THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
James B. Jackson, Jr., Master in Equity

Appellate Case No. 2020-000433

Shanika Monique Void,……..…….…. Respondent,

v.

Pine Hill Apartments, L.P., and JDC Management, LLC,…….…....Defendants,

Of which Pine Hill Apartments, L.P., is the……...Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal arises out of a personal injury action in which Respondent Shanika Monique Void ("Void") properly served Appellant Pine Hill Apartments, L.P., ("Pine Hill") and Pine Hill failed to answer, resulting in the entry of default and a judgment against Pine Hill that it seeks to vacate. Void filed a Complaint against Pine Hill on February 4, 2019. Service on Pine Hill's registered agent sent by certified mail was returned as unable to forward. (R. p. 29). On March 11, 2019, Void filed an affidavit of personal service on Pine Hill. (R. p. 28). The lower court entered default as to Pine Hill on May 7, 2019. (R. pp. 1, 32). On July 8, 2019, The Honorable James B. Jackson, Jr., Master in Equity, entered an order of judgment against Pine Hill for $250,000.00 in actual and punitive damages. (R. pp. 5-13). On July 18, 2019, Pine Hill filed a motion to set aside the entry of default and to vacate the court's default judgment. (R. p. 41).

On August 19, 2019, Void filed an Amended Summons and Complaint adding JDC Management, LLC, as a defendant. (R. p. 57). On September 3, 2019, Pine Hill filed an Answer to the Amended Complaint. (R. p. 61). On November 19, 2019, Void filed a motion to strike Pine Hill's Answer. (R. pp. 112, 181). On February 10, 2019, the lower court entered an Order denying Pine Hill's motion. (R. pp. 15-18). Pine Hill filed a motion to alter or amend on February 20,

2019, and the court denied it on March 4, 2020. (R. pp. 113, 20). On March 10, 2020, Pine Hill filed a notice of appeal. (R. p. 124).

FACTS

On September 2, 2016, Void was a tenant living at Pine Hill Apartments in Orangeburg, South Carolina. (R. p. 24 ¶ 4). That morning Void visited a friend on the third floor. *Id.* When she left the friend's apartment and walked down the stairwell, Void fell on slippery steps. *Id.* She slipped down the flight to the second floor and suffered painful injuries to her back, right leg, ankle, and foot. *Id.*

In November 2016 Void sent a spoliation letter to Pine Hill at the apartment complex address, 117 Yellow Jasmine Road, Orangeburg, South Carolina. (R. pp. 170, 175-76, 190). In July 2018, she sent to the same address a demand letter explaining her injuries. *Id.* Pine Hill received both letters. (R. pp. 170, 178).

On February 4, 2019, Void filed a Summons and Complaint against Pine Hill asserting a negligence action and seeking actual and punitive damages. (R. p. 24). On February 7, 2019, Void sent Pine Hill by certified mail, restricted delivery a copy of the Summons and Complaint to its registered agent listed on the South Carolina Secretary of State's website. (R. pp. 29, 31). On February 11, 2019, the service was returned as "Attempted-Not Known, Unable to Forward." (R. pp. 29-30). After Void received this, she served Pine Hill personally at the location where it received her prior letters. (R. p. 179).

On February 28, 2019, Void served the Summons and Complaint on Brandon Wages at the same address where she previously sent two letters. (R. p. 28). The affidavit of service for Wages states he was served at Pine Hill Apartments and is the "Property Manager." *Id.* Pine Hill did not answer or appear within thirty days of service as required by Rule 12(a), SCRCP. (R. p. 32).

On May 2, 2019, Void filed an affidavit of default as to Pine Hill. The affidavit stated that more than thirty days passed since service on Wages and Pine Hill did not file an answer or appear. (R. p. 32). On May 7, 2019, the Honorable Edgar W. Dickson entered default as to Pine Hill. (R. p. 1). On May 24, 2019, Judge Dickson referred the case to the Master in Equity. (R. p. 3). On May 31, 2019, Void filed a Notice of Damages Hearing. (R. p. 33).

On June 20, 2019, the Honorable James B. Jackson, Jr., Master in Equity, held a damages hearing. (R. p. 5). Void presented evidence of her then-current medical expenses and lost wages. (R. p. 8). Judge Jackson found she presented evidence of the need for future medical care, pain and suffering from the fall on September 2, 2016, to the present and into the future, and mental anguish and loss of enjoyment of life from her injury to the present and into the future. (R. pp. 7-8, 145-55). Void testified that she previously talked to someone at Pine Hill about the slippery steps and the need for grip strips but no one fixed it. (R. p. 157). On July 8, 2019, Judge Jackson entered a $250,000.00 judgment against Pine Hill for actual and punitive damages. (R. p. 13).

