STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No. 2017-CP-40-3728
Appellate Case No. 2017-002469

Neal Truslow.....Respondent,

v.

Stephen Bretzinger, Lindsey Holsinger, and Rikard & Protopapas, Defendants,

Of Whom Stephen Bretzinger and Lindsey Holsinger are the, ...Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent, attorney Neal Truslow (hereafter "Truslow"), brought an action for declaratory relief, seeking an order directing Defendant Rikard & Protopapas, LLC (hereafter "Protopapas") to release funds held in trust that were related to Truslow's prior representation of Appellants Bretzinger and Holsinger (hereafter "Appellants"). (R. pp. 26-46).

Protopapas filed an answer on his own behalf dated July 8, 2016, in which he admitted he was holding $35,132.55 in his trust account. (R. p. 49 ¶ 7).

By order dated September 12, 2016, the Richland County Clerk of Court authorized Service by Publication after Protopapas was forbidden to accept service on behalf of Appellants and multiple attempts at personal service on Appellants were unsuccessful. (R. p. 4). Service by Publication upon Appellants was completed by the Sun Sentinel newspaper on October 6, 2016, with proof of service filed with the Richland County Clerk of Court on October 14, 2016. (R. p. 104).

On November 14, 2016, Truslow's counsel filed a motion for default judgment. Circuit Court Judge Benjamin signed an order entering default judgment against Appellants on November 18, 2016. (R. pp. 6-8). For reasons that are not apparent from the record, the entry of default judgment was not recorded with the clerk of court until November 29, 2016. *Id.*

Appellants filed a Motion to Set Aside Default on November 16, 2016 (received by the court, per online database, via U.S. Mail on November 18, 2016) and a Motion to Set Aside Default Judgment on December 22, 2016. On September 21, 2017, Judge Lee issued an Order denying Appellants' Motion to Set Aside Default Judgment.[1] (R. pp. 16-20). Appellants filed a Rule 59(e)

[1] There was no separate entry of default entered against Appellants. Judge Benjamin's order entered default judgment, and there was no intervening entry of default by the clerk of court.

motion on October 2, 2017, which was denied by order dated October 30, 2017 and filed October 31, 2017. (R. pp. 22-24). On November 27, 2017, Appellants' served the Notice of Appeal in this matter.

FACTS

Respondent Truslow previously served as counsel for Appellants in recovering funds in a civil action. (R. pp. 31-32 ¶ 6 – 12); *See also* United States District Court for District of South Carolina PACER, Case #:0:13-cv-01771-JMC (ECF 78). Appellants attempted to reject the settlement reached between the parties to that action after previously authorizing it. The court in which the matter was then pending issued an order enforcing the settlement. *Id.*

Defendant Protopapas became successor counsel for Appellants, and the funds recovered by Truslow on Appellants' behalf were delivered to Protopapas for safekeeping. Appellants authorized release of the net proceeds to themselves but objected to payment to Truslow. (R. p. 601, Item No. 1; R. p. 603, Item 9).

Truslow then brought an action for declaratory relief, seeking an order directing Protopapas to release the remaining funds held in trust. (R. pp. 26-46). Truslow's counsel asked Protopapas if he could accept service for Appellants. On June 20, 2016, Protopapas forwarded a copy of the complaint to Appellants and asked that they "advise as to how you wish me to proceed." (R. p. 533). Nevertheless, Appellants forbade Protopapas from accepting service on their behalf. (R. p. 650). Appellants therefore had actual notice of this lawsuit and a copy of the complaint no later than June 26, 2016.

Protopapas filed an answer on his own behalf dated July 8, 2016, in which he admitted he was holding $35,132.55 in his trust account. (R. p. 49 ¶ 7). Protopapas also admitted the allegations of Paragraphs 14, 15 and 16 of the complaint, which read as follows:

14. Upon appearance as counsel by ... Protopapas, [Truslow] notified Bretzinger, Holsinger, and Protopapas that [Truslow] was asserting a charging lien for attorney's fees and costs against the first $100,000 of any recovery made by Defendants Bretzinger and Holsinger in connection with the Federal Action, pursuant to the terms of the Fee Agreement.

