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IN THE

# Supreme Court of Virginia

**RECORD NO. 171117**

COLIN McCULLEY,

*Appellant,*

**v.**

BROOKS & COMPANY GENERAL CONTRACTORS, INC.,

*Appellee.*

**BRIEF OF APPELLEE**

Bradley P. Marrs (VSB No. 25281)
Patrick C. Henry, II (VSB. No. 80468)
MARRS & HENRY
7202 Glen Forest Drive, Suite 307
Richmond, Virginia 23226
(804) 662-5715 (Telephone)
(804) 662-5712 (Facsimile)
bmarrs@marrslaw.com
phenry@marrslaw.com

*Counsel for Appellee*

**LANTAGNE LEGAL PRINTING**
**801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477**

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## STATEMENT OF FACTS TO CORRECT AND AMPLIFY

Plaintiff Brooks & Co. General Contractors, Inc. ("Brooks") filed its two-count Complaint in the Circuit Court for the City of Richmond against defendants Colin McCulley ("McCulley") and his company Plastic Lumber & Outdoor, LLC d/b/a Plastic Lumber, Inc.[1] ("Plastic Lumber") on May 2, 2016.[2]

McCulley was properly served via posting at his residence by the sheriff on May 6, 2016.[3] Plastic Lumber's registered agent was served on May 9, 2016.[4] Neither defendant responded to the lawsuit at all, let alone within the timeframe prescribed by Rule 3:19 of the Rules of the Supreme Court of Virginia.[5] On June 6, 2016, Brooks filed plaintiff's Motion for Default Judgment.[6]

A hearing for plaintiff's Motion for Default judgment was scheduled for July 7, 2016 before the Honorable William R. Marchant.[7] A notice of hearing for July 7, 2016 was filed with the Court on June 21, 2016.[8] The

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[1] Plastic Lumber is not party to this appeal. The judgment as to Plastic Lumber is final.
[2] Joint Appendix ("JA") at pp. 1-24.
[3] JA at 28.
[4] JA at 28.
[5] JA at 28-29.
[6] JA at 28-29.
[7] JA at 55-56.
[8] JA at 55-56.

Notice of Hearing for plaintiff's Motion for Default Judgment was mailed to defendant McCulley, via both certified and regular mail, on June 16, 2016.[9]

Neither defendant McCulley nor defendant Plastic Lumber objected to, contested, or appeared at the hearing on July 7, 2016, and default judgment was entered.[10]

After judgment was entered, Brooks initiated collection efforts.[11] On August 23, 2016, Brooks filed a Summons to Answer Interrogatories before Commissioner in Chancery William K. Grogan to be held on September 15, 2016.[12] On September 9, 2016, counsel for McCulley contacted Commissioner Grogan's office to make a Motion to Continue the proceeding, making his first general appearance.[13] McCulley made a general appearance (on multiple occasions) both before and after filing a Motion to Vacate.[14]

Commissioner Grogan transferred the debtor interrogatory proceeding to Commissioner Howard S. Marley due to his lack of

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[9] JA at 55-56.
[10] JA at 59-60, 101.
[11] JA at 101.
[12] JA at 61, 78-79, 101.
[13] JA at 79, 101. McCulley inaccurately contends in his Statement of Facts that he made a "special appearance", but offered no such evidence to the trial court. *See* JA at 101-102 (Statement of Facts); *See also* JA at 79, 94,101.
[14] JA at 79, 97, 101-102.

availability. On September 14, 2016, Commissioner Marley granted defendant McCulley's motion for a continuance of the debtor interrogatory until September 27, 2016.[15] Per the request of Commissioner Marley, a letter was sent by counsel for the plaintiff confirming the granting of McCulley's motion.[16]

McCulley incorrectly and without basis in the trial court record represents to this Court in his statement of facts that:

> …counsel for the Appellant [McCulley] called the office of the Commissioner in Chancery, at the time William Grogan, Esquire, to reschedule [continue] the **interrogatories until he could file and be heard on a Motion to Vacate**… The matter having been continued, **subject to a special appearance**, counsel for the Appellant [McCulley] filed a Motion to Vacate on September 19, 2016.[17]

The trial court's record reflects that the McCulley requested and was granted a continuance.[18] However, there is nothing in the trial court's record to support McCulley's claim, which he now presents as "fact" to this

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[15] JA at 79, 101 ("the timeline of those efforts and the defendant's and defense counsel's participation/objection thereto is all set out in the Court's opinion letter of March 23, 2017, which is incorporated herein by express reference.")
[16] JA at 79, 82, 101
[17] Opening Brief of Appellant ("Appellant Brief") at p. 3 (emphasis added).
[18] JA at 79, 101 ("the timeline of those efforts and the defendant's and defense counsel's participation/objection thereto is all set out in the Court's opinion letter of March 23, 2017, which is incorporated herein by express reference.")