On July 19, 2019, Pine Hill appeared for the first time and filed a motion[1] to set aside the entry of default and to vacate the court's default judgment under Rules 55 and 60(b), SCRCP, on the bases that service on Wages was improper and good cause and excusable neglect existed. (R. p. 41). In support of the motion, Pine Hill filed affidavits of Cheryl Ferraro and Wages. (R. pp. 48-53). Ferraro is the vice president of the two entities that are the sole members of two other entities that are the general partners of Pine Hill. (R. p. 48 ¶¶ 3-4). Ferraro, was previously known as "Cheryl Finch", who is listed as the registered agent for Pine Hill. (R. pp. 31, 48 ¶ 6).

[1] Pine Hill also filed a motion to stay enforcement of the judgment, which the parties resolved through a stipulation, and a motion to alter or amend the order entering judgment against it. (R. pp. 35, 54, 37). The lower court did not hear the motion to alter or amend, and Pine Hill did not ask it to address that motion at the hearing.

Ferraro stated that Pine Hill did not receive the Summons and Complaint but did not explain why Pine Hill failed to keep an accurate registered agent address with the Secretary of State. (R. p. 48 ¶ 5). JDC Management, LLC, is the property manager for Pine Hill. (R. p. 49 ¶ 11). Ferraro stated the management agreement between JDC Management and Pine Hill "specifically dictates that JDC Management 'is not authorized to accept service of process on behalf of [Pine Hill Apartments, LP]'" but does not include a copy of the agreement to show what words the bracketed-in "Pine Hill Apartments, LP" replaced. (R. p. 49 ¶ 13) (alteration in original).

Wages stated he is "and was on February 28, 2019" a maintenance technician employed by JDC Management and not a property manager employed by Pine Hill. (R. p. 52 ¶¶ 3-4). Ferraro and Wages attested that Wages was not authorized to accept service for Pine Hill. (R. pp. 52 ¶ 6, 49 ¶ 8). Wages did not deny receiving service or representing to the process server that he was a property manager. (R. pp. 52-53). Neither Wages nor Ferraro stated what Wages did with the Summons and Complaint. (R. pp. 48-53).

On August 19, 2019, Void filed an Amended Complaint to add JDC Management, LLC, as a defendant because she first learned of JDC Management and Pine Hill's relationship from Ferraro and Wages' affidavits. (R. pp. 57, 180). The only amendments to the Complaint were the addition of JDC Management as a defendant, a paragraph about its citizenship, and changing the word "Defendant" to plural "Defendants" in some of the allegations. (R. pp. 57-60). Void served JDC Management, and it timely filed an answer. (R. pp. 83, 85). Ferraro, the vice president of the entities that own the entities that own Pine Hill, is also the registered agent for JDC Management, and she received and accepted service for it. (R. pp. 83-84).

Void did not serve the Amended Complaint on Pine Hill because the court had already entered judgment against it. Despite not receiving service, on September 3, 2019, Pine Hill filed

an answer to the Amended Complaint. (R. p. 61). On September 11, 2019, Pine Hill filed a supplement to its motion to set aside the entry of default and to vacate the judgment arguing that the Amended Complaint is operative and renders the original Complaint, entry of default, and judgment null and void. (R. pp. 67-69).

On November 18, 2019, Pine Hill filed a memorandum in support of its motion to set aside the entry of default and judgment. It argued service was improper, the Amended Complaint rendered the initial Complaint and default order and judgment moot, and good cause and excusable neglect existed to set aside the entry of default and judgment. (R. pp. 101-10).

On November 19, 2019, Void filed a motion to strike Pine Hill's Answer to the Amended Complaint because the court already entered a judgment against it at the time Void filed the Amended Complaint. (R. p. 112).

Also on November 19, 2019, Judge Jackson held a hearing on Pine Hill's motion to set aside the entry of default and vacate the judgment. (R. p. 162). Pine Hill made three arguments: (1) the Amended Complaint superseded the original complaint and rendered the entry of default and judgment void; (2) service on Wages was not proper service on Pine Hill, and (3) excusable neglect existed to support setting aside the judgment because it did not receive the Complaint and has meritorious defenses. (R. p. 172). As to the Amended Complaint, Void argued she filed it after the court entered judgment against Pine Hill and, therefore, it was not entitled to service of the Amended Complaint or to answer it. (R. pp. 180-81). As to service of process, Void argued she previously sent letters to the Pine Hill address where Wages was served and Pine Hill actually received those letters, and that the process server believed Wages was the property manager. (R. pp. 175-79, 170, 184). Wages' affidavit did not deny telling the process server he was the property manager. (R. pp. 52-53). As to good cause, Void argued the Complaint sufficiently stated a cause

of action against Pine Hill, Ferraro and Wages did not address any meritorious defense in their affidavits, argument of counsel that the damages were too large was not a meritorious defense, and she is prejudiced by the delay. (R. pp. 182-86).

