavit can only be treated as a “scrivener’s error” if other proof of a different, and purportedly correct date, was before the Clerk, the Referee and the Court. Without a basis for correction, this was not a “scrivener’s error” when the Default Entry and Judgment were made – it was simply an error. Defendants have identified error in the record that is evidence of “mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation or other

misconduct of an adverse party as it relates to the service date indicated in the Affidavit and Motion for Default.

**III. The Certificate of Service as to LSA on file with the Clerk, was not in compliance with Rule 4(d)(8), SCRPC and should not have been the basis of a default entry.**

Appellant LSA argues that although a Certificate of Service was filed purporting service upon the Corporation, that service was not in accordance with Rule 4(d)(8).

Rule 4(d)(8) provides as follows:

**(d)(8) Service by Certified Mail.** Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a sheriff or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. 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. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

Plaintiff mailed the Summons and Complaint to the Registered Agent for LSA listed with the North Carolina Secretary of State, Ted Goins. Plaintiff filed an unsigned Green Card with its Certificate of Service on LSA. This Proof of Service fails under two criteria from Rule 4 quoted above: (1) the receipt was unsigned, (2) Certified Mail shall not be the basis for the entry of default or the judgment by default unless the record contains a return receipt showing acceptance by the Defendant....SCRPC 4(a)(8)

Here there was no return receipt signature in the record as required by the Rule, and as claimed on Plaintiff's filed certificate, AND the unsigned Certified Mail Receipt

was used as the basis for default. Again, Appellants have produced evidence from the record of “mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct”.

**IV. Entry of Default and the Default Judgment are void.**

Under Rule 60(b)(4), the Court may relieve a party from default if the judgment is void. This is a separate analysis from the validity or proof of service above.

As referenced above, Rule 4 SCRCP outlines the requirements of service, but Rule 55, requires that the “fact” of service and failure to answer have been “made to appear by affidavit or otherwise” before the Clerk can enter default.

As discussed above, an impossible service date before the complaint was filed was the only “fact” available to the Clerk when default was entered as to LFSC.

As discussed above, the “fact” of service on LSA was an unsigned Green Card, which by Rule 4(d)(8) SCRCP, (1) cannot be the basis for a default entry; and (2) any such default shall be set aside.

No Proof of Service on LSC was in the record at the Entry or Judgment. Respondent tries to cure these defects with untimely affidavits and amendments to prior Affidavits. However, even if the Court were to accept these late affidavits, they were not available to the Clerk of Court or Referee when the Entry of Default and Default Judgment were made in the summer of 2018 – the facts of service did not appear in the record in 2018. Therefore, Defendants have demonstrated that the default was void, *ab initio*, and are entitled to relief under Rule 6(b)(4) SCRCP – the judgment is void.

**V. Ineffective Notice of Damages Hearings.**

In the Court’s Order denying Defendants’ Motion, it discussed Plaintiff’s mailing

of notices to the Defendants of the original and rescheduled damages hearings. At the hearing of January 30, 2019, Plaintiff presented the Court and opposing counsel correspondence purporting to give notice of the damages hearing to the following mailing addresses with the following dates:

Lutheran Services  
1118 Union Street  
Columbia, SC 29201

August 9, 2018

Ted Goings, CEO  
Lutheran Services for the Aging  
Post Office Box 947  
Salisbury, NC 28145

August 16, 2018

Referring to the Rule 55(b)(2) mandate that every written notice be served on each of the parties, McCall v. IKON, 363 S.C. 646, 611 S.E.2d 315 (Ct.App. 2005) concludes "The plain language of the rule therefore requires that each party shall be served separately. Mailing one letter addressed to both IKON and CESC, therefore, was not sufficient to comply with Rule 55(b)(2) and Rule (5)(a)". Here, Respondent has made no effort to address the three Appellants she has named in her Complaint. Further, the correspondence purporting notice to "Lutheran Services" was only for the cancelled hearing of August 13, not the rescheduled date on August 20. Appellants deny a misnomer or a scrivener's error. Respondent selected the parties to sue, named them in the Caption and identified them in the Complaint. However, the Court record of Respondent's filings and notices show no consistency in naming the Appellants. This is not a case of an Appellant stating Respondent sued the wrong entity. Here, Respondent claims one set of Appellants in pleadings, and another set in its filings in pursuit of Default. The purported target of Certificates of Service, "Lutheran Services" is not in the Caption. In suing three entities, service must be demonstrated on each. Service on

each must be apparent in the record at default entry and judgment. Separate notice must be given to each Appellant for each Damages Hearing.

Appellants have identified a series and a pattern of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or misrepresentation or other misconduct of an adverse party. The record documents separate instances of these conditions under Rule 55(b), but more significantly, the pattern and accumulation of these particularized instance. warrants the setting aside of default and judgment.

### **CONCLUSION**

Therefore, the ruling of the Circuit Court should be reversed, the entry of default should be set aside, and the damages award should be set aside. Service was ineffective; but even if service was effective on any of the Appellants, proper notice was not given of the damages hearings. If the court determines service is effective on any Appellant, 30 days should be granted to allow for the filing of a responsive pleading.

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ALLENDALE COUNTY  
Court of Common Pleas

Perry M. Buckner, Circuit Court Judge

Case No.: 2019-000849

Louise Fishburne ..... Respondent

v.

Lutheran Services for the Aging, Inc., Lutheran Family Services in the Carolinas, and Lutheran Services for the Aging, Inc. and Lutheran Family Services in the Carolinas d/b/a Lutheran Services Carolinas ..... Appellants

**PROOF OF SERVICE**


I, Patrick T. Morrissey, Counsel for the Appellant, Lutheran Family Services in the Carolinas d/b/a Lutheran Services Carolinas, hereby certify that I have served the within Initial Brief by depositing a copy of the same in the United States Mail, postage prepaid, addressed to the following:

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August 7, 2019

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The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
PO Box 11629  
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AUG 12 2019  
SC Court of Appeals

Re: Louise Fishburne, Respondent

vs.

Lutheran Services for the Aging, Inc., Lutheran Family Services in the Carolinas, and  
Lutheran Services for the Aging, Inc. and Lutheran Family Services in the Carolinas  
d/b/a Lutheran Services Carolinas, Appellants

Appellate Case No.: 2019-000849

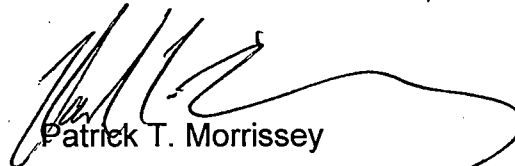
Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Appellants' Initial Brief, Appellants' Designation of Matter case to be included in the Record on Appeal, and Proofs of Service in the above referenced matter. Please file the original and return a stamped, filed copies in the self-addressed, stamped envelope provided for your convenience.

Thank you very much for your attention to this matter.

Very truly yours,

CLAWSON and STAUBES, LLC

  
Patrick T. Morrissey

PTM/msm

Enclosures

cc: Steven D. Murdaugh, Esq.  
Herbert Louthian, Esq.  
Christopher W. Nickels, Esq.

Hasler  
08/07/2019  
USPS022019  
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The Honorable Jenny Abbott Kitchings  
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