W2025-00779-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

SCOTT PATRICK WERNER and KELLY LYNN WERNER BECK,
personal representatives of THE ESTATE OF DR. STANLEY WERNER,
Plaintiffs-Appellees,
v.
DE'ANTHONY MELTON,
Defendant-Appellant.

BRIEF OF APPELLANT DE'ANTHONY MELTON

Larry H. Montgomery (TN #9579)
Aubrey B. Greer (TN #35613)
S.T. Rayburn (TN #41634)
GLANKLER BROWN, PLLC
6000 Poplar Avenue, Suite 400
Memphis, Tennessee 38119
Phone: (901) 525-1322
Facsimile: (901) 525-2389
lmontgomery@glankler.com
agreer@glankler.com
srayburn@glankler.com
Counsel for Defendant-Appellant

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

Whether the trial court erred in denying Appellant, De'Anthony Melton's, Motion to Set Aside Judgment Pursuant to Tennessee Rule of Civil Procedure 60.02, where: (i) Appellant was not properly served by Appellee, Dr. Stanley Werner, in accordance with the Tennessee Rules of Civil Procedure; (ii) Appellant's delay in seeking to set aside judgment was not unreasonable; (iii) Appellee was awarded a $758,325.72 judgment when only $250,000.00 was demanded in the Complaint's *ad damnum* and Appellee offered no proof to support such a high award; and (iv) Appellee's Motion for Summary Judgment was based on a false and misleading statement of facts. Appellant appeals the Circuit Court's decision with respect to each of the foregoing issues.

STATEMENT OF THE CASE

The trial court erroneously denied Defendant-Appellant, De'Anthony Melton's ("Mr. Melton"), Motion to Set Aside Judgment. The trial court concluded that, *inter alia*, Mr. Melton was properly served by Appellee, Dr. Stanley Werner (Dr. Werner)[1], that Mr. Melton's Motion to Set Aside Judgment was untimely under Tennessee Rule of Civil Procedure 60.02 because Mr. Melton's delay was unreasonable. The trial court's ruling should be reversed.

The case below was an ordinary negligence claim arising out of an alleged dog bite. On June 3, 2022, Dr. Werner sued Mr. Melton, alleging that, on January 23, 2022, Mr. Melton's dog was running loose and attacked him. (*See* TR Vol. I., pp. at 1-4 (Complaint)). Importantly, Dr. Werner only sought "compensatory damages in the amount of $250,000.00." (*See id.* at 4). Dr. Werner was unable to personally serve Mr. Melton, and so Dr. Werner filed a Motion to Deem Service Complete, or in the Alternative, Motion for Service by Publication. (*See id.* at 5-9).

[1] On May 3, 2025, Dr. Werner passed away. (*See* Mot. for Substitution of Party at pg. 1). His counsel moved to substitute in Scott Patrick Werner and Kelly Lynn Werner Beck, the personal representatives of the Estate of Dr. Werner, which the Court granted. (*See* July 18, 2025, Order).

The trial court held a hearing on Dr. Werner's Motion on December 2, 2022, (TR. Vol. I, pp. at 43-44 (Notice of Hearing)), and entered an order on December 12, 2022, granting Dr. Werner's Motion to the extent it sought to allow service by publication, (TR. Vol. I, pp. at 45-46 (Order to Allow Service by Publication)).

Dr. Werner then issued request for admissions as to a litany of allegations related to his claim, including requests that Mr. Melton admit that Dr. Werner incurred $58,325.72 in past medical expenses, suffered $350,000.00 in past pain and suffering, and will suffer $350,000.00 in future medical expenses, pain and suffering. (*See* TR. Vol I, pp. at 55-60 (Request for Admission)). When Mr. Melton did not respond to the Request for Admissions, Dr. Werner moved to have those admissions deemed admitted, a request the trial court granted. (*See id.* at 53-54; TR. Vol. VII, pp. at 6-7 (Motion to Deem Service Complete)).

Dr. Werner then filed a Motion for Summary Judgment, based only on his Complaint, a brief affidavit, and the Request for Admissions. (*See id.* at 95-111). Notably, without amending his Complaint, Dr. Werner's Motion now sought a judgment in the amount of $758,325.72. (*See id.* at 95). The trial court held a hearing on the Motion and entered a Judgment

for $758,325.72 on October 31, 2023. (*See* TR Vol. III., pp. at 347-350 (Judgment)). Thereafter, Dr. Werner issued a series of garnishments attempting to garnish Mr. Melton's wages and/or levy his accounts. (*See* TR Vol. I., pp. at 134-151; TR Vol II., pp. at 152-225 (Garnishments)).

On July 23, 2024, Mr. Melton filed a Motion to Set Aside Judgment Pursuant to Tennessee Rule of Civil Procedure 60.02, asserting that he was not properly served, the Judgment awarded was more than triple what was prayed for in the Complaint's *ad damnum*, and the Motion for Summary Judgment was based on a false statement of facts. (TR Vol II., pp. at 230-232 (Motion to Set Aside Judgment)). The trial court granted the Motion at a December 6, 2024, hearing, but entered no order. (TR Vol. IV., Dec. 6, 2024, Hr'g Tr., pp. at 29-32).[2]

Dr. Werner then filed a Motion to Reinstate Judgment or for Rehearing on Mr. Melton's Motion to Set Aside Judgment. (*See* TR Vol. III., pp. at 366-68). The trial court reheard the Motion to Set Aside Judgment on April 25, 2025, and denied the Motion as untimely, finding that service was effective and Mr. Melton unreasonably delayed his

[2] Volumes IV and V, which contain the hearing transcripts, are not paginated to correspond with the remainder of the Technical Record. Citations to those volumes are to the transcript page numbers.

response to the litigation. (TR Vol. V., Apr. 25, 2025, Hr'g Tr., pp. at 41-42). The Order denying the Motion was entered on May 1, 2025. (*See* TR Vol. III., pp. at 404-07)

On May 23, 2025, Mr. Melton initiated his appeal to this Court. (TR Vol. III., pp. at 409-10).

STATEMENT OF THE FACTS

Steve Eushery ("Mr. Eushery"), Mr. Melton's uncle, was visiting Mr. Melton's property in Eads, Tennessee, on January 23, 2022, and let Mr. Melton's dog, a German Shepard, out on a chain to be fed that morning. (TR. Vol. III., pp. at 400 (Corrected Declaration of Steve Eushery)). The dog somehow got free. (*Id.*). Mr. Eushery received a phone call from one of Mr. Melton's neighbors that he had found the dog and was keeping it in a garage. (*Id.*).[3] While the dog was safely enclosed in the garage, Dr. Werner approached the dog and reached toward its head while the dog was eating. (*Id.*; Tr. Vol. III, pp. at 382 (Police Report)). When he did that, the dog bit him. (TR. Vol. III., pp. at 400

[3] While Mr. Eushery thought the gentleman who placed the dog in the garage was a neighbor, the gentleman was apparently Dr. Werner's tenant. (*See* TR Vol. III, pp. at 388 (Deceleration of Dewey Parnell)).

(Corrected Declaration of Steve Eushery; TR Vol. III, pp. at 395 (Environmental Court Summons)).

The Shelby County Sheriff's Office wrote a Police Report at the scene in which the deputy stated that Dr. Werner "advised that . . . a stray [G]erman [S]hepard c[a]me on to his property" and that "he was feeding the stray dog in his barn and the dog bit him." (Tr. Vol. III, pp. at 382 (Police Report)). The deputy reported that Dr. Werner "sustained a bite wound to his left arm." (*Id.*) Dr. Werner "advised" the deputy that "the dog had not been aggressive all day . . . ." (*Id.*) The "Deputies observed the [G]erman [S]hepard[,] which was secured in victims[']climate controlled shop[,] and did not appear aggressive." (*Id.*) The Police Report states that Mr. Eushery was contacted and came and retrieved the dog. (*Id.*)

Mr. Eushery was charged with allowing a dog to run at large, and animal bite, in the Shelby County Environmental Court, Division 14 of the General Sessions Court. (TR Vol. III, pp. at 393 (Environmental Court Summons)). Mr. Eushery appeared at a hearing on those charges in General Sessions Court on February 16, 2022. (*Id.* at 395). The Code Enforcement Officer appeared at the hearing and corroborated the Police

Report, that Dr. Werner reached toward the dog while it was eating in a garage and the dog bit him. (*Id.* at 401; *see also* TR Vol. III, pp. at 395 (Environmental Court Summons)). Because of this, the dog running at large charge was dismissed at costs, and the animal bite charge was dismissed without costs. (TR. Vol. III., pp. at 400 (Corrected Declaration of Steve Eushery)).

