

**IN THE SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**HERBERT TUCKER, INDIVIDUALLY  
and d/b/a H & G CONSTRUCTION, INC.**

**APPELLANTS**

**VS.**

**CASE NO. 2007-CA-02223**

**TYRONE WILLIAMS  
and SHARON WILLIAMS**

**APPELLEES**

**APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY,  
MISSISSIPPI, HONORABLE JUDGE WILLIAM H. SINGLETARY**

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**BRIEF OF APPELLANTS**

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**ORAL ARGUMENT IS NOT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

**SUPREME COURT OF MISSISSIPPI  
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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Herbert Tucker, Defendant below, Appellant here.

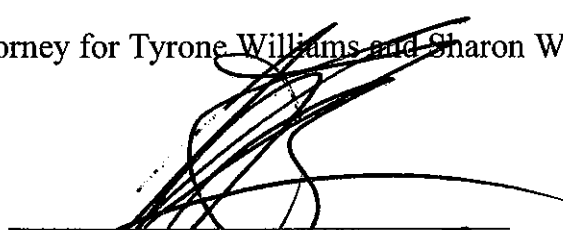
H & G CONSTRUCTION, INC., Defendant below, Appellant here. (The correct legal name of this corporation is H & G Construction Company, Inc.)

K. F. Boackle, attorney for Herbert Tucker and H & G Construction Company, Inc.

Tyrone Williams, Plaintiff below, Appellee here.

Sharon Williams, Plaintiff below, Appellee here.

S. Malcolm O. Harrison, Esq., attorney for Tyrone Williams and Sharon Williams.



K. F. Boackle, MS Bar No. [REDACTED]  
Attorney for Appellants

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**SUPREME COURT OF MISSISSIPPI  
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---

**BRIEF OF APPELLANTS**

---

COME NOW, Herbert Tucker, individually and H & G Construction Company, Inc.,  
(The correct legal name of this corporation is H & G Construction Company, Inc.),  
Appellants (hereinafter "Tucker and H & G" ) by and through the undersigned counsel, and  
file this their brief in support of their appeal of the rulings of the Chancery Court of the First  
Judicial District of Hinds County, Mississippi and in support thereof would say and show  
unto this Honorable Court the following, to wit:

***STATEMENT OF ISSUES***

**ISSUE NUMBER 1:**

Whether the trial court was manifestly wrong, clearly erroneous, or applied the wrong  
legal standard when it granted Tyrone Williams and Sharon Williams a Default Judgment.

**ISSUE NUMBER 2:**

Whether the trial court was manifestly wrong, clearly erroneous, or applied the wrong

legal standard. when it denied Herbert Tucker, Individually and d/b/a H & G Construction Company, Inc.'s Motion To Set Aside Default Judgment.

### ***STATEMENT OF THE CASE***

This case involves real property known as Lot 20, Levon Owens Estates, a subdivision in the First Judicial District, Hinds County, Mississippi, (hereinafter referred to as the "property" or "subject property") owned by Tyrone Williams and Sharon Williams (hereinafter the "Williams"). On, or about, March 20, 2006, the Williams hired H & G Construction Company, Inc. (hereinafter "H&G") to construct improvements on the subject property.(Rec., pages 0067-0073) During the course of construction the Williams made certain changes, but at the end of construction were unwilling to pay for the changes. Therefore on, or about, November 3, 2006, H & G filed a Notice of Construction Lien (Rec., pages 0013-0014) for its final draw in the amount of \$34,320.00. Four days later H & G received notice from its bank that a check the Williams had given H & G for a previous draw in the amount of \$49,845.00 had been dishonored by the Williams' bank. The Williams had stopped payment of the check. On November 9, 2006, H & G filed a second Notice of Construction Lien (Rec., pages 0017-0018) for what was thought to be the amount of the dishonored check. Six days later H & G filed a Corrected Notice (Rec., pages 0026-0027) reducing the amount of the second lien to \$49,357.00, the correct amount on the dishonored check. Approximately two weeks later, H & G filed a Corrected Notice of Construction Lien (Rec., pages 0035-0036) reducing the amount of the first lien to \$33,894.25. H & G at all

times acted in good faith.