Court, regarding: (a) the alleged reasons McCulley requested and was granted a continuance, or (b) that McCulley's appearance before the Commissioner seeking a continuance was a "special appearance." McCulley's unfounded and unsupported "facts" must be rejected by this Court, as there is nothing in the trial court's record to support them.

On September 19, 2016, defendant McCulley filed a Motion to Vacate (noting that a hearing is not held on this motion for over 4 months).[19] Defendant McCulley does not file or seek an injunction to stay collections, including the debtor interrogatory, even thou his motion for a continuance had been granted, delaying the proceeding until September 27, 2016.[20]

Defendant McCulley did not file any written motion or objection with Commissioner Marley or Commissioner Grogan regarding the debtor interrogatory that was continued to September 27, 2016.[21] On September 27, 2016, defendant McCulley appeared, with counsel, at the debtor interrogatory and fully participated, without objection.[22] The trial court record does not support McCulley's reference to a "special appearance" or

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[19] JA at 65, 74.
[20] JA at 79-80, 82, 94
[21] *See* JA generally; *see also* JA at 101-102 (statement of facts).
[22] JA at 79, 94, 101-102 (statement of facts).

to any objection to the hearing.[23] Defendant and his counsel fully participate in the hearing, making another general appearance.[24]

In his statement of facts, McCulley represents to this Court as alleged "fact" that:

> Counsel for the Appellant [McCulley] informed Commissioner Marley of the Motion to Vacate, counsel for the Appellee argued that the Commissioner did not have the authority to suspend the proceedings until the Motion to Vacate could be heard, and the debtors' interrogatories proceeded over the objection of the Appellant [McCulley].[25]

McCulley is unable to point to anywhere in the trial court record to support his allegation regarding the objections that McCulley purportedly raised to the Commissioner in September 2016.[26] Instead, the defendant references an unrelated email from January 2016,[27] over three months later, wherein

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[23] JA at 79, 94, 102.
[24] JA at 79, 82, 94, 102.
[25] *See* Appellant Brief at p. 4; *Compare*, JA at 79, 94, 101-102 (statement of facts).
[26] The record makes clear that McCulley made no such objection. *See* JA at 79 ("Defendant personally appears, with counsel, at debtor interrogatory and fully participates. He makes a general appearance and does not object to the hearing."); 94 (…by making a general appearance in this case through his post-judgment participation in Debtor's Interrogatories, all as more fully set out in the Court's Letter Opinion of March 23, 2017, which is incorporated by reference…"); 101 ("the timeline of those efforts and the defendant's and defense counsel's participation/objection thereto is all set out in the Court's opinion letter of March 23, 2017, which is incorporated herein by express reference.")
[27] JA at 91-92.

counsel for Brooks references the Commissioner's December 14, 2016[28] decision to deny McCulley's December 13, 2016 request for a Stay of the Motion for Show Cause.[29] The Court must disregard the alleged "facts" that are presented by McCulley to the extent they are not supported by, or otherwise preserved in the record.

McCulley inaccurately represents to the Court, without basis or evidence in the trial court record, that "[u]nder the threat of potential show cause the Appellant [McCulley] participated in the debtor's interrogatories."[30] McCulley made a general appearance before and at the debtor interrogatory and made no objection,[31] there is nothing in the record to suggest that McCulley did so because of a threat of show cause.[32]

At the conclusion of questioning on September 27, 2016, Commissioner Marley orally ordered the production of documents and continued the debtor interrogatory generally.[33] Commissioner Marley entered an Order on October 12, 2016, *nunc pro tunc*, September 27,

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[28] JA at 79 ("Commissioner Marley denies Defendant's Motion to Stay on December 14, 2016"), 94, 101.
[29] JA at 79 ("On December 13, 2016, defendant requests a stay of the Motion for Show Cause from the Commissioner, without mentioning a special appearance"), 82, 94, 101.
[30] Appellant Brief at p. 5.
[31] JA at 79, 94, 101.
[32] *See* JA generally; *see also* JA 101-102 (Statement of Facts).
[33] JA at 79, 94, 101.