On June 3, 2022, Dr. Werner filed his Complaint and alleged that Mr. Melton lived at 85 West Wickliffe Creek Circle, Eads, Tennessee 38028, and asserted claims of negligence and negligence per se against Mr. Melton. (TR. Vol. I, pp. at 1 (Complaint)). Contrary to the testimony of the Code Enforcement Officer and the Police Report, the Complaint alleged that "[w]hile the dog was loose, it viciously and savagely attacked Dr. Werner, a practicing orthodontist, on his arm[.] Dr. Werner suffered numerous severe lacerations and puncture wounds as a result of the attack, necessitating significant plastic surgery and required a long, painful recovery[.]" (*Id.* at 2). It further claimed that "Dr. Werner's injuries and damages described herein were the direct and proximate result of the careless and negligent acts of the Defendant when the Defendant knew or had reason to know the German Shepard dog he

allowed outside of the home was or could be dangerous." (*Id.* at 3). Even though the dog bit Dr. Werner when he reached toward the dog's head while it was eating, the Complaint alleged that "[a]t the time of the attack on Dr. Werner, he was exercising due care and was free from any contributory negligence or comparative fault." (*Id.*). Importantly, the Complaint included the following damages prayer: "[t]hat Plaintiff be awarded damages in the amount of $250,000.00." (*Id.* at 4). It did not say "*in the amount of at least $250,000.00.*" (*See id.*) It said, "in the amount of $250,000.00." *(Id.*)

Dr. Werner made numerous failed attempts at service. He first issued the original summons to Mr. Melton's Eads, Tennessee residence. (TR. Vol. I, pp. at 5 (Motion to Deem Service Complete)). Mr. Melton was not to be found there because Mr. Melton is a professional basketball player and goes to California to train during the off-season. (TR. Vol. II, pp. at 257 (Declaration of De'Anthony Melton)). Moreover, shortly after Dr. Werner filed his Complaint, Mr. Melton was traded from the Memphis Grizzlies to the Philadelphia 76ers. (*Id.*)

In September 2022, Dr. Werner issued an alias summons to the address of the Philadelphia 76ers, but the process server was unable to

serve Mr. Melton and instead met with a Craig McCartt, who the process server claimed identified himself as the 76ers' Director of Executive Protection and "accepted service on Mr. Melton's behalf." (TR. Vol I, pp. at 11 (Affidavit of Clay Culpepper)). However, Mr. Melton has "never given anyone, including 76ers personnel, the authority to accept legal papers on [his] behalf." (TR. Vol II, pp. at 258 (Declaration of De'Anthony Melton)). Dr. Werner then mailed two summonses to the Philadelphia 76ers, which were not signed for by Mr. Melton, and were signed for by a "Giadiel Nunez" and "G. Montancy." (TR. Vol II, pp. at 272 (Dr. Werner's Response)).

Based on these feeble and ineffective attempts at service, Dr. Werner then moved to deem service complete or, just in case Mr. Melton had in fact never been served, for service by publication. (TR. Vol. I, pp. at 5-9 (Motion to Deem Service Complete)). The trial court granted the Motion to the extent it sought permission to attempt service by publication. Thereafter, a notice was placed in newspapers in the Memphis and Philadelphia areas. (*See* TR. Vol. I, pp. at 45-46 (Order to Allow Service by Publication)). Dr. Werner then hired Timothy Maduzia ("Mr. Maduzia"), a private process server employed by Gill & Associates

in Philadelphia, Pennsylvania, who attempted to serve Mr. Melton at his New Jersey residence on March 29, 2023. (*See* TR. Vol. III, pp. at 321-25 (Affidavit of Service)). Mr. Maduzia purportedly spoke with Mr. Eushery, who was visiting his nephew, and gave Mr. Eushery the summons. (*Id.*)

Mr. Eushery occasionally visits his nephew during the season, but he makes his home, and resides, in California. (TR. Vol III, pp. at 401 (Corrected Declaration of Steve Eushery); *see also* TR. Vol. VII, pp. at 18 (Supplemental Declaration of Steve Eushery)). Mr. Melton was not at home when Mr. Maduzia attempted to serve him, as he had a game against the Dallas Mavericks that day and was in Philadelphia. (TR. Vol III, pp. at 402 (Corrected Declaration of Steve Eushery)). Dr. Werner then made a final attempt at service on April 10, 2024, when he sent a copy of the Complaint via certified mail to Mr. Melton's New Jersey home, which was returned and marked "UNCLAIMED." (*See* TR. Vol III, pp. at 327 (Exhibit to Dr. Werner's Response)).

On May 10, 2023, Dr. Werner issued Request for Admissions, even though Mr. Melton had not been served. (*See* TR. Vol I, pp. at 55-60 (Request for Admissions)). The Requests sought admissions to the facts allegations of the Complaint. (*Id.*) Notably, to take advantage of the lack

of service, the Requests sought admissions that "Dr. Werner has endured past pain and suffering totaling $350,000" and "Dr. Werner continues to suffer, will require future medical treatment, and will endure future pain and suffering totaling $350,000." (*Id.* at 59-60). On June 12, 2023, Dr. Werner moved to have the Requests deemed admitted, (*see* TR. Vol. I, pp. at 53-54 (Motion to Deem Request for Admissions Admitted)), which the trial court granted on June 30, 2023, (*see* TR. Vol. VII, pp. at 6 (Order Granting Motion to Deem Requests Admitted)).

Dr. Werner then filed a Motion for Summary Judgment on September 8, 2023, seeking damages of $758,325.72,[4] and based his request for $700,000.00 in non-economic damages on only the Request for Admissions and the Affidavit of Dr. Stanley Werner. (*See* TR. Vol. I, pp. at 95-106 (Motion for Summary Judgment)). The Affidavit generally claimed that Dr. Werner was owed $700,000.00 in non-economic damages with no explanation or detail as to what pain and suffering he has endured and what future medical expenses he expects to incur. (*See* TR. Vol. I, pp. at 109-10 (Affidavit of Dr. Stanley Werner)). The trial court

[4] Dr. Werner also claims $58,325.72 in past medical expenses. *See* (TR. Vol I, pp. at 112-14 (Affidavit of Dr. Stanley Werner)).

granted the Motion and entered a Judgment on October 31, 2023, awarding Dr. Werner $758,325.72 in damages. (TR. Vol VI, pp. at 347-50 (Judgment)). The award of $700,000.00 in non-economic damages was based solely on the Request for Admissions. (*See id.* at 348). Dr. Werner then issued garnishments to a multitude of banking institutions. (*See* TR. Vol. I, pp. at 134-151; TR. Vol. II, pp. at 155-229 (Garnishments)).

On July 23, 2024, Mr. Melton filed his Motion to Set Aside Judgment Pursuant to Rule 60.02, arguing that he was never served with process; the $758,325.72 Judgment was more than triple the *ad damnum*; and the Motion for Summary Judgment was based on a false set of facts, as Dr. Werner misrepresented that the dog bite was not his fault. (TR. Vol II, pp. at 230-50 (Motion to Set Aside Judgment)). The trial court granted the Motion at a December 6, 2024, hearing. (TR Vol. IV., Dec. 6, 2024, Hr'g Tr., pp. 29-32).

Dr. Werner filed a Motion to Reinstate Judgment or for Rehearing on Mr. Melton's Motion to Set Aside Judgment on March 28, 2025. (*See* TR Vol. III., pp. at 366-68). The trial court reheard the Motion to Set Aside Judgment on April 25, 2025, and denied Mr. Melton's Motion as

untimely, finding that service was effective and Mr. Melton unreasonably delayed his response to the litigation. (TR Vol. V., Apr. 25, 2025, Hr'g Tr., pp. 41-42)). The Order denying the Motion was entered on May 1, 2025. (*See* TR Vol. III., pp. at 404-07).

ARGUMENT

I. STANDARDS OF REVIEW

Generally, Tennessee appellate courts "review a trial court's ruling on a request for relief from a final judgment under Rule 60.02 of the Tennessee Rules of Civil Procedure . . . pursuant to the abuse of discretion standard." *Turner v. Turner*, 473 S.W.3d 257, 268 (Tenn. 2015). "[A] trial court abuses its discretion when it has applied an incorrect legal standard or has reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *Silliman v. City of Memphis*, 449 S.W.3d 440, 451 (Tenn. Ct. App. 2014).

"However, [Tennessee appellate courts] apply de novo review, with no presumption of correctness, when reviewing a trial court's ruling on a Tennessee Rule 60.02(3) motion to set aside a judgment as void due to a lack of jurisdiction over a defendant." *Jones v. Automated Bldg. Sys. Inc.*, No. E2024-00383-COA-R3-CV, 2025 WL 2336449, at *4 (Tenn. Ct. App.

Aug. 13, 2025) (quotations omitted); *see also* Turner, 473 S.W.3d at 268 ("Moreover a decision regarding the exercise of personal jurisdiction over a defendant involves a question of law to which de novo review applies[.]" (alterations in original and quotations omitted)).

