THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE CHARLESTON COUNTY
COURT OF COMMON PLEAS

Frank D. Addy, Jr., Circuit Court Judge

Case No. 2016-CP-10-3696

MARGARET CARR, Respondent

v.

TW GRAHAM and COMPANY, LLC, Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES

(I) Whether the court erred in concluding the Court had obtained personal jurisdiction of the Appellant per Rule 60(b)(4) SCRCP;

(II) Did the Trial Judge err in refusing to set aside the default judgment against Appellant per Rule 60(b) SCRCP.

STATEMENT OF THE CASE

Respondent filed a lawsuit in the Charleston County Court of Common Pleas on July 19, 2016 claiming a violation of South Carolina Code §41-1-80, Retaliation for filing a Workers' Compensation claim. On July 21, 2016, the Respondent sent a copy of the Summons, Complaint, Interrogatories, Requests for Production, and Requests to Admit to the Appellant by Certified Mail, Return Receipt Requested, at the address listed on the South Carolina Secretary of State's website, 3722 Channel View Court, Mt. Pleasant, South Carolina 29466. The mailing was returned, marked as "Return to Sender – Unclaimed" on July 29, 2016. (*See* Returned envelope dated July 29, 2016). The Respondent then hired a process server in an attempt to find the Appellant and serve its Registered Agent with the suit. The process server made several attempts to locate the Appellant but documented that the agent "would not make himself available for service" and that he was "avoiding service." (*See* Affidavit of Non-Service).

Respondent filed the process server's Affidavit of Non-Service and Motion to Serve via Publication on September 15, 2016. (*See* Motion and Order of Publication). The Clerk of Court for Charleston County signed the Order for Publication and pursuant to that Order, the Summons was published in the Post and Courier Newspaper for the requisite three (3) consecutive weeks, from September 23, 2016 to October 7, 2016. The Affidavit of Publication was filed with the Court on October 18, 2016. The Appellant did not file an Answer nor did anyone appear on its behalf after publication ran.

Respondent filed a Motion for Entry of Default on December 20, 2016 on the basis that the Appellant had not answered the Summons and Complaint. Respondent then attempted to mail the Motion for Default to the Appellant and that too was returned. By the time of the hearing, still no Answer had been filed nor had anyone appeared on the Appellant's behalf, so

the Court found the Appellant in default and entered an Order of Default on February 22, 2017. (*See* Order for Default).

Respondent attempted to notify the Appellant of the Court's Order but the mail was again returned. (*See* Returned Envelope dated May 18, 2017). Respondent then filed for a hearing to set damages and once set, Respondent mailed the Notice of Hearing to the Appellant. The hearing on damages took place on June 9, 2017. Appellant was not present, nor was anyone there on his behalf. Following the hearing, the presiding judge entered a Judgment for the Respondent in the amount of $11,863.60 and issued an Order of Judgment against the Appellant reflecting the same. Respondent attempted to serve the Appellant with the Order of Judgment at the addresses listed on the South Carolina Secretary of State's website and at the address for the Restaurant, but those mailings were also returned. (*See* returned envelopes dated February 21, 2018 and March 21, 2018). The Respondent was finally able to serve the Appellant with the Judgment on April 2, 2018 in a Planet Fitness parking lot, and subsequently filed an Affidavit of Service.

Appellant then hired counsel who filed a Motion to Set Aside Default on May 24, 2018. A hearing was scheduled on August 23, 2018 and the presiding Judge did not set aside the Default or Judgment, finding that the Appellant had intentionally evaded service and had been served. On September 17, 2018, Appellant filed its Notice of Appeal and on September 28, 2018, the Appellant filed its Amended Notice of Appeal.

STANDARD OF REVIEW

A circuit court's findings regarding the issue of relief from a judgment will not be disturbed on appeal absent an abuse of discretion. "An abuse of discretion arises where the

judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006).

