

P. App. 1

Supreme Court of Kentucky

2021-SC-0466-D
(2019-CA-1338)

TRACI M. CULL

MOVANT

V. CAMPBELL CIRCUIT COURT
09-CI-00600

DYCK-O'NEAL, INC., ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: April 20, 2022.

/s/ John D. Minton, Jr.
CHIEF JUSTICE

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Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-1338-MR

TRACI M. CULL

APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT
v. HONORABLE DANIEL J. ZALLA, JUDGE
ACTION NO. 09-CI-00600

DYCK-O'NEAL, INC.;
DEUTSCHE BANK TRUST
COMPANY AMERICAS, AS
TRUSTEE RESIDENTIAL
FUNDING CO., LLC F/K/A
RESIDENTIAL FUNDING;
DOUGLAS A. CULL; AND
NATIONAL CITY BANK

APPELLEES

ORDER
DENYING PETITION FOR REHEARING

*** * * * *

BEFORE: COMBS, JONES, AND MCNEILL, JUDGES.

Having considered the Petition for Rehearing and the Response thereto, and being sufficiently advised, the COURT ORDERS that the petition be, and it is hereby, DENIED.

ENTERED: 9/15/2021 /s/ J. Chris McNeill
JUDGE, COURT
OF APPEALS

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RENDERED: JULY 30, 2021; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-1338-MR

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APPELLEES

OPINION
AFFIRMING

*** * * * *

BEFORE: COMBS, JONES, AND McNEILL, JUDGES.

COMBS, JUDGE: Traci M. Cull appeals an order of the Campbell Circuit Court that declined to set aside the judgment and order of sale entered in a foreclosure action against her. It did so on the basis that Cull had been properly served with process. The circuit court specifically rejected Cull's testimony that she had not been served with a summons and a copy of the

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complaint in favor of the deputy sheriff's testimony to the contrary and his return of service. After our review, we affirm.

By deed dated September 6, 2006, Traci Cull and her husband, Douglas A. Cull (a home builder), acquired from Douglas Cull & Company, Inc., a residence at 6 Camryn Court in Newport, Kentucky. Essentially refinancing the existing construction loan, the Culls executed a note in the amount of \$1,300,000.00, and agreed to make monthly interest-only payments to the lender for 120 months – after which they were to make monthly payments to include both principal and interest.

The note was secured by a mortgage against the Camryn Court home. The mortgage included a borrower occupancy rider. Pursuant to the rider, the Culls agreed that they would occupy the home at 6 Camryn Court as their principal residence. If they failed to do so, the lender retained the right to accelerate the debt and foreclose the mortgage.

When the Culls defaulted on the note by failing to make the monthly interest payments, Deutsche Bank, the holder of the note, accelerated the repayment terms. The bank filed a foreclosure action against the Culls in Campbell Circuit Court on April 20, 2009. Named as defendants were Traci Cull, Douglas Cull, and National City Bank (an additional mortgagee). For each of the Culls, the complaint identified three separate addresses for service of process. Two of these were

addresses in Fort Thomas; the remaining address was the Camryn Court house in Newport.

Civil summonses on the complaint were duly issued by the clerk on April 20, 2009. One summons directed that Traci was to be served by the Kenton County Sheriff; one was to be served by certified mail; and the last one was to be served by special bailiff and indicated that she could be served at 6 Camryn Court in Newport. On May 1, 2009, another summons was issued to be served upon Traci by the Campbell County Sheriff. It was given to Campbell County Sheriff's Deputy Timothy Rechtin for service. It indicated that Traci Cull could be served at 6 Camryn Court.

On May 5, 2009, Deputy Timothy Rechtin filed his proof of service. It indicated that he had served the summons along with a copy of the complaint upon Traci Cull on May 4, 2009. An alias summons was served upon Douglas Cull by Deputy Rechtin on the same date, and proof of service appears of record. On May 15, 2009, Douglas answered the complaint. National City Bank filed its answer on May 18, 2009.

On August 7, 2009, Deutsche Bank filed a motion for default judgment with respect to its claim against Traci Cull and a motion for summary judgment with respect to its claims against Douglas Cull and National City Bank. Deutsche Bank certified that Traci Cull had been served by the sheriff's department on May 4, 2009; that she had filed nothing in response; and that the balance due from the borrowers totaled \$1,347,022.36 as of that date. The circuit court granted

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the default judgment and the summary judgment. Its final judgment and an order of sale were entered on September 2, 2009, and the matter was referred to the master commissioner for judicial sale.

On April 20, 2010, the master commissioner filed his report of sale. Deutsche Bank was the successful bidder at the sale with an offer of \$733,434.00. The court's order confirming the sale was entered on May 20, 2010. Deutsche Bank paid \$6,366.95 into court for sale expenses, acquiring a deed to the home at 6 Camryn Court on June 1, 2010.

In 2013, Deutsche Bank assigned its remaining interest in the court's final judgment to Dyck-O'Neal, Inc. By order entered on April 23, 2018, Dyck-O'Neal was substituted as plaintiff in the foreclosure action. In order to address the substantial deficiency remaining with respect to the judgment, Dyck-O'Neal sought to garnish Traci Cull's wages. Notice was forwarded to Deloitte Tax, LLP, where she worked as a certified public accountant.

On December 27, 2018, by limited appearance, Traci Cull filed a motion to void the judgment against her. She contended that she had never been served with process. Cull contended that because she was never properly before the court, its judgment was ineffective with respect to her interest in the disputed property. Cull attached her affidavit to the motion in which she explained that she had never resided at 6 Camryn Court. Instead, the house had been leased to John and Victoria Grooms, who resided there at the

time that the foreclosure action was commenced. Cull swore that she had never been served with process. Despite her husband's participation in the foreclosure litigation, Cull indicated that she had not been aware that a judgment by default had been entered against her until November 2018 when her employer told her about the wage garnishment. Dyck-O'Neal responded and opposed the motion; Deutsche Bank filed a motion to intervene.