The Williams filed their Complaint For Slander of Title And For Removal of Cloud Upon Title (Rec., pages 0001-0038) on December 14, 2006. On February 12, 2007, Counsel for the Williams filed an Application To Clerk For Entry Of Default and Supporting Affidavit. (Rec., pages 0047-0049) A Final Judgment Removing of [sic] Cloud Upon Title (Rec., pages 0050-0054) was entered by the trial court on February 15, 2007.

Mr. Tucker was first served with the Complaint and two Summons on February 25, 2007. (Tucker Affidavit, Rec., pages 0141-0142) Thereafter, within the time allowed for an answer to be filed, on March 27, 2007, Herbert Tucker and H & G Construction Company, Inc. filed their Motion To Dismiss, Answer and Counterclaim. (Rec., pages 0055-0073) After the Williams failed to respond to the Motion to Dismiss and Counterclaim, on May 14, 2007 Tucker and H & G filed their Motion For Default Judgment. (Rec., pages 0076-0077) When counsel for Tucker and H & G called the Court to schedule a hearing on Tucker and H & G's Motion For Default it was learned that a Final Judgment had been entered. Thereafter, counsel for Tucker and H & G went to the Chancery Clerk's office and collected a copy of the entire court file.

On August 9, 2007, Herbert Tucker and H & G Construction Company, Inc. filed their Motion To Set Aside Default Judgment. (Rec., pages 0082-0088) The trial court denied that motion on November 23, 2007 (filed November 26, 2007). (Rec., page 0218) It is from the trial court's granting of the Williams' Default Judgment and the denial of Tucker and H &

G's Motion to Set Aside Default that this appeal is taken.

***STATEMENT OF THE FACTS***

On December 14, 2006, Plaintiffs filed their Complaint For Slander Of Title And For Removal Of Cloud Upon Title. (Rec., pages 0001-0038) On December 15, 2006, the Chancery Clerk of Hinds County issued a Summons to Herbert Tucker and a Summons to H & G Construction, Inc. (Rec., page 0039 and page 0042)

On January 10, 2007, Plaintiffs sent a copy of the Complaint and two Summons to Boackle Law Firm, PLLC. (Rec., page 0129) Neither K. F. Boackle nor Boackle Law Firm, PLLC was the agent for service of process for H & G Construction Company, Inc. or an employee of the corporation.

Also, on January 10, 2007, Plaintiffs sent a Certified piece of mail to Herbert Tucker at 500 Cobblestone Court, Ste. B, Madison, MS 39110 and to Herbert Tucker at 1186 North Old Canton Road, Canton, MS 39046. (Rec., pages 0045-0046) These two pieces of Certified Mail were returned to Plaintiffs' counsel on March 2, 2007 and February 20, 2007, respectively.

On, or about, January 17, 2007, a Hinds County Deputy Sheriff filed a return of service form with the Clerk in regard to the Summons to Herbert Tucker. The copy of the Summons (Rec., page 0039) had "Posted to the property 8 January, 2007" written on the back of the Summons and below, there appeared a stamp which stated "M. E. McMillin, Sheriff By \_\_\_\_\_ D.S.." This was signed by what appeared to be a "Lt Robert [Turner?]."

Attached thereto was a form from the Hinds County Sheriff's Department styled "In The County Court Of The First Judicial District of Hinds County, Mississippi." There appeared at the bottom of this form a "Certificate of Service By Mailing" in regard to Herbert Tucker. This Certificate was dated January 8, 2006[sic] (Rec., pages 0040-0041) and signed by Robert [Turner?].

