THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Judge James B. Jackson, Jr., Master-In-Equity
Trial Court Case No.: 2019-CP-38-00190

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SC Court of Appeals

Appellate Case No. 2020-000433

Shanika Monique Void ……. Respondent

v.

Pine Hill Apartments, L.P. and JDC Management, LLC …….. Defendants
Of whom, Pine Hill Apartments, L.P. is Appellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Shanika Monique Void ("Void" or "Respondent") commenced this personal injury action by filing a summons and complaint on February 4, 2019 in the Court of Common Pleas for the

County of Orangeburg. (R., p. 24-27, Compl.). The Complaint alleged that on September 2, 2016, Void slipped and fell on a staircase at the Pine Hill Apartments located at 117 Yellow Jasmine Road, Orangeburg, South Carolina 29115. (Id.).

According to affidavits of service filed by Void in the Court of Common Pleas, Void attempted to serve the Summons and Complaint on Appellant Pine Hill Apartments, L.P. ("Pine Hill" or "Appellant") by:

(1) Mailing "a copy of the Summons and Complaint via U.S. Postal Mail, certified-Restricted Delivery to Cheryl Finch, Registered Agent for Pine Hill Apartments, L.P., 216 Seven Farms Drive, Suite 210, Charleston S.C. 29492. The Summons and Complaint "was returned by the U.S. Postal Service as Return to Sender, Attempted-Not Known Unable to Forward;" and

(2) Personally serving the Summons and Complaint "by Service on the Property Manager (Brandon Wages) on 2/28/2019 at 12:45 p.m. at his POE[1] located at 117 Yellow Jasmine Road, Orangeburg, S.C. 29115."

(R., p. 28, Affidavit of Service and R., p. 29, Affidavit of Non-service). Appellant did not receive notice of the summons and complaint (R., p. 48, Affidavit of Cheryl Ferraro) and, therefore, Appellant did not file a responsive pleading or otherwise appear.

Default was entered on May 7, 2019 (R., p. 1, Order of Default) and, upon motion of Respondent, was referred on May 24, 2019, to the Master-In-Equity for a damages hearing. (R., p. 3, Order of referral to Master-in-Equity). Pine Hill did not receive notice of the Damages Hearing (R., p. 48, Affidavit of Cheryl Ferraro) and was not present at the Damages Hearing which was held on June 20, 2019. (R., p. 5, Damages Order). On July 8, 2019, after the

[1] Upon information and belief, Appellant understands this abbreviation to mean Place of Employment.

undefended Damages Hearing, Judge James B. Jackson Jr., awarded Void $250,000 on "uncontested medical bills of $6,021.56 and uncontested lost wages of $2,708.90." (R., p. 5, Damages Order, pg. 9). Therefore, the award was approximately 29 times the amount of actual damages presented at the uncontested hearing. The only witness at the hearing was Plaintiff. There was no testimony from a treating physician, witness, or expert witness. (R., p. 136-159, Transcript of Hearing; R., p. 5, Order of Damages)

Within ten days of the Damages Order, on July 18, 2019 Pine Hill filed three motions: (1) a Motion to Set Aside Order of Default and Damages Order (R., p. 41, Motion to Set Aside Default), (2) an Emergency Motion to Stay Enforcement of the Judgment (R., p. 35, Motion to Stay Enforcement of Judgment), and (3) a Motion to Alter or Amend the Damages Order (R., p. 37, Motion to Alter or Amend the Damages Order). Only Pine Hill's Motion to Set Aside Default and Order of Damages was set and heard before Judge Jackson on November 19, 2019. The Parties resolved the emergency Motion to Stay Enforcement by and through the entrance of a Stipulation. The remaining Motion to Alter or Amend the Damages Order remains pending and unresolved.

The Motion to Set Aside was based primarily on the fact that: (1) the attempts at service of the Summons and Complaint on Appellant were improper and could not support entry of default or default judgment (See, R., p. 41, Motion to Set Aside, ¶11(a)); (2) The Trial Court did not have personal jurisdiction over Defendant because it was not properly served (See, R., p. 41, Motion to Set Aside, ¶11(b)); and (3) The default should be set aside pursuant to Rules 55 and 60, SCRCP for good cause, mistake, inadvertence, surprise, excusable neglect, and the judgment is void. The Motion to Set Aside was supported by affidavits from Cheryl Ferraro and Brandon Wages.

Between the filing of Appellant's Motions and the Hearing on the Motion to Set Aside Default, Void voluntarily amended her Complaint on August 19, 2019, and added JDC Management ("JDC Management") as a defendant. (R., p. 56, Amended Complaint). The Amended Complaint altered the allegations against Appellant by leveling them equally against JDC Management. Within fifteen days, on September 3, 2019, Pine Hill filed an Answer to the Amended Complaint. (R., p. 61, Pine Hill Answer to Amended Complaint). JDC Management has also appeared and timely filed an Answer to the Amended Complaint. (R., p. 85, JDC Management Answer to Amended Complaint).

As a result, Pine Hill supplemented its Motion to Set Aside to include the amendment of the complaint as additional grounds to support setting aside default. (R., p. 67, Supplement to Motion to Set Aside Default). Both the original Motion to Set Aside Default and the Supplement to the Motion to Set Aside Default were supported by Pine Hill's Memorandum in Support filed on November 18, 2019. (R., p. 101, Memorandum in Support of Pine Hill's Motions to Set Aside Default).

On November 19, 2019, the hearing on Appellant's Motion to Set Aside was heard by Judge James B. Jackson. Following the hearing, Judge Jackson requested an Order drafted by counsel for Plaintiff. Said Order denying Appellant's Motion to Set Aside was entered on February 10, 2019. (R., p. 15, Order Denying Motion to Set Aside). The Court's Order denied the Motion to Set Aside stating the following grounds:

(1) "This court finds that Defendant Pine Hill failed to keep the address current of its agent for Service of Process with the Secretary of State. Had they done so, none of this would be a problem yet now Defendant Pine Hill seeks to be relieved from default which is a problem of their own creation."

(2) "Brandon Wages could be perceived to be an agent of Defendant Pine Hill."

(3) "Defendant Pine Hill is not excused from answering the initial complaint because an amended complaint was filed."