15. The Federal Action concluded shortly thereafter after a motion to compel settlement filed in November 2014 was ultimately granted by order of the Federal District Court on May 7, 2015.

16. ... Protopapas received $100,000 in payment from the Federal Action defendants on or about June 5, 2015, and subsequently deposited the funds into its firm trust account.

Since Protopapas was prohibited by Appellants from accepting service of the pleadings on their behalf, Truslow attempted service of the pleadings in this matter via personal service on multiple occasions at Appellant's home address in Florida. As more fully set forth in the Affidavit in Support of Motion for Service by Publication (which motion was granted), the sheriff's department in the county of Appellant's residence in Florida attempted service upon Appellants on eight (8) occasions and noted activity that suggested Appellants were evading service of process. (R. pp. 92-102). Service was also attempted by United Parcel Service on four (4) additional occasions. *Id.* By order dated September 12, 2016, the Richland County Clerk of Court authorized Service by Publication. (R. p. 4).

Service by Publication upon Appellants was completed by the Sun Sentinel newspaper on October 6, 2016, with proof of service filed with the Richland County Clerk of Court on October 14, 2016. (R. p. 104).

Ten days later, Appellants' current counsel contacted the undersigned via email asking for a copy of the pleadings filed to date, indicating he and his clients' knowledge that service by publication was being accomplished. (R. pp. 665-666). Truslow's counsel responded via email the same day and provided the Summons and Complaint, Order for Service by Publication, and a

filed copy of the Affidavit for Service by Publication, thereby providing Appellants' counsel with proof of final service by publication as of October 6, 2016. *Id.* In closing that communication, the undersigned said "[l]look forward to hearing from you." *Id.* Assuming Appellants' counsel opened the attachments provided by Truslow's counsel, he was aware no later than October 24, 2016 that service had been fully completed as of October 6, 2016. As a result, Appellants were also charged with knowledge of service by publication on October 6, 2016 (although they received a copy of the Summons and Complaint approximately four (4) months earlier when Protopapas first sent it to them).

More than thirty (30) days passed after service was accomplished by publication. No request for extension, notice of appearance, or any other communication was made or received. On November 14, 2016, Truslow's counsel filed a motion for default judgment and, even though not required to by rule, she provided an email courtesy copy of the motion to Appellants' counsel. (R. p. 667). The following day, Truslow's counsel received an email from Appellants' counsel indicating he had been "in the process of" preparing an answer when the Affidavit of Default and Motion for Entry of Default Judgment had been served upon him and asked for consent to set aside the default. Truslow's counsel declined, indicating the reasons why consent would not be forthcoming. (R. p. 668).

Circuit Court Judge Benjamin signed an order entering default judgment against Appellants on November 18, 2016, which was recorded with the clerk of court on November 29, 2016. (R. pp. 6-8).

The email indicating that an answer was being prepared was received five (5) weeks after service by publication was complete, and three (3) weeks after proof of service on October 6, 2016 had been provided to Appellants and their counsel.

Appellants' counsel transmitted a copy of a motion to set aside entry of default, which was received by the court (per online database) via U.S. Mail on November 18, 2016. Appellants' counsel also filed and served an Answer on behalf of Appellants, but the Answer was filed after Motion for Entry of Default Judgment had been filed. A month later, on December 22, 2016, Appellant's filed a Motion to Set Aside Default Judgment.

While awaiting hearing on the post-trial motions, Truslow served discovery primarily regarding to the issues surrounding Appellants' default. For instance, he asked for proof that Appellants had, in fact, received the net settlement proceeds from the $100,000 settlement, and evidence regarding when they first received a copy of the complaint. (R. pp. 436-438; R. pp. 440-444). Appellants' initial responses to discovery were evasive at best. Following motion by Truslow, Judge Lee ordered Appellants to supplement their discovery responses and awarded attorney's fees to Truslow. (R. pp. 10-14). Once ordered to supply complete responses, Appellants admitted they were aware of the existence of the lawsuit "no later than August 22, 2016" and also aware that service upon them was being attempted. (R. pp. 601-604). Subsequent responses admitted they had received a copy of the summons and complaint from Protopapas on June 20, 2017. (R. p. 533).