2016, confirming the oral order.[34] Defendant McCulley did not object to this order or take any action to pursue his Motion to Vacate.[35] McCulley produced some documents in response to the order.[36]

On November 18, 2016, Brooks requested dates for a Motion for Show Cause relating to McCulley and Plastic Lumber's failure to fully comply with Commissioner Marley's October 12, 2016 order to produce documents.[37] On December 8, 2016, 81 days after filing his Motion to Vacate, and now facing a pending Show Cause for his improper conduct, McCulley first requests dates for a hearing on his Motion to Vacate.[38] A notice of hearing for the Motion to Vacate is filed on December 16, 2016 (setting the hearing for February 10, 2017).[39] Defendant McCulley, without any support or foundation in the record, inaccurately represents that "after it become apparent that a settlement agreement was not possible, a hearing on the Motion to Vacate was conducted…"[40] This claim is not supported by the record, which clearly reflects that McCulley elected to move forward

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[34] JA at 79, 94, 101, 110.
[35] JA at 79, 94, 101.
[36] JA at 102.
[37] JA at 79, 94, 101.
[38] JA at 79, 94, 101.
[39] JA at 79, 94, 101, 74.
[40] Appellant Brief at p. 5.

with his motion only after facing a show cause for violating the Commissioner's order in not producing all the required records.[41]

On December 13, 2016, defendant McCulley requested a stay of the Motion for Show Cause from Commissioner Marley, without mention or reference to any purported special appearance.[42] Commissioner Marley properly denied his request.[43] McCulley again does not seek any other relief, including but not limited to the seeking of injunction from the trial court.[44]

On February 10, 2017, the parties appear before Judge Marchant on defendant McCulley's Motion to Vacate.[45] McCulley claims, without any support in the record that "the court reporter ordered by the Appellant [McCulley] was relieved by the Court prior to the hearing."[46] There is nothing in the record to support this alleged "fact".[47] Evidence regarding McCulley's multiple general appearances and the chronology of events are

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[41] JA at 79 (On November 18, 2016, Brooks requests dates for Show Cause hearing. In December, McCulley seeks hearing date and requests commissioner stay show cause hearing), 94, 101, 110 (show cause summons).
[42] JA at 79, 94, 101.
[43] JA at 79, 94, 101.
[44] *See* JA generally; *see also* JA 101-102 (Statement of Facts).
[45] JA at 79, 94, 101.
[46] Appellant Brief at p. 5.
[47] *See* JA generally; see JA 101-102 (noting that this claim is not in the statement of facts).

presented through the testimony of the witnesses and review of the trial court record.[48] At the conclusion of the evidentiary hearing and oral argument of the counselors, Judge Marchant took the matter under advisement.

On May 23, 2017, Judge Marchant issued a five-page written opinion[49] (later confirmed and incorporated in an Order entered May 23, 2017),[50] denying defendant McCulley's Motion to Vacate on grounds that McCulley had waived any such objections by making multiple general appearances.[51] McCulley filed a Motion to Reconsider and the motion was denied without a hearing.[52] Defendant McCulley now appeals.

McCulley correctly notes that Commissioner Marley issued a show cause to McCulley on September 18, 2017 (nearly a year after McCulley appeared at the debtor interrogatory), personally and in his capacity as member, owner and custodian of records for Plastic Lumber, relating to their collective failure to produce records for a **full year**.[53] McCulley is

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[48] JA at 79, 94, 101 ("the timeline of those efforts and the defendant's and defense counsel's participation/objection thereto is all set out in the Court's opinion letter of March 23, 2017, which is incorporated herein by express reference.")
[49] JA at 78-82.
[50] JA at 94.
[51] JA at 78-82, 94-96, 101-102.
[52] JA at 102.
[53] JA at 110.

facing a show cause and sanctions due to his improper conduct in relation to the Commissioner's order.

## STANDARD OF REVIEW

On an appeal like the one before this Court, the questions before the Court are subject to an abuse of discretion standard. *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011).

## ARGUMENT

### I. THE TRIAL COURT DID NOT ERR IN FINDING THAT DEFENDANT MCCULLEY'S MULTIPLE GENERAL APPEARANCES, BEFORE AND AFTER THE FILING A MOTION TO VACATE, WAIVED ANY OBJECTIONS TO THE ALLEGED DEFECTS IN SERVICE.

Virginia law has established the proper procedure for challenging a judgment, when a judgment debtor receives a summons for debtor interrogatories, but believes the underlying judgment is void because of an alleged defect in service. *See e.g.*, *Mack v. Dunleavy*, 86 Va. Cir. 84, 85 (Norfolk 2012) (defendant filed a petition for temporary injunction to stay collection efforts and to set aside the default judgment); *John Deere Indus. Equip Co. v. Wyne Excavating, Inc.*, 32 Va. Cir. 309, 310 (Spotsylvania 1993) (Defendant filed a Motion to Set aside the judgment and did not appear at debtor interrogatories). This clearly established process for

challenging a judgment, without waiving objections, was not followed by McCulley.