(R., p. 15, Order Denying Motion to Set Aside). The Order Denying Motion to Set Aside does not address the grounds and arguments presented under Rule 60 or 55. Within ten (10) days thereof, on February 20, 2020, Appellant filed a Motion to Alter or Amend the Order denying the Motion to Set Aside. (R., p. 113, Motion to Alter or Amend). The Motion to Alter or Amend addressed several errors of law including but not limited to the Court's failure to address the Rule 60 and Rule 55 arguments. (R., p. 113, Motion to Alter or Amend). On March 4, 2020, the Court denied the Motion to Alter or Amend in a Form 4 Order stating simply, "Defendant presents no arguments not previously considered by the Court." (R., p. 20, Order Denying Motion to Alter or Amend). This appeal ensued[2].

STATEMENT OF THE FACTS

According to the Complaint, Plaintiff slipped and fell on a staircase located at the Pine Hill Apartments located at 117 Yellow Jasmine Road, Orangeburg, South Carolina. (R., p. 24, Complaint). As a result of the fall, Plaintiff contends that she suffered damages in the amount of $6,021.56 of actual medical expense and lost wages of $2,708.90. (R., p. 8, Damages Order).

The Pine Hill Apartments are owned by Appellant Pine Hill Apartments, L.P. (R., p. 48, Affidavit of Cheryl Ferraro). Appellant is a limited partnership with two general partners; HF Pine Hill, LLC and HH Pine Hill, LLC (collectively, HF Pine Hill, LLC and HH Pine Hill, LLC are referred to as the "General Partners"). (R., p. 48, Affidavit of Cheryl Ferraro). The Pine Hill

[2] "The denial of a motion to set aside a default judgment is immediately appealable as it is a final judgment on the merits." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC,* 428 S.C. 261, 265–66, 834 S.E.2d 204, 206 (Ct. App. 2019), reh'g denied (Nov. 15, 2019).

Apartments are managed by a different company, Defendant JDC Management, LLC, pursuant to a Management Agreement. (R., p. 48, Affidavit of Cheryl Ferraro). The Management Agreement between Pine Hill Apartments, L.P. and JDC Management, LLC specifically dictates that JDC Management "is not authorized to accept service of process on behalf of [Pine Hill Apartments, L.P.]." (R., p. 49, Affidavit of Cheryl Ferraro).

Plaintiff attempted to serve the summons and complaint on Appellant Pine Hill pursuant to two methods. First, Plaintiffs attempted service pursuant to certified mail to the agent for service of process. (R., p. 29, Affidavit of Non-Service). The return receipts were not signed and were returned as undeliverable. (R., p. 29, Affidavit of Non-Service).

Next, Plaintiff attempted service of process by personally serving Brandon Wages. (R., p. 28, Affidavit of Service). On the date of alleged service of process, February 28, 2019, Brandon Wages was (and at least as of the date of his affidavit still was) employed by JDC as a maintenance technician. (R., p. 52, Affidavit of Brandon Wages). He has never been employed by Pine Hill or any of its General Partners and certainly has not been an officer, managing or general agent of the same. (R., p. 52, Affidavit of Brandon Wages and R., p. 48, Affidavit of Cheryl Ferraro). He has never been a "Property Manager" of Pine Hill or any of its General Partners. (R., p. 52, Affidavit of Brandon Wages and R., p. 48, Affidavit of Cheryl Ferraro). Specifically, Mr. Wages has never been authorized to accept service of process on behalf of Pine Hill or any of its General Partners. (R., p. 52, Affidavit of Brandon Wages and R., p. 48, Affidavit of Cheryl Ferraro). In fact, Mr. Wages is not even authorized to accept service of process on behalf of his own employer, JDC Management. (R., p. 53, Affidavit of Brandon Wages).

Relying on these attempts at service, Plaintiff sought and obtained entry of default and default judgment against Appellant. Other than the affidavits of service, Plaintiff has presented no further evidence regarding service of process, the authority of Brandon Wages to accept service of process on behalf of the Appellant, or the effectiveness of their attempts at service of process.

As a result of the default and the damages hearing, at which Appellant was not present, Judge Jackson awarded Plaintiff $250,000 on "uncontested medical bills of $6,021.56 and uncontested lost wages of $2,708.90." (R., p. 13, Damages Order). The award was approximately 29 times the amount of actual damages presented at the uncontested hearing. The only witness at the hearing was Plaintiff. There was no testimony from a treating physician, witness, or expert witness. Appellant's Motion to Alter or Amend this Damages Order and contesting its constitutionality, appropriateness, legality and its validity is still pending and has not been heard.

STANDARD OF REVIEW

Typically, "[t]he decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Roberson*, 365 S.C. at 9, 615 S.E.2d at 114. (citing, *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 902-03 (1989)). That decision "will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Id*. "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Id*.

ARGUMENT

The Trial Court's decisions should be reversed. The Trial Court was in error when it determined it had personal jurisdiction over Defendant to issue its orders. Further, the Trial Court erred in determining not to set aside default despite the defects in service. Further, the Trial Court erred in determining that the Amended Complaint did not moot the previous complaint and render the entry of default and the default judgment void as a matter of law. Finally, the Trial Court erred in ignoring the Appellant's substantive arguments under Rules 55 and 60, SCRCP regarding mistake, inadvertence, surprise, excusable neglect, and that the judgment is void.

I. Service of Process was not effectuated and therefore, the Trial Court did not have personal jurisdiction over Appellant, and the entry of default, default judgment, and the Order of Damages are all void and should be set aside.

The South Carolina Rules of Civil Procedure require service of process of a summons and complaint pursuant to Rule 4. "Rule 4 serves at least two purposes: it confers personal jurisdiction on the court and assures the defendant reasonable notice of the action." *Richardson v. P.V., Inc.*, 383 S.C. 610, 615,682 S.E.2d 263, 265 (2009) (citing, *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995)). "The Plaintiff has the burden to establish that the court has personal jurisdiction over the defendant." *Moore v. Simpson*, 322 S.C. 518, 523 473 S.E.2d 64, 66 (Ct. App. 1996). While exacting compliance is not required, "inquiry must be made as to whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *Id*.

A. Attempted Service of Process by Certified Mail cannot support default where, as here, there is no return receipt with an authorized signature.

Plaintiff's attempt to serve Appellant by certified mail cannot be the basis for the entry of default in this case. The South Carolina Rules of Civil Procedure provides for service of the

summons and complaint by registered certified mail, return receipt requested and delivery restricted to the addressee. Rule 4(d)(8), SCRCP. However, service pursuant to this provision "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." *Id*. As Rule 4 states, "If delivery of process is refused or is returned undelivered, service shall be made as otherwise provided by these rules." Rule 4(d)(8), SCRCP.