Dyck-O'Neal and Deutsche Bank argued that Cull's statements were false. They explained that Cull had made a number of representations to the lender indicating that she resided at 6 Camryn Court; that she would continue to maintain the home as her primary residence; and that the loan was intended to pay for the home. They contended that Cull's flimsy attack on the service of process was insufficient to overcome the presumption that the sheriff department's return of service was valid. In response, Cull indicated that she was entitled to an evidentiary hearing in which she intended to present the testimony of Victoria Grooms, her tenant at the time the foreclosure action was commenced, and retired Deputy Sheriff Rechtin, who provided the proof of service.

By order entered on February 27, 2019, the Campbell Circuit Court permitted Deutsche Bank to intervene. The circuit court referred the matter to the master commissioner for a hearing and specifically directed him to consider whether Cull had been personally served with process. A period of discovery followed.

On July 18, 2019, the master commissioner conducted an evidentiary hearing on a single issue of fact: whether Traci Cull was served with a summons and a copy of the complaint in Deutsche Bank’s foreclosure action by Campbell County Deputy Sheriff Rechtin. One week later, the master commissioner filed his report with the court indicating that Traci Cull had been duly served with process by Rechtin on May 4, 2009. Cull filed timely her exceptions to the commissioner’s report. Nevertheless, the report was confirmed by the circuit court on August 15, 2019. Cull’s motion to alter, amend, or vacate the order confirming the report was denied, and the court’s final judgment was entered on August 23, 2019. This appeal followed.

On appeal, Cull argues that the circuit court erred by confirming the master commissioner’s report. Having carefully considered each of her several arguments, we disagree.

Master commissioner reports are governed by the provisions of CR¹ 53.05. Pursuant to the rule, the master commissioner is required to prepare a report of recommendations to the court upon the matters submitted to him by the court’s order of referral. CR 53.05(1). The master commissioner is expressly authorized to make findings of fact and conclusions of law. *Id.* The court has a variety of options. It may: adopt the master commissioner’s report; modify it; reject it in

¹ Kentucky Rules of Civil Procedure.

whole or in part; or elect to receive additional evidence. CR 53.05(2).

To the extent that the court adopts the master commissioner's findings of fact, they are to be considered the findings of the court. CR 52.01. Findings of fact shall not be set aside unless clearly erroneous. *Id.* Findings are clearly erroneous only where they are not supported by substantial evidence. *Ryan v. Collins*, 481 S.W.2d 85 (Ky. 1972). Where the court has adopted the findings of the master commissioner, due regard shall be given to the opportunity of the commissioner to judge the credibility of the witnesses. CR 52.01.

There is no dispute that Rechtin executed and filed his proof of service confirming that he had personally served Traci Cull with a summons and a copy of Deutsche Bank's complaint against her on May 4, 2009. The fact issue concerns whether it was actually Traci Cull who was served.

The evidence is conflicting on that point. Cull testified that despite her representations to the lender, she had never lived at the Camryn Court address. She admitted that the house had been utilized as an office for her husband's construction business instead and that she worked in the business part-time as a book-keeper. Cull explained that the house was eventually leased to John and Victoria Grooms, who were residing there at the time the foreclosure action was commenced. Cull swore that she had never been served with process.

Victoria Grooms confirmed that she had resided at 6 Camryn Court since May 2008. She and her husband rented the property on a month-to-month basis, and it remained on the market throughout their tenancy. Grooms testified that she had no recollection that anyone from the Campbell County Sheriff's Office had ever attempted to serve her with a summons.

Rechtin testified that he began working as a process server for the sheriff's office in 2006. In 2008, he was hired as a Campbell County sheriff's deputy. Rechtin indicated that he was unfamiliar with Traci Cull. He testified that he had served "thousands and thousands of papers" during his tenure and that he could not specifically recall Camryn Court or serving the individual identified as Traci Cull on May 4, 2009. He also candidly admitted that he could not remember what he had for lunch yesterday. Nevertheless, Rechtin was adamant that "[i]f my signature's on it, I served her." He explained that the "only way I would have served this is if that person was telling me that's who they were." Rechtin specifically denied that he would have "just given [the summons and a copy of the complaint] to anybody. . . . [T]here's no incentive for us to do that." "I was never under pressure to serve X number of papers, anything like that." Rechtin was asked whether "in the totality of your experience in serving papers . . . have you ever after the fact realized that you were mistaken in making the return on anything ever[?]" He responded, "No, I've never . . . I never, to my knowledge, know that I made any mistakes on returning a paper."

There is a well established presumption that a sheriff's return of service is correct. *See Igo v. Berea Realty & Finance Co.*, 300 Ky. 526, 189 S.W.2d 733 (1945), and the cases cited therein. An officer's proof of service indicating that he served a defendant with process is ordinarily conclusive to show that the summons and a copy of the complaint were duly delivered to her. *Id.* In light of the evidence and the long established presumption in favor of the validity of proof of service by a sheriff's deputy, the court did not err by finding that Cull's unsupported and unequivocal testimony -- albeit ten years after the event at issue -- was insufficient to impeach Rechtin's proof of service.

In the alternative, Cull argues that the service of process was invalid. She bases the argument on the premise that Deputy Rechtin was not truly a deputy sheriff because he admitted in his deposition that he was never sworn in by Campbell County Sheriff John Dunn, who held office until 2013. KRS² 70.030(1) expressly provides that a deputy "shall take the oath required to be taken by the sheriff" before he executes the duties of his office.

Cull contends that Rechtin was acting merely as a process server in 2009 when he allegedly delivered the summons and a copy of the complaint to her. She argues that the presumption that a **sheriff's** return of service is correct does not apply. She notes the requirements of KRS 70.050 pertinent to execution of process by someone other than the sheriff (or his deputy). She

² Kentucky Revised Statutes.

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contends that Rechtin did not follow those statutory requirements by failing to attach an affidavit to the return and deliver it to the sheriff (or his deputy). Thus, she argues that service of process was fatally defective.

We conclude that Rechtin's delivery of the summons and a copy of the complaint to Cull was sufficient to bring her before the court -- even if the presumption in favor of Rechtin's proof of service is ignored. The testimony was sufficient to support the court's finding that Cull was personally served with process on March 4, 2009.