The Supreme Court of Virginia has detailed the law on general appearances as follows:

> **An appearance for any other purpose than questioning the jurisdiction of the court** -- because there was no service of process, or the process was defective, or the service thereof was defective, or the action was commenced in the wrong county, or the like -- is general and not special, although accompanied by the claim that the appearance is only special.

*Norfolk & O. v. R. Co. v. Consolidated Turnpike Co.*, 111 Va. 131, 136, 68 S.E. 346, 348, 1910 Va. LEXIS 15, *10 (Va. 1910) (emphasis added); *accord Gilpin v. Joyce*, 257 Va. 579, 581, 515 S.E.2d 124, 125, 1999 Va. LEXIS 54, *3 (Va. Apr. 16, 1999); *see also, Sun Co. v. Burruss*, 139 Va. 279, 284, 123 S.E. 347, 348, 1924 Va. LEXIS 106, *10 (Va.1924) (explaining that any other motion, besides contesting jurisdiction, constitutes a general appearance). McCulley's multiple general appearances are detailed in the trial court's Statement of Fact[54] and written opinion[55] include, but are not limited to:

- Making a Motion to Continue to the Commissioner in Chancery to continue the debtor interrogatory from September 9, 2016 to September 27, 2016, prior to filing a Motion to vacate.[56]

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[54] JA at 101-102 (Statement of Facts).
[55] JA at 79, 94, 101.
[56] JA at 79, 94, 101.

- Appearing and fully participating in debtor interrogatories on September 27, 2016, without objection.[57]

- Producing some documents in response to Commissioner in Chancery's October 12, 2016 order.[58]

- Requesting an additional stay of debtor interrogatory and show cause motion, not via special appearance, in January 2017.[59]

The trial court, based on these multiple general appearances, in applying the law of Virginia, properly held that "Defendant's participation in the post-judgment debtor interrogatory for months… constituted a waiver."[60]

Defendant McCulley, who was represented by licensed legal counsel, elected to not pursue the proper procedure outlined in the above cases,[61] but instead made general appearances **before**[62] and **after**[63] filing a motion to vacate.[64] These multiple general appearances, as ruled by the trial court

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[57] JA at 79, 94.
[58] JA at 79, 94.
[59] JA at 79, 94.
[60] JA at 82.
[61] *See e.g., Mack v. Dunleavy*, 86 Va. Cir. 84, 85 (Norfolk 2012); *John Deere Indus. Equip Co. v. Wyne Excavating, Inc.*, 32 Va. Cir. 309, 310 (Spotsylvania 1993).
[62] JA at 79 ("On September 9, 2016, Defendant's counsel contacts Commissioner Grogan's office to reschedule [Motion for Continuance] debtor interrogatory…. On September 14, 2016, the request to reschedule [motion to continue] the debtor interrogatory is granted… defendant files Motion to Vacate on September 19, 2016.").
[63] JA at 79, 94, 101-102.
[64] JA at 79, 94, 101-102.

in conformity with established precedent, waived any objection to the alleged defects in service.[65] *See e.g*., *Maryland Cas. Co. v. Clintwood Bank, Inc*. 155 Va. 181, 186, 154 S.E. 492, 494 (1930) (any action by a defendant, except an objection to jurisdiction, recognizing a case as in court amounts to a general appearance); *Shephard v. Starbuck*, 118 Va. 682, 684 (1916) (the making of a motion for continuance constitutes a general appearance); *Gilpin v. Joyce,* 257 Va. 579, 581, 515 S.E.2d 124, 125, 1999 Va. LEXIS 54, *3 (Va. Apr. 16, 1999) (a general appearance "is a waiver of process, equivalent to personal services of process, and confers jurisdiction of the person on the court"); *New Life Christian Church v. Dynabilt Tech. Int'l Corp.*, 59 Va. Cir. 399, 402, 2002 Va. Cir. LEXIS 367, *8 (Norfolk 2002)(Defendant made a general appearance when it appeared, by counsel, to request a continuance and extension of time).