Also on, or about, January 17, 2007, a Hinds County Deputy Sheriff filed a return of service form with the Clerk in regard to the Summons to H & G Construction [Company], Inc. The copy of the Summons (Rec., page 0042) had "Posted to the property 8 January, 2007" written on the back of the Summons and below, there appeared a stamp which stated "M. E. McMillin, Sheriff By \_\_\_\_\_ D.S.." This was signed by what appeared to be a "Lt Robert [Turner?]." Attached thereto was a form from the Hinds County Sheriff's Department styled "In The County Court Of The First Judicial District of Hinds County, Mississippi." There appeared at the bottom of this form a "Certificate of Service By Mailing" in regard to H & G Construction Company, Inc. This Certificate was dated January 8, 2006[sic] (Rec., pages 0043-0044) and signed by Robert [Turner?].

On February 12, 2007, S. Malcolm O. Harrison, Counsel for Plaintiffs filed an Application To Clerk For Entry Of Default and Supporting Affidavit. (Rec., pages 0047-0049) In the Affidavit, Mr. Harrison, under oath, represented to the trial court "That Defendants, Herbert Tucker individually and d/b/a H & G Construction, Inc. were duly served with a copy of the summons at his place of residence, 1186 North Old Canton Road,

Canton, Mississippi and at his place of business, H & G Construction, 500 Cobblestone Ct., Suite B, Madison, Mississippi, pursuant to Rule 4(d)(1)(A) of the Mississippi Rules of Civil Procedure.” Rule 4(d)(1)(A) of the Miss. R. Civ. P. states that the summons and complaint are properly served “(1) Upon an individual other than an unmarried infant or incompetent person, (A) by delivering a copy of the summons and complaint to him personally or to an agent authorized by appointment or by law to receive service of process.” Mr. Harrison misrepresented the service of process to the trial court, because Mr. Herbert Tucker was never served personally. Herbert Tucker was never served as the registered agent for service of process for the corporation, and he had not given anyone else the authority to accept service on the corporation’s behalf.

Herbert Tucker submitted his Affidavit (Rec., pages 0141-0142) attached to his Motion To Set Aside Default Judgment (Rec., pages 0082-0088), which was filed on, or about, August 9, 2007. The individual Summons to Mr. Tucker was not even served through his wife Glenda Tucker as provided by Rule 4(d)(1)(A). Mrs. Tucker’s Affidavit (Rec., pages 0143-0144) was also attached to the Motion To Set Aside Default Judgment.

On February 15, 2007, the Court entered a Final Judgment Removing of [sic] Cloud Upon Title. (Rec., pages 0050-0054) Said final judgment submitted to the Court by plaintiffs’ counsel contained serious misrepresentations.

Mr. Tucker was first served with the Complaint and two Summons on February 25, 2007. (See Mr. Tucker’s Affidavit - Rec., pages 0141-0142) Thereafter, within the time

allowed for an answer to be filed, on March 27, 2007, Herbert Tucker and H & G Construction, Inc. filed their Motion To Dismiss, Answer and Counterclaim. (Rec., pages 0055-0073) This pleading properly and completely answers all allegations of the Complaint and states a valid counterclaim.

Plaintiffs failed to respond to Herbert Tucker and H & G Construction Company, Inc.'s Motion to Dismiss, Answer and Counterclaim, which was served on the Williams' counsel of record S. Malcolm O. Harrison, Esq. (Rec., page 0064). Therefore, on May 14, 2007, Herbert Tucker and H & G Construction filed their Motion For Default Judgment. (Rec., pages 0076-0077)

In January, 2007, K. F. Boackle was not an attorney of record for Herbert Tucker or H & G Construction Company, Inc. in this case. K. F. Boackle was not in January, 2007, and is not now, an employee or the agent for service of process for H & G Construction Company, Inc. The Affidavit of Nancy M. Frederick was attached to Tucker and H & G's Motion To Set Aside Default Judgment (Rec., pages 0176-0177).

It was only when the undersigned counsel for Tucker called the trial court for a setting for the hearing on Tucker and H & G's Motion For Default that he learned that the Final Judgment had been entered. (Rec., pages 0050-0054) The undersigned went to the Chancery Clerk's office and collected a copy of the entire file.