On February 10, 2020, Judge Jackson entered an Order denying Pine Hill's motion to set aside the default and to vacate the judgment. (R. p. 15). The court found proper service on Pine Hill. (R. pp. 16-17). It found Ferraro and Wages' affidavits established only that Wages was not an employee of Pine Hill but did not deny or explain why Wages represented to the process server that he was the property manager or explain what Wages did with the Summons and Complaint. (R. p. 17). The affidavits show "a very close relationship" between Pine Hill and JDC Management such that it is not unreasonable for Wages to be perceived as an agent of Pine Hill. (R. p. 17). The court noted Pine Hill created the problem of Void trying to personally serve it by failing to keep its registered agent information updated with the South Carolina Secretary of State. (R. pp. 16-17).

The court found the Amended Complaint did not void the entry of default or judgment against Pine Hill because it was filed after the court entered default and judgment. (R. p. 17). Further, Void was not required to serve the Amended Complaint on Pine Hill due to its default. *Id.*

On February 20, 2020, Pine Hill filed a motion to alter or amend the Order. (R. p. 113). As to service of process on Wages, Pine Hill argued the process server's statement that he was the property manager is unfounded, what he did with the Summons and Complaint is irrelevant, and "perceived agency" is not a basis for service. (R. pp. 114-17). Pine Hill also argued that the court cannot rely on the failure to update its registered agent information with the Secretary of State as support for finding proper service. (R. pp. 117-18). Pine Hill argued the court erred in finding the

Amended Complaint did not moot the entry of default and judgment, and erred in not addressing its arguments for relief under Rules 55 and 60(b), SCRCP. (R. pp. 119-22).

On March 4, 2020, the court entered a Form 4 order denying the motion to alter or amend because "Defendant presents no arguments not previously considered by the Court." (R. p. 20). On March 10, 2020, Pine Hill filed a notice of appeal. (R. p. 124).

STANDARD OF REVIEW

"Whether to grant or deny a motion under SCRCP 60(b) is within the sound discretion of the judge." *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). "The trial court's decision will not be disturbed on appeal absent a ***clear*** showing of an abuse of that discretion." *Richardson v. P.V., Inc.*, 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009) (emphasis added). "[I]n reviewing a decision with respect to Rule 60(b), this Court utilizes a deferential standard of review." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 594, 748 S.E.2d 781, 786 (2013). "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." *Stearns Bank N.A. v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007) (internal quotation marks omitted). "The burden rests on the appellant to show that an order based on factual conclusions is without evidentiary support, or that the judge was controlled by an error of law." *Berry v. Ianuario*, 286 S.C. 522, 526, 335 S.E.2d 250, 252 (Ct. App. 1985).

Pine Hill attempts to shift the burden to Void by asserting that the plaintiff has the burden to establish personal jurisdiction over the defendant. (Br. of App. p. 10). This is an appeal from an order denying a motion to set aside an entry of default and vacate a judgment. The issue is service of process, as to which Pine Hill has the burden to show the lower court's decision is without evidentiary support or controlled by an error of law. *Berry*, 286 S.C. at 526, 335 S.E.2d at 525. Regardless, to the extent Void has any burden under these procedural circumstances, she

"need only show compliance with the rules" which, as explained below, she shows in this case. *Roche v. Young Bros.*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995).

ARGUMENT

The lower court correctly denied Pine Hill's motion to set aside the entry of default and to vacate the judgment, and this Court should affirm because Pine Hill fails to satisfy its burden of showing the court's decision is without evidentiary support or controlled by an error of law.

I. THE LOWER COURT CORRECTLY HELD VOID PROPERLY SERVED PINE HILL

The lower court's holding that Void properly served Pine Hill by personal service on Wages is supported by the evidence and not controlled by an error of law.[2] (R. p. 17). This Court should affirm.

Service on a corporation is governed by S.C. Code Ann. § 15-9-210 (1976) which provides for service on a corporation's registered agent but also specifies that service may be accomplished as allowed under Rule 4, SCRCP. § 15-9-210(d) ("This section does not prescribe the only means, or necessarily the required means, of service a domestic business or nonprofit corporation."); S.C. Code Ann. § 33-5-104 (2006), South Carolina Reporters' Cmt. ("[T]he revised statute states that the company can be served by any other proper means. In this regard, attention is directed to South Carolina Rules of Civil Procedure Rule 4(d)(3) . . . ."). Under Rule 4(d)(3), SCRCP, a plaintiff may serve 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

[2] Pine Hill argues that Void's attempted but unsuccessful service on it by certified mail cannot support default. (Br. of App. pp. 10-11). Void does not dispute that contention, and the lower court did not find make that finding. (R. pp. 16-17). The lower court only noted that Void did actually try to serve Pine Hill by its registered agent and Pine Hill's failure to comply with statutory law requiring it to update its registered agent information was the reason Void needed to attempt personal service. *Id.* The Court need not consider or rule on this issue on appeal.

service of process." "No case has been found in South Carolina defining 'managing agent' under Rule 4(d)(3), SCRCP." *Schenk v. Nat'l Health Care*, 322 S.C. 316, 320, 471 S.E.2d 736, 738 (Ct. App. 1996). It is determined based on the particular circumstances of each case.