The trial court's ruling is not only supported by Virginia law, but other forums have ruled similarly when addressing analogous fact patterns. For example, a Florida appeals court, in overturning a trial court's decision, held:

> The husband's post-judgment participation at a hearing, along with his counsel's notice of appearance, without a simultaneous objection to service of process, would still result in a waiver of the husband's right to contest the trial court's exercise of

[65] JA at 79, 94, 101-102

> personal jurisdiction. *Johnson v. Dep't of Revenue ex rel. Lamontagne*, 973 So.2d 1236, 1239 (Fla. 1st DCA 2008) ("[A]lthough a court has already entered judgment, a party waives the right to contest personal jurisdiction by entering a general appearance without contesting personal jurisdiction at the same time."); *Dep't of Revenue ex rel. King v. Blocker*, 806 So.2d 607, 609-10 (Fla. 4th DCA 2002) (holding the **defense of insufficient service was waived where** the defendant made a **general appearance at a contempt hearing** after entry of the final judgment).

*Sheila Scott-Lubin v. Paul Lubin*, No. 4D09-4609 (Fla. 4th DCA, December 8, 2010)(emphasis added). The trial court did not err, but ruled consistent with established precedent.

A. McCulley's General Appearances Prior to Filing a Motion to Vacate waived alleged defects in Service under Established Precedent since 1916.

The trial court found that on September 9, 2016, prior to filing a Motion to Vacate, McCulley made and was granted a Motion for a Continuance.[66] Under Virginia law dating back to 1916, "[i]f…the defendant makes or accepts a motion for a continuance… he thereby waives all defects in process…" *Shephard v. Starbuck*, 118 Va. 682, 684 (1916) (internal citations omitted). Just like in *Shephard*, McCulley sought and was granted a continuance, before his later attempted special appearance in filing a Motion to Vacate.[67] The motion for a continuance was a general

[66] JA at 79, 94.
[67] JA at 79, 94.

appearance under established law and waives any purported defects in service. *Shephard v. Starbuck*, 118 Va. 682, 684 (1916).

Without addressing *Shepard*[68] and its critical impart, McCulley argues that under *Lyren v. Ohr*, that he did not make a general appearance because he subsequently made a "special appearance" when later filing his Motion to Vacate.[69] *Lyren v. Ohr*, 271 Va. 155, 623 S.E.2d 883 (2006). This argument is unpersuasive because these motions were not made simultaneously. McCulley's first general appearance, his September 9, 2016 Motion for Continuance,[70] was made 10 days prior to his Motion to Vacate on September 19, 2016.[71] McCulley's reliance on *Lyren v. Ohr* and Va. Code § 8.01-277 is misplaced and distinguishable, as he fails to meet the contemporaneous requirement of both common law and statute.

McCulley's making of a Motion for Continuance constitutes a general appearance. Consistent with *Shephard*, this Court should deny the appeal.

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[68] The trial Court cited *Shephard v. Starbuck*, 118 Va. 682, 684 (1916) in its written opinion. Yet, McCulley has elected to ignore this case in his motion to reconsider and in his Opening Brief.
[69] JA at 79, 94.
[70] JA at 79, 94.
[71] JA at 79, 94.

B. There is nothing in trial court's record to support McCulley's claim that he participated in debtor interrogatories under protest.

In efforts to secure this appeal, McCulley claims that he participated in the debtor interrogatories only under protest. Yet, McCulley is unable to cite in the trial court record to where he contemporaneously made and preserved any such objections to the trial court and/or the commissioner in chancery as required by VA Sup. Ct. R. 5:25.[72] *See infra*, Section II (A)(for more detailed discussion on McCulley's failure to preserve objections and record for appeal).

McCulley's first general appearance was his Motion for Continuance on September 9, 2016.[73] There is nothing in the record to suggest this Motion and corresponding general appearance was made under duress or based on any interaction with third parties. The trial court record does not reflect any communication with Brooks until after that event.[74] Even if the Court accepted McCulley's claim, which was not contemporaneously objected to, not made part of the record or preserved for appeal, that he appeared at the actual debtor interrogatory under protest, his argument

[72] *See* JA generally; *see also* JA 101-102 (Statement of Facts).
[73] JA at 79, 94.
[74] *See* JA generally; *see also* JA 101-102 (Statement of Facts)

would still fail. McCulley's general appearance in making the Motion for a Continuance, waived any and all objections to purported defects in service.

C. The Policy Concerns Raised by McCulley are Unpersuasive.

McCulley argues that the trial court's ruling, consistent with precedent dating back until 1916, would "create a disincentive for future plaintiffs to comply with service provisions…and prejudice all future defendants."[75] This argument is unpersuasive, ignores the availability of established procedure for challenging judgments and is inapplicable to the case as hand.