As admitted by Plaintiff, the certified mail was not signed for by anyone and certainly not signed by an authorized representative of the defendant. (R., p. 29, Affidavit of Non-Service). Rather, the certified mail "was returned by the U.S. Postal Service as Return to Sender, Attempted-Not Known Unable to Forward." (R., p. 29, Affidavit of Non-Service). Therefore, pursuant to the specific language of Rule 4, without a signature, Plaintiff's attempts to serve the summons and complaint by certified mail cannot be the basis for the entry of default. Any reliance on this method of service of process would be in error.

B. Attempted Service of Process on Brandon Wages is insufficient because Brandon Wages is not an officer, a managing or general agent of Appellant, and is not otherwise authorized by appointment or law to receive service of process on Appellant's behalf

The only other attempt to serve the summons and complaint on Appellant was "by Service on the Property Manager (Brandon Wages) on 2/28/2019 at 12:45 p.m. at his POE located at 117 Yellow Jasmine Road, Orangeburg, S.C. 29115." (R., p. 28, Affidavit of Service). As noted above, on February 28, 2019, Mr. Wages was employed by a separate company, JDC Management, as a maintenance technician. (R., p. 52, Affidavit of Brandon Wages). Mr. Wages has never been employed by or an officer, managing or general agent of Appellant. (R., p. 52, Affidavit of Brandon Wages). Mr. Wages has never been a "property manager" for Appellant as

alleged in the Affidavit of Service. (R., p. 52, Affidavit of Brandon Wages). JDC Management manages the Pine Hill Apartments pursuant to a Management Agreement with Appellant. (R., p. 48, Affidavit of Cheryl Ferraro). That Management Agreement specifically states that JDC Management "is not authorized to accept service of process on behalf of [Appellant]." (R., p. 48, Affidavit of Cheryl Ferraro). At no time has Mr. Wages or JDC Management ever been authorized to accept service of process on behalf of Appellant.

The South Carolina Rules of Civil Procedure provides for service of process upon a corporation or partnership "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 …" Rule 4(d)(3), SCRCP. In order to be effective, service must be made on an actual agent. *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583–84, 560 S.E.2d 624, 631 (Ct. App. 2001). More specifically, "[s]ervice on a corporation may only be accomplished by service upon an authorized person." *Langley v. Graham*, 322 S.C. 428, 430, 472 S.E.2d 259, 260, fn 2 (Ct. App. 1996). In fact, without specific authorization to receive process, service is not even effective when made "upon an employee of the defendant such as a secretary." *Moore*, 322 S.C. at 523-24, 473 S.E.2d 64, 67.

Here, Plaintiff has not served an officer or a managing or general agent of Appellant. In fact, Mr. Wages is not even employed by the Defendant in any capacity. Further, Mr. Wages is not authorized by appointment or law to accept service on behalf of Appellant. In fact, the management agreement between his employer and Appellant specifically dictates that he is not authorized to accept service for Appellant. In other words, neither Mr. Wages nor his employer JDC Management had authority to accept service and are specifically not "authorized by appointment or law" to accept service as is required pursuant to the South Carolina Rules of

Civil Procedure. (See, Rule 4(d)(3), SCRCP). For this reason alone, the Trial Court's findings are in error and should be reversed.

However, because neither Mr. Wages nor his employer JDC had actual authority to accept service of process as required by Rule 4, SCRCP, the Trial Court and Plaintiff attempt to ground service of process on a "perceived" agency theory. The Trial Court held:

> Furthermore, per the affidavits and arguments presented by Defendant Pine Hill, the new defendant JDC Management, LLC seems to have a very close relationship with Defendant Pine Hill. JDC manages the property owned by this Defendant and both have the same agent for Service of Process, although JDC provided the Secretary of State with a new, correct address. Therefore, Brandon Wages **could be perceived to be an agent of Defendant Pine Hill**.[3]

(R., p. 15, Order denying Motion to Set Aside) (emphasis added). This is not sufficient to find effective service of process.

"Whether apparent authority can suffice to show authorization to accept service under Rule 4 is an unsettled question." *Roberson*, 365 S.C. at 11, 615 S.E.2d 112, 115. Rather, "[a]ctual appointment for the specific purpose of receiving process normally is expected and the mere fact that a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process." *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 295, 721 S.E.2d 430, 433 (2012) (quoting, *Moore v. Simpson*, 322 S.C. 518, 473 S.E.2d 64 (Ct. App. 1996)). Rule 4(d)(3) specifies very detailed and specific categories of "agents" capable of accepting service. Rule 4(d)(3) does not specify those who "could be perceived to be an agent."

[3] Appellant finds no law supporting a theory of "perceived" agency in South Carolina, nor did the Trial Court cite any. Appellant interprets this to allude to apparent agency. To the extent the Trial Court is indeed relying on "perceived" agency theory, the inquiry should cease here and the Trial Court should be overturned.

> A rule permitting certain persons to receive service of process on behalf of others does not imply that "anyone who happens to pick up the mail" can stand in for the defendant. As with corporations, the class of persons who may receive service of process on behalf of an individual is limited.

Graham Law Firm, 396 S.C. at 297, 721 S.E.2d 430, 434.

Mr. Wages is clearly outside the limited class of persons designated by Rule to accept service of process on behalf of a corporation – namely he is a maintenance technician for a management company hired to manage a piece of property and who is specifically not authorized to accept service. This tangential relationship is far outside the delineated persons capable of accepting service under Rule 4. Again, for this reason alone, Plaintiff's and the Trial Court's theory should be overturned.

However, for the sake of argument, assuming apparent agency can support service of process under Rule 4(d)(3), there is no evidence in the record that could support a finding that Mr. Wages was an apparent agent of Appellant for purposes of accepting service of process. "[A]pparent agency is when the **principal** knowingly permits the agent to exercise authority, or the **principal** holds the agent out as possessing such authority. *Roberson*, 365 S.C. at 11, 615 S.E.2d 112, 115 (emphasis added). "An apparent agency may not be established solely by the declarations and conduct of an alleged agent." *Id*. Apparent agency, therefore, is dependent on overt actions of the principal and cannot be based solely on the actions or representations of an alleged agent.