Pine Hill argues that Wages was not a managing agent under Rule 4(d)(3) and, therefore, service on him was improper. Pine Hill argues Wages was employed by JDC Management (not Pine Hill) and is a maintenance technician not authorized to accept service for either entity. (Br. of App. pp. 11-12). These facts are not dispositive of service under these circumstances, and the lower court correctly held that service on Wages was proper service on Pine Hill.

The court "considered the argument that Brandon Wages was not Defendant Pine Hill's manager or even their employee." (R. p. 17). It found proper service regardless of those facts and noted Ferraro and Wages' affidavits do not address that the process server's affidavit of service indicates Wages is the "property manager" of Pine Hill, and Wages did not explain what he did with the summons and complaint. (R. p. 17). These findings are supported by the evidence and the law.

That Wages was not employed by Pine Hill is not dispositive because corporations commonly designate and authorize agents to accept service of process who are not employed by them, *see, e.g.*, S.C. Code Ann. § 33-5-101 (2006), Official Cmt. ("Corporation service companies often provide, as a commercial service, registered offices and registered agents at the office of the corporation service company."), and an agent does not have to be a principal's employee to have an agency relationship, *see, e.g.*, *Newell v. Trident Med. Ctr.*, 359 S.C. 4, 14, 597 S.E.2d 776, 781 (2004) (holding a hospital may be liable "for non-employee physician negligence" if the physician is its apparent agent).

That Wages was not Pine Hill's "property manager" is not dispositive under these circumstances. The court found Ferraro and Wages' affidavits "fail to address the process server's Affidavit of Service which indicates Brandon Wages was the manager of this defendant." (R. p. 17). This failure is significant. Void is not omniscient and cannot be expected to know the inner managerial workings of Pine Hill. Once Pine Hill failed to comply with statutory law requiring it to maintain accurate registered agent information on file with the Secretary of State, Void was left with no choice but to attempt personal service. *See* S.C. Code Ann. § 33-5-102 (2006); S.C. Code Ann. § 33-5-101, Official Cmt. ("The requirements that a corporation continuously maintain a registered office and a registered agent at that office are based on the premises that at all times a corporation should have an office where it may be found and a person at that office on whom any notice or process required or permitted by law may be served."). Void previously sent legal correspondence to the same address where she served Wages. (R. pp. 170, 175-76, 178). In response to those prior letters which Pine Hill actually received, it did not respond or direct her to send correspondence elsewhere. (R. pp. 170, 178). The process server returned an affidavit showing proper service on a property manager. (R. p. 28). Wages appeared as its managing agent by his presence and appearance as an employee at the same location where Pine Hill previously received legal correspondence. *See Schenk v. Nat'l Health Care*, 322 S.C. 316, 317-20, 471 S.E.2d 736 (Ct. App. 1996) (finding valid service of process where plaintiff served office manager who told the process server that the registered agent retired but assured him that she could accept service); *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 564-65, 274 S.E.2d 290, 291 (1981) (finding service on an assistant restaurant manager sufficient even though the corporation had a registered agent). Void complied with Rule 4(d)(3), SCRCP, and "[w]hen the civil rules on service are

followed, there is a presumption of proper service." *Roche v. Young Bros.*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995) (internal quotation marks omitted).

Pine Hill argues that service on Wages is not proper because service must be made on an "actual agent" who is an "authorized person." (Br. of App. p. 12). This case is distinguishable from those cited by Pine Hill. In *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 560 S.E.2d 624 (Ct. App. 2001), the defendant was a group of independent emergency room doctors that provided services to Greenville Memorial Hospital and maintained no physical office. The process server went to the hospital and served a woman who "indicated she was the manager of" the defendant. *Id.* at 583, 560 S.E.2d at 631. The Court of Appeals found service was ineffective because the defendant provided affidavits stating the woman "was an employee of the hospital and was not authorized to accept service on behalf of" the defendant. *Id.* It stated "there must be evidence the defendant intended to confer" authority to accept service. *Id.* at 584, 560 S.E.2d at 632.

In *Moore v. Simpson*, 322 S.C. 518, 473 S.E.2d 64 (Ct. App. 1996), the plaintiff served a legal malpractice action against a lawyer and his law firm by serving the law firm secretary. The Court of Appeals affirmed the lower court's decision to quash service because there was evidence to support the finding that the secretary lacked authority to accept service. *Id.* at 524, 473 S.E.2d at 67. The secretary "denied she was ever made aware that [the process server] was attempting to serve a summons and complaint." *Id.*

In this case, unlike in *Brown* and *Moore*, there is evidence to support the lower court's finding that Pine Hill intended to confer authority to accept service on a physically-present employee who receives correspondence at 117 Yellow Jasmine Road, Orangeburg, South Carolina, based on Void's prior legal correspondence to that address. In *Brown*, unlike in this

case, the plaintiff served the defendant at a hospital that was not its physical office location. In *Moore*, unlike in this case, the person who received service expressly denied knowing that she was accepting a summons and complaint.