Dr. Werner concedes that the caselaw surrounding default judgments is instructive here, as what is before the Court is essentially a default judgment. (TR Vol. VII, pp. at 29). To that effect, as "[i]n deciding whether to enter a default judgment . . . trial courts must be mindful that a default judgment is a drastic sanction disfavored under Tennessee law." *Youree v. Recovery H. of E. Tennessee, LLC*, 705 S.W.3d 193, 203 (Tenn. 2025). "In recognition that default judgments are not favored under Tennessee law, our courts construe requests to set aside a judgment much more liberally in cases involving a default judgment than in cases following a trial on the merits." *Id.* (quotations omitted). "Thus, as a general matter, a trial court ordinarily should exercise its discretion in favor of allowing a case to be heard on its merits." *Id.* "To that end, this Court has stated that a request to vacate a default judgment should be granted if there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits." *Id.* (quotations omitted).

II. MR. MELTON WAS NEVER PROPERLY SERVED BY DR. WERNER AND THUS THE JUDGMENT IS VOID AND SHOULD BE SET ASIDE UNDER RULE 60.02(3).

As an initial matter, there is no timeliness restriction as to a motion to set aside a judgment under Tennessee Rule of Civil Procedure 60.02(3). *See Kelso v. Decker*, 262 S.W.3d 307, 311 (Tenn. Ct. App. 2008) ("Regarding Rule 60.02(3) motions alleging that a judgment is void, we have stated that except for exceptional circumstances that might require a different rule, Tenn. R. Civ. P. 60.02's reasonable time limitation does not place a time limit on the right to challenge a judgment on the ground that it is void." (quotations omitted)). Thus, Mr. Melton's Motion to Set Aside Judgment cannot be untimely as to the issue of lack of personal jurisdiction due to ineffective service of process.

It is axiomatic that to properly bring a defending party within the ambit of the court's powers to bind that party, process must be properly issued and served on the defendant in accordance with Tennessee Rule of Civil Procedure 4. "The record must establish that the plaintiff complied with the requisite procedural rules, and the fact that the defendant had actual knowledge of attempted service does not render the service effectual if the plaintiff did not serve process in accordance with

the rules." *Ramsay v. Custer*, 387 S.W.3d 566, 568 (Tenn. Ct. App. 2012). "A court acquires personal jurisdiction over a defendant when the defendant is served with process." *McNeary v. Baptist Mem'l Hosp.*, 360 S.W.3d 429, 436 (Tenn. Ct. App. 2011). "A judgment rendered by a court lacking either personal or subject matter jurisdiction is void." *Turner*, 473 S.W.3d at 269-70.

a. DR. WERNER'S PURPORTED SERVICE BY PUBLICATION IS INEFFECTIVE AS A MATTER OF LAW.

An original summons was issued to Mr. Melton's Eads, Tennessee residence when he was not there; an alias summons was issued to Mr. Melton's then employer, the Philadelphia 76ers; and three alias summonses were mailed to Mr. Melton and the 76ers. (TR. Vol. I, pp. at 5-6 (Motion to Deem Service Complete)). None of these summons were received by Mr. Melton, and none of the mailed summons returned with a receipt signed by Mr. Melton. (*Id.*) Dr. Werner does not dispute this. (*See id.*)

Dr. Werner then filed a Motion to Deem Service Complete, or in the Alternative, a Motion for Service by Publication. (*Id.* at 5-9). It is notable that the trial court did not grant the Motion to Deem Service Complete but instead granted the Motion for Service by Publication. (TR. Vol. I,

pp. at 45-46 (Order to Allow Service by Publication)). Thus, the trial court clearly did not believe that service had been effective to that point.

Service by publication was then attempted by placing notices in newspapers in Memphis, Tennessee, and Philadelphia, Pennsylvania. The problem for Dr. Werner is service could not be completed by publication because no statute authorizes service by publication in Circuit Court.[5] *See, e.g.*, *Ebulueme v. Onoh*, No. M2018-00742-COA-R3-CV, 2019 WL 2246621, at *4 (Tenn. Ct. App. May 24, 2019) ("The case now before us on appeal is a breach of contract suit filed in circuit court. Plaintiff has cited this Court to no statute allowing for service by publication in a breach of contract action in circuit court, nor has our research uncovered any.").

The Tennessee Supreme Court addressed the problems with constructive service by publication at length in *Turner*, highlighting that constructive service by publication has been accepted for over a century, but that "sixty-five years ago, the United States Supreme Court clarified

[5] This Court in *Ebulueme* did highlight that statutes allow for service by publication in circuit court where the cases involve delinquent property taxes and divorce proceedings. *See Ebulueme*, 2019 WL 2246621, at *4 n.2. Neither of which are at issue here.

that constructive service by publication is permissible only if it is accomplished in a manner reasonably calculated to give a party defendant adequate notice of the pending judicial proceedings." *See* 473 S.W.3d at 272 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Notably, the Court in *Turner* stated that "[f]or missing or unknown persons, the Supreme Court explained that service by this 'indirect and even . . . probably futile' means—publication—does not raise Due Process concerns." *Id.* (omissions in original) (quoting *Mullane*, 339 U.S. at 314). "But as to known parties with known addresses, the Supreme Court concluded that notice by publication is constitutionally defective because it is not 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* (quoting *Mullane*, 339 U.S. at 314). Because of this, Tennessee courts have routinely held that "constructive service by publication should be viewed as a last resort means of serving a party whose identity is known." *Id.* at 273.

Understanding these concerns, "Tennessee statutes permitting constructive service by publication incorporate safeguards to ensure that

the foregoing constitutional principles are satisfied." *Id.* "Therefore, because service of process is not 'a mere perfunctory act' but has 'constitutional dimensions,' a plaintiff who resorts to constructive service by publication must comply *meticulously* with the governing statutes." *Id.* at 274 (emphasis in original). Here, Dr. Werner failed to comply with the statutes he invoked in his Motion for Service by Publication. (TR. Vol. I., pp. 14-19 (Motion to Deem Service Complete)) (citing Tenn. Code Ann. §§ 21-1-203 and 21-1-204). The trial court granted that Motion and allowed service by publication. This was error.

Tennessee Code Annotated §§ 21-1-203 and 21-1-204, and Title 21 of the Tennessee Code as a whole, deal with proceedings in chancery court, and this case was brought in Shelby County Circuit Court. *See* Tenn. Code Ann. §§ 21-1-203, 21-1-204. Tennessee Code Annotated § 21-1-203 provides that "[p]ersonal service of process on the defendant *in a court of chancery* is dispensed with in the following cases[,]" Tenn. Code Ann. § 21-1-203(a) (emphasis added), and Tennessee Code Annotated § 21-1-204's statement that "[i]n case personal service is not used" is clearly a reference back to § 21-1-203, Tenn. Code Ann. § 21-1-204(a). Thus, service by publication under these statutes is only allowable in chancery

court proceedings, which these are not, and thus, the Court erred in allowing service by publication here. *See, e.g.*, *Ebulueme*, 2019 WL 2246621, at *3-5 (finding that the plaintiff failed to achieve service upon the defendant in a circuit court case where the plaintiff moved for service by publication under Tennessee Code Annotated §§ 21-1-203 and 21-1-204 because "these statutes deal with suits in chancery court, not circuit court").

The fact is Mr. Melton was never missing nor unknown in this case; thus, the Due Process concerns with service by publication were heightened. Despite this, and without statutory authority, the trial court nonetheless proceeded with service by publication. That service is ineffective as a matter of law, such that personal jurisdiction never attached, and the judgment rendered is void. *See id.* ("As Plaintiff failed to properly serve Defendant, the Trial Court lacked personal jurisdiction, and the judgment rendered against Defendant was void."). The trial court erred in granting Dr. Werner's motion for service by publication. *See id.* Because service by publication was not available here, and because of the inherent Due Process concerns with that method of service even if it was proper, Mr. Melton was not served by publication.

b. THE RECORD DEMONSTRATES THAT MR. MELTON WAS NOT OTHERWISE PROPERLY SERVED.

Dr. Werner points to a list of purported alias summonses in his Response to Mr. Melton's Motion to Set Aside Judgment.[6] (TR. Vol. II., pp. 271-73 (Dr. Werner's Response)). None are effective. The four attempts at service before the purported service by publication are clearly ineffective. The alias summons sent to Mr. Melton's then employer on September 14, 2022, was never received by Mr. Melton, nor is there any proof it was received by him. (*Id.* at 271). The summonses sent to the Philadelphia 76ers' training facility during September 2022 were given to a Craig McCartt, who was never authorized to accept service for Mr. Melton, and even if Mr. McCartt was authorized to accept service for Mr. Melton, there is no proof Mr. Melton received them. (*Id.* at 271-72). In October 2022, two summonses were mailed to the Philadelphia 76ers' training facility and basketball arena, which were signed for by a "Giadiel Nunez" and "G. Montancy." (*Id.* at 272). Neither of those persons were authorized to accept service for Mr. Melton and, even if they had been,

[6] Notably, Dr. Werner apparently never attempted to contact Mr. Melton's agent.

there is no proof Mr. Melton received them. (*See* TR. Vol II, pp. at 258 (Declaration of De'Anthony Melton)).