There is no evidence in the record to establish apparent agency. As noted above, Plaintiffs did not submit any evidence of agency and, instead, relied exclusively on the affidavits of service. In fact, the only evidence in the record indicates that the alleged principal (Pine Hill) took affirmative steps to prevent the alleged agent (Mr. Wages or JDC Management) from

exercising authority to accept service. (R., p. 48, Affidavit of Cheryl Ferraro) Specifically, Appellant directly prohibited acceptance of service in their Management Agreement. (Id.) There is certainly no evidence in the record that the alleged principal (again, Pine Hill) held Mr. Wages or JDC Management out as an agent for service of process or knowingly permitted them to exercise any authority to accept service.

The Trial Court and Plaintiff note that the process server's Affidavit of Service identifies Mr. Wages as the "Property Manager" and that Pine Hill's affidavits fail to address this purported discrepancy. This is incorrect. Both Affidavits clearly and unequivocally declare that Mr. Wages has never been a "Property Manager" of Appellant. What Appellant's affidavits do state is that Mr. Wages was a maintenance technician **for the property management service** JDC Management – a separate entity and now a defendant. The Affidavit of Service includes no reference to Appellant, any action or representation by the Appellant, Mr. Wages' relationship to Appellant, or his authority to accept service on its behalf. As stated above, apparent agency must be found based on conduct of the principal and "cannot be established solely by the declarations and conduct of an alleged agent." *Roberson*, 365 S.C. at 11, 615 S.E.2d 112, 115. To the extent the Process Server's representation of Mr. Wages' title (even if accepted as true) could support service of process on its face (which it would not), it relies solely on the declarations or conduct of the alleged agent – which cannot form the basis of apparent agency. Therefore, the evidence in the record supports only one conclusion – that Mr. Wages lacked the appropriate agency to accept service. Without any evidence in the record to support actual or apparent agency, and with

specific evidence in the record to contradict actual and apparent agency, attempts to serve Pine Hill by and through Mr. Wages cannot be deemed effective[4].

The South Carolina Supreme Court has already addressed and resolved this very same issue on more than one occasion. In *Roberson*, plaintiff in a negligence action attempted service of process by certified mail to the defendant's registered agent. *Roberson*, 365 S.C. at 8, 615 S.E.2d at 113. A clerical employee for the registered agent signed the return receipt; however, the actual registered agent testified that he never received the summons and complaint. *Id*. The plaintiffs sought and received entry of default and default judgment and a damages hearing was heard before a special referee where a default award was granted. *Id*. at 9, 615 S.E.2d at 113. Subsequently, the defendant moved under Rule 60(b), SCRCP to set aside default on the grounds that the judgment was void because the clerical employee was not authorized to receive service of process on behalf of the defendant. *Id*. The motion was denied and appealed. *Id*.

The Supreme Court found that there was no evidence in the record that the defendant exhibited the clerical employee as its apparent agent in any way. *Id*. at 11, 615 S.E.2d at 115. Therefore, the Supreme Court reversed the special referee's decision "as it was unsupported by the evidence." *Id*. at 12, 615 S.E.2d at 115.

> We are unable to find any evidence in the record to support a legal relationship between the [clerical employee] and [defendant] sufficient to have effectuated proper service. Because we find service was improper, we need not address the remaining issues as the default judgment is void.

Id.

[4] Neither Plaintiff nor the Trial Court have relied upon, addressed or argued a theory of implied agency to support authorization to accept service of process. However, it too would be unavailing. "[A]n agent has no implied authority unless she herself believed she had such authority." *Roberson*, 365 S.C. at 11, 615 S.E.2d 112, 115. Here, as in *Roberson*, the alleged agent has testified that he has never been authorized to accept service. (R., p. 52, Affidavit of Brandon Wages).

In this case, without any evidentiary support, Plaintiff and the Trial Court attempt to find effective service of process by and through serving a maintenance technician for a management company employed by the Appellant. In *Roberson*, the person who was served was employed by the registered agent for the defendant. A registered agent is specifically authorized to accept service of process. Here, the person served was employed by an entity specifically not authorized to accept service of process on behalf of the defendant. This fact further distinguishes the instant situation from that presented in *Roberson* – a case where the Supreme Court still did not find proper service. As in *Roberson*, the record is devoid of any evidence of authority sufficient to support service of process and, as in *Roberson*, the default judgment should be set aside as a result.

Similarly, in *Makawi*, a plaintiff seeking repayment for professional services attempted service of the summons and complaint on both the individual defendant and corporate defendant by certified mail. *Makawi*, 396 S.C. at 293, 721 S.E.2d 430, 432. The attempt at service on the corporation was signed by a company employee employed as a restaurant receptionist. *Id*. The attempt at service on the individual was signed by a bookkeeper for the corporate defendant. *Id*. Makawi, the president and registered agent for the corporation, filed affidavits stating that the bookkeeper and receptionist did not have authority to accept service of process on his behalf or on behalf of the company respectively. *Id*. Following the attempted service, Makawi called the plaintiff and acknowledged receipt of the documents. *Id*. However, despite this acknowledgement, neither defendant filed an answer, default was entered, and default judgment was granted. *Id*.

The trial court initially denied the motion to set aside default finding that, among other things, Makawi had acknowledged receiving the documents. *Id*. at 294, 721 S.E.2d at 432.

However, upon reconsideration, the trial court ultimately set aside default finding that those who received the summons and complaint lacked actual or apparent authority and were "not authorized to receive service of process on behalf of the [corporation]." *Id*. at 296, 721 S.E.2d at 433. The Supreme Court agreed with the trial court's finding that plaintiff "had not offered any evidence of declarations or conduct on the part of the respondents[/defendants] that could potentially give rise to apparent authority" in either person receiving the attempted service of process. *Id*. at 298, 721 S.E.2d at 434.

Similar to *Roberson*, the instant case is many steps beyond the facts presented in *Makawi*. In *Makawi*, an actual employee of the defendant received the summons and complaint and yet, the court again found that because they were not endowed with actual or even apparent authority to accept service, the attempts at service of process are insufficient. Here, Respondent attempts to hang their attempts on service of process on serving the employee of a different company who is specifically not authorized to accept service of process on behalf of Appellant. Respondent has not presented, and the Trial Court did not find or rely upon, a single declaration, act, or conduct on part of the Appellant upon which to find authority. The Trial Court's determination is in error and should be overturned because there is no evidence to support a finding of authority in Mr. Wages or his employer JDC Management to accept service on behalf of Appellant.