Pine Hill argues there is no apparent agency. (Br. of App. pp. 14-19). "The elements of apparent agency are: (1) purported principal consciously or impliedly represented another to be his agent; (2) third party reasonably relied on the representation; and (3) third party detrimentally changed his or her position in reliance on the representation." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000). The elements are met in this case because, as explained below, Pine Hill represented Wages as an on-site employee in the management office by consciously allowing him to interact with the public on its behalf, the process server and Void reasonably relied on that representation, and Void detrimentally changed her position in reliance on the representation by believing service on Wages was valid only to have Pine Hill challenge it.

After finding sufficient evidence that service on Wages complied with Rule 4(d)(3), SCRCP, the lower court found JDC Management (Wages' employer) and Pine Hill "seem[] to have a very close relationship" because JDC Management manages Pine Hill Apartments and "both have the same agent for Service of Process" such that "Wages could be perceived to be an agent of Defendant Pine Hill." (R. p. 17). Pine Hill takes issue with the court's use of the word "perceived"[3] (Br. of App. p. 13 n.3) but acknowledges that the court found Wages had apparent authority. *Id.* Pine Hill challenges this finding on the bases that (1) its management agreement

[3] The lower court did not base its decision on a "theory of 'perceived' agency" but, as discussed below, it recognized that what a person dealing with an agent is led to believe is relevant to apparent agency. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 297, 468 S.E.2d 292, 296 (1996).

with JDC Management states that JDC management is not authorized to accept service on behalf of Pine Hill and (2) Wages' representation to the process server that he was a property manager cannot support apparent authority. (Br. of App. pp. 14-15; R. p. 49). Both arguments are without merit.

As to the prohibition on acceptance of service in the management agreement,[4] South Carolina law plainly states this is not dispositive. "A true agency relationship may be established by showing evidence of apparent or implied authority, ***even where the parties have entered an agreement to the contrary***." *Fernander v. Thigpen*, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982) (emphasis added). This makes sense given that a person dealing with Pine Hill or JDC Management is unlikely to know the terms of the management agreement. *See Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 297, 468 S.E.2d 292, 296 (1996) ("Those dealing with such an agent, *without notice of restrictions upon his authority*, have a right to presume that his authority is coextensive with its apparent scope, and as broad as his title indicates." (emphasis in original)).

"[A]pparent authority focuses on the principal's manifestation to a third party that the agent has certain authority." *Id.* at 297, 468 S.E.2d at 296. "Accordingly, the principal is bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe that the agent has certain authority and they in turn deal with the agent based upon that assumption." *Id.* Void's process server believed, based on his knowledge of business usages and customs in a career serving legal process, that Wages had authority to accept service for Pine Hill. By employing JDC Management as its property manager, Pine Hill placed JDC Management's employees acting on

[4] Pine Hill inserted its name into the management agreement quotation about not being authorized to accept service and did not submit the agreement to the court to review. (R. p. 49). There is no evidence of the actual language of the agreement.

Pine Hill's behalf in the management office of an apartment complex in a position of authority to accept service of process. The process server did not know Pine Hill employed a separate management company or that Wages was not employed by Pine Hill. Rather, when he went to ***Pine Hill*** apartments to serve a summons and complaint on Pine Hill and Wages was present on the property working on behalf of Pine Hill to ***manage*** the property, this led to the process server's reasonable belief that Wages could accept service for Pine Hill, and the process server dealt with Wages based upon that assumption. Pine Hill cannot engage JDC Management to manage its property and then disavow any authority of JDC Management's employees to act on its behalf.

As to Pine Hill's argument that Wages' representation to the process server that he was a property manager cannot support apparent authority, the court did not rely solely on that basis for its ruling (R. pp. 16-17) and, regardless, the representation is some evidence of apparent authority. While apparent agency is based on conduct of the principal, that conduct is not so limited as Pine Hill argues. (Br. of App. p. 15). A principal may create apparent authority "by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." *Genovese v. Bergeron*, 327 S.C. 567, 571, 490 S.E.2d 608, 610 (Ct. App. 1997) (internal quotation marks omitted) (emphasis in original). "The principal must either intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief." *Id.* at 571, 490 S.E.2d at 610 (emphasis in original). In *Genovese*, the court found a landlord's property manager had apparent authority to release the tenant from the lease where the landlord always dealt with the tenant through the manager. *Id.*