The purpose of the proof of service is to provide evidence that service has been effected and to put on record the statement of a responsible official that notice has been provided to the defendant that proceedings have been commenced against her. *Ryan*, 481 S.W.2d 85. Even if we were to accept that Rechtin's return of service was deficient because it omitted a necessary affidavit, we are not persuaded that the defect invalidated the service of process. Rechtin testified that he served Cull with the summons and a copy of the complaint. The court found this testimony credible. In addition, the provisions of CR 4.16 permit the court in its sound discretion -- *at any time* -- to allow proof of service to be amended to remedy any deficiency. Our review of the totality of the circumstances and pertinent law persuades us to conclude that service of process was valid in this case.

Cull next argues that portions of Rechtin's deposition testimony were improperly admitted into evidence. She contends that Rechtin's inability to recollect any of the specifics concerning his alleged service of process upon her on March 4, 2009, renders the testimony entirely speculative and inadmissible under the provisions of KRE³ 602.

A master commissioner may rule upon the admissibility of evidence. CR 53.03. The provisions of KRE 602 prohibit a witness from testifying to matters unless evidence is introduced that is sufficient to support a finding that the witness has personal knowledge of the matter. Rechtin freely and candidly acknowledged that he had no specific recollection of serving Cull with a summons more than a decade before his deposition was taken. The challenged testimony related to the standard procedure that he followed when serving defendants with process. Evidence was introduced that was sufficient to support a finding that he had personal knowledge of this practice of asking for confirmation of an individual's identity before delivering a summons and complaint. The testimony, elicited by Cull's own counsel, was clearly admissible. Moreover, Cull's counsel proffered Rechtin's deposition testimony to the master commissioner during the evidentiary hearing and indicated when asked that he had raised no objections while the testimony was being taken. There was no evidentiary error. Moreover, under the

³ Kentucky Rules of Evidence.

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circumstances, Cull cannot now be heard to complain about the testimony.

Finally, Cull argues that the master commissioner's report exceeded the scope of the circuit court's referral. A master commissioner is authorized to make recommendations to the court concerning matters submitted to him through referral by the court. CR 53.05(1). In this matter, the circuit court directed the master commissioner to consider whether Cull had been personally served with process. The evidentiary hearing was confined to this sole issue. The master commissioner's report characterized Cull's testimony concerning the events of a decade earlier as merely self-serving. The report reflected his conclusion that her testimony was insufficient to overcome Rechtin's credible testimony concerning the standard practices that he scrupulously observed while serving a defendant with process. The report did not contain recommendations beyond the master commissioner's authority, nor did it exceed the scope of his directive to focus on service of process.

We AFFIRM the order of the Campbell Circuit Court.

ALL CONCUR.

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BRIEF FOR
APPELLANT:

David A. Kruer
Covington, Kentucky

BRIEF FOR APPELLEES DYCK-
O'NEAL, INC.; AND DEUTSCHE
BANK TRUST COMPANY
AMERICAS, AS TRUSTEE,
RESIDENTIAL FUNDING CO., LLC
FKA RESIDENTIAL FUNDING
CORP., ATTORNEY IN FACT:

Olivia F. Amlung
Covington, Kentucky

Lawrence J. Kemper
Carmel, Indiana

Sarah S. Mattingly
Louisville, Kentucky

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**COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
SECOND DIVISION
CASE NO. 09-CI-00600
JUDGE DANIEL ZALLA**

DYCK-O'NEAL, INC.

PLAINTIFF

and

**DEUTSCHE BANK TRUST
COMPANY AMERICAS, AS
TRUSTEE RESIDENTIAL
FUNDING COMPANY, LLC
FKA RESIDENTIAL
FUNDING CORPORATION
ATTORNEY IN FACT**

**INTERVENING
PLAINTIFF**

vs.

**DOUGLAS A. CULL and
TRACI M. CULL, et al.**

DEFENDANTS

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT**

(Filed Aug. 23, 2019)

This matter is before the Court on Defendant Traci Cull's Motion to Declare Judgement Void. Having reviewed the parties' filings, deposition testimony, and the Master Commission's Report, and the Court being in all ways sufficiently advised;

FINDINGS OF FACT

1. In 2009, the Intervening Plaintiff, Deutsche Bank Trust Company Americas as Trustee Residential Funding Company, LLC fka Residential Funding Corporation Attorney in Fact, hereinafter referred to as "Deutsche Bank", filed a foreclosure action in the Campbell Circuit Court, Case No. 09-CI-00600, Division Two. Deutsche Bank, as original Plaintiff in said action, obtained a final Judgment and Order of Sale, which was entered on September 2, 2009, against Defendant, Traci M. Cull, hereinafter referred to as "Ms. Cull", among others.
2. Defendant, Ms. Cull, in the foreclosure action, has now moved the Court to declare the judgment rendered against her as void, claiming she was not served personally with the complaint and summons.
3. The real estate, located at 6 Camryn Court, Newport, KY, which was the subject matter of the foreclosure action, was sold by the Master Commissioner of this Court on April 20, 2010. After the Master Commissioner's sale, there remained a deficiency after credit of the sale proceeds of the Maser Commissioner sale on the judgment. The current Plaintiff, Dyck-O'Neal, Inc., in this action, was assigned the judgment by Deutsche Bank and has pursued judgment collection against Defendant, Ms. Cull.
4. The Defendant, Ms. Cull, challenges the validity of the summons in the foreclosure action, alleging that the Campbell County Deputy Sheriff did not serve her with the summons and complaint on May 4, 2009

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at 6 Camryn Court, Newport, KY, which is evidenced by the summons return executed by Campbell County Deputy Sheriff, Timothy Rechtin, hereinafter referred to as "Rechtin". A copy of the Civil Summons including the Proof of Service by Rechtin was introduced as Defendant's, Ms. Cull, Exhibit "B" at the hearing.