McCulley elected to not seek an injunction or file anything with the trial court seeking a stay of collection efforts in conformity with the proper available process detailed in the case law.[76] After participating in post judgment collection proceedings, McCulley waited months, until both he and his company, Plastic Lumber, were facing a show cause for violating an order to seek a hearing on his Motion to Vacate.[77]

The facts of this case reveal that the public policy concern should actually be judgment debtors, like McCulley, who attempt to avoid paying

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[75] Opening Brief, p. 14.
[76] *See* JA generally; *see also* JA 101-102 (Statement of Facts); *compare Mack v. Dunleavy*, 86 Va. Cir. 84, 85 (Norfolk 2012); *John Deere Indus. Equip Co. v. Wyne Excavating, Inc.,* 32 Va. Cir. 309, 310 (Spotsylvania 1993).
[77] JA at 79, 94, 101.

their debts, participate in debtor interrogatories, violate orders, and only bring their purported defect to the trial court for hearing when they are about to face the consequences of their malfeasance. This type of lie in wait approach, where a judgment debtor waits months and only brings forward its purported claim after he has abused and obstructed the collection process, must not be indulged by the Court. This is a real policy concern.

Virginia common law has developed a clear procedure for challenging judgments and addressing collection efforts.[78] McCulley's policy concern ignores these cases and the reality that this procedure is and remains available. If the legislature believed that a Motion to Vacate should automatically stay enforcement efforts, they could legislate that. However, that is not the law and a judgment is valid and can be pursued until the trial court rules otherwise. McCulley appears to suggest that an automatic stay should apply when a Motion to Vacate is filed, until he or any debtor decides to set a hearing.

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[78] *See e.g.*, *Mack v. Dunleavy*, 86 Va. Cir. 84, 85 (Norfolk 2012),*John Deere Indus. Equip Co. v. Wyne Excavating, Inc.,* 32 Va. Cir. 309, 310 (Spotsylvania 1993).

The trial court's decision does not change the reality that improper judgments can and will be challenged in the appropriate process. For the foregoing reasons, the Court should deny the appeal.

## II. THE TRIAL COURT DID NOT ERR IN FINDING THAT DEFENDANT MCCULLEY'S MULTIPLE GENERAL APPEARANCES IN DEBTOR INTERROGATORIES, BEFORE AND AFTER FILING A MOTION TO VACATE WAIVED ANY JURISIDICTION ARGUMENTS, AND THAT BROOKS' CONDUCT AND REPRESENTATIONS WERE APPROPRIATE.

Based on the evidence and testimony, the trial court, properly held that McCulley's multiple general appearances for months, before and after filing a Motion to Vacate, waived any objection to the alleged defects in service. *See supra*, Section I.

The trial court did not err in rejecting McCulley's unsubstantiated, irrelevant and improper arguments relating to Brooks' purported representations to McCulley regarding applicable law. Additionally, McCulley failed to contemporaneously object and otherwise preserve these issues for appeal.

### A. McCulley failed to contemporaneously object and preserve his objections and purported grounds for appeal.

The trial court record reflects that McCulley voluntarily appeared and participated at debtor interrogatory, without objection.[79] This finding of fact

[79] JA at 79, 94, 101-102.

should not be disturbed on appeal. There is nothing in the trial court record to support McCulley's claims that: (a) McCulley contemporaneously objected to the debtor interrogatory, (b) that McCulley either requested or was denied a stay on September 27, 2016 at the debtor interrogatory, (c) McCulley contemporaneously raised any arguments or objections to the Commissioner's decision on that same day, (d) the arguments Brooks allegedly raised in response to this motion, and (e) the basis of the Commissioner's purported denial of the alleged Motion for Stay on September 27, 2016, except for McCulley's claims in his Motion to Reconsider filed on April 10, 2017.

McCulley was provided a full hearing on his Motion to Vacate and elected to not put on any testimony or any evidence supporting his claims (he did not even make a proffer of such). At no time has McCulley claimed that he was prevented from doing so, or offered any explanation for why he did not put on any such evidence. McCulley was provided a full and fair opportunity for his claims to be heard.

As such, McCulley has failed to contemporaneously object to and preserve such issues for appeal, as required under Rule 5:25.[80] *See e.g.,*

[80] VA. Sup. Ct. R. 5:25 provides "…unless an objection was stated with reasonable certainty at the time of the ruling…"

*Prince Seating Corp. v, Radideau*, 275 Va, 468, 659 S.E.2d 305, 2008 Va. LEXIS 45 (2008) (denying appeal of default judgment because the record did not reflect/support arguments being raised); *see also Omohundro v. Arlington County*, 194 Va. 773, 778, 75 S.E.2d 496, 499 (1953) ("We can consider only the evidence presented in the record. Questions raised in the brief about evidence not shown in the record cannot be considered by us.")