In this case, Pine Hill should realize its conduct of employing a management company with employees on site without open disclosure of their employer is likely to create the belief that such

an employee working in the management office is authorized to accept service for Pine Hill. *See Langdale v. Harris Carpets*, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011) ("Agency may be implied or inferred and may be proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal."). "[C]itizens [such as Pine Hill] are presumed to know the law and are charged with exercising reasonable care to protect their interests." *Ahrens v. State*, 392 S.C. 340, 355, 709 S.E.2d 54, 62 (2011) (internal quotation marks omitted). Pine Hill is charged with knowledge that, when it failed to maintain accurate registered agent information with the Secretary of State, a plaintiff could attempt personal service at the apartment complex where JDC Management employees conducted business on its behalf.

Pine Hill cites to two cases as supposed instances in which the Supreme Court "addressed and resolved this very same issue." (Br. of App. pp. 16). Pine Hill is incorrect.

In *Roberson v. Southern Finance of S.C., Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005), the plaintiff served the defendant corporation by certified mail with return receipt requested addressed to the registered agent. *Id.* at 8, 615 S.E.2d at 114. Instead of the registered agent, a "clerical employee" signed the return receipt. *Id.* The Supreme Court found this insufficient service because the defendant corporation did not manifest the clerical employee as its apparent agent. *Id.* at 11, 615 S.E.2d at 115.

In *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 721 S.E.2d 430 (2012), the plaintiff served the individual and corporate defendants by certified mail with return receipt requested, restricted delivery, to the individual defendant, who was the president of the corporate defendant. *Id.* at 293, 721 S.E.2d at 431-32. The defendants submitted an affidavit stating neither the bookkeeper who signed for the individual defendant nor the woman who signed for the corporate

defendant (that it never employed and had never heard of) were authorized to accept service. *Id.* at 293, 721 S.E.2d at 432. The Supreme Court affirmed the lower court's finding of insufficient service based on the defendants' affidavits that the signatories lacked authority and the absence of evidence that they had authority. *Id.* at 298, 721 S.E.2d at 434.

The facts of this case are not analogous to *Roberson* or *Makawi* because those cases involved service by certified mail and Void served Pine Hill by personal service. Under Rule 4(d)(8), SCRCP, which governs service by certified mail, the defendant need only demonstrate "that the return receipt was signed by an unauthorized person" to set aside the entry of default or vacate a default judgment. There is no such provision in Rule 4(d)(3), under which Void served Pine Hill. Further, service by certified mail does not provide for the defendant to make any representation of authority to the plaintiff or process server. Here, Void served Pine Hill by ***personal service*** performed by a process server that served a person present in the management office where Void previously sent legal correspondence that Pine Hill received. *Roberson* and *Makawi* do not apply to and are not legally controlling under the facts of this case.

Pine Hill makes two final arguments as to service on Wages. First, it argues the lower court erred in relying on the absence of an explanation of what Wages did with the summons and complaint. (Br. of App. pp. 18-19). The court did not err in noting that fact because it is relevant given that Void previously sent to the same address legal correspondence that Pine Hill received and because Pine Hill's mere denial that it received the summons and complaint is legally insufficient. *See Fassett v. Evans*, 610 S.E.2d 841, 844, 364 S.C. 42, 47 (Ct. App. 2005) ("[A]n officer's return of process creates the legal presumption of proper service that cannot be impeached by the mere denial of service by the defendant." (internal quotation marks omitted)). Second, Pine Hill makes the far-fetched and unsupported argument that, if the Court affirms then any defendant

may be served through a third-party and this will undermine the constitutional protections of service of process. (Br. of App. p. 19). The lower court did not hold that service on any third-party that provides any service to a defendant is sufficient service of process. It held that, under the circumstances of this case, service on Wages (employed by the company Pine Hill employed to manage and operate the apartment complex where Void suffered her injuries) was proper service on Pine Hill. This will not result in the parade of horribles that Pine Hill asserts.

Pine Hill fails to show an abuse of discretion because the lower court's decision is supported by South Carolina law and its factual conclusions are supported by the evidence. *Stearns Bank N.A. v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007). This Court should affirm the holding that Void's service on Wages is proper service of Pine Hill.

II. THE LOWER COURT CORRECTLY HELD THE AMENDED COMPLAINT DOES NOT MOOT OR RENDER VOID THE ENTRY OF DEFAULT OR JUDGMENT

The lower court held that Void's filing of the Amended Complaint to add JDC Management as a defendant did not void the judgment. (R. p. 17). The court explained that Void filed the Amended Complaint after entry of judgment against Pine Hill and, based on its status as a party with a judgment entered against it, Void was not required to serve Pine Hill with the Amended Complaint. (R. pp. 17-18). The procedural posture of this case and the law support the court's decision, and this Court should affirm because the filing of an amended complaint cannot void a ***judgment***.