Finally, the Trial Court and Respondent attempt to rely on the absence of a fact in record – "what Brandon Wages did with the Summons and Complaint he was served" – to somehow support service of process. (See, R., p. 15, Order Denying Motion to Set Aside). This is an irrelevant fact even if left unaddressed by Appellant. However, Appellant addresses this fact head-on when it clearly states that there is no record that it ever received the summons and complaint. (R., p. 48, Affidavit of Cheryl Ferraro). Regardless, in *Makawi*, the trial court

acknowledged and found that the individual defendant and the registered agent for the corporate defendant received the Summons and Complaint. In fact, the defendant in that case called the plaintiff to specifically acknowledge such receipt. However, receipt of a Summons and Complaint has never sufficed to constitute service of process, and it did not suffice in *Makawi*. Plaintiff, who bears the burden of proving service of process, has not presented a single fact and certainly no evidence to support a finding of notice – even if it were to suffice for service of process. Rather, the Trial Court reverses the burden of proof and demands the Appellant prove the absence of a fact – that it did not receive the Summons and Complaint. The Trial Court's reliance on this line of thinking is in error in that it reverses the burden of proof, is contradictory to the only evidence in the record, and is ultimately irrelevant to the proper inquiry.

If permitted to stand, the Trial Court's holding would effectively undo and undermine the important constitutional protections formal service of process affords. Service of process under Rule 4, SCRCP would effectively expand nearly indefinitely. For example, law firms could be served by personally serving an employee of Ricoh – an oft used and on-site third-party office-management company. Property owners could be sued by personally serving the lawn care service. To allow a party to be served by and through technicians employed by third-parties is contrary to South Carolina law and would undermine the important and constitutional protections afforded by Rule 4 and service of process and greatly expand the notion of personal jurisdiction.

C. Without effective Service of Process of the Summons and Complaint, the entry of default and Default Judgment must be set aside.

"A judgment is void if a court acts without personal jurisdiction" and "a court generally obtains personal jurisdiction by the service of a summons." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). In other words, where service is improper, default judgments are void. *Roberson*, 365 S.C. at 12, 615 S.E.2d 112 at 115. Because service of process was improper,

the entry of default, default judgment and the orders of the Trial Court are void as a matter of law and must be set aside.

II. The Amended Complaint moots the initial Complaint and renders the entry of default and default judgment null and void.

While Appellant believes the insufficient service of process is dispositive, the judgment should also be set aside because the Plaintiff filed an Amended Complaint which mooted the entry of default and default judgment. As noted above, subsequent to Appellant filing its Motion to Set Aside Default, Respondent voluntarily filed an Amended Summons and Complaint on August 19, 2019 which added JDC Management as a defendant[5]. The Amended Summons, directed to both Appellant and JDC Management, states:

> YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at 1281 Russell Street (29115), Post Office Box 1084, Orangeburg, South Carolina 29116 within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

(R., p. 56, Amended Summons). Respondent therefore obligated Appellant to file an Answer to the Amended Complaint. Appellant filed its Answer to the Amended Complaint on September 3, 2019.

In addition to adding JDC Management as a defendant, the Amended Complaint alters the allegations against Pine Hill by leveling them equally against JDC Management. (R., p. 57, Amended Complaint). For example, instead of alleging that Appellant Pine Hill, alone, "knew or

[5] Plaintiff did not seek or obtain leave of court to amend her complaint as required by Rule 15, SCRCP.

should have known there was a foreseeable condition on the steps, yet placed no warnings or cautions of said conditions …" the Amended Complaint makes that allegation against "Defendants". (R., p. 58, Amended Complaint).

There is a significant body of law holding that an amended complaint renders a previous complaint of no import and entries of default and default judgments rendered thereon should be set aside. "As a general rule, an amended pleading ordinarily supersedes the original and renders it of no legal effect." *Young v. City of Mt. Rainier*, 283 F.3d 567, 572 (4th Cir., 2001) (internal quotations omitted) (quoting *Crysen/Montenay Energy Co. v. Shell Oil Co.*, 226 F.3d 160, 162 (2d Cir. 2000)); *see also* 6 Charles Alan Wright, et al., *Federal Practice and Procedure* § 1476 (3d ed. 2011) ("A pleading that has been amended … supersedes the pleading it modifies … Once an amended pleading is interposed, the original pleading no longer performs any function in the case…."). "As a result, motions directed at the superseded pleading generally are to be denied as moot." *Sigmon v. Byars*, 2014 U.S. Dist. LEXIS 115242, 4 (D.S.C. 2014) (citing, *Hall v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW*, 2011 U.S. Dist. LEXIS 66084 (W.D.N.C., 2011) (citing, *Colin v. Marconi Commerce Sys. Emps.' Ret. Plan*, 335 F.Supp. 2d 590, 614 (M.D.N.C., 2004); *Turner v. Kight*, 192 F.Supp. 2d 391, 397 (D. Md., 2002)).

Specifically, motions for default judgments should be dismissed and the entry of default should be set aside when based on a superseded complaint. Courts across the country have found "once the amended complaint becomes the operative complaint, a motion for default judgment made on a prior pleading should be denied." *Allstate Ins. Co. v. Yadgarov*, 2014 WL 860019, *8, 2014 U.S. Dist. LEXIS 30068, 20-21 (E.D.N.Y., 2014) (citing *Liberty Media Holdings, LLC v. Hawaii Members of Swarm of November 15, 2010 to January 27, 2011*, Sharing Hash File