Recognizing that service efforts to date had been ineffective, Dr. Werner then attempted service via publication, which was ineffective for reasons already explained. Then, on March 29, 2023, Dr. Werner hired Mr. Maduzia, a Pennsylvania private process server, who allegedly gave Mr. Eushery a summons at Mr. Melton's New Jersey home. (*Id.* at 273; *see also* TR. Vol. III., pp. at 401-02 (Corrected Declaration of Steve Eushery)). Mr. Melton was not in his home at that time because he had a basketball game against the Dallas Mavericks in downtown Philadelphia. (TR. Vol. III., pp at 402 (Corrected Declaration of Steve Eushery); TR. Vol. II, pp. at 258 (Declaration of De'Anthony Melton)). Again recognizing that he had not served Mr. Melton, Dr. Werner mailed additional process to Mr. Melton's New Jersey home on April 10, 2023, which was returned unclaimed. (TR. Vol. II., pp. 271-73 (Dr. Werner's Response)).

Acknowledging that all his other attempts at service were clearly ineffective, Dr. Werner centered his arguments around Mr. Maduzia's

effort to affect service on March 29, 2023.[7] (*See* TR. Vol. II., pp. 268-74 (Dr. Werner's Response)). But Mr. Maduzia's attempt at personal service was also ineffective.

Tennessee Rule of Civil Procedure 4.05 governs service on out-of-state individuals and provides, in pertinent part, that service may be made "in any manner prescribed by the law of the state in which service is effected for an action in any of the courts of general jurisdiction in that state." Tenn. R. Civ. P. 4.05. Under Rule 4 substitute service is only permissible if the defendant evades service. *See In re Ethan D.*, No. E2024-01322-COA-R3-PT, 2025 WL 2673874, at *3 (Tenn. Ct. App. Sept.

[7] To the extent Dr. Werner may argue that Mr. Melton was served by mail pursuant to Tennessee Rule of Civil Procedure 4.04(10), Appellee has not provided either: "(a) a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute; or (b) a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11)." Tenn. R. Civ. P. 4.04(10). Dr. Werner states that the certified mail sent on April 10, 2024, to Mr. Melton's New Jersey home was returned marked "UNCLAIMED" but this is insufficient to constitute proper service under the post-2016 version of Rule 4.04. *See Villalba v. McCown*, No. E2018-01433-COA-R3-CV, 2019 WL 4130794, at *8 (Tenn. Ct. App. Aug. 30, 2019) (highlighting that Rule 4.04 was amended in 2016 to remove the provision allowing service to be deemed complete where certified mail is returned "unclaimed"). Thus, any attempted service via certified mail was ineffective as well.

18, 2025) ("Specifically, an individual may be served by leaving copies of the summons and the complaint at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing in the house or abode but only if the defendant evades or attempts to evade service." (alterations in original and quotations omitted)). Importantly, "[c]ourts may not infer or presume that a defendant has attempted to evade service based solely on failed prior attempts at service." *Id.* Mr. Maduzia purported to make service on Mr. Melton by serving Mr. Eushery in New Jersey. New Jersey law provides in relevant part that process may be served:

> Upon a competent individual of the age of 14 or over, by delivering a copy of the summons and complaint to the individual personally, or by leaving a copy thereof at the individual's dwelling place or usual place of abode with a competent member of the household of the age of 14 or over then residing therein, or by delivering a copy thereof to a person authorized by appointment or by law to receive service of process on the individual's behalf . . . .

N.J. Ct. Rule 4:4-4(a)(1). Thus, there are three elements to issue proper service upon a non-defendant at the defendant's residence. The non-defendant must be competent, at least fourteen years old, and must be a "member of the household . . . residing therein[.]" *See id.* There is no doubt Mr. Eushery is at least fourteen years old and competent, but, the

attempt at service was ineffective because Mr. Eushery was not a member of the household, nor did he reside in Mr. Melton's New Jersey home. (*See* TR. Vol. III., pp. at 401-02 (Corrected Declaration of Steve Eushery)).

This New Jersey Rule of Civil Procedure was amended in the 1970's to drop the word "family" and replace it with the word "household." *See Resol. Tr. Corp. v. Associated Gulf Contractors, Inc.*, 622 A.2d 1324, 1329 (N.J. App. Div. 1993). The court in *Associated Gulf Contractors* states that this change was made "to include all competent persons over fourteen years *who make their home with the person to be served*[.]" *Id.* (emphasis added). Simply put, the record is clear that Mr. Eushery did not make his home with Mr. Melton, and therefore service was ineffective.[8] *See United States. v. Floyd*, No. CV 12-1890 (JBS/KMW),

[8] Dr. Werner's Response in Opposition to Mr. Melton's Motion to Set Aside cited to a screen shot of a "PeopleMap Report" gleaned from Westlaw, which purported to show that Mr. Eushery resided in New Jersey. Mr. Eushery does not know why that "report" lists his address as being in New Jersey. (TR. Vol. VII, pp. at 18 (Supplemental Declaration of Steve Eushery)). Mr. Eushery is a resident and citizen of the State of California and has been a resident and citizen of California for more than 20 years. (*Id.*) The Record includes a redacted copy of his driver's license which establishes his California residency during the period of time at issue. (*Id.* at 20).

2015 WL 5771137, at *2 (D.N.J. Sept. 30, 2015) (New Jersey Rule of Civil Procedure 4:4-4(a)(1) "consistently require[s] that service be made upon an actual resident of the household, rather than simply a visitor.").

As relevant here, though Mr. Eushery is Mr. Melton's uncle, he did not reside at Mr. Melton's New Jersey address on March 29, 2023, nor did he reside there after that date. (TR. Vol. III., pp. at 401-02 (Corrected Declaration of Steve Eushery)). Equally salient, while Mr. Eushery recalls Mr. Maduzia coming to the New Jersey home, he did not identify himself to Mr. Maduzia as Mr. Melton's "roommate." (*Id*.). Mr. Eushery was visiting the New Jersey address that day as he had come to visit Mr. Melton, which Mr. Eushery does from time to time during the NBA season. (*Id*. at 399, 401). However, Mr. Eushery resides and is domiciled in the State of California. (*Id*. at 399). On March 29, 2023, Mr. Eushery was merely a guest, not a resident of the property where service was allegedly accomplished. (*Id*. at 401). He was not a "member of the household . . . residing therein" and did not make his home with Mr. Melton. As the record shows, he made his home in California and was not someone who could accept service under the statute. *See Weeks v. Sheppard*, No. A-6130-04T3, 2006 WL 709137, at *1 (N.J. Super. App.

Div. Mar. 22, 2006) (finding that service on an adult son briefly visiting and staying with his parents during the Christmas holidays was not service upon a member of the household residing therein, and therefore was ineffective).

Importantly, the evidence Dr. Werner pointed to for his contention that Mr. Eushery identified himself as Mr. Melton's roommate does not say what he claims. (*See* TR Vol. III, pp at 321-25 (Affidavit of Service)). The Affidavit of Service by the private process server simply states that "Personal service upon Steve Eushery, identified as Roommate of the defendant." (*Id.*) There is also a letter that provides a conclusory label that Mr. Eushery is "DeAnthony Melton's roommate." (*Id.*) There is nothing in that Affidavit or the letter that says Mr. Eushery identified himself as Mr. Melton's roommate, or otherwise attempts to provide any information as to how the process server came to that conclusion. (*See id.*) The process server's Affidavit and letter establish, at most, that the process server did nothing more than see Mr. Eushery open the door at Mr. Melton's residence and assume that Mr. Eushery was Mr. Melton's roommate.

Effective service implicates Due Process. The "residing in" requirement of process statutes across the country are intended to prevent the outcome we have here – where a process server guesses that whoever opens the door of a home resides there and is someone capable of receiving service, when they actually are not.