Appellants' post-trial motions which were denied by order dated September 21, 2017.[2] (R. pp. 16-20).

Note: Many of the "facts" set forth in Appellants' brief are unverified allegations taken from the Answer they filed in this action, which was untimely by virtue of being filed after they were already in default. As such, it was not considered by the trial court. Those facts have not

[2] Again, there was no separate entry of default entered against Appellants. Judge Benjamin's order entered default judgment, and there was no intervening entry of default by the clerk of court.

been adjudicated, nor subjected to the scrutiny of a judicial proceeding. The allegations are certainly not "facts" and should not be considered as true for purposes of this appeal. In fact, but for the physical clocking-in of the Answer, the Answer itself is not within the scope of pleadings which were considered by the trial court and should not be considered by the appellate court either. Truslow strenuously disagrees with the facts as alleged in the answer. (R. p. 410, line 13 – p. 411, line 10) (summarizing the events leading up to the settlement that Appellants claim was not authorized).[3]

STANDARD OF REVIEW

Truslow asserts that Appellants have almost accurately stated the appropriate scope of review on page 7 of their initial Appellants' brief, the issue, however, being the citation to *Sundown v. Intedge Industries*, 383 S.C. 601, 606, 681 S.E.2d 885, 887 (2009) is slightly jumbled. The actual quotation from the case is "[t] he trial court's decision [whether to set aside default judgment] will not be disturbed on appeal of an abuse of... discretion. [...] An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as opposed to legal conclusions, is without evidentiary support." *Id.* at 888.

Issue One

The trial court correctly ruled that Appellants had failed to show "good cause" to set aside default judgment and in denying Appellants' Motion to Alter or Amend.

As set forth above, the "facts" which Appellants incorporate into their argument are all derived from Appellants' untimely Answer, which was not before the trial court and should not be

[3] The United States District Court has already ruled that the settlement was approved in writing, and for that reason, an order was issued enforcing it. (R. pp. 618-625). The United States District Court for the District of South Carolina contains a Motion by Truslow seeking to be relieved as counsel because of "fundamental" disagreements that had arisen between himself and Appellants. (R. pp. 626-631). It should be obvious to this Court, as it was to the United States District Court, that Appellants' had "buyers remorse" after agreeing to the settlement which Truslow presented on their behalf and attempted to claim the settlement had not been authorized.

referenced on appeal. *Spreeuw v. Barker*, 385 S.C. 45, 682 S.E.2d 843 (Ct. App. 2009) (appellate court cannot consider issues that were not before the trial court).

Entry of default is a ministerial act performed by the Clerk of Court. *Stark Truss Co. v. Superior Cons. Corporation*, 360 S.C. 503, 602 S.E.2d 99 (Ct.App. 2004). There was no entry of default in this case. Upon filing of the motion for entry of default judgment, default judgment was granted. (R. pp. 108-109; R. pp. 6-8).

The issue Appellants' purport to be arguing is whether the trial judge erred in failing to find "good cause" under the terms of Rule 55(c) for their counsel's failure to timely file the answer in this action. In their brief, however, Appellants gloss over that requirement and assert that they obviously showed evidence of good cause because their counsel notified Truslow's counsel that he would be representing them. (Appellants' Initial Brief p. 8). Appellants' counsel admits he did not calendar the date for filing the responsive pleadings correctly, and that led to entry of the default judgment. *Id.* p. 8-9. Instead of attempting to show good cause (as none can be shown), Appellants argue that they had meritorious defenses. *Id.* p. 9. They generally refer to their Answer, which was not considered by the trial court, and which makes no argument about "good cause."

At the hearing, Appellants "good cause" for failing to timely respond to the pleadings was their assertion that their counsel calendared the date for answering incorrectly. (R. p. 396, line 10). Counsel asserted that most attorneys would have given their counsel a thirty-day extension of time within which to answer. (R. p. 399, line 24 – p. 400, line 4). They asserted that their Answer was filed within forty-five days and that should have been good enough. (R. p. 400, lines 3-5). As Truslow's counsel pointed out to the trial court, she might have given Appellants an extension of time to answer had they asked for one, but they did not.