FACTS

The Respondent began working for the Appellant on August 22, 2015 as a dishwasher in its restaurant. On September 3, 2015, Respondent was injured on the job and inquired to her supervisor about filing a Workers' Compensation claim. The Appellant rebuffed her. Since Appellant refused Respondent's request to file a claim, she went to her own doctor and was given prescriptions and a work excuse for her injury. On September 5, 2015, Respondent turned in her work excuse and was fired without warning. Respondent pursued her Workers' Compensation claim to a successful resolution, despite Appellant's initial denial.

The Respondent mailed a letter to Appellant at the restaurant notifying him that the Respondent was subjected to an illegal employment action on the job and asking that the correspondence be forwarded to an insurance carrier or if there was not one, to have someone contact counsel for Respondent to discuss the employment case. It further stated if counsel did not hear from Appellant or an insurance company that further legal action would be taken. (*See* Wigger Law Firm Ltr. Dated May 11, 2016 and green Certified Mail card dated June 2, 2016). When Respondent did not hear from Appellant nor anyone on its behalf, she filed the present action.

ARGUMENT AND AUTHORITY

ARGUMENT I

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

While Appellant agrees that service by publication is a valid avenue for service, it seems to take issue with the Order for Publication because "it did not direct the Respondent to mail a copy of the summons to the Appellant." (*See* Appell. Brief P. 7). This argument has no merit, as the Respondent did mail the Summons and Complaint to the registered addresses for the business on numerous occasions.

The Appellant next argues that Affidavit of Non-Service is somehow insufficient because it does not specifically reference the words "due diligence." It is clear, based on the language of the Affidavit, that the process server did everything in his power to locate and serve the Appellant. Appellant, here, uses the decision in Caldwell v. Wiquist in support of its argument. However, Respondent clearly satisfies the test set forth in Caldwell ("affidavit must include some factual basis upon which the court issuing the order of service by publication can find that the defendant cannot, after due diligence, be found within the state.") (Caldwell v. Wiquist 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013). Instead of merely printing the words "due diligence," the process service goes into detail to explain that (1) the address listed on the Secretary of State's website is invalid; (2) that he attempted service at a second address; (3) that he conducted a search to find a phone number for the agent; (4) that he contacted that agent and was told he would "ha[ve] to find him." Finally, Appellant takes issue with the presiding judge's statement that Respondent's attorney "tried numbers of other address[es] for the company, and they came up dry" and alleges this is misstatement. Quite simply, the record does support that finding. The

Respondent attempted to mail documents to multiple addresses, and the process server attempted to serve the registered agent personally at two different addresses. The trial judge therefore drew a conclusion based on the record and exercised his discretion when ruling on the issue.

Respondent agrees that per Rule 60(b)(4) SCRCP, the court may relieve a party from a final judgment, order, or proceeding on the basis that the judgment is void because the court acted without acquiring personal jurisdiction of the defendant. Here, however, the Respondent exactly followed all service statutes and rules in serving the Appellant, even though the Appellant was already well aware a claim was being pursued. In fact, the Respondent did more than is required and continued to attempt to inform the Appellant of its actions throughout the Default process. The Appellant does not claim it was not within the area of publication, that the service effectuated was not pursuant to the rule, or any other viable reason for the Court to set aside its Order. Instead, the Appellant now asks for the Court to overturn a decision to its benefit, but to the detriment of the person who followed the rules. Attempts to evade are clearly frowned upon and the Appellant attempted to evade at his own peril.

In Patel v. Southern Brokers, Ltd., which is very similar to the facts of the present case, the court reasoned that because the Defendant knew the name of the Plaintiff's attorney, knew that the envelope contained or probably contained legal process concerning the lawsuit, and that it willfully and deliberately refused to accept the Summons and Complaint in an attempt to avoid the process of the Court, the Court acquired jurisdiction over the Defendant. In so ruling, the Court states that "if the Defendant suffers material prejudice, it is not because of the inadequacy of proof. The injury suffered is the result of a self-inflicted wound." Patel v. Southern Brokers, Ltd., 277 S.C. 490, 289 S.E.2d 642 (1982).

ARGUMENT II

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

According to the South Carolina Rules of Civil Procedure Rule 55(c), the Court for good cause shown may set aside an entry of default in accordance with Rule 60(b). According to Rule 60(b), upon a motion the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: mistake, inadvertence, surprise or excusable neglect; newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); fraud, misrepresentation, or other misconduct of an adverse party; the judgment is void; and the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based longer equitable that the judgment should have prospective application. None of the justifications according to the rule apply in this matter.