Pine Hill cites to over thirty cases from courts around the country but does not represent that a single one holds that a ***judgment*** is rendered void by the filing of an Amended Complaint. (Br. of App. pp. 21-27). Pine Hill cites cases stating that when a plaintiff files an amended complaint, a court may (1) deny an entry of default, (2) refuse to enter a default judgment, or (3) set aside an entry of default. (Br. of App. pp. 21). These are not applicable to the procedural

posture of this case in which the court already entered a judgment against Pine Hill when Void filed the Amended Complaint.

In *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, Case No. 2:04-531-18, 2004 WL 7332779 (D.S.C. June 3, 2004), the Court granted the plaintiff's motion to strike the defaulting defendant's answer to an amended complaint. The plaintiff filed suit against numerous defendants, and defendant Hoover Universal's failure to answer resulted in an entry of default. *Id.* at *1. The court denied Hoover Universal's motion to set aside the entry of default. *Id.* Before the damages hearing, the parties discovered a conflict of interest between the plaintiff's attorney and Hoover Universal. *Id.* The parties agreed to resolve the conflict by bifurcating the case into two actions—one against Hoover Universal which was to have a new case number and one against the other defendants which was to keep the original case number. *Id.* When the plaintiff filed the new complaint against Hoover Universal, it filed an answer despite previously being held in default. *Id.* The plaintiff filed a motion to strike the answer based on the prior default. *Id.* In granting the motion to strike the answer, the Court noted that any damages "award will be based on the Complaint under which defendant was held in default" and that the new complaint "was an administrative formality that carries no weight in determining defendant's liability." *Id.* at *4 n.2.

This case is similar to *Colleton Preparatory* and presents an even stronger case for refusing to allow a defaulting defendant to answer an amended complaint because, in this case, the court entered a judgment against Pine Hill prior to the filing of the Amended Complaint and, in *Colleton Preparatory*, the court had only entered default when the plaintiff filed a new complaint. The default judgment in this case, as in *Colleton Preparatory*, is based on the complaint under which Pine Hill was held in default. Also, in both cases, the amended complaints do not assert new

allegations against the defaulting defendant and the "prayers for relief in the two complaints are exactly the same." *Id.* at *2; R. pp. 24-27, 57-60.

Pine Hill is asking the Court to hold that a filing by a plaintiff can void a judgment entered by a court. There is no legal support for this position. While a plaintiff's conduct may moot its own prior filing, it cannot unilaterally void a judgment entered by the court. An example illustrates that Pine Hill's position is incorrect. A court grants summary judgment in a case to one defendant, and the plaintiff proceeds to trial against the other defendant. At the end of trial, the plaintiff moves to amend the complaint to conform to the evidence presented. Under Pine Hill's argument, the amended complaint would void the prior order entering summary judgment against the now-dismissed defendant because it was based on the original complaint. The law does not support this illogical and procedurally unworkable outcome.

The allegations in the Amended Complaint also do not support voiding the judgment because they do not expose Pine Hill to any greater or different liability than was presented by the original complaint. The Amended Complaint adds one paragraph as to JDC Management's citizenship, registered agent, and management of Pine Hill. (R. p. 57 ¶ 3). The only other addition is to make the word "Defendant" plural "Defendants" in seven paragraphs. (R. pp. 58-59). The allegations of Pine Hill's conduct and liability are exactly the same. (R. pp. 24-27, 57-60). The amendments do not alter the allegations admitted by Pine Hill by virtue of its default and they cannot change the amount of damages Pine Hill owes because that amount was already decided in the judgment. Stated plainly, the Amended Complaint has no effect on Pine Hill's legal liability or position in this case and, therefore, cannot be a basis to void the judgment against it.

Finally, the lower court correctly held that Void was not required to serve Pine Hill with the Amended Complaint and, therefore, Pine Hill was not entitled to file an answer. Under Rule

5(a), "[n]o service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them" in accordance with Rule 4. Rule 5(a), SCRCP.

Pine Hill fails to show an abuse of discretion because the lower court's decision is supported by South Carolina law and its factual conclusions are supported by the evidence. *Stearns Bank N.A. v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007). This Court should affirm the holding that Void's filing of the Amended Complaint did not void the judgment or entry of default.

III. THE LOWER COURT CORRECTLY DENIED PINE HILL'S RULE 55, SCRCP, MOTION BECAUSE PINE HILL APPEARED AFTER THE COURT ENTERED A JUDGMENT AND CORRECTLY DENIED THE RULE 60(b), SCRCP, MOTION BECAUSE IT FOUND PROPER SERVICE AND PINE HILL DID NOT EXPLAIN WHAT HAPPENED TO THE SUMMONS AND COMPLAINT

Pine Hill argues the lower court erred in not separately addressing its arguments that the court should set aside the entry of default under Rule 55(c), SCRCP, and vacate the default judgment under Rule 60(b), SCRCP. Pine Hill is incorrect. Despite Pine Hill's assertion in its motion to reconsider that the court did not address its Rule 55 and 60 arguments, the court stated in its order denying the motion that Pine Hill presented "no arguments not previously considered by the Court." (R. p. 20). The court considered the arguments, it just denied them.