On August 9, 2007 Herbert Tucker and H & G Construction Company, Inc. filed their Motion To Set Aside Default Judgment. (Rec., pages 0082-0088) The trial court denied that

motion on November 27, 2007. (Rec., page 0218) It is from the two lower court rulings that this appeal is taken.

There is clear and convincing proof that Mr. Harrison misrepresented service of process and thus obtained a Judgment in this cause without giving Herbert Tucker or H & G Construction Company, Inc. an opportunity to respond to said Complaint prior to the court's issuance of the default judgment. Mr. Harrison, under oath, misrepresented the "proof of service" as meeting the requirements of Rule 4(d)(1)(A). There is no proof of proper service on these Defendants prior to, or after, the entry of the default judgment.

## ***VII. SUMMARY OF THE ARGUMENT***

### **ISSUE NUMBER 1:**

Whether the trial court was manifestly wrong, clearly erroneous, or applied the wrong legal standard when it granted Tyrone Williams and Sharon Williams a Default Judgment.

*Miss. R. Civ. P. Rule 4 (d)* provides:

**Summons and Complaint: Person to Be Served.** The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:

(1) Upon an individual other than an unmarried infant or a mentally incompetent person,

(A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or (B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the

complaint where left. Service of a summons in this matter is deemed complete on the 10th day after such mailing.

(4) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name by delivering a copy of the summons and of the 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.

*Miss. R. Civ. P. Rule 55* provides:

**(a) Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

**(b) Judgment.** In all cases the party entitled to a judgment by default shall apply to the court therefor.

At the time of the filing of the Application To Clerk For Entry of Default and Supporting Affidavit, there was no evidence of proper service of process in the court file, because proper service had not been accomplished. Therefore, there was no basis for the trial court to grant a default judgment.

## **ISSUE NUMBER 2:**

Whether the trial court was manifestly wrong, clearly erroneous, or applied the wrong legal standard when it denied Herbert Tucker, Individually and d/b/a H & G Construction, Inc.'s Motion To Set Aside Default Judgment.

*Miss. R. Civ. P. Rule 60(b)(1)* provides if "...misrepresentation ... of an adverse party" is present, the court may relieve a party from a final judgment, order, or proceeding. Mr. Harrison represented to the Court that Herbert Tucker and H & G were "duly served" on, or about, January 8, 2007. These Defendants were not served on January 8, 2007. They were

not served with process in this case until February 25, 2007, ten days after the entry of the Final Judgment. (Rec., 0141-0142) "Posting to the property" as indicated by the serving Deputy Sheriff is not one of the allowed methods for service for resident individuals and domestic corporations. Herbert Tucker and H & G Construction Company, Inc. were not properly served. Therefore the trial court should have set aside the default judgment previously entered.

### ***VIII. ARGUMENT***

#### **ISSUE NUMBER 1:**

Whether the trial court was manifestly wrong, clearly erroneous, or applied the wrong legal standard when it granted Tyrone Williams and Sharon Williams' Motion for Default Judgment.

The standard of review for this case was stated in *McNeil v. Hester*, Nos. 97-CA-00048-SCT, 97-CA-01107-SCT and 97-CA-01469-SCT. (Miss. 2000), 753 So.2d 1057, 1063. "A limited standard of review is employed by this Court in reviewing decisions of a chancellor. [Internal cites omitted] The findings of a chancellor will not be disturbed on review unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard. [Internal cites omitted] The standard of review employed by the Supreme Court for review of a chancellor's decision is abuse of discretion. [Internal cite omitted] However, for questions of law, the standard of review for decisions of a chancellor is de novo." [Internal cites omitted] The Court continued on page 1064 to state "...this Court

cannot set aside a chancellor's findings of fact so long as they are supported by substantial credible evidence." There was no substantial credible evidence of proper service on Tucker or H & G. In fact there was no evidence of proper service.