This is especially relevant here, where Mr. Eushery has provided a declaration that "[a]t no point in time did I represent to Mr. Maduzia that I was Mr. Melton's roommate, nor did I represent that I resided at the New Jersey home."[9] (TR. Vol. III., pp at 402 (Corrected Declaration of

[9] Additionally, a New Jersey federal court has found service to be ineffective under New Jersey law where the defendant moved after filing and the plaintiff never put anything in the record to establish a change in residence by the defendant. *See Prudential Ins. Co. of Am. v. Bramlett*, No. CIV.A. 08-119(JAG), 2009 WL 2634644, at *5 (D.N.J. Aug. 24, 2009). The Court in *Bramlett* held that "[i]f the residence listed in the complaint is taken as true, and nothing in the record reflects any change in Defendant's residence after the filing of the complaint then service to the [new] address is not service to Defendant's 'dwelling house or usual place of abode.'" *Id.* In this case, the Complaint lists Melton's Eads, Tennessee, home as his address, (TR Vol. I, pp. at 1 (Complaint)), and Dr. Werner never put anything in the record to show that Mr. Melton had moved, (TR. Vol I, pp. at 5-14 (Motion to Deem Service Complete); TR. Vol I, pp. at 55-60 (Request for Admissions)). Thus, nothing in the record reflected a change in residence. Under the precedent set by *Bramlett*, even if Mr. Eushery was residing in the New Jersey home, which he was not, that was not Mr. Melton's dwelling house or usual place of abode under the facts of this case, such that service could be effective. *See Bramlett*, 2009 WL 2634644, at *5.

Steve Eushery)). Thus, what is before the Court is a case where the record does not support Dr. Werner's contention that Mr. Eushery was Mr. Melton's roommate and resided in Mr. Melton's home. That stands in stark contrast to Mr. Eushery's declaration that he did not reside in Mr. Melton's New Jersey home. Under a *de novo* review of this record, the Court should find that Mr. Eushery was not a member of the household residing therein under New Jersey law.[10] *See Floyd*, 2015 WL

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[10] Moreover, to the extent that the trial court based its ruling on a finding that Mr. Melton had notice of the lawsuit, such is reversible error. *See Krogman v. Goodall*, No. M201601292COAR3CV, 2017 WL 3769380, at *7 (Tenn. Ct. App. Aug. 29, 2017) ("Even though Appellees undoubtedly received actual notice of the lawsuit, such notice does not qualify as service of process."); *In re Beckwith Church of Christ*, No. M201500085COAR3CV, 2016 WL 5385853, at *4 (Tenn. Ct. App. Sept. 23, 2016) ("[O]ur courts have repeatedly held that actual knowledge of a pending action cannot cure insufficient service of process"). Dr. Werner argued that the garnishments constituted effective service because they gave actual notice of the suit, but he did not point to any authority to support such a contention, and in fact, even if Mr. Melton had actual knowledge of the lawsuit based upon the garnishments, merely having notice of a lawsuit is not sufficient to cure ineffective service. *See Krogman*, 2017 WL 3769380, at *7; *In re Beckwith Church of Christ*, 2016 WL 5385853, at *4. That same reasoning applies to Dr. Werner's argument that his Request for Admissions was served at Mr. Melton's New Jersey residence and returned signed by an "[S] Melton." First, Mr. Melton is unaware who "[S] Melton" is and his first name does not start with that letter, making such a signature wholly unreliable. (*See* TR Vol. VII, pp at 22 (Supplemental Declaration of De'Anthony Melton)). Moreover, when the certified mail was delivered, Mr. Melton was in downtown Philadelphia playing the Boston Celtics in Game 6 of the

5771137, at *2-3 (finding service ineffective where there is a certification that the person served at the defendant's home was only a visiting niece and "the affidavit of service provides no indication that [the visitor] identified herself any differently to the process server").

Simply put, this case is a prime example of why there are Due Process concerns with ineffective service. A defendant was never properly served, and a plaintiff took full advantage of that by not just moving for default, but by seeking summary judgment so that he could improperly juice the damages to three times the amount prayed for, with no evidentiary support for the number provided – a number that just happened to be right at the non-economic damages cap. *See* Tenn. Code Ann. § 29-39-102(2).

Dr. Werner claimed to, but never actually served Mr. Melton. Then, instead of simply obtaining a default judgment for the $250,000.00 prayed for in the Complaint, Dr. Werner took advantage of the lack of service, filed Request for Admissions, got them deemed admitted, and

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Eastern Conference Semifinals, where he spent the entire day at the team facility. (*Id.*) Second, even if it did put him on notice, which it did not, the clear rule is that actual notice of a lawsuit does not cure defective service. *See Krogman*, 2017 WL 3769380, at *7; *In re Beckwith Church of Christ*, 2016 WL 5385853, at *4

moved for and obtained summary judgment for three times the amount prayed for. *See id.* Allowing all of this was error. *See Tennison Brothers, Inc. v. Thomas*, 556 S.W.3d 697, 718 (Tenn. Ct. App. 2017) ("This Court has recognized that the mere entry of a default judgment in favor of a party *does not*, *ipso facto*, *entitle that party to carte blanche damages*. Rather, a trial court may only award those damages to which the party is legally entitled." (emphasis added) (quotations omitted)).

Based on the foregoing, this Court should find that the trial court erred in finding that Mr. Melton received effective service of process. That error alone warrants remand to the Shelby County Circuit Court with instructions to void the judgment for lack of service and proceed with this litigation.

III. MR. MELTON'S MOTION TO SET ASIDE ON GROUNDS OTHER THAN SERVICE IS TIMELY.

Even if this Court finds that Mr. Melton was served, it should still remand this case to Shelby County Circuit Court because the Motion to Set Aside is timely. The trial court did not rule on the merits of Mr. Melton's non-service arguments, instead finding those arguments untimely. (TR Vol. III, pp. at 406 (Order Denying Motion to Set Aside Judgment)). Thus, upon finding that the Motion to Set Aside was timely,

this Court need not even reach the merits of Mr. Melton's non-service arguments, and it should remand for a ruling on the merits of the Motion.

"Motions made under Rule 60.02 must be filed 'within a reasonable time,' although motions asserting the grounds of mistake, inadvertence, surprise, excusable neglect, or fraud must be filed not more than one year after the judgment in question was entered." *Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 336 (Tenn. 2010) (quoting Tenn. R. Civ. P. 60.02). There is no dispute here that Mr. Melton's Motion to Set Aside Judgment was made within a year, the dispute is whether it was filed within a reasonable time of the Judgment.

"Whether a Rule 60.02 motion is filed within a reasonable time is a question of fact and not a question of law." *Hussey v. Woods*, 538 S.W.3d 476, 486 (Tenn. 2017). "This determination is made on a case-by-case basis." *Id.* The judgment in this case was entered on October 31, 2023, (*see* TR Vol. VI, pp. at 2), Appellant filed the Motion to Set Aside Judgment on July 23, 2024, roughly nine months later, (*see* TR Vol. II, pp. at 230). The analysis should be simple. Any delay was reasonable simply because Mr. Melton was never served with process and was

unaware of the lawsuit. That alone makes the filing "within a reasonable time."

But notwithstanding the lack of service, the facts of this case also support a finding of reasonableness. The mere fact nine months passed between the Judgment and the Motion being filed does not make the delay per se unreasonable. *See, e.g.*, *Silliman v. City of Memphis*, 449 S.W.3d 440, 451 (Tenn. Ct. App. 2014) (finding a delay of seven months reasonable); *Brown v. Consolidation Coal Co.*, 518 S.W.2d 234, 235 (Tenn. 1974) (finding a delay of approximately fourteen months reasonable). There are also numerous examples of similar, and even longer, delays being found reasonable in federal courts.[11] *See City of Oak Ridge v. Levitt,* 493 S.W.3d 492, 499 (Tenn. Ct. App. 2015) ("Federal

[11] *See, e.g.*, *Planned Parenthood Monte Mar, Inc. v. Ford*, 349 F.R.D. 213, 219-21 (D. Nev. 2025) (seventeen month delay found reasonable); *Bynoe v. Baca*, 966 F.3d 972, 980-82 (9th Cir. 2020) (seven month delay found reasonable); *Suite 225, Inc. v. Lantana Ins. Ltd.*, 625 F. App'x 502, 505 (11th Cir. 2015) (delay of just under a year found reasonable); *Associated Builders & Contractors v. Michigan Dept. of Lab. and Econ. Growth*, 543 F.3d 275, 277-78 (6th Cir. 2008) (fourteen-year delay found reasonable); *Armstrong v. The Cadle Co.*, 239 F.R.D. 688, 691-94 (S.D. Fla. 2007) (eight month delay found reasonable); *Grace v. Bank Leumi Tr. Co. of NY*, 443 F.3d 180, 189-91 (2d Cir. 2006) (five-year delay found reasonable); *Mazzone v. Stamler*, 157 F.R.D. 212, 214-15 (S.D.N.Y. 1994) (ten month delay found reasonable); *Wink v. Rowan Drilling Co.*, 611 F.2d 98, 102 n.3 (5th Cir. 1980) (delay of over one year found reasonable).

judicial decisions 'interpreting rules similar to our own are persuasive authority for purposes of construing the Tennessee rule." (alterations in original and quotations omitted)).