The trial court record reveals the opposite of what McCulley claims, providing that, "[o]n September 27, 2017 defendant [McCulley] personally appears, with counsel, at debtor interrogatory and fully participates. He makes a general appearance and does not object to the hearing."[81] The trial court's Statement of Facts[82] makes no reference to any of McCulley's purported claims or alleged facts.[83] As such, under Rule 5:25, McCulley has failed to contemporaneously object and preserve such issues for appeal. *See e.g, Rose v. Jacques*, 268 Va 137, 597 S.E.2d 64. 2004 Va. LEXIS 92 (2004) (Defendant failed to preserve arguments because they failed to make offers of proof or otherwise preserve the objections). These objections and alleged errors must be deemed waived, and also denied.

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[81] JA at 79; *see also*, JA at 79, 94, 101-102.
[82] JA at 79, 94, 101-102.
[83] JA at 101-102.

B. McCulley elected to not pursue a temporary injunction to stay the collection efforts.

At no time did McCulley avail himself of the proper process for challenging the judgment and preventing collection efforts. *See infra,* Section I. McCulley now attempts to shift responsibility for his decision to not properly pursue remedies that may have been available to him. The trial court record does not reflect why McCulley elected to not pursue any relief from the trial court to stay or enjoin collection efforts, including debtor interrogatories, despite the case law that provided McCulley ample guidance. *See e.g.*, *Mack v. Dunleavy*, 86 Va. Cir. 84, 85 (Norfolk 2012) (defendant filed a petition for temporary injunction to stay collection efforts and to set aside the default judgment).

McCulley was represented by legal counsel and could have pursued a remedy through proper channels, or he could have elected to not appear at the debtor interrogatory at all.[84] McCulley cannot salvage these decisions by attempting to claim reliance[85] on Brooks' counsel statement of law on the eve of the debtor interrogatory. At no time did Brooks represent

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[84] *See* Section I.

[85] Noting that McCulley does not cite to anywhere in the record where the Commissioner relied on such positions in making a determination about staying the debtor interrogatory proceedings.

to McCulley, the trial court, or the Commissioner that McCulley could not seek an injunction or other relief from the trial court. [86]

C. Brooks' Articulated Legal Position Regarding Stays and Judgments was Appropriate and Proper.

Brooks correctly presented the law as it pertains to stays, specifically that the filing of a motion to vacate (regardless of whether a party, like McCulley, had already made a general appearance before the filing of such a motion) does not create an automatic stay, like a bankruptcy petition, to stop enforcement efforts.[87] McCulley was free and able, at all times, to seek an injunction from the trial court, and had ample time to do so.[88] The trial court record shows that Brooks did not object to a Motion for Stay until December 2016, months after the debtor interrogatory occurred, when McCulley sought a stay of the Motion for Show Cause. As such, McCulley cannot claim that the Commissioner relied on any such arguments prior to that date for estoppel purposes.

At no point did Brooks represent to McCulley, the trial court or the Commissioner that McCulley could not seek an injunction or other relief from the trial court.[89] Brooks made it clear that no automatic stay exists

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[86] *See* JA generally; *see also* JA 101-102 (Statement of Facts).
[87] JA at 90.
[88] *See* JA generally; *see also* JA 101-102 (Statement of Facts).
[89] JA at 79, 94, 101-102.

and he would object to any such motion that may be raised to the Commissioner.[90] The trial court record does not reflect that any such motion for relief was ever actually made by McCulley, prior to or at the debtor interrogatory, in fact it reflects the opposite.[91]

Any suggestion that Brooks has been inconsistent in his position or that Brooks did not accurately represent the law is disingenuous and without merit. Furthermore, McCulley had legal counsel during the entire process and Brooks invited McCully to provide law to support his position on the imposition of an automatic stay (McCulley elected not to).[92]

McCulley and his counsel misrepresent Brooks' position regarding a stay in efforts to remedy McCulley's decision to not pursue an injunction. McCulley does not and cannot cite to anywhere in the record where he actually made a motion for stay (except for December 2016, in relation to McCulley's motion for show cause) or preserved an objection to the Commissioner's purported denial of his alleged motion on September 27, 2016.[93] Furthermore, McCulley fails to reference in the record where Brooks purportedly made any arguments to the Commissioner regarding