"Findings of fact made by a chancellor, whether characterized as ultimate facts or as mere evidentiary facts, may not be disturbed or set aside on appeal unless manifestly wrong." *Cotton v. McConnell*, 435 So.2d 683, 685 (Miss. 1983). If the lack of proper service, evident from the file is considered a finding of fact, it was manifestly wrong, because the court file had no evidence of proper service.

"Service of process may not be had by certified mail upon an in-state defendant." *Triple "C" Transport, Inc. v. Dickens*, No. 2002-IA-01094-SCT. (Miss. 2004), 870 So.2d 1195, 1198. In the lower court, in the Williams' response to Tucker and H & G's Motion to Set Aside Default Judgment they argued that they had served K. F. Boackle, Esq. at Boackle Law Firm. (Rec., pages 0193-0194) However, no proper service was ever accomplished. K. F. Boackle was not an employee or the registered agent for service of process for H & G and he had not been authorized by Herbert Tucker to accept service on his behalf. The record is void of any evidence of proper service on Tucker and H & G.

"The comment to that rule provides that '[t]he certified mail procedure is not available to serve a person within the state.'" *Triple "C" Transport, Inc. v. Dickens*, No. 2002-IA-01094-SCT. (Miss. 2004), 870 So.2d 1195, 1199.

The court stated in Slip Copy, 2002 WL 34213425 (S.D.Miss.) *Brown v. Bristol-Myers*

*Squibb Company*, No. CIV A402CV301LN. (Miss. 2002):

“In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999) ‘...the Supreme Court, applying the ‘bedrock principle’ that ‘[a]n individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court’s authority, **by formal process....**’[emphasis added] The *Brown* Court continued: See, e.g. *Liberty Mut. Ins. Co. v. Bayer Corp.*, No. 02-343-GMS, 2002 WL 1467331, \*2 (D.Del. 2002) ‘(stating that ‘only after a plaintiff has rendered proper service is a defending party obligated to take action’).”

*Big B Automotive Warehouse Distributors, Inc. v. Cooperative Computing, Inc.*, No. SC 00-2602, 2000 WL 1677948, \*1-2 (N.D.Cal. Nov. 2000) “(stating that under *Murphy Bros.*, ‘it is not enough for Plaintiffs to show that Defendant...actually received a copy of the complaint by a particular date; Plaintiffs must demonstrate compliance with the requirements of service.’)”

“This case proceeded by flawed procedure from its inception. Not only did Buckley fail to serve process, but the chancellor erred when he failed to follow our rules of civil procedure.... Regardless, the chancery court lacked personal jurisdiction over Lexington. In default cases, where proper service of process is not shown in the record, **the default judgment is void.**” [emphasis added] [internal cite omitted] *Lexington Insurance Co. v. Buckley*, Nos. 2003-CA-01249-COA, 2003-CA-02183-COA.(Miss. App.2006), 925 So.2d 859, 870.

“...the decision to grant or set aside a default judgment is ‘addressed to the sound discretion of the trial court.’ Pointer v. Huffman, 509 So.2d 870, 875 (1987). This discretion must be exercised in accordance with the rules set forth in M.R.C.P. 55(c) and 60(b). Guaranty National Insurance Co. V. Pittman, 501 So. 2d 377, 388 (1987). In determining whether the trial court has abused its discretion, we consider three factors: ‘whether the defendant has good cause for default...whether the defendant in fact has a colorable defense to the merits of the claim, and ...the nature and extent of prejudice which may be suffered by the plaintiff if the default is set aside.’ Johnson v. Weston Lumber & Building Supply Co., 5466 So.2d 466, 468 (Miss. 1990); King v. King, 556 So.2d 716 (Miss. 1889); H & W Transfer and Cartage Service, Inc. v. Griffin, 511 So.2d 895 (Miss. 1987).”

“In order to enter a default, ‘the court must have jurisdiction over the party against whom judgment is sought, which also means that he must have been effectively served with process...’” Williams v. Kilgore. 618 So.2d 51, 55 (Miss. 1992, Rehearing Denied June 3, 1993).