5. The Defendant, Ms. Cull, called as a witness, Elizabeth Grooms, who along with her husband entered into a Lease Agreement with Cull Management Group on May 1, 2008, on a month to month basis, for the property located at 6 Camryn Court, Newport, KY. Elizabeth Grooms testified that she and her husband resided in the property on May 4, 2009; however, she testified that she was never served any papers by a Campbell County Deputy Sheriff on or about May 4, 2009. She further testified she has never been served, at any time, with papers at 6 Camryn Court, Newport, KY.

6. Testimony was clear that Defendant, Ms. Cull, was aware that a foreclosure action was filed in 2009, and that she was a party Defendant to said action. She not only discussed the foreclosure action with her husband, who was also a party defendant to the action, she later had a discussion with an attorney regarding the ramifications of the foreclosure action.

7. Defendant, Ms. Cull, was aware at the time she executed a promissory note, mortgage, and other loan documents with Deutsche Bank, that this was a loan which would be secured with property located at 6 Camryn Court, Newport, KY., where she would be

residing and would occupy it as her principal residence. Defendant, Ms. Cull, testified that shortly after the execution of the loan, due to financial reasons of her husband's construction company, she moved from the property and has lived in several locations and currently resides at 18 Pinnacle Drive, Ft. Thomas, KY. Ms. Cull further testified that on May 4, 2009 she was residing at 1724 N. Ft. Thomas Ave., Ft. Thomas, KY.

8. Ms. Cull is a well-educated woman, who graduated from Northern Kentucky University with an accounting degree. She later obtained her CPA. Ms. Cull is currently employed as an accountant with the firm of Deloitte.

9 Rechtin, who executed the proof of service on the civil summons on Defendant, Ms. Cull, was not present at the hearing to testify. The parties agreed that in lieu of live testimony the deposition given by Rechtin on May 14, 2019, would substitute as his testimony at the hearing.

10 Rechtin stated in his deposition that he would have asked the person he was serving if she was Defendant, Ms. Cull, and in fact, he would not have signed a return of the summons if it was not represented to him that she was, the Defendant, Ms. Cull. Since it was ten (10) years since he executed the return of civil summons on the Defendant, Ms. Cull, he could not remember the particular instance regarding the service of the Defendant, Ms. Cull. However, he would not have signed a return if in fact it was not the Defendant, Ms. Cull.

CONCLUSIONS OF LAW

1. It is concluded as a matter of law that all parties are properly before this Court; this Court has jurisdiction of the subject matter; and venue is proper.
2. In *Newsom v. Hall*, 161 S.W.2nd 629 (Ky. App. 1942), the Court held that the Sheriff's endorsement of execution on the summons created a presumption that the execution and delivery of the summons upon the Defendant was done according to law. The Court went on to hold that an Officer's return on process can only be impeached by clear, strong and convincing evidence.
3. The testimony given by Ms. Cull, regarding the service of summons on her, was that she was not served. This self-serving statement in and of itself is not sufficient to set the Judgment aside. In *First Horizon Home Loan Corp. v. Barbanel*, 290 S.W.3d 686, 688-89 (Ky. App. 209), the Court explained the three-factor analysis that needs to be shown to set aside a Default Judgment (in this case the judgment against Ms. Cull), the Court explained the analysis as follows:

According to CR 55.02, if a defaulting party demonstrates good cause, a trial court may set aside a default judgment providing said good cause meets the requirements set forth in CR 60.02. To show good cause, and thereby justify vacating a default judgment, the defaulting party must: (1) provide the trial court with a valid excuse for the default; (2) demonstrate a meritorious defense; and, (3) show the absence of prejudice to the non-defaulting party.

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All three elements must be present to set aside the default judgment.

Ms. Cull has failed to demonstrate any meritorious defense that would have absolved her of a liability to the Plaintiff or Intervening Plaintiff. Ms. Cull has not alleged that she did not sign the note and mortgage that are the subject of this action, nor has she alleged that the loan evidenced by the note and mortgage was current and not in default, nor has she alleged any valid defense to her liability to the Plaintiff, Dyck-O'Neal, Inc.

Ms. Cull has also failed to demonstrate the absence of prejudice Plaintiff, Dyck-O'Neal, Inc., if her motion were granted. The complaint in this case was filed April 20, 2009, more than ten (10) years ago. The summons and complaint were served on May 4, 2009. Setting aside the judgment in this case would be prejudicial to the Plaintiff, Dyck-O'Neal, Inc., because, among other things, it would now be barred by statute of limitations to sue Ms. Cull on the note.

Finally, Ms. Cull, has not presented sufficient evidence to contradict the Deputy Sheriff's return of service. Rechtin testified that although he does not remember the specifics about the service of the summons on Ms. Cull, he does remember that he served a female at 6 Camryn Court, Newport, KY, and he further testified in his deposition that he would have asked the person he was serving if she was Ms. Cull and that he would have not signed the return if she did not represent to him that she was Ms. Cull.

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In this case, the presumption is that service was properly effected upon Ms. Cull by virtue of Rechtin, noting on the summons, that he personally served Ms. Cull. The only evidence presented here to rebut the presumption are self-serving statements made by Ms. Cull, ten (10) years after the judgment was entered.

4. Based upon the foregoing, it is concluded that Ms. Cull was served with summons on May 4, 2009 in the foreclosure action that was filed in April 2009.

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that Ms. Cull's Motion to Declare Judgement Void is **DENIED**. Because this Court has proper jurisdiction over Ms. Cull, September 2, 2009 Final Judgment and Order of Sale entered against her-was properly

entered and shall remain intact. This is a final and appealable order. [AS THERE IS NO JUST CAUSE FOR DELAY.]

ENTERED THIS THE 23 DAY OF AUG., 2019.

/s/ Dan Zalla
HON. DAN ZALLA
JUDGE, CAMPBELL
CIRCUIT COURT

Copies to: all counsel of record

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This Instrument Prepared By:

/s/ Olivia F. Amlung

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KENTUCKY COURT OF APPEALS
FILE NO. 2019-CA-001338
ACTION NO: 09-CI-00600

Traci M. Cull	:	
Appellant	:	<u>APPELLANT'S</u>
v.	:	<u>PETITION FOR</u>
Dyck-O'Neal, Inc., et al	:	<u>REHEARING</u>
Appellees	:	

Now comes Appellant, Traci M. Cull, and files this petition for rehearing pursuant to Rule 76.32 of the Kentucky Rules of Civil Procedure of the Opinion entered on July 30, 2021 by the Court of Appeals on this matter, a copy of which is attached (the "Opinion").