As to Rule 55(c), SCRCP, the court correctly did not analyze it because the Rule does not apply when the defaulting defendant does not appear until after the court enters a ***judgment***. Pine Hill did not move to set aside the entry of default prior to judgment; it appeared only ***after*** the lower court entered a default judgment. Once the lower court entered judgment against Pine Hill, the only available procedure for it to seek relief was Rule 60(b), SCRCP, and not Rule 55(c). "Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 608, 681 S.E.2d 885,

888 (2009); *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005) ("Southern Finance did not make any motion until after the default judgment had been entered. Therefore, Rule 55(c) is inapplicable."). "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)." *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888 (internal quotation marks omitted). "The different standards under the two rules underscore the clear intent to make it ***more difficult*** for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default." *Id.* at 608, 681 S.E.2d at 888-89 (emphasis added). Therefore, the lower court correctly denied Pine Hill's Rule 55(c) argument because it is legally and procedurally improper in these circumstances.

As to Rule 60(b), SCRCP, Pine Hill's argument for excusable neglect and that the judgment is void are based on insufficient service of process. (Br. of App. pp. 30-31). Once the court found Void properly served Pine Hill, it did not need to address those arguments. Pine Hill argues on appeal that excusable neglect exists even if it received proper service because it did not receive actual notice of the Complaint. (Br. of App. p. 30). The lower court addressed this when it found that neither Ferraro nor Wages' affidavits explain what Wages did with the Summons and Complaint he undeniably received. (R. p. 17). "Losing a summons and complaint within the corporation is not a ground to set aside a default judgment." *Roche v. Young Bros.*, 318 S.C. 207, 212, 456 S.E.2d 897, 900 (1995); *see also Fassett v. Evans*, 610 S.E.2d 841, 844, 364 S.C. 42, 47 (Ct. App. 2005) ("[A]n officer's return of process creates the legal presumption of proper service that cannot be impeached by the mere denial of service by the defendant." (internal quotation marks omitted)). Once the court's finding resulted in Pine Hill's failure to prove a ground for setting aside the judgment under Rule 60(b), it did not need to consider any other factors. *McClurg*

v. Deaton, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008) ("[T]o obtain relief from a default judgment under Rule 60(b)(1) or 60(b)(3), not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense.").

Even if this Court does consider the other factors, the record supports a finding that Pine Hill failed to satisfy them. "[I]n determining whether to set aside a default judgment under Rule 60(b), the trial judge should consider the following relevant factors: (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." *Id.* at 573, 671 S.E.2d at 93. If the Court reaches the meritorious defenses argued by Pine Hill, they are all based solely on arguments of counsel. "Arguments of counsel are also not evidence." *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (finding party failed to present evidence to entitle him to relief under Rule 60(b)). Ferraro and Wages' affidavits—the only evidence Pine Hill submitted in support of its motion—address only service of process. (R. pp. 48-53). They do not address anything related to a meritorious defense. (R. p. 183). "The movant 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). Further, contrary to Pine Hill's assertion that the record does not support the theory that Pine Hill knew or should have known about the dangerous condition of the stairs (Br. of App. p. 31), the Complaint alleges "Defendant knew or should have known there was a foreseeable condition on the steps, yet placed no warnings or cautions of said condition, nor made efforts to correct or prevent said hazardous conditions" and Void previously talked to someone at Pine Hill about the slippery steps and the need for grip strips but no one fixed it. (R. pp. 25, 157).

Finally, if the Court reaches the issue of prejudice, Void will suffer prejudice if the judgment against Pine Hill is set aside. "[T]he prejudice to the other party" is a factor the court considers "[i]n determining whether to grant relief" under Rule 60(b), SCRCP; *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010). If the judgment is set aside, Void will lose the legal right to execute the judgment against Pine Hill and suffer a significant delay in the resolution of her claim against it and perhaps the loss of evidence given the passage of time. (R. pp. 185-86).

The evidence and law support the lower court's denial of Pine Hill's motion under Rules 55(c) and 60(b), SCRCP, and this Court should affirm.

CONCLUSION

For these reasons, the Court should affirm the lower court's order denying Pine Hill's motion to set aside the entry of default and vacate the judgment.

August 25, 2020

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
James B. Jackson, Jr., Master-in-Equity

Appellate Case No. 2020-000433

Shanika Monique Void,……..…….…. Respondent,

v.

Pine Hill Apartments, L.P., and JDC Management, LLC,…….…....Defendants,

Of which Pine Hill Apartments, L.P., is the……...Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

August 25, 2020

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