But looking at the facts of this case, it is also reasonable that Mr. Melton was unaware of this judgment for nine months. Mr. Melton is a professional basketball player. (TR Vol. II, pp. at 257 (Declaration of De'Anthony Melton)). He was traded from the Memphis Grizzlies to the Philadelphia 76ers only a few weeks after this lawsuit was filed. (*Id.*). At the time the lawsuit was filed, it was the NBA off-season, and Mr. Melton was living and training in Los Angeles, California, before reporting to the 76ers' training camp prior to the upcoming 2022-23 season. (*Id.*) As such, at the time that Dr. Werner attempted to serve him at the Eads, Tennessee, address, Mr. Melton was not residing there any longer. (*Id.*)

During the NBA season, Mr. Melton is focused on his profession as a basketball player, and almost nothing else. (*Id.* at 258). From approximately October, which is when the Judgment was entered, through (at least) May of every year, depending on whether the team

makes the playoffs, Mr. Melton is constantly traveling for games or, even when in his team's home city, training with the team. (*Id.*)

In fact, because the 76ers made the playoffs in 2023, Mr. Melton continued playing with team that year until May 14, 2023, falling in Game 7 to the Boston Celtics (a game in which Mr. Melton played almost 30 minutes). (*Id.*) Mr. Melton is rarely ever at home during the season. (*Id.*) As a professional basketball player, Mr. Melton is constantly barraged by requests, documents, mailings, and other matters. (*Id.*) During the season, Mr. Melton relies on others, including team support staff, agents, and others to assist with matters not pertaining directly to playing basketball. (*Id.*) That said, Mr. Melton has never given anyone, including 76ers personnel, the authority to accept legal papers on his behalf. (*Id.*) Mr. Melton is not aware of ever receiving papers pertaining to this lawsuit from 76ers personnel. (*Id.* at 259).

On March 29, 2023, when Mr. Maduzia purportedly served process at the New Jersey address, Mr. Melton was in downtown Philadelphia preparing for and playing in a game against the Dallas Mavericks. (*Id.* at 258). Mr. Eushery never provided Mr. Melton with the papers that

were purportedly delivered that day, nor does Mr. Melton recall ever hearing about that delivery. (*Id.* at 259).

What is important to understand is Dr. Werner argues at length that Mr. Melton had notice of this lawsuit, but he has not presented one iota of evidence on the record to directly support that. Instead, Dr. Werner argues that his attempts at service, which were all faulty, somehow put Mr. Melton on notice of this suit, even though nothing in the record proves that Mr. Melton ever received or was otherwise aware of them. Dr. Werner also contends, without record proof, that the garnishments put Mr. Melton on notice of this suit, despite the fact that, as frank as it may be, the garnishments are not for noticeable sums for someone of Mr. Melton's net worth and income.[12] Plus, of course, notice, even if it had occurred, is not service. Dr. Werner is deflecting from the fact that he has no record proof that Mr. Melton knew of this lawsuit. He has no record proof that anyone ever told Mr. Melton of this lawsuit, and

[12] Mr. Melton was earning anywhere from eight to twelve million dollars a year during the relevant periods, such that as crass as it is to say, the garnishments were not for noticeable sums. Moreover, the period the garnishments were in effect before the Motion to Set Aside was filed was also during NBA season. As Appellant has already established, Mr. Melton is extremely busy during the season and is totally focused on doing his job.

he has no record proof that Mr. Melton was ever handed or saw any paper relating to this lawsuit.

In fact, the only evidence in the record relating to whether Mr. Melton was aware of this lawsuit is his own uncontested affidavit. (*See* TR Vol. II, pp. at 259). Dr. Werner did not place into the record any proof disputing Mr. Melton's sworn declaration. The Court ignored Mr. Melton's sworn declaration and found that Mr. Melton knew of the lawsuit without any finding as to how or why he did, or what in the record proved this finding. (*See* TR. Vol. IV, Dec. 6, 2024, Hr'g Tr., pp. at 33 ("And under those circumstances and, you know, other issues that may suggest, that maybe Mr. Melton really didn't know about this, although I truly believe he did"); TR Vol. V, Apr. 25, 2025, Hr'g Tr., pp. at 42 ("Okay. All right. So, I mean, he did know about it. I don't understand why. I think he got proper notice of it.")). This is an abuse of discretion. *Gooding v. Gooding*, 477 S.W.3d 774, 779 (Tenn. Ct. App. 2015) ("[A] court abuses its discretion when it acts contrary to uncontradicted substantial evidence[.]" (quotations omitted)). The record proof directly contradicts Dr. Werner's Complaint and his Motion for Summary Judgment.

The Court should look to *Brown* as an example. *See* 518 S.W.2d at 238. There, an employer was unaware it was paying a judgment for an incorrect amount in disability benefits. *See id.* at 235-36. After thirteen months, the employer discovered the error and moved under Rule 60.02 to have the judgment corrected. *See id.* The Tennessee Supreme Court found that the thirteen-month delay between the judgment and the motion was reasonable. *See id.* at 238. In both this case and *Brown*, the defendants were unaware that they were paying more than they should have been paying. And in both cases, once the mistake was discovered, they moved to set aside the judgment. In *Brown*, thirteen months elapsed before the motion to set aside was filed. Here, nine months elapsed.

In sum, Dr. Werner never properly served Mr. Melton and Mr. Melton was unaware of this lawsuit. Any delay in filing the Motion to Set Aside was reasonable. Moreover, there is no prejudice in setting aside the Judgment and trying this case on the merits– indeed, it is critical to do so here since the Judgment is based on a false set of facts and exceeds the *ad damnum* in Dr. Werner's Complaint by a factor of three.

IV. MR. MELTON'S MOTION TO SET ASIDE SHOULD HAVE BEEN GRANTED UNDER RULE 60.02(1)(2)(3) AND (5).

a. THE EXTREME DAMAGES AWARD, WHICH DR. WERNER DID NOT PRAY FOR IN HIS COMPLAINT, REQUIRES RELIEF FROM JUDGMENT.[13]

Dr. Werner's June 3, 2022, Complaint alleged a personal injury action arising out of a dog bite. Dr. Werner prayed that he "be awarded compensatory damages in the amount of $250,000.00." (TR Vol. I, pp. at 4 (Complaint)). Dr. Werner did not demand "at least $250,000.00" or "no less than $250,000.00," he demanded "damages in the amount of $250,000.00." (*See id.*). Additionally, the Alias Summons, set forth an *ad damnum* of "$250,000" in the top right corner. (TR Vol. II, pp. at 300). Despite never having amended the Complaint, Dr. Werner moved for summary judgment, seeking $758,325.72 in damages. (*See* TR Vol. I, pp. at 106). On October 31, 2023, the trial court granted that Motion. (*See* TR, Vol. VI, pp. at 2).

[13] The arguments as to this issue should also be considered as part of the circumstances justifying timeliness, due to the overarching concerns created by the way Dr. Werner chose to abuse a lack of proper service or a failure to appear. *See Doe v. Briley*, 562 F.3d 777, 781 (6th Cir. 2009) (finding a 30-year delay reasonable because the issues involved were a matter of public concern).

Tennessee Rule of Civil Procedure 8.01 requires a plaintiff to set forth: "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." Tenn. R. Civ. P. 8.01. Relatedly, "[a] judgment that exceeds the *ad damnum* clause is invalid." *Cross v. City of Morristown*, No. O3A01-9606-CV-00211, 1996 WL 605248, at *3 (Tenn. Ct. App. Oct. 23, 1996);[14] Burch, Robert E., Trial Handbook for Tenn. Law § 38:4 ("The sum awarded cannot exceed the amount demanded in the *ad damnum* clause . . . ."); *see also McCracken v. City of Millington*, No. 02A01-9707-CV-00165, 1999 WL 142391, at *9 (Tenn. Ct. App. Mar. 17, 1999) ("Under Tennessee law, a trial court may not enter a judgment in excess of the amount sought in the plaintiff's complaint.").

[14] In *Cross*, a plaintiff was injured in a motor vehicle accident with an on-duty police officer. Though the plaintiff presented evidence at trial that he was damaged in an amount more than $250,000.00, the Court of Appeals held that it could only increase the damages awarded at trial up to the $100,000.00 amount prayed for in the complaint. *Cross*, 1996 WL 605248, at *3 ("As to the award of damages, we find that the trial court's judgment of $48,000 is inadequate. We think the preponderance of the evidence, as outlined above, supports a substantially larger award. Although the plaintiff presented proof that his economic loss was $258,101.00, the *ad damnum* clause of the complaint seeks only $100,000. A judgment that exceeds the *ad damnum* clause is invalid. Accordingly, we are limited by the *ad damnum* clause in rendering a judgment for damages." (internal citations omitted)).