STATEMENT OF POINTS AND AUTHORITIES

Ky. R. Cv. P 76.32	1, 3
<i>Gardner v. Lincoln Bank & Trust Co.</i> , 251 KY 109, 64 S.W.2d 497 (Ky. App. 1933).....	2, 3, 4, 5, 10
KRS 70.030	2, 5, 10
KRS 70.050	2, 5
Ky. R. Cv. P 60.02	2, 6
<i>Trager v. Webster</i> , 174 Mass. 580, 55 N.E. 318 (Mass. 1899)	4
<i>R. F. Burton & Burton Tower Co. v. Dowell Div. of Dow Chemical Co.</i> , 471 S.W.2d 708 (Ky. App. 1971)	4

<i>F. W. Newsome v. Hall</i> , 161 S.W.2d 629 (Ky. App. 1942)	7
<i>Ryan v. Collins</i> , 481 S.W. 2d 85 (Ky. 1972).....	9
Ky. R. Cv. P. 61.02.....	9, 10
<i>Johnson v. Commonwealth</i> , 450 S.W.3d 707 (Ky. 2014)	10
<i>Williamson v. Commonwealth</i> , 767 S.W.2d 323, 326 (Ky. 1989).....	10

SUMMARY OF THE ARGUMENT IN SUPPORT OF REHEARING

- A) The Court ignored the authority and precedent in *Gardner v. Lincoln Bank and Trust*, 251, KY 109, 64 S.W. 2d 497 (Ky. 1933).
- B) The Court improperly applied a presumption of truth in favor of an unsworn and statutorily defective document contrary to KRS 70.030 and KRS 70.050.
- C) The Court incorrectly applied the clearly erroneous standard.
- D) The 3 factor analysis under Ky. R. Cv. P. 60.02 is not applicable because the matter is a direct attack on the judgment.
- E) The only person with the requisite and unassailable personal knowledge that the document was not served upon Traci Cull at the Camryn Court, Mr. Grooms, was not permitted to testify at the evidentiary hearing and is a basis for remand.

PROCEDURAL HISTORY

It is unfortunate, but this Court's Opinion affirming is both contrary to established and binding precedent and the facts introduced at the evidentiary hearing. Appellant does not mean to be disrespectful, but this Court's ruling is just plain wrong. This factually unsupported incursion into the due process rights of the Appellant is not only an unconstitutional taking of her property, but, if allowed to stand, will also have a profound and unacceptable ripple effect throughout the Commonwealth.

Ky. R. Cv. P 76.32 provides that a party affected by the Opinion of the Court of Appeals may petition for a rehearing "when it appears that the court has overlooked a material fact in the record, or a controlling statute or decision or has misconstrued the issues presented on the appeal or law applicable thereto."

GENERAL STATEMENT OF FACTUAL HISTORY¹

In 2009, the Lender foreclosed on a house owned by Appellant Traci Cull and her husband. There is no question that Traci Cull's husband and co-maker on the mortgage note was personally served by certified mail on April 20, 2009 and by Rechtin on May 4, 2009 and a summary judgment was entered against him. A

¹ See Appellant's Brief, incorporated herein by reference, for the detailed statement of the case with substantial reference of the Certified Record on Appeal (CROA) and the Appendix to Appellant's Brief (Appx.) as a supplement to that record to enable reference by page number.

default was taken against Appellant for failure to appear and defend. Appellant, however, was never personally served or otherwise legally served under any provision of the Kentucky Civil Rules and applicable Kentucky Statutes. Prior to the foreclosure being initiated, the house was leased to John Grooms and his wife, Victoria Grooms, for \$5,000 per month commencing in May, 2008. After the foreclosure was initiated, the Grooms stopped paying rent during May, 2009. During April, 2010, the house was sold at the foreclosure sale to the original plaintiff and shortly thereafter sold to Mr. and Mrs. Grooms.

Eight years later, the national bad debt purchasing organization, Dyke O’Neal, Inc., bought the deficiency balance judgment for “ONE DOLLAR (\$1.00) and other good and valuable consideration on a “without recourse” basis. (CROA 174 / Appx. pg. 24). In doing so, it sought and obtained an order substituting itself as plaintiff and has been garnishing Appellant’s wages since November, 2018 for the asserted amount of \$1,127,435.51 as being the balance owed on the mortgage note after applying the \$733,434 gross proceeds of the foreclosure sale. (CROA 216 / Appx. pg. 27).

Traci Cull testified that she never lived at 6 Camryn Court and her Husband’s business was temporarily located there prior to May, 2008 out of necessity due to the financial depression of that time period. (CROA 222 and Exh. D / Appx. pg. 33 and pgs. 59-97). Consequently, Traci Cull was not at the house on the date of May 4, 2009. The Grooms were leasing the

house and Traci Cull had no reason to be there during that time.

ARGUMENTS

A) THE OPINION IS CONTRARY TO THE LONG-ESTABLISHED HOLDING IN *GARDNER Y. LINCOLN BANK AND TRUST CO.*, 251 KY. 109, 64 S.W.2D 497 (KY. APP. 1933).

Both the Circuit Court/Master Commissioner's Report and the Opinion of this Court are at odds with clear and binding precedent in *Gardner v. Lincoln Bank and Trust*, 251, KY 109, 64 S.W. 2d 497 (Ky. 1933). It appears from even a cursory review of the Opinion that the *Gardner* case was not even considered. Though both this Court and the Master Commissioner were made aware of the precedent in the *Gardner* case, both entities inexplicably decided to just ignore it. There is no mention of the *Gardner* case in the Opinion despite it being the most persuasive authority and guidance on the facts in this case. Very clearly, the Court overlooked material facts and a controlling decision. Respectfully, this Court should revisit its deliberations with the holding of the *Gardner* case in mind.