AE340D0560129AFEE8D78CE07F2394C7B5BC9C05, No. 11 Civ. 262 (DAE), 2012 U.S. Dist. LEXIS 54384, 2012 WL 1377003, at *1 (D. Haw. Mar. 27, 2012) (filing an amended complaint rendered the plaintiff's motion for a default judgment moot), report & recommendation adopted, No. 11 Civ. 262 (DAE), 2012 U.S. Dist. LEXIS 54377, 2012 WL 1377000 (D. Haw. Apr. 18, 2012); *Anderson v. CitiMortgage, Inc.*, No. 11 Civ. 583 (DAE), 2011 U.S. Dist. LEXIS 145947, 2011 WL 6301739, at *1 (D. Haw. Nov. 25, 2011) (same), report & recommendation adopted, No. 11 Civ. 583 (DAE), 2011 U.S. Dist. LEXIS 145077, 2011 WL 6301427 (D. Haw. Dec. 16, 2011); *Mercer v. Csiky*, No. 08 Civ. 11443 (BC), 2010 U.S. Dist. LEXIS 64777, 2010 WL 2671329, at *2-4 (E.D. Mich. June 30, 2010) (listing cases where "courts have denied motions for default judgments as moot due to the filing of an amended complaint"); *Faulkner v. Transp. Made Simple, Inc.*, No. 09 Civ. 2233 (BBM) (TMP), 2010 U.S. Dist. LEXIS 15501, 2010 WL 711152, at *1 (W.D. Tenn. Jan. 28, 2010) (stating that where the plaintiff planned to amend the complaint to add a defendant, "[a] motion for default judgment based on an entry of default on an earlier complaint becomes moot once the amended complaint is filed," and further stating that the clerk's entry of default should be set aside after the amendment), report & recommendation adopted, No. 09 Civ. 2233 (BBM) (TMP), 2010 U.S. Dist. LEXIS 15434, 2010 WL 711148 (W.D. Tenn. Feb. 22, 2010); *Bituminous Cas. Corp. v. Tindle Enterprises, Inc.*, No. 07 Civ. 1158 (DJB), 2009 U.S. Dist. LEXIS 80382, 2009 WL 2843375, at *4 (W.D. Tenn. Aug. 31, 2009) ("A motion for default judgment based on an entry of default on an earlier complaint becomes moot once the amended complaint is filed."); *U.S. ex rel. SimplexGrinnell, LP v. Aegis Ins. Co*., No. 08 Civ. 01728 (SHR), 2009 U.S. Dist. LEXIS 18707, 2009 WL 577286, at *2 (M.D. Pa. Mar. 5, 2009) (finding that "an amended complaint moots a request for default judgment"); *Rock v. Am. Exp. Travel Related Servs. Co., Inc.*, No. 08

Civ. 853 (GTS) (RFT), 2008 U.S. Dist. LEXIS 101909, 2008 WL 5382340, at *1 (N.D.N.Y. Dec. 17, 2008) (finding that the motion for default judgment "was mooted and/or rendered untimely" by the filing of an amended pleading); *Lacy v. Hubbard*, No. 08 Civ. 0868 (FCD) (DAD), 2008 U.S. Dist. LEXIS 111540, 2008 WL 2725063, at *5 (E.D. Cal. July 10, 2008) (same); *Dourlain v. United States*, No. 01 Civ. 1251(NAM) (GJD), 2003 U.S. Dist. LEXIS 19582, 2003 WL 22753452, at *2 (N.D.N.Y. Sept. 26, 2003) (same); *Haamid v. United States*, No. 89 Civ. 0780, 1990 U.S. Dist. LEXIS 17149, 1990 WL 210610, at *1 (E.D. Pa. Dec. 18, 1990) (same)).

Similarly, courts consistently hold that once the original complaint is superseded, the entry of default on that pleading is mooted. *Allstate Ins. Co. v. Yadgarov*, 2014 WL 860019, *8, 2014 U.S. Dist. LEXIS 30068, 21 (E.D.N.Y., 2014) (citing, *Sheldon v. Khanal*, No. 08 Civ. 3676 (KAM) (LB), 2009 U.S. Dist. LEXIS 91599, 2009 WL 3233093, at *1 n.1 (E.D.N.Y. Sept. 30, 2009) (stating that "the plaintiffs' filing of their Amended Complaint" mooted the prior entry of default), *aff'd in part, vacated in part on other grounds*, 396 F. App'x 737 (2d Cir. 2010); *see also Brewer v. Grossbaum*, No. 12 Civ. 1555 (WBS) (DAD), 2014 U.S. Dist. LEXIS 3346, 2014 WL 119233, at *1 (E.D. Cal. Jan. 9, 2014) ("In light of plaintiff's filing of an amended complaint, however, the court will deny as moot plaintiff's requests for entry of default . . . since plaintiff's amended complaint supersedes the original complaint."); *Hooker v. Goldstein & Assocs., LLC*, No. 12 Civ. 12232 (RHC), 2013 U.S. Dist. LEXIS 166572, 2013 WL 6163638, at *6 (E.D. Mich. Nov. 20, 2013) (noting that the filing of an amended complaint rendered the entry of default on the original complaint moot); *U.S. S.E.C. v. Boey*, No. 07 Civ. 39 (SJM), 2013 DNH 66, 2013 WL 1775444, at *1 (D.N.H. Apr. 25, 2013) (finding that the clerk's entry of default was rendered a "nullity" by the subsequent amendment of the complaint, and the motion

for default judgment must therefore be denied); *Winston v. City of Laurel*, No. 12 Civ. 61 (KS) (MTP), 2012 U.S. Dist. LEXIS 156036, 2012 WL 5381346, at *2 (S.D. Miss. Oct. 31, 2012) (same); *Enigwe v. Gainey*, No. 10 CIV. 684 (LHP), 2012 U.S. Dist. LEXIS 7961, 2012 WL 213510, at *3 (E.D. Pa. Jan. 23, 2012) (same, concerning request for entry of default).

These decisions are based in part on Rule 15(a) of the Federal Rules of Civil Procedure which is, in relevant part, substantially similar to Rule 15(a) of the South Carolina Rules of Civil Procedure. Therefore, the substantial body of federal case law, including that from the District of South Carolina, should be considered instructive. *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) ("In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules."). Accordingly, upon the filing of the Amended Complaint, which Pine Hill timely answered, the Entry of Default, Default Judgment and the Order of Damages – all based on the Original Complaint – are moot and should be set aside

In finding this black letter law not applicable in this instance to render the default moot, the Trial Court stated "nothing in the Amended Complaint changed as to Defendant Pine Hill. Thus, in accordance with SCRCP Rule 4(d)(3) and (8), no additional service was required on Defendant Pine Hill." (R., p. 15, Order denying Motion to Set Aside Default). This reliance is in error for multiple reasons.