“The first objection taken is, that the decree is against Jamison, who was not a party to the record. It does not appear that any subpoena was issued for or executed upon him; that he ever appeared to the suit, or that a *pro confesso* ever was regularly entered against him. It was, therefore, a most palpable error to render any decree against him.” Arnold v. Miller, 4 Cushm. 152, 26 Miss. 152, 1853 WL 3680 (Miss. Err. & App.1853).

“This Court has stated that, ‘[t]o be sure, default judgments are not favored and trial

[judges] should not be grudging in the granting of orders vacating such judgments where showings within the rules have arguably been made... 'Guaranty Nat'l Ins. Co. v. Pittman, 501 So.2d 377, 387 (Miss.1987); see also Bailey v. Georgia Cotton Goods Co., 543 So. 2d 180, 182 (Miss. 1989) But granting of relief is not 'a matter of right'; it is a matter 'addressed to the sound discretion of the [judge].' And this Court may not disturb a judge's exercise of discretion unless abuse is shown." *Rich v. Nevels*, 578 So.2d 609, 613 (Miss. 1991, Rehearing denied May 8, 1991).

In this case, the trial court abused its discretion. Tucker and H & G were not properly served and that was abundantly clear from even a cursory review of the file. The trial court was requested by the Williams to remove an apparent lien in an amount in excess of Thirty Three Thousand Dollars (\$33,000.00). This is not an insignificant amount of money. It is obvious that the court did not carefully examine the file to determine if service of process was, in fact, valid and proper.

This issue should be resolved in favor of Tucker and H & G and the default judgment should be reversed by this Court.

## **ISSUE NUMBER 2:**

Whether the trial court was manifestly wrong, clearly erroneous, or applied the wrong legal standard. when it denied Herbert Tucker, Individually and d/b/a H & G Construction Company, Inc.'s Motion To Set Aside Default Judgment.

"There is a three-prong balancing test for trial courts to consider in determining

whether to set aside a default judgement pursuant to Miss. R. Civ. P. 60 (b) *Stanford v. Parker*, No. 2000-IA-01512-SCT. (Miss. 2002, Rehearing denied August 8, 2002) 822 So.2d 886, 887-88 (Miss. 2002) (citing *McCain v. Dauzet*, No. 2000-CA-00355-SCT (Miss. 2001) 791 So.2d 839, 842 The court must consider: (1) the nature and legitimacy of the defendant's reasons for default, (2) whether the defendant has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the judgment is set aside. *Id.* at 843." "Where there is reasonable doubt as to whether the default judgment should be set aside, the doubt falls in favor of allowing the case to go forward for a decision on the merits." *McCain v. Dauzet*, 791 So.2d at 843. "...Nevertheless, the decision to set aside a default judgment is addressed to the sound discretion of the trial court. *Williams v. Kilgore*, 618 So.2d 51, 55 (Miss. 1992)" *Capital One Services, Inc. v. Rawls*, No. 2003-CA-01050-SCT. (Miss. 2004), 904 So.2d 1010, 1015.

The results of applying the three-prong balancing test for trial courts to consider in determining whether to set aside a default judgement to this case, we find the following: (1) The nature and legitimacy of these defendants' reasons for default was that they were never properly served with process prior to the entry of the default judgment. (2) It is obvious that Tucker and H & G had a colorable defense to the merits of the claim, as supported by the Counterclaim filed by them against the Williams. (3) The nature and extent of prejudice which may be suffered by the plaintiff if the judgment is set aside was non-existent because the construction liens contained incorrect legal descriptions which had been taken from the

attachment to the contract. The Williams knew that the liens did not encumber their property when their complaint was filed on December 14, 2006. See paragraph 6 on page 2 of the Complaint. (Rec., page 0002) When Tucker and H & G filed their Motion To Dismiss, Answer and Counterclaim, they acknowledged in the Motion To Dismiss on the top of page 2 that the Notices of Construction Liens had been filed on the incorrect property. (Rec., page 0056) Therefore there would be no prejudice to the plaintiffs, only to Tucker and H & G by not being able to proceed with their counterclaim against the Williams. The trial court's denial of the Motion To Set Aside Default Judgment will delay the prosecution of Tucker and H & G's counterclaim by a year or more.