The facts in the *Gardner* case are uncannily similar to the facts in this case. Mrs. Gardner testified that she was not properly served but the bank went ahead with the foreclosure anyway. And of course, when the Gardner's became aware that their house has been

sold by the Sheriff, a conflict arose as to whether she was, in fact, served with proper notice.

The *Gardner* Court, on facts which are almost identical to these facts except that the person serving process was sworn, held that the presumption of truth accorded to the information in the Return of Service can be overcome even if the home owner's testimony cannot be corroborated. The Court reversed the lower court and found that service was constitutionally invalid. "In respect to process, the constitution places life, liberty, and property upon an equality, a party cannot be deprived of his property without service of process in the manner provided by law. A presumption of service may or may not be true; and, if it is false, a judgment entered upon it, if it is enforced by execution, results in depriving the person, who is the subject of the presumption, of his property without due process of law." *Id.* at 111.

B) THERE CAN BE NO PRESUMPTION THAT RECHTIN'S RETURN OF PROCESS WAS TRUTHFUL

We are naturally reluctant to disbelieve the testimony of someone to whom we have entrusted the critical constitutional duty to carry out the requirements of due process, but here we must. "[T]he doctrine that an official return cannot be impeached by the uncorroborated testimony of the party appearing to have been served is repudiated in the case of *Trager v. Webster*, 174 Mass. 580, 55 N.E. 318." *Gardner v. Lincoln*

Bank & Trust, 251 Ky. 109, 115, 64 S.W.2d 497 (Ky. App. 1933) (citing and adopting *Trager v. Webster*). See also *R. F. Burton & Burton Tower Co. v. Dowell Div. of Dow Chemical Co.* 471 S.W.2d 708 (Ky. App. 1971).

The Opinion affirming the lower court primarily rests upon an improper presumption that the unsworn return of process made by Rechtin 10 years ago is true and accurate. It is not, as Mr. Grooms' testimony would show.

Rechtin testified that he was not sworn or under any oath of truthfulness at the time of alleged service on Traci Cull -- despite the legal requirement of KRS 70.030 that a deputy be sworn and under an oath of truthfulness before executing the duties of a deputy. (CROA Exh. C / Appx. pgs. 119-129). And, despite the further requirement of KRS 70.050 that an affidavit of truthfulness must be attached to the allegedly personally, legally and properly served summons, there was no affidavit attached. (CROA Exh. C / Appx. pg. 140).

There can be no presumption of truthfulness when the very statutes which guarantee such truthfulness are not followed. Because he was never under a duty to be truthful and never supplied the requisite statutory indicia of truthfulness, a presumption of truthfulness should not attach to the summons and return of service executed by Rechtin over 10 years ago.

Traci Cull's testimony, while of course self-serving, as would be any person's testimony in the same circumstance, is entitled to as much or more probative weight than the testimony of Rechtin, who does not

remember much of anything. Why? Because, as to Traci Cull, service of such a document likely meant the loss of ownership of a house worth more than a million dollars, and had it been properly served, “would have burned itself into her memory so deep she would not have forgotten it, while to Mr. [Rechtin] it was only a casual event in the day’s work.” *Gardner* at 118.

Rechtin testified unequivocally that he did not remember serving Traci Cull, despite his testimony that he still has a quite vivid recollection of serving her husband on the very same day. (CROA Exh. C / Appx. pgs. 122-123). Contrary to the Master Commissioner’s “finding of fact,” Rechtin did not testify that he remembered serving a female at 6 Camryn Court. (CROA 414 / Appx. pg. 154). But he did testify that he never asked any person for any kind of definitive identification when serving a summons. (CROA Exh. C / Appx. pgs. 130-131). Rechtin simply took their word for it. So even if a woman had answered the door at 6 Camryn Court, Rechtin would not have asked for proof of identity.

And most importantly, the only person who has direct and personal knowledge of what happened at 6 Camryn Court on that day is Mr. Grooms, who was not permitted to testify at the initial evidentiary hearing.² Traci Cull testified that she was not at the Camryn

² Appellant’s Counsel, despite repeated unsuccessful attempts to personally serve subpoena for deposition and attendance at the hearing upon Mr. and Mrs. Grooms, did not have any communications with Mr. Grooms until the day before the hearing (CROA Exh. B / Appx. pgs. 43-44 and pgs. 49-51).

Court house on that day and had not been there since the Grooms had leased it. Likewise, Mrs. Grooms testified that she had no knowledge or recollection of anyone coming to the Camryn Court residence to serve a summons and notice of foreclosure. (CROA Exh. D / Appx. pgs. 54-56). But, Mr. Grooms had he been allowed to testify, remembers Rechtin attempting to serve Traci Cull on that date, but she was not there and had not been there since the Grooms had leased the house. Appellant is of the opinion that nobody was handed that particular summons and the contrary information on the return of service is just not true and certainly does not merit a presumption of truthfulness.

Any so-called presumption that the return by Rechtin was accurate and honest should go by the wayside when Rechtin, though called a deputy sheriff, really was not a responsible official because he was not sworn nor under any obligation to tell the truth at the time he made the return of process. The mere speculative testimony that he followed his routine habit is not enough to invoke the presumption. (See Opinion at 8-9). Rechtin was unequivocal that he did not remember serving Traci Cull. Yet his testimony was very detailed as to the service on Traci Cull's husband on the very same day. It is also significant to mention that the Mr. and Mrs. Grooms are both African American whereas the Culls are both Caucasian. Accordingly, it is hard to believe Mr. Rechtin who could remember the details of what he and Doug Cull talked about but had no recollection of serving a female at 6 Camryn Court that Rechtin would have had to assume was Doug

Cull's wife (who only could have been Mrs. Grooms). Rechtin should have had a much greater recollection in such circumstance as an interracial marriage of such a long-term acquaintance would normally be very memorable unless he feigned his ability for such recollection. Rechtin's testimony is also suspect as to his routine practice. He was under no compulsion or obligation to be truthful on the documents he returned, because he was not sworn in as a deputy sheriff at the time nor under oath under an affidavit attached to the return. Rechtin was just a guy in a uniform delivering court papers. He was nothing more than an delivery person under no legal obligation to be truthful.