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[90] JA at 90 ("I am unaware of any precedent which would allow a stay simply because a debtor filed a motion requesting relief…").
[91] *See* JA generally; *see* also JA 79, 101-102 (statement of facts).
[92] JA at 90.
[93] *See* JA generally; *see* also JA 101-102 (statement of facts).

the stay, except as to McCulley's December 2016 request for stay on Brooks Motion for show cause.[94] As such, there is no record that any tribunal ever relied on Brooks statements or arguments in making such a determination. *See generally*, *Lowery v. Stovall*, 92 F.3d 219, 1996 U.S. App. LEXIS 19535 (4th Cir. Va. Aug.6, 1996) (discussion of requirements of judicial estoppel, including Judicial acceptance of that position. "Judicial acceptance means only that the first court has adopted the position urged by the party . . . as part of a final disposition."). As there was no reliance, judicial estoppel does not apply. Even if the Commissioner or tribunal had heard this argument and relied, McCulley did not contemporaneously object or preserve this issue for appeal, and has therefore waived such claims.

The lack of reliance by the commissioner or any tribunal distinguishes this case from *Norfolk & O. v. R. Co. v. Consolidated Turnpike Co*., as relied upon by McCulley. McCulley's argument is not well taken and should be rejected by this Court.

[94] JA at 79.

D. This Argument is Moot Because McCulley's First General Appearance was on September 9, 2016, Before Ever Contacting Brooks.

On September 9, 2016, McCulley made his first general appearance in making a Motion for a Continuance.[95] As the record reflects, that was prior to any communication with Brooks. That general appearance waived any and all arguments regarding the alleged defects in service. *Shephard v. Starbuck*, 118 Va. 682, 684 (1916).

This fact and finding is determinative, and removes the need for the Court to review this issue any further. Once McCulley made the general appearance on September 9, 2016, the later alleged representations or legal arguments of Brooks became moot. The appeal should therefore be denied.

E. McCulley's Claim of "Misconduct" is Improper and Unsupported by the Record.

McCulley's claim that Brooks or his counsel engaged in misconduct is equally wrong and unsupported by the trial court record. McCulley attempts to rely on *Abel v. Smith*, 151 Va. 568, 144 S.E. 616 (1928) to suggest that Brooks engaged in "misconduct" in providing his view regarding the

[95] JA at 79, 94, 101-102.

applicable law of automatic stays. As discussed above,[96] the trial court record does not reflect any improper conduct, as Brooks accurately presented the law regarding automatic stays and invited McCulley to offer other authority (which McCulley declined to do). Unlike the plaintiff in *Abel*, Brooks has not engaged in any improper, suspect or otherwise nefarious conduct.

McCulley now asks this Court to permit him to remedy his own strategic errors in electing to make general appearances, by attempting to shift responsibility to Brooks. This improper and unsupported attempt must be denied.

## CONCLUSION

For the reasons stated above, appellee Brooks & Co. General Contractors, Inc. pray that that the Court deny his appeal. Appellee further requests that the Court remand this case to the trial court for a determination and award of additional attorney's fees and costs in defending this appeal.

BROOKS & CO.
GENERAL CONTRACTORS, INC.

By: _____/s/_____
Counsel

[96] *See* Section II (C).

Bradley P. Marrs (VSB No. 25281
Patrick C. Henry II (VSB no. 80468)
Marrs & Henry
7202 Glen Forest Drive, Suite 307
Richmond, VA 23226
(804) 662-5715 Phone
(804) 662-5712 Facsimile
e-mail bmarrs@marrslaw.com
or phenry@marrslaw.com
*Counsel for Appellee*

## CERTIFICATE

I certify compliance with Rule 26 as follows:

1. That this Brief of Appellee does not exceed 50 pages.

2. A PDF version of this Opening Brief of Appellee has been filed through VACES, and three paper copies delivered to the Clerk's Office on this 5th day of March 2018.

3. An electronic version has also been delivered to Counsel for Appellant on March 5, 2018:

Richard T. Booker, Esquire
MCDONALD, SUTTON & DUVAL PLC
5516 Falmouth Street
VISTAS II - Suite 108
Richmond, Virginia 23230
rbooker@mcdonaldsutton.com

/s/

Bradley P. Marrs (VSB No. 25281
Patrick C. Henry II (VSB no. 80468)
Marrs & Henry
7202 Glen Forest Drive, Suite 307
Richmond, VA 23226
(804) 662-5715 Phone
(804) 662-5712 Facsimile
e-mail bmarrs@marrslaw.com
or phenry@marrslaw.com
*Counsel for Appellee*