A defendant fails to establish sufficient cause for relief from entry of default judgment where he mistakenly believed that plaintiff's counsel had given an unlimited extension of time to respond. *Dixon v. Besco Engineering Inc.,* 320 S.C. 174, 463 S.E.2d 636 (Ct.App. 1995). This, in essence, is what Appellants argue here, *i.e.,* our counsel calendared the response date incorrectly and we should have had more time because everybody always grants more time.

Rather than arguing or establishing good cause before the trial court, the record reflects unquestionably that Appellants had a copy of the complaint from their former counsel Protopapas no later than June 20, 2016. (R. p. 533). They knew formal service was being attempted on them no later than August 22, 2016. (R. p. 602, Item 2), and they actively avoided service. (R. pp. 92-102). Appellants also admit they "were aware no later than October 8, 2016 that service by publication had been authorized by this Court." (R. p. 602, Item 4).

When Truslow's counsel provided Appellants' counsel with a copy of the pleadings via email on October 24, 2016, she included the Summons and Complaint, the Order for Service by Publication and the Filed Affidavit of Service by Publication filed on 10-14-2016. (R. pp. 665-666). The Affidavit of Service by Publication states that the third date upon which publication occurred, and therefore the date service was accomplished/completed in accordance with the Order providing for the same, was October 6, 2016. (R. p. 104).

The "good cause" asserted in Appellants' brief is only that their counsel "erroneously calendared the due date for the Answer." (Appellant's Brief p. 8-9). However, the record therefore reflects as follows:

1. Appellants actually received a copy of the Summons and Complaint in this action on June 20, 2016. (R. p. 533).

2. Appellants were aware no later than August 22, 2016 that efforts were being made to serve those pleadings on them formally. (R. p. 602, Item 2).

3. Appellants were aware no later than October 8, 2016 that service by publication had been authorized by order of the Court. (R. p. 602, Item 4).

4. On October 24, 2016, Appellants' counsel received from Truslow's counsel proof that service by publication had been accomplished on October 8, 2016. (R. pp. 665-666). However, the filed Affidavit of Service was docketed with the Richland County Clerk of Court ten (10) days' earlier, so both he and his clients could have found the proof that service had been accomplished on October 6, 2016. *Id.*

5. That filing was made five (5) months after Appellants first received a copy of the filed complaint from their former counsel Protopapas.

In determining whether a moving party has established "good cause" for setting aside default[4] the court must consider (1) the timing of the motion; (2) whether the defendants had a meritorious defense; and (3) the degree of prejudice to the plaintiffs if the relief is granted. *Top Value Homes Inc. v. Harden,* 319 S.C. 302, 460 S.E.2d 427 (Ct.App. 1995). Once a party has put forth a satisfactory explanation for the default (which has not occurred here), the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on

[4] *See* footnote 1. There was no separate entry of default followed by entry of default judgment. Judge Benjamin's order dated November 18, 2016 addressed both entry of default and default judgment.

the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E. 2d 636, 639 (Ct. App. 1995).

While the Motion to Set Aside Default was promptly filed, none of the other criteria have been established. The "meritorious defense" purportedly shown is a reference to the Answer that was filed after the deadline, which includes eight vague defenses and a "counterclaim" that simply contains more denials of the allegations contained in the complaint. Moreover, Defendants cannot overcome the acceptance created by their receipt, without objection, of the settlement proceeds obtained for them by Truslow. Moreover, there is no "excusable neglect." There is neglect, certainly, but none that can be excused.

Rule 55(c), SCRCP, permits a party to move to set aside the entry of default; however, the trial court has the sound discretion over the decision to grant or deny relief from an entry of default. *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct App. 1987); *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).