“[I]f the [Appellant] in good faith dispute[s] the fact that the paper purporting to be the original execution was genuine, the burden shifted to [her] to introduce evidence showing that the purported execution and sheriff's return thereon were not authentic.” *F.W. Newsome v. Hall*, 290 Ky. 486, [492,] 161 S.W.2d 629[, 633] (Ky. 1942) The burden is on the Appellant to establish that this certification was false. *Id* at 492[, 633]. She has done so. The doctrine that an official return cannot be impeached by uncorroborated testimony of the person appearing to have been served is repudiated by the *Gardner* and *Newsome* cases.

C) THE CLEARLY ERRONEOUS STANDARD

The Court is required to analyze findings of fact under the clearly erroneous standard. “Findings of fact are clearly erroneous only where they are not

supported by substantial evidence.” (Opinion at 7) (emphasis added). Traci Cull’s personal testimony that she was never served is at odds with the Court’s finding that Rechtin’s habit testimony is more credible. The Court is not empowered to just ignore her testimony and neither is the Master Commissioner.

Traci Cull’s personal recollection testimony is more credible than Rechtin’s unsworn statement in a 10 years old summons not in conformance with the statutory requirements. In contrast, Traci Cull’s testimony that she was not present at the Camryn Court house and was not served with a document that sought to take a million-dollar house is more credible than the unsworn delivery person’s testimony that he has served thousands of documents over the course of time. A person’s single recollection of not being served is much more believable and credible than reliance upon an unsworn person’s testimony of habit alone. There was no foundation laid that can support a presumption of truth just because Rechtin served “thousands” of summons. There is no foundation that he was truthful, properly trained or even that he followed the statutorily prescribed procedure. In fact, the record contains evidence that he never followed the statutorily prescribed procedure. And, had Mr. Grooms been allowed to testify, there would have been no question that the return of service allegedly executed by Rechtin was not truthful, and was not served upon Traci Cull in 2009 at 6 Camryn Court.

Rechtin’s alleged habit of filling out a form is simply not enough to overcome Traci Cull’s due process

rights and deprive her of her property and the most likely truth is Rechtin was mistaken in making the return. And this is especially so when we consider that the only person with a direct and personal recollection that the summons was not served upon Traci Cull at the Camryn Court house on that day was never allowed to testify to this fact. Rechtin's return of service is just an unsworn document and is simply not credible enough to deprive the Appellant of even 10 cents much less over a million dollars.

D.) THIS IS A DIRECT ATTACK ON THE JUDGMENT SO THE 3 FACTOR ANALYSIS OF KY. CV. P. 60.02 UNDER *RYAN V. COLLINS*, 481 S.W. 2D 85 (KY. 1972) IS NOT APPLICABLE.

The Master Commissioner did not have the jurisdictional authority to engage in the 3 factor analysis of Ky. R. Cv. P 60.02 because the Appellant was never properly before Court. It was not the issue to be heard at the evidentiary hearing. The 3 factor analysis and the discussion are irrelevant to whether Traci Cull had constitutional notice sufficient to deprive her of her property. (CROA Exh. D / Appx pgs. 153-54).

E) REMAND FOR THE TESTIMONY OF MR. GROOMS

At the very beginning of the evidentiary hearing in front of the Master Commissioner, Appellant's Counsel sought to introduce the testimony of Mr.

Grooms to the effect that he did remember Mr. Rechtin coming to the house for the purpose of serving Traci Cull. Appellant was overruled and the hearing went ahead with only the live testimony of Mrs. Grooms and Traci Cull. Timothy Rechtin's testimony was by deposition depriving the Master Commissioner of the opportunity to evaluate his "credibility." (CROA Exh. D / Appx. pgs. 45-48).

Kentucky Civil Rule 61.02 provides an avenue for this Court to remand for Mr. Grooms' testimony. "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." Ky. R. Cv. P. 61.02. The fact that both entities ignored the *Gardner* case results in the necessity to hear Mr. Grooms' testimony.

As an alternative to a rehearing, Appellant suggests that this case be remanded with instructions to hear what Mr. Grooms has to say on the issue of service upon Traci Cull. The Court of Appeals may review this substantive error pursuant to Ky. R. Cv. P. 61.02 and is empowered to grant the relief requested here and it is appropriate given it was not foreseeable that *Gardner* would not be considered and KRS 70.030 not enforced. *Johnson v. Commonwealth*, 450 S.W.3d 707 (Ky. 2014) (citing *Williamson v. Commonwealth*, 767 S.W.2d 323, 326 (Ky. 1989).

CONCLUSION

“The authority of a court to set aside its judgment, when the action is demanded by justice, is not dependent upon statute. The power is inherent, and may, in a proper case, and upon a proper showing, be exercised at any time.” *Gardner* at 109 (citations omitted).

WHEREFORE for the reasons given above, the Appellant petitions for a rehearing on this case or in the alternative, a remand to the lower court to hear the testimony of Mr. Grooms. As required by Civil Rule 76.12(4)(c)(v), this Appellant’s Petition for Rehearing is submitted by David A. Kruer as the attorney for the Appellant and said attorney is responsible for its contents.

/s/ David A. Kruer

David A. Kruer, Esq. (KY-82409)
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**CAMPBELL CIRCUIT COURT
SECOND DIVISION
CASE NO: 09-CI-00600**

Dyck-O'Neal, Inc., assignee :
of Deutsche Bank Trust : **MOTION TO**
Company Americas as : **DECLARE**
Trustee Residential Funding : **JUDGMENT VOID**
Corporation Attorney in Fact : **AS AGAINST**
Plaintiff : **DEFENDANT,**
v. : **TRACI M. CULL**
Douglas A. Cull, et. al. : (Filed Dec. 27, 2018)
Defendants :

Now comes the purported Judgment Debtor, Traci M. Cull, by and through counsel in the making of a special and limited appearance as described below. Pursuant to Civil Rules 55.02 and 60.02(f) of the Kentucky Rules of Civil Procedure, the said Defendant moves the Court to enter an order declaring the purported judgment entered by default against her as being void under the controlling precedent of *R. F. Burton & Burton Tower Co. v. Dowell Div. of Dow Chemical Co.*, 471 S.W. 2d 708, 1971 Ky. LEXIS 249 (1971) and Civil Rule 4.04 of the Kentucky Rules of Civil Procedure. As evidenced by the attached affidavit, Traci M. Cull was not personally or otherwise served with the summons and complaint underlying the judgment entered against her herein. Without personal service of the summons and complaint on her, the Court lacked jurisdiction over her person to have properly entered the instant

judgment against her. Accordingly, it is respectfully requested that the Court enter an order declaring that the judgment entered against the defendant, Traci M. Cull, as being void.