Here, judgment was granted in an amount that was more than $500,000.00 greater than the damages prayed for in the Complaint. (*See* TR Vol. VI, pp. at 2 (Judgment)). What is more, the judgment for $350,000.00 in past pain and suffering, and $350,000.00 in future pain and suffering was based on nothing more than Dr. Werner's unilateral declaration that he was entitled to such amounts. (*See* TR. Vol. I, pp. at 95-113). Dr. Werner's Affidavit offered in support of his Motion for Summary Judgment says only that he is "seeking" those amounts, without ever providing any proof or other competent evidence supporting those amounts. (*See id.* at 112-13). The amounts were, quite clearly, plucked from thin air to slide in just under the damages caps imposed by Tennessee Code Annotated § 29-39-102(a)(2). While non-economic damages can be difficult to precisely ascertain, there must be "some evidence to justify the amount awarded." *Dedmon v. Steelman*, 535 S.W.3d 431, 438 (Tenn. 2017). Here, there was no such evidence; rather, it was an arbitrary number chosen solely to max out the award pursuant to the caps.

Assuming *arguendo* that Dr. Werner properly served Mr. Melton with process (which he did not), since Mr. Melton never pled or otherwise

defended, Dr. Werner's "summary judgment" was, practically speaking, a default judgment. *See* Tenn. R. Civ. P. 55.01. But Dr. Werner did not want his judgment to be a default judgment because of Tennessee Rule of Civil Procedure 54.03, which provides in pertinent part that "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Tenn. R. Civ. P. 54.03. Dr. Werner very clearly sought summary judgment instead of a default judgment to circumvent this requirement. Dr. Werner did so knowing full well that Mr. Melton had filed nothing in this case, but also that Rule 54.03 would limit a default judgment to the $250,000.00 Dr. Werner prayed for in the Complaint. Dr. Werner created the fiction of a summary judgment to dodge the Rules and recover three times more than he prayed for in the Complaint.

It should concern the Court that Dr. Werner did not move for default and swiftly conclude this case, as is the usual practice when a party does not respond. Instead, to dodge Rule 54.03's clear default judgment limit, Dr. Werner used request for admissions and summary judgment, both of which he knew would never be responded to, to try to recover more damages than he prayed for in his Complaint.

If the Court were to affirm the trial court's ruling, it would be setting the precedent that anytime a default occurs, by using request for admissions, and summary judgment, plaintiffs can always recover damages equaling the caps, regardless of the damage prayer in their complaint, and regardless of their damages proof. In essence, this would turn every single default into a $750,000.00 judgment with no evidence to support such an award.

Dr. Werner's position is that if a minimum wage worker rear-ends another car on the way to work, and then for some reason fails to appear, that person should be paying a judgment for the rest of his or her life, as the plaintiff in that case can simply pray for "compensatory damages in the amount $10,000.00," but then use request for admissions and summary judgment to obtain a $750,000.00 judgment. It cannot be the law that every default in Tennessee will automatically yield a judgment of at least $750,000.00 regardless of the amount prayed for in the complaint or the damages proven, which is exactly what the result will be if the Court affirms the trial court's ruling.[15]

[15] Alternatively, if the Court declines to set aside the Judgment, it should remand this case with instructions to amend the Judgment to the $250,000.00 prayed for in the Complaint.

At a minimum, the trial court's failure to inquire at all about any proof of the absurdly high damages sought in this case is an abuse of discretion. *See Tennison Brothers, Inc.*, 556 S.W.3d at 718 ("This Court has recognized that the mere entry of a default judgment in favor of a party *does not*, *ipso facto*, *entitle that party to carte blanche damages*. Rather, a trial court may only award those damages to which the party is legally entitled." (emphasis added) (quotations omitted)). Considering the circumstances under which the Judgment was obtained and the means by which Dr. Werner obtained it, the damages awarded in this case are unjust and the Judgment should be set aside.[16] *See Youree*, 705 S.W.3d at 206 ("[T]his Court has stated that a request to vacate a default judgment should be granted if there is reasonable doubt as to the justness of dismissing the case before it can be heard on its merits." (quotations omitted)). Here, there is much more than reasonable doubt about the

[16] To the extent Dr. Werner may argue the Court cannot consider this issue because it should be brought under Tennessee Rule of Civil Procedure 59, such an argument is without merit. Rule 60.02(5) allows for relief for "any other reason justifying relief from the operation of the judgment." Tenn. R. Civ. P. 60.02(5). This abuse of a default to triple the *ad damnum* and the danger caused by endorsing Dr. Werner's method of obtaining the judgment is exactly the type of scenario this was meant to cover.

justness of a $758,325.72 judgment for an injury Dr. Werner admits was his fault, that exceeded the Complaint's damages prayer by more than $500,000.00, and that was not based on any material proof.

b. DR. WERNER'S SUMMARY JUDGMENT MOTION WAS BASED ON A FALSE SET OF FACTS.

Dr. Werner's Complaint, and the Statement of Undisputed Material Facts, and Affidavit, he filed seeking summary judgment, represent that Mr. Melton's dog came onto Dr. Werner's property and, unprovoked, attacked him there. That is false. (*See* Tr. Vol. III, pp. at 382 (Police Report) ("Victim Stanley Werner advised that … he was feeding the stray dog in his barn and the dog bit him . . . . Victim Stanley Werner advised the dog had not been aggressive all day . . . ."). The truth is, according to the Code Enforcement Officer, the bite was Dr. Werner's fault because he reached down toward the dog's head when it was eating food out of a bowl. (TR Vol. III, pp. at 395 (Environmental Court Summons)).

Here are the real facts: Mr. Eushery, who was visiting Mr. Melton's property in Eads, Tennessee, on January 23, 2022, let Mr. Melton's dog out to be fed at approximately 7:30 a.m. that morning by chaining the dog up in Mr. Melton's backyard. (TR. Vol. III., pp. at 400 (Corrected Declaration of Steve Eushery)). Somehow, the dog managed to get free,

and Mr. Eushery received a call from a nearby property owner that he had found the dog and was keeping it in his garage until Mr. Eushery could pick it up. (*Id.*) The dog was fed while in the garage. (*Id.*; Tr. Vol. III, pp. at 382 (Police Report)). At that time, and for some unknown reason, Dr. Werner entered the garage, approached the dog, and then reached down toward the dog while it was eating, and the dog bit him. (TR. Vol. III., pp. at 400 (Corrected Declaration of Steve Eushery; TR Vol. III, pp. at 395 (Environmental Court Summons)).

Shelby County Sheriff's deputies drafted a police report at the scene. (*See* Tr. Vol. III, pp. at 382 (Police Report)). The Police Report states that Dr. Werner advised the deputies that he put the dog in a garage, that he was bitten while feeding the dog in the garage, and that the dog was not aggressive at all during the day. (*See id.*) The deputies also made their own observations that the dog did not appear aggressive. (*See id.*)

Mr. Eushery was charged with two violations of law—allowing dogs to run at large, and animal bite—and summoned to appear before Judge Patrick Dandridge of the Shelby County Environmental Court, Division

14 of the General Sessions Court. (*Id.*) The citation[17] against Mr. Eushery was issued on February 2, 2022, and set for arraignment on February 16, 2022. (*See* TR Vol. III, pp. at 395 (Environmental Court Summons)). Mr. Eushery appeared before Judge Dandridge on February 16, 2022, at which time the court dismissed all charges. (TR. Vol. III., pp at 400-01 (Corrected Declaration of Steve Eushery)). A person Mr. Eushery believes to be the Code Enforcement Officer[18] appeared at the court setting, and "represented to the General Sessions Court that the dog bite occurred when Dr. Werner had reached toward the dog while it

[17] Styled as the *State of Tennessee v. Steve Eushery*, Case No. 22500190. The case information and disposition are publicly available through the Shelby County Criminal Justice System Portal, https://cjs.shelbycountytn.gov/CJS.

[18] Dr. Werner readily acknowledges there was an error in the initial Declaration of Mr. Eushery provided to the trial court. In that initial Declaration, it was represented that Dr. Werner himself appeared at the Environmental Court hearing. This was incorrect as it was the Code Enforcement Officer that appeared. Upon discovering this, Mr. Melton, through counsel, corrected the record and filed a corrected Declaration with the correct identity of the individual appearing at Environmental Court. (*See* TR. Vol III, pp. at 397 (Notice of Correction)). This mistake has no bearing on how the dog bite actually occurred, as witnesses at the scene of the dog bite have a very different story to tell than what Dr. Werner told the trial court, as can also be corroborated by the Police Report which recites the same facts Mr. Eushery outlines in his Declaration. (*Cf.* TR. Vol. III., pp. at 400-01 (Corrected Declaration of Steve Eushery), *with* TR. Vol. III, pp. at 382 (Police Report)).

was eating in (what I understood to be) a neighbor's garage, and the dog bit him." (*Id.* at 401; *see also* TR Vol. III, pp. at 395 (Environmental Court Summons)). As a result, Judge Dandridge dismissed the dog running at large charge at costs, but, significantly, dismissed the animal bite charge without assessing any costs at all. (TR. Vol. III., pp. at 400 (Corrected Declaration of Steve Eushery)). Mr. Eushery paid the running at large court costs the same day. (*Id.*)

Dr. Werner's Complaint, and the Statement of Undisputed Material Facts, and Affidavit, he filed seeking summary judgment, misrepresented to the trial court what happened here. Dr. Werner's Complaint included allegations that Dr. Werner knew were false or misleading. In Paragraph 4 of the Complaint, Dr. Werner misrepresented to the trial court that "[w]hile the dog was loose, it viciously and savagely attacked Dr. Werner, a practicing orthodontist, on his arm." (TR Vol. I, pp. at 2 (Complaint)).