While it is true that Appellants moved for relief quickly after learning that Truslow had filed for a default judgment, the timing of Appellants' motion cannot be examined in isolation. It must be viewed in light of the actual date Appellants received a copy of the complaint, therefore being on full notice of the allegations raised against them, which was five (5) months before Truslow sought default judgment. It must also be examined in light of Appellants' admissions that they knew service by publication was being sought three (3) months earlier and that it had been authorized more than six (6) weeks earlier. Lastly, the evidence that Appellants were actively avoiding service, both by law enforcement and by private courier, must also be considered in addressing timeliness of their request for relief. Appellant's active efforts to avoid service are significant in terms of the trial court's application of discretion in refusing to set aside the default.

While the issue as stated by Appellants is limited to "good cause," they also argue in their brief that they presented meritorious defenses, again citing to the answer that was filed after the default judgment was signed. The issues regarding the enforcement of settlement had already been addressed by the United States District Court by order dated May 7, 2015, a year and one-half before suit was filed in this action. (ECF 77, Case No. 0:13-cv-02771). The alleged "meritorious defenses" Appellants offer are largely affirmative claims they sought to assert against Truslow. Those defenses and claims were mooted by Appellants' acceptance of the settlement proceeds from the federal court settlement. *See Watson v. Coxe Brothers Lumber Company*, 203 S.C. 125, 24 S.E.2d 401 (1943) (settlement binding when contesting party accepted the benefits of the settlement).

Moreover, the standard for setting aside the default judgment is "more rigorous" than the "good cause" argument asserted by Appellants. *Sundown Operating Company Inc. v. Intedge Industries Inc.,* 383 S.C. 601, 681 S.E.2d 885, 888 (2009). In order to be relieved from a default judgment, a moving party must establish "a more particularized showing of mistake, inadvertence, excusable negligence, surprise, newly discovered evidence, fraud, misrepresentation or 'other misconduct of an adverse party.'" *Id.*

Appellants have not attempted to show any of these things, nor could they. They also argue that Truslow would sustain no prejudice if the default judgment is set aside. However, as is evident from the Answer Appellants attempted to file, Appellants want to introduce collateral matters into this litigation, suggesting this is an appropriate forum in which to assert a claim against Truslow for settling the underlying case without their permission (which Truslow strenuously disputes and the federal district court rejected). Prejudice to Truslow is incalculable. Just a glance at the tortured history of the instant litigation makes clear that Appellants are litigious and unreliable witnesses.

They tried to play games with discovery in this matter, so much so that the circuit court sanctioned them and required Appellants to pay Truslow's attorney's fees. (R. pp. 11-14). Supplemental discovery responses produced after the order to compel make clear that Appellants were playing fast and loose with discovery and actually telling untruths in their original discovery responses. (R. pp. 601-604; R. p. 533). Only upon receipt of the supplemental discovery responses was it clear that Appellants had lied about when they knew about the pendency of this action and when they received a copy of the complaint in this action.[5]

Appellants' argument is without merit.

Issue Two

The trial court did not err in failing to grant Appellants' Motion pursuant to Rule 60(b)(1).[6]

Appellants argue, by way of separate argument, that the trial court erred in failing to grant its Rule 60(b) motion. Their argument focuses on the promptness which they claim they acted after learning the default judgment had been entered against them. (Appellant's Initial Brief p. 13-14) and the existence of a meritorious defense. *Id.* p. 14-15.

These are the same arguments Appellants made under their Issue One, and Truslow incorporates his response to Issue One here.

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[5] In Appellants' Supplemental response to RTP, Appellants stated they received a copy of the complaint in this action on October 24, 2016 from their present counsel. (R. p. 526). After the motion to compel was granted, Appellants produced a document which they had previously claimed as privileged, which reflected they received a copy of the complaint in this action from their prior counsel on June 20, 2016. (Excerpt from Documents produced with Appellants' Third Supplemental Response to RFP). Appellants were clearly attempting to mislead Truslow and this Court as to when they knew this lawsuit had been filed against them.

[6] Appellants made one motion pursuant to both Rule 55(c) and Rule 60(b)). (R. pp. 169-171). The earlier motion, dated November 16, 2016, only sought to set aside default, and cited only to Rule 55(c). (R. pp. 140-155).

Issue Three

Absence of a Rule 55(b)(4) examination did not invalidate the default judgment.