In Stark Truss Co. v. Superior Const. Corp., the Court states, "The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." Stark Truss Co. v. Superior Const. Corp. 360 S.C. 503, 602 S.E.2d 99 (S.C. App., 2004). *See also* Thompson v. Hammond, 299 S.C. 116 at 119, 382 S.E.2d 900 at 902 (1989); Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462 at 465, 381 S.E.2d 499 at 502 (Ct. App. 1989).) This decision will not be reversed absent an abuse of that discretion. Thompson, 299 S.C. at 119, 382 S.E.2d at 902-903; In Re Estate of Weeks, 329 S.C. 251, 495 S.E.2d 454 at 459 (Ct.App.1997). An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support. *Id.* Stark Truss Co. at 503, 602 S.E.2d 99 (S.C. App., 2004). South Carolina courts have ruled that the only way a judgment should be set aside is if an abuse of discretion occurs when the decision is based upon an error of law or when

the order is without evidentiary support. Limehouse v. Husley, 397 S.C. 49, 723 S.E.2d 211 (S.C. App., 2011).

The Appellant was aware of the case being filed. Not only was the agent warned that further legal action would be taken if Respondent's counsel did not hear from him, his attorney, or his insurance company, but he spoke with the process server who attempted to serve him with the pleadings and told him to "come find him." (*See* Affidavit of Non-Service). Counsel for the Respondent attempted to notify the Appellant numerous times prior to Appellant's Motion to Set Aside Judgment and Default of the case, but the Appellant did not make an appearance in the case until over a year after he had been served via publication. The Respondent tried to contact the Appellant regarding the trial for the matter filed with the Court and explored every avenue possible to establish contact by sending correspondence and a process server to addresses registered with the South Carolina Secretary of State and the business that is the Appellant. The Appellant still ignored the Court's request for him to appear, therefore giving the Court no other choice but to enter a default judgment against him in this matter.

Despite the aforementioned facts, Appellant nevertheless argues that "the existence of a meritorious defense" was not taken into consideration at the hearing to set aside default. (*See* Appell. Brief P 11). First, all factors would have been considered and analyzed by the trial court judge. Second, the assertion that Appellant truly had a meritorious defense is absurd.

Appellant argues primarily that "Mr. Runey dismissed the Respondent on the basis she did not notify him that she could not work," (Appell. Brief P. 12) and attempts to use this assertion in support of a defense based on "absence from work." The two are not the same. If Mr. Runey is going to state that he terminated Respondent due to a failure to notify, he then cannot contradict is own Affidavit by way of Memo to claim an absence from work defense.

Appellant then vaguely argues that "the Respondent did not file for workers' compensation until December 8. 2015, which was almost four months after she was terminated..." Appell. Brief P. 12. However, this assertion does not equate to a meritorious defense.

Johnson v. J.P. Stevens & Co. held that §41-1-80 does not "require a formal filing of a Workers' Compensation Claim by the employee;" that "other jurisdictions have held other conduct sufficient to have instituted a proceeding including the employer's agreement to pay or payment of medical care or the employer's receipt of written notice from an independent health care provider;" and that "these types of conduct will suffice to constitute instituting a proceeding under our statute as well." Johnson v. J.P. Stevens & Co., Inc., 308 S.C. 116, 417 S.E.2d 527 (1992). In this case, Respondent was injured on September 3, 2015, on September 4, 2015 she provided her doctor's release and inquired about a workers' compensation claim and on September 5, 2015, she was terminated. Given these facts and the decision in Johnson, it is irrelevant when she instituted her formal workers' compensation claim.

The Appellant clearly fired the Respondent for bringing a Worker's Compensation claim in retaliation of §41-1-80. The Appellant has offered nothing that indicates they have even a plausible defense in this action, much less a meritorious one.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that Judge Addy's Form 4 Order dated August 23, 2018 should remain in effect and the Appellant's Appeal be denied.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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July 3, 2019