First, the requirement for service of process only changes **when** the Amended Complaint becomes the operative pleading – not **whether** it becomes the operative pleading. *Allstate Ins. Co. v. Yadgarov*, 2014 WL 860019, *8, 2014 U.S. Dist. LEXIS 30068, 21 (E.D.N.Y., 2014). In *Yadgarov*, the plaintiff obtained entry of default against a group of defendants and subsequently moved for default judgment based on a failure to answer the original complaint. *Yadgarov*, 2014

WL 860019, at 4-6. Following the filing of their motion, Plaintiff filed an Amended Complaint which merely added a new defendant such that service on the original, defaulted defendants was not necessary. *Id*. at 4. The *Yadgarov* court found that where an amended pleading is required to be served on defaulting defendants under Rule 5, FRCP, the amended complaint does not supersede the original complaint until service is affected. *Id*. at 6 (citing, *International Controls Corp. v. Vesco*, 556 F.2d 665 (2d Cir. 1977)). However, the court went on to find that "an amended pleading excused from service on a defaulting defendant by FRCP 5(a)(2) becomes the operative document on filing, not on service." *Id*. at 7. The court went on to set aside the entry of default as to the previously defaulted defendants holding that "once the amended complaint becomes the operative complaint, a motion for default judgment made on a prior pleading should be denied. Similarly, several courts have found that once the original complaint is superseded, a clerk's entry of default on that pleading is mooted." *Id*. at 8. Therefore, when an amended complaint becomes the operative document, whenever that may be (whether that be upon filing or upon service), that amended complaint supersedes an original complaint rendering the entry of default and default judgment moot.

Here, the summons and complaint directed to Appellant and JDC Management was filed and served, by electronic filing, upon Appellant on August 19, 2019. Therefore, regardless of what trigger date is used to make the amended complaint the operative pleading, the amended complaint became the operative pleading on August 19 and superseded the original complaint. The entry of default, default judgment, and order of damages all should be set aside because they are based on a moot pleading.

Second, courts have repeatedly held that defaults are moot and null and void regardless of the presence of new allegations or the requirement to serve the amended complaint.

> To be sure, the Rules did not require [plaintiff] to serve the Amended Complaint on the original defendants, since the amended pleading did not "[assert[ ] a new claim for relief" against any of them. Fed. R. Civ. P. 5(a)(2). By the same token, however, the defaults that were entered by the Clerk with respect to [plaintiff's] original complaint were moot, and therefore could not technically serve as the premise for a default judgment.

Alfa Vision Ins. Corp. v. Lopez, No. 5:17-CV-05201, 2019 WL 1150507, at *1 (W.D. Ark. Mar. 13, 2019) (citing, *Greater St. Louis Constr. Laborers Welfare Fund v. A.G. Mack Contracting Co., Inc.*, 2009 WL 2916841, at *1 n.1 (E.D. Mo. Sept. 4, 2009) (discussing cases from multiple jurisdictions that found that a clerk's entry of default was rendered moot upon the filing of an amended complaint)). "The filing of the amended complaint will effectively set aside the default entered against [a defendant in default under an original complaint]." *Hooks v. Women's Health Inst. of Georgia, LLC*, No. 118CV01833MLBRGV, 2019 WL 2720813, at *2 (N.D. Ga. Apr. 11, 2019) (Citing, *Montgomery Bank, N.A. v. Alico Rd. Bus. Park, LP*, No. 2:13-cv-802-FtM-29CM, 2014 WL 757994, at *2–3 (M.D. Fla. Feb. 26, 2014) ("The filing of an amended complaint similarly cures a party's default as to the superseded original complaint."); *Lemon Tree Dev., LLC v. Philopatyr Corp.*, No. 10–CV–5228 (ARR), 2011 WL 6396624, *2 (E.D.N.Y. Dec. 20, 2011) ("In short, the caselaw teaches that, having amended the complaint and added new parties, plaintiff should not now be permitted to pursue a default judgment on the original pleading. Rather, plaintiff should promptly serve the Amended Complaint on each defendant and, if that defendant fails to appear, plaintiff may then move for a default judgment against that defendant on the Amended Complaint."); *Saint–Gobain Autover USA, Inc. v. Fuyao Glass Indus. Grp. Co.*, No. 05–71079, 2005 WL 3454402, *1–2 (E.D. Mich. Dec. 16, 2005) (setting aside default in part because it was entered on the original complaint that was nullified by the filing of an amended complaint)).

Allowing Amended Complaints to proceed against some defendants while proceeding on original complaints as to others would be a procedural nightmare. As the Western District of Arkansas put it:

> The Court can easily envision a case in which some defendants default on an original complaint, other defendants answer the original complaint, and the plaintiff files an amended complaint that is served on some defendants, but not others. The only clear-cut way for the parties and the Court to have confidence as to which pleading is operative is to require that Clerk's defaults be renewed after the filing of each amended pleading.

Alfa Vision Ins. Corp. v. Lopez, No. 5:17-CV-05201, 2019 WL 1150507, at *2 (W.D. Ark. Mar. 13, 2019).

One need not look further than this very case to understand the complexities of permitting two operative complaints to operate in unison. As this matter currently stands, Appellant is challenging a default held on the original complaint. Appellant is also a named party to an Amended Complaint which it has answered. The amended complaint and Appellant's answer thereto are technically still valid and operative documents in this case[6]. Finally, while Respondent currently argues that the Amended Complaint should not be the operative pleading as to Appellant, if service is flawed as Appellant argues, Respondent will presumably be arguing vigorously that the Amended Complaint (if properly amended) is operative as to Appellant. If service is determined to be ineffective, the original complaint will be subject to dismissal on

[6] Plaintiff has filed a motion to strike Appellants answer to its Amended Complaint which is still pending as of the time of this Brief. The grounds for striking an answer are far different than for setting aside default. (See, Rule 12(f), SCRCP ("at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.")). It is entirely permissible and foreseeable that a court could decide not to strike Appellant's answer leaving the parties in a wholly uncertain and uncharted procedural and substantive purgatory.

statute of limitations grounds. Respondent should not be permitted to argue and benefit from both sides of her decision to amend the complaint.

A defaulting party merely "forfeits his right to answer or otherwise plead to the complaint." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 428 S.C. 261, 266, 834 S.E.2d 204, 207 (Ct. App. 2019), reh'g denied (Nov. 15, 2019) (quoting, *Howard v. Holiday Inns, Inc*., 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978)). By filing an Amended Complaint and serving Appellant with a Summons on the same, Plaintiff obligated Appellant to answer or otherwise plead. Hence, the effect of the default is mooted, Appellant may contest liability, and this case should be permitted to proceed on the pleadings. For all of these reasons, the filing of the Amended Complaint made it, not the original complaint the operative pleading. The entry of default, default judgment and order of damages are all now void and of no effect.