In their motions to set aside default judgment pursuant to Rule 55(c) and Rule 60(b), Appellants argue for the first time that the provisions of Rule 55(b)(4) were not complied with, and therefore the judgment should have been set aside. This argument was raised for the first time after entry of judgment, which did not preserve the issue for appellate review. *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005).

Moreover, requiring compliance with the requirements of Rule 55(b)(4) would have been superfluous because of the circumstances of this case. Here, the location of the funds was not in dispute, nor was the amount being claimed by Truslow in dispute. Requiring further proceedings, when the complaint set forth all information necessary to determine whether the amount in controversy was definite, would have been duplicative.

The rule upon which Appellants rely provides that, in an action where service is effected by publication and the defendant is a non-resident, default judgment shall not be entered unless "the defendant have been examined on oath respecting any payments that have been made to the plaintiff. . ." together with an affidavit showing "an attachment has been issued in the action and levied upon property belonging to defendant, which affidavit shall contain a specific description of such property, and a statement of its value. . ." Rule 55(b)(4), SCRCP.

While no published South Carolina decision has construed this particular section[7] of Rule 55, the Court of Appeals has noted that the notice requirements of Rule 55 exist to ensure that

[7] There is no federal counterpart to this rule, and thus no body of caselaw about a comparable federal rule to access for assistance in considering this particular provision.

defendants receive due process in connection with proceedings in which a default is entered. *Dymon Inc. v. Hyman*, 305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991).

While Truslow did not file proof of an examination under oath of these Defendants with his Motion for Entry of Default Judgment, the complaint itself with the incorporated exhibits, established these facts. (R. pp. 35-46).

Additionally, Protopapas' answer acknowledged that he had been counsel for the Defendants for a time, that he had received $100,000.00 on their behalf, and that he continued to hold the exact amount of $35,132.55 in his trust account. It also admitted that Appellants had been made aware by Protopapas of the charging lien being asserted by Truslow. (R. p. 49 ¶¶ 6 & 7).

That filing by Protopapas established Appellants' knowledge of the lien asserted by Truslow, and that Protopapas continued to hold remainder of the $100,000.00 that Protopapas had received, in the amount of $35,132.55 in trust pursuant to Truslow's charging lien.[8]

Additionally, however, after Appellants filed their Motion to Set Aside Default Judgment, Truslow served Requests to Admit to Defendants. In their responses, Appellants admitted the following:

1. Protopapas "was not allowed to accept service [of the complaint in this action] on [Appellants'] behalf."

4. "[Appellants] admit that they were aware no later than October 24, 2016 that service by publication has been authorized by this Court."

[8] Appellants' own Answer, filed after the Motion for Entry of Default, also established Defendants' knowledge of Truslow's "charging lien for costs and fees" and that Protopapas was holding the disputed funds in trust. (R. p. 162¶ 34; R. p. 163¶ 39).

5. "[Appellants] admit that they had notice of the litigation no later than November 1, 2016."

6. "[Appellants] admit that they received a copy of the complaint no later than November 1, 2016.

9. "[Appellants'] admit they received a portion of settlement funds in the action. . ."

(R. pp. 446-449).

Of course, the Court can readily tell that the statements in No. 5 and 6 are attempts to mislead, because Appellants' counsel had proof in hand on October 24, 2016 that the complaint had been filed and service on his clients has been completed on October 6, 2016. Additionally, after acknowledging that Protopapas was not allowed to accept service of the pleadings in this action (because he apparently contacted them and made them aware of the request to accept service), Defendants disingenuously claim they "cannot recall a specific date upon which they became aware that a lawsuit had been filed and that service was being attempted." *Id.* at ¶ 2. However, by their answer to RTA No. 1, Defendants acknowledged that they refused to allow Protopapas to accept service on their behalf. That communication was received by the undersigned on August 22, 2016. (R. p. 650). Therefore, the suggestion that Defendants "cannot recall" the date upon which they first became aware of the lawsuit is an untruth, intended to mislead this Court and Truslow and to subvert these proceedings.