Dr. Werner knew that allegation was false when he made it. He knew the dog was not loose when it bit him. (*See* Tr. Vol. III, pp. at 382 (Police Report); TR. Vol. III., pp at 401 (Corrected Declaration of Steve Eushery); TR Vol. III, pp. at 395 (Environmental Court Summons)). He

knew the dog was confined to a garage. (*See* TR. Vol. III, pp. at 382 (Police Report); TR. Vol. III., pp at 401 (Corrected Declaration of Steve Eushery)). Dr. Werner advised the Shelby County Sheriff's deputy that "the dog had not been aggressive all day" and the deputies themselves observed that the dog "did not appear aggressive." (TR. Vol. III, pp. at 382 (Police Report)). More importantly, Dr. Werner's own Declaration now acknowledges this and directly contradicts the Complaint. (*See* TR. Vol. III, pp. at 377-78 ("I went to the shop/garage building where the dog was being kept so I could feed the dog.")).

In Paragraph 14 of the Complaint, Dr. Werner misrepresented to the Court that "[a]t the time of the attack on Dr. Werner, he was exercising due care and was free from any contributory negligence or comparative fault." (TR Vol. I, pp. at 3 (Complaint)). That statement was false. Indeed, the reason the General Sessions Court dismissed the charges against Mr. Eushery is because the Code Enforcement Officer informed the Court that the dog bite was Dr. Werner's fault because he reached down toward the dog while it was eating. (*See* TR. Vol. III., pp. at 401 (Corrected Declaration of Steve Eushery); *see also* TR Vol. III, pp. at 395 (Environmental Court Summons)).

Dr. Werner's Statement of Undisputed Material Facts in Support of his Motion for Summary Judgment also contained numerous false statements. In Paragraph 4 of his Statement of Undisputed Facts, Dr. Werner stated that "[o]n January 23, 2022, Melton's German Shepherd was unattended, uncontained, away from his home and not under his or anyone else's control." (TR. Vol I, pp. at 108). That was false. The Police Report stated that the dog was in a barn, (*See* Tr. Vol. III, pp. at 382 (Police Report)). And the Code Enforcement Officer represented to the General Sessions Court that the dog was attended and contained in a garage. (*See* TR. Vol. III., pp at 401 (Corrected Declaration of Steve Eushery)). Dr. Werner's own Declaration now confirms this. (*See* TR. Vol. III, pp. at 377-78 (Declaration of Dr. Stanley Werner)). There was no reason or need for Dr. Werner to enter the garage or interact with the dog – those were Dr. Werner's choices to make.

In Paragraph 5 of his Statement of Undisputed Facts, Dr. Werner represented to the Court that the dog "wandered on to Dr. Werner's residential property," and in Paragraph 7 of the Statement, Dr. Werner represented to the Court that while the dog "was on the loose it attacked Dr. Werner." (TR. Vol I, pp. at 109). The dog did not wander onto Dr.

Werner's property and attack him. As the Code Enforcement Officer informed the General Sessions Court, the dog was confined to a garage, and was eating when Dr. Werner reached down in front of the dog and the dog bit him. (*See* TR. Vol. III., pp at 401 (Corrected Declaration of Steve Eushery)). Again, Dr. Werner's own declaration confirms that the dog was not "on the loose" but rather was being held in a garage on his property. (*See* TR. Vol. III, pp. at 377-78 (Declaration of Dr. Stanley Werner)). Only when Dr. Werner went into the garage around 5:00 p.m. that day and reached toward the dog while it was eating, did the bite occur. (*See id.*)

In Paragraph 14 of his Statement of Undisputed Facts, Dr. Werner represented to the Court that "[n]o other person contributed to the injuries sustained by Dr. Werner." (TR. Vol I, pp. at 110). That statement was false. As the Code Enforcement Officer informed the General Sessions Court, the bite was Dr. Werner's fault because he reached down in front of the dog while it was eating. (*See* TR. Vol. III., pp. at 401 (Corrected Declaration of Steve Eushery)). That is why the General Sessions Court dismissed the charges. (*See id.*).

Dr. Werner's Affidavit filed in support of his Motion for Summary Judgment also included false statements. In Paragraph 3 of the Affidavit, Dr. Werner represented to the Court that "[o]n January 23, 2022, Mr. De'Anthony Melton's dog, a German Shepherd, or German Shepherd type canine/dog wandered on to my property and subsequently attacked me." (TR. Vol I, pp. at 112). That was false. The dog bit Dr. Werner in a garage or barn when Dr. Werner reached down in front of the dog while it was eating. (*See* TR. Vol. III, pp. at 382 (Police Report); TR Vol. III, pp. at 395 (Environmental Court Summons); TR. Vol. III., pp. at 401 (Corrected Declaration of Steve Eushery)). At minimum, he now admits that the dog wandered onto the property in the morning and the bite did not occur until that evening after he had put the dog in a garage. (*See* TR. Vol. III, pp. at 377-78 (Declaration of Dr. Stanley Werner)).

The reality is, the dog bite was Dr. Werner's fault, which he, the deputies onsite, and the Code Enforcement Officer, all knew to be the case. Despite this, Dr. Werner filed a Complaint representing otherwise. The Judgment should not stand on a false set of facts.

But the trial court had no interest in hearing the actual facts of what happened in this case, instead disregarding the Police Report, the

Environmental Court documents, and other facts which underscore the error of summary judgment in this case. (*See* TR. Vol. V, Apr. 25, 2025, Hr'g Tr., pp. at 24-27 ("So, regardless of what actually happened right – we know, as lawyers, a fact is a fact if it's proven . . . So, we have a motion for summary judgment, which was granted. So, as far as this Court is concerned, that's what happened in this case. . . . So, the Code people can say what they want to say, it doesn't have anything to do with this case in Division 5.")). This was an abuse of discretion by the trial court. Under such circumstances, especially considering the excessive and improper damages award, which as three times more than prayed for in the Complaint, this is plainly unjust, and the Judgment should be set aside. *See Youree*, 705 S.W.3d at 203.

C. THE JUDGMENT WAS THE RESULT OF EXCUSABLE NEGLECT.

Mr. Melton incorporates by reference and restates here his arguments supporting the timeliness of his Motion and that he was not served with effective process. For those same reasons, this Judgment should be set aside for excusable neglect. Dr. Werner did not achieve effective service on Mr. Melton. Mr. Melton's lack of awareness of this

lawsuit was reasonable and excusable. Thus, the Judgment should also be set aside pursuant to Rule 60.02(1).

CONCLUSION

The trial court's decision to deny Mr. Melton's Motion to Set Aside Judgment was error. For the foregoing reasons, that Motion should have been granted, and the Judgment below should be reversed.

Respectfully Submitted,

GLANKLER BROWN, PLLC

By: /s/ Aubrey B. Greer
Larry H. Montgomery (TN #9579)
Aubrey B. Greer (TN #35613)
S.T. Rayburn (TN #41634)
GLANKLER BROWN, PLLC
6000 Poplar Avenue, Suite 400
Memphis, Tennessee 38119
Phone: (901) 525-1322
Facsimile: (901) 525-2389
lmontgomery@glankler.com
agreer@glankler.com
srayburn@glankler.com

Counsel for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Tenn. R. App. P. 30(e), I hereby certify that the forgoing brief contains 11,974 words and complies with the word count limitations and electronic filing requirements set forth in Tenn. Sup. Ct. R. 46.

By: /s/ Aubrey B. Greer
Aubrey B. Greer (TN #35613)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was served this 29th day of October 2025, via the Court's e-file system and/or email on the following:

L. Clayton Culpepper III (TN #23583)
EVANS PETREE, P.C.
1715 Aaron Brenner Dr., Ste. 800
Memphis, TN 38120
cculpepper@evanspetree.com
Counsel for Plaintiff-Appellees

/s/ Aubrey B. Greer
Aubrey B. Greer (TN #35613)