III. The Court erred in failing to address or grant Appellant's motion for relief under Rules 55 and 60

In its Motion to Set Aside, Appellant moved for relief based on Rules 55 and 60 of the South Carolina Rules of Civil Procedure. In its Order denying Appellant's Motion to Set Aside, the Trial Court failed to address Appellant's Rule 55 and 60 arguments. Therefore, Appellant raised this issue in its Motion to Alter or Amend the Order Denying the Appellant's Motion to Set Aside. However, the Trial Court again refused to address the arguments in any way. The grounds presented under Rules 55 and 60 support setting aside default. It was in error for the Trial Court to fail to address and not grant relief thereunder.

The Court should set aside the default judgment in this matter for one or all of the reasons established by Rules 55 and 60(b), SCRCP. Rule 55(c) provides that, "[f]or good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Rule 55(c), SCRCP. The rules regarding

setting aside default should be liberally construed to promote justice and dispose of cases on the merits. *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995).

The issue of what is good cause "is within the sound discretion of the court." *Williams v. Vannolkenburg*, 312 S.C. 373, 375, 404 S.E.2d 408, 409 (Ct. App. 1994). However, the good cause standard is not as rigorous as the excusable neglect standard under Rule 60(b), SCRCP, used when a default judgment has been entered. Pursuant to Rule 60(b), SCRCP, a court may relieve a party of default judgment amount other things, for the following reasons, (1) mistake, inadvertence, surprise, or excusable neglect or (4) the judgment is void. The motion to set aside the judgment must be "made within a reasonable time" and "not more than one year after the judgment, order, or proceeding was entered or taken. Rule 60, SCRCP.

When determining whether a default judgment should be set aside under Rule 60, "the promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant" must all be taken into account. *Hill v. Dotts*, 345 S.C. 304, 309, 547 S.E.2d 894, 897 (Ct. App. 2001) (quoting, *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50 435 S.E.2d 377, 379 (Ct. App. 1993)). Importantly, a showing of meritorious defense does not require Appellant establish that they would prevail on the merits – it only need be a defense which is worthy of judicial inquiry. *See McClurg v. Deaton*, 380 S.C. 563, 573-74, 671 S.E.2d 87, 93 (Ct. App. 2008). Proof of any one of the Rule 60(b) factors – mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, or misrepresentation – is sufficient to show "good cause." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009).

A. Good cause and excusable neglect all support setting aside default

Good cause and excusable neglect abound in this case. Appellant was never served the Summons and Complaint and, therefore, Default cannot be entered or sustained. However, to the extent any of the methods of service of process propounded by the Respondent can constitute proper service (which Appellant strenuously objects to), Appellant did not receive actual notice of the Complaint. If accepted, the summons and complaint would have been served on the maintenance employee of a different company than Appellant. To the extent that this constitutes service, good cause, excusable neglect and inadvertence should be found to excuse the failure to timely respond.

Appellant promptly sought relief from default after learning of the proceeding. Within days of learning of the default situation (and within mere days of the Order of Damages being issued), Appellant filed multiple motions, including one seeking to set aside the default. Further, when Respondent filed her Amended Complaint, Appellant answered within 15 days. Appellant should be excused for not receiving the Summons and Complaint from a maintenance employee of its management company. Further, since learning of the situation, Appellant has promptly sought to address and remedy the situation. The default judgment should be set aside because good cause, inadvertence, and excusable neglect exist.

B. The Judgment is void and should be set aside.

"Under Rule 60(b), SCRCP, a judgment is void if the court that rendered it lacked jurisdiction over the parties." *Jackson v. Speed*, 326 S.C. 289, 303, 486 S.E.2d 750, 757 (1997) (See also, Jenkins v. Cent. Carolina Christian Acad., No. 2005-UP-159, 2005 WL 7083834, at *2 (S.C. Ct. App. Mar. 4, 2005) ("The definition of 'void' under the rule only encompasses judgments from courts which failed to provide due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.")). Service of process under Rule 4

confers personal jurisdiction unto a Court. *Richardson v. P.V., Inc.*, 383 S.C. at 615, 682 S.E.2d 263, 265 (2009). For all of the reasons set forth above, service of process was not properly effectuated in this case and thus the Trial Court lacked personal jurisdiction over Appellant. Therefore, the judgment is void under Rule 60(b) and as such, the default should be set aside.

C. The Appellant has numerous meritorious defenses and Appellant will not be prejudiced by setting aside default.

Further, Pine Hill has numerous meritorious defenses to this action. A meritorious defense need not be perfect nor one which can be guaranteed to prevail at trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to essential facts arising from conflicting or doubtful evidence. *Graham v. Town of Loris*, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978).

Specifically, neither the Complaint nor the Order of Damages allege or state facts in support of the theory that Appellant knew or should have known about the alleged dangerous condition on the stairs. Further, the alleged accident occurred on September 2, 2016, when many schools and public offices were closed because Hurricane Hermine was passing through the midlands. Plaintiff's conduct in walking down an outside staircase in hurricane conditions absolves any liability on behalf of Appellant due to assumption of the risk and/or open and obvious hazards.

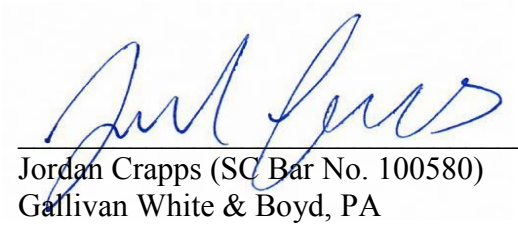
Finally, the Plaintiff cannot be prejudiced by relieving Appellant of the default because the case will proceed anyway as to the newly added defendant – who has timely Answered. Therefore, the merits of the matter will be subject to discovery, motions practice and trial all on the merits of the matter. Therefore, Respondent cannot even put forth delay as a prejudicial

factor. Regardless, mere "[d]elay in realizing satisfaction on a claim rarely serves to establish a sufficient degree of prejudice." *Nationwide Mut. Ins. Co. v. Starlight Ballroom Dance Club, Inc.*, 175 Fed. Appx. 519, 523-24 (3rd Cir. 2006) (see also, Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 2699 at 536-37). There can be no prejudice to Respondent by permitting Appellant to participate in those proceedings to determine this matter on its merits, as opposed to technicalities, which Courts of this State prefer.

Therefore, pursuant to Rules 55 and 60, because good cause, excusable neglect and understandable inadvertence exist, and because the judgment is void, default should be set aside and Appellant should be relieved of any impact of the Default or Order of Damages.

CONCLUSION

For the reasons set forth herein, the Trial Court's Order should be reversed and this Court should enter an Order setting aside entry of default, the default judgment, and the Damages Order.



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