The said Defendant makes this special and limited appearance pursuant to Civil Rule 12.08 and expressly preserves any and all defenses to the claims made by the Plaintiff and the insufficiency of process upon her.

/s/ David A. Kruer
David A. Kruer, Esq. (KY-82409)
DAVID KRUER & COMPANY, LLC
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118 West Fifth Street, Ste E
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NOTICE OF HEARING

Notice is hereby given that the foregoing motion shall be heard by the Court on January 11, 2019 at 9:00 a.m. or such later time as the business of the Court permits. A proposed entry granting this motion is attached.

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that a copy of the foregoing motion has been duly served upon the following parties or counsel of record by regular U.S. Mail or

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electronically, as indicated, this 27th day of December, 2018.

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/s/ David A. Kruer

David A. Kruer, Esq.
(KY-82409)

AFFIDAVIT

Now comes Affiant, Traci M. Cull, and being first duly sworn and cautioned, states as follows:

1. Affiant is informed and believes that Affiant is a named defendant in the foreclosure action brought by Deutsche Bank Trust Company Americas as Trustee Residential Funding Company, LLC FKA Residential Funding Corporation Attorney in Fact v. Douglas A. Cull, et. al., in the Campbell Circuit Court under case number 09-CI-00600 (hereinafter referred to as the "Foreclosure Action");
2. The Foreclosure Action concerned a certain residential house that was built by Affiant's Husband's construction company to sell in the open market to high end purchasers (hereinafter referred to as the "Market House");
3. Due to the collapse of the residential real estate market during 2008 and thereafter, Affiant's Husband's construction company could not sell the Market House and was not able to continue to service the associated mortgage debt leading to the Foreclosure Action;
4. In the effort to continue to service the aforesaid mortgage debt, the Market House was rented to John and Victoria Grooms who resided in the Market House at the time the Foreclosure Action was initiated and who have continued to reside in the Market House at all times relevant thereafter;
5. Affiant has never resided in the Market House;

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6. Affiant is informed and believes that the Court's records in the Foreclosure Action reflect that Affiant was purported to have been personally served with the summons and complaint of the Foreclosure Action on May 4, 2009 by a Deputy of the Campbell County Sheriff at the Market House;
7. Affiant expressly and affirmatively states that she was not personally served by a Deputy of the Campbell County Sheriff at the Market House on May 4, 2009 or otherwise at any other time or place;
8. Affiant was not aware that the Court had entered a personal judgment against her by default until during November, 2018 when she received an informal notice from her employer that a wage garnishment had been purportedly issued by the Court in favor of Dyck-O'Neal, Inc. as the purported assignee of the purported personal judgment by default entered against Affiant;
9. Affiant is informed and believes her wages are exempt from garnishment due to the underlying judgment purportedly assigned to Dyck-O'Neal, Inc. being void as a consequence of Affiant not ever being personally served with a summons and complaint of the Foreclosure Action as required by Civil Rule 4.04 of the Kentucky Rules of Civil Procedure and the binding precedent of *R. F. Burton & Burton Tower Co. v. Dowell Div. of Dow Chemical Co.*, 471 S.W.2d 708, 1971 Ky. LEXIS 249 (1971).

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10. Pursuant to Civil Rule 12.08, Affiant expressly preserves any and all defenses she has to a personal judgment being entered against her, including, by not limited to, lack of jurisdiction over the person or insufficiency of process;
11. Further Affiant sayeth naught.

/s/ Traci M. Cull
Traci M. Cull

COUNTY OF KENTON)
) **ss**
STATE OF KENTUCKY)

Before me, a Notary Public in and for the above state and county, the Affiant, Traci M. Cull, being first duly sworn and cautioned, duly executed the foregoing Affidavit to attest to the truth and veracity of the statements contained therein on this 18th day of December, 2018.

/s/ Scott D. Augsback
Notary Public

my commission expires: Jan 28, 2020

[NOTARY STAMP]

**CAMPBELL CIRCUIT COURT
SECOND DIVISION
CASE NO: 09-CI-00600**

Dyck-O'Neal, Inc., assignee	:	
of Deutsche Bank Trust	:	
Company Americas as	:	
Trustee Residential Funding	:	<u>ORDER DECLAR-</u>
Corporation Attorney in Fact	:	<u>ING JUDGMENT</u>
Plaintiff	:	<u>VOID AS AGAINST</u>
v.	:	<u>DEFENDANT</u>
Douglas A. Cull, et. al.	:	<u>TRACI M. CULL</u>
Defendants	:	

This matter is before the Court at the request of the Defendant, Traci M. Cull, by and through counsel making a special and limited appearance on her behalf. The said Defendant has made a motion to the Court seeking an order declaring the judgment entered against her as being void based on the insufficiency of the service of process upon her. In support of such motion, the said Defendant has tendered an affidavit that attests to her not being personally served with the summons and complaint underlying the judgment entered against her. Based on such evidence and the absence of sufficient evidence to the contrary, and based upon the binding precedent of *R. F. Burton & Burton Tower Co. v. Dowell Div. of Dow Chemical Co.*, 471 S.W. 2d 708, 1971 Ky. LEXIS 249 (1971), the Court hereby order the judgment entered against the Defendant, Traci M. Cull, is void.

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IT IS SO ORDERED this ____ day of January, 2019.

Judge Daniel J. Zalla