"An affidavit is not a mere formality that guarantees a motion to set aside a default judgment will be granted. Still necessary is that the affidavit addresses the substantive legal requirements for having a default judgment set aside." *Capital One Services, Inc. v. Rawls*, No. 2003-CA-01050-SCT. (Miss. 2004), 904 So.2d 1010, 1017. In this case the Affidavit of Herbert Tucker and the Affidavit of Glenda Tucker state clearly that Herbert Tucker and H & G Construction [Company], Inc. were not properly served with a copy of the Complaint and the two Summons until after the Final Judgment had been entered. The Williams filed no counter-affidavits, nor did they bother to file the return from the proper service which occurred on Sunday, February 25, 2007. (Rec., page 0141)

"We review a decision whether to set aside a default judgment on an abuse of discretion standard. *Stanford v. Parker*, 822 So.2d 886 (¶ 6) (Miss. 2002) (quoting *McCain*

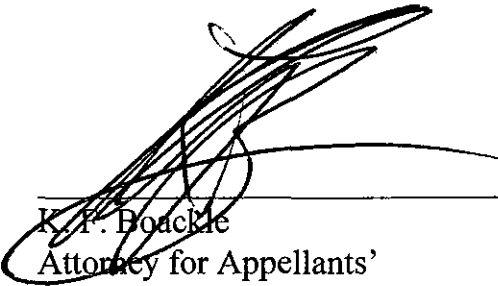
v. *Dauzet*, 791 So.2d 839 (¶ 5) (Miss. 2001). This standard implies that a trial judge has a limited right to be wrong.” *Leach v. Shelter Insurance Company*, No. 2004-CA-00122-COA. (Miss. 2005), So.2d 1283,1285.

The trial court should have set the default judgment aside and in not doing so, abused its discretion. In this case the trial judge exceeded his right to be wrong.

### ***IX. CONCLUSION***

The trial court’s rulings on each of these motions should be reversed and rendered. Herbert Tucker and H & G Construction Company, Inc.’s Motion To Set Aside Default Judgment should be rendered by this Court and Williams’ default judgment should be reversed because there was no evidence of proper service of process in the court file. The service on these two defendants was not sufficient to meet the requirements of the Mississippi Rules of Civil Procedure. Therefore, Herbert Tucker and H & G Construction Company, Inc. respectfully request that this Court reverse and set aside the Order granting the Motion For Default Judgment, reverse the trial court’s ruling denying their Motion to Set Aside Default Judgment and remand the case to the trial court for the case to proceed according to the *Mississippi Rules of Civil Procedure*.

Respectfully submitted,



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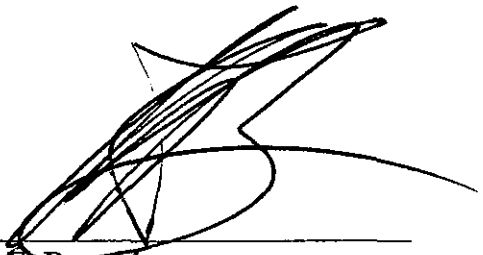
CERTIFICATE OF SERVICE

I, K. F. Boackle, do hereby certify that I have, this day served, by U.S. Mail, first class postage prepaid, a true and correct copy of the above and forgoing BRIEF OF APPELLANTS', and RECORD EXCERPTS OF APPELLANTS' to:

Betty Sephton, Supreme Court Clerk (Original & Three Copies)  
Post Office Box 249  
Jackson, Mississippi 39205

S. Malcolm O. Harrison, Esq.  
HARRISON & FLOWERS, PLLC  
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This the 6<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
K. F. Boackle  
Attorney for Appellants