Moreover, after being compelled to more fully respond to discovery, Appellants admitted they were in receipt of a copy of the summons and complaint on June 20, 2017, (R. p. 533). They admitted this only after being ordered to fully respond to discovery.

The appellate courts of this state have stated that "due process" is a fluid doctrine to be applied based on the circumstances of the case. *Capers v. Flautt*, 305 S.C. 254, 407 S.E.2d 660

(Ct. App. 1991). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Stono River Environmental Protection Association v. South Carolina Department of Health and Environmental Control*, 305 S.C. 90, 406 S.E.2d 340 (1990), citing *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed 2d 484 (1972).

The protections afforded by Rule 55(b)(4) exist to ensure that default judgment is not entered unless the Court can determine from the record that a defendant has had sufficient notice of the particular relief being requested. Here, Appellants:

- had counsel when this dispute arose,
- refused to negotiate with Truslow,
- refused to allow Protopapas to accept service of this complaint,
- accepted the net proceeds of the settlement from Protopapas while refusing to allow him to disburse earned fees of an exact amount to Truslow,
- acknowledged they were aware of Truslow's charging lien,
- consistently evaded service, and
- misled Truslow and the Court with their false discovery responses.

Even when Appellants' current counsel was provided with the pleadings and a copy of the proof of service by publication, no effort was made by Defendants or their counsel to acknowledge service, verify the date of service, or to request additional time to respond. Indeed, it is clear that Appellants were in no hurry to respond to Truslow's claim, and only did so almost a full year after the dispute has arisen when they had run out of delaying tactics.

Truslow respectfully asserts that more than sufficient evidence existed at the time default judgment was entered for the Court to satisfy itself that Appellants' due process rights were protected. Additionally, those matters filed and served after entry of Default Judgment simply

verify Appellants' knowledge of all of the essential elements of this claim at the time Default Judgment was entered against them.

Issue Four

Failure to require service of the pleadings at Appellants' last known address was not grounds for setting aside the default judgment.

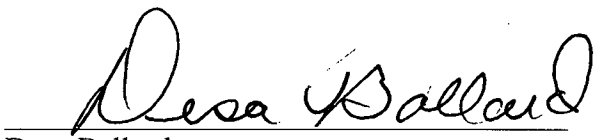
Truslow acknowledges that the order for service by publication did not include a requirement that he send a copy of the pleadings by US mail to Appellants' last known address. Nevertheless, as with the prior issue, this omission did not affect the validity of the default judgment, nor did it deprive Appellants of their due process rights, which were otherwise met under the facts outlined hereinabove. It is without doubt that Appellants received a copy of the Summons and Complaint on June 20, 2017, immediately after they were filed (via email from Protopapas) after Protopapas was asked if he could accept service.

Simply stated, "What doesn't make a difference doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App. 1987). Had the order for publication included a requirement that Truslow send a copy of the pleadings to Appellants' last known address, and had he done so, nothing would have been different. Appellants still would have refused Protopapas permission to accept service, they would have repeatedly avoided service of process, go on to serve misleading discovery responses, and further drag these proceedings out beyond logic and the limits of the rules.

CONCLUSION

This is a classic case where clients fire their lawyer after the settlement was reached, then despite gladly accepting their portion of the proceeds, undertake all manner of effort (including some worthy of court sanction) to prevent their former counsel from getting that to which he is

obviously entitled. Based on the facts properly considered by the trial court, however, and the procedure by which this matter reached its conclusion, the trial court correctly ruled that Appellants have failed to show any sufficient basis to set aside default judgment or justify altering or amending that judgment. It was a lawful and appropriate exercise of sound discretion by the trial court with sufficient evidentiary support, and as such, Respondent respectfully requests that the orders of the trial court be affirmed in their entirety.



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ATTORNEYS FOR RESPONDENT

August 23, 2018

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
ALISON RENEE LEE, CIRCUIT COURT JUDGE

Case No. 2017-CP-40-3728
Appellate Case No. 2017-002469

Neal Truslow.....Respondent,

v.

Stephen Bretzinger, Lindsey Holsinger, and Rikard & Protopapas, Defendants,

Of Whom Stephen Bretzinger and Lindsey Holsinger are the, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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