

THE ARKANSAS COURT OF APPEALS HOLDS SERVICE BY
WARNING ORDER INSUFFICIENT FOR JURISDICTIONAL
PURPOSES WHERE APPELLEE HAD BEEN TO DEBTOR'S PLACE
OF RESIDENCE, CONSTITUTING ACTUAL KNOWLEDGE OF
DEBTOR'S WHEREABOUTS AND REQUIRING ACTUAL NOTICE.

In *Scott v. Wolfe*,¹ the Arkansas Court of Appeals held a default judgment previously entered against appellant, Karen Scott, *void ab initio*, reversing the circuit court and setting aside the judgment for want of jurisdiction.² The appellee, Jim Wolfe, had sought to revive the default judgment entered against Scott on September 13, 2000, which awarded him \$19,800 in damages and \$1,000 in attorney fees.³ However, because Wolfe had personally been to Scott's residence years ago, the court determined Wolfe had "actual knowledge" of Scott's whereabouts.⁴ Service by warning order is only available to a moving party after making a "diligent inquiry" into the other's whereabouts.⁵ Thus, when it entered the default judgment against her, the Hot Spring County Circuit Court lacked jurisdiction over Scott because Wolfe never attempted to contact Scott at the same residence.⁶

The facts leading to this case began in the year 1994 when Wolfe, a goat breeder from Greenwood, Sebastian County, placed an ad in the Arkansas Democrat-Gazette seeking to purchase purebred registered goats to which Scott responded.⁷ The two entered into an agreement where Scott was to sell a number of purebred goats to Wolfe.⁸ Thereafter, Wolfe traveled to Scott's Traskwood residence in Saline County, where he purchased the goats subject to Scott's future presentment of the goats' registration papers.⁹ Scott never fulfilled her obligation to give Wolfe the registration papers, and Wolfe was forced to sell the goats at a price that he asserts to be lower than the fair-market value of goats sold with purebred registration documentation.¹⁰

In 2000, Wolfe filed suit to recover the difference.¹¹ According to him, Scott lived in Malvern, Hot Spring County, and did so at all relevant times.¹²

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1. 2011 Ark. App. 438, at 2, ___ S.W.3d at ___.
 2. *Id.*, ___ S.W.3d at ___.
 3. *Id.* at 4, ___ S.W.3d at ___.
 4. *Id.* at 8, ___ S.W.3d at ___.
 5. *Id.* at 7, ___ S.W.3d at ___ (citing ARK. R. CIV. P. 4(f)(1) (2000)).
 6. *Scott*, 2011 Ark. App. 438, at 8, ___ S.W.3d at ___.
 7. *Id.*, at 2, ___ S.W.3d at ___.
 8. *Id.*, ___ S.W.3d at ___.
 9. *Id.*, ___ S.W.3d at ___.
 10. *Id.* at 2-3, ___ S.W.3d at ___.
 11. *Id.*, ___ S.W.3d at ___.

Wolfe's attorney mailed a complaint and summons to a process server in Malvern who was unable to locate and serve Scott.¹³ Wolfe's attorney also mailed a file-marked copy of the summons and complaint to Scott at her last known address in Malvern.¹⁴ The envelope was returned to Wolfe's attorney, with the marking "Returned to Sender, No Such Number."¹⁵ On request by Wolfe's counsel, the circuit court published a warning order against Scott in a local newspaper, and Wolfe's counsel again mailed a certified copy of the complaint and summons, restricted delivery, to Scott's last-known address in Malvern.¹⁶ On September 13, 2000, the circuit court acknowledged that Scott had not responded to Wolfe's complaint, and entered the previously mentioned default judgment against her.¹⁷

In 2010, Wolfe again petitioned the court, claiming Scott had failed to comply with the order and seeking its reestablishment for an additional ten-year period.¹⁸ Scott objected, stating that she had lived at her Traskwood residence since 1994, and that Wolfe knew of this.¹⁹ Nevertheless, the circuit court granted the revival, basing its decision largely on the fact that, in 2006 or 2007, Scott had learned of a lien against her property, to which she should have investigated.²⁰ Scott appealed the circuit court's decision to the Arkansas Court of Appeals, claiming that the former lacked personal jurisdiction to enter the judgment against her in the first place, thus, violating her right to due process.²¹

On appeal, the court discussed the promulgations set forth in the Arkansas Rules of Civil Procedure, first considering the availability of setting aside default judgments.²² Next, to resolve the first consideration, the court then discussed the availability of constructive notice and actual notice, and the requirements of meeting each, respectively.²³

First, Scott argued that the default judgment against her should be set aside as it was "void."²⁴ Applying Rule 55(c), the court stated that default judgments shall be set aside for

(1) mistake, inadvertence, surprise, or excusable neglect;

12. *Scott*, 2011 Ark. App. 438, at 3, ___ S.W.3d at ___.

13. *Id.* at 3, ___ S.W.3d at ___.

14. *Id.*, ___ S.W.3d at ___.

15. *Id.*, ___ S.W.3d at ___.

16. *Id.* at 3, ___ S.W.3d at ___.

17. *Id.* at 4, ___ S.W.3d at ___.

18. *Scott*, 2011 Ark. App. 438, at 6, ___ S.W.3d at ___.

19. *Id.* at 4–5, ___ S.W.3d at ___.

20. *Id.* at 5, ___ S.W.3d at ___.

21. *Id.* at 6, ___ S.W.3d at ___.

22. *Id.*, ___ S.W.3d at ___.

23. *Id.* at 7–8, ___ S.W.3d at ___.

24. *Scott*, 2011 Ark. App. 438, at 7–8, ___ S.W.3d at ___.

- (2) the judgment is void;
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or
- (4) any other reason justifying relief from the operation of the judgment.²⁵

A default judgment is void if entered against a party over whom the court lacks jurisdiction.²⁶ For a court to have jurisdiction over a party, that party must receive proper service.²⁷ The court declared that constructive notice may be given by warning order issued by the clerk of the court, but only after a diligent inquiry into the party's whereabouts has been made,²⁸ and the moving party holds the burden of proving that he or she made a diligent inquiry beyond, at the least, a mere recitation in an affidavit.²⁹

The court reasoned that because Wolfe had actually been to Scott's residence in Traskwood, Wolfe had "actual knowledge" of her whereabouts, thus obligating him to serve Scott with actual notice of his complaint against her.³⁰ The court found it particularly telling that, even in Wolfe's petition for revival, he listed Scott's residence as 2210 Traskwood Road, Traskwood, Arkansas.³¹ In the court's opinion, all subsequent actions or inactions of the parties were immaterial, because Scott was never served with actual notice as required under Rule 4(f).³² The circuit court lacking jurisdiction over Scott to begin with rendered all proceedings and judgments null and void for lack of due process.³³

This case is significant to the development of procedural law in Arkansas for its illustrative workings. The court established one way in which a party can *fail* to make a "diligent inquiry" into the whereabouts of an adversary. The ruling did not change the law; rather, it shed light on how a litigant can fail to satisfy the law, even when the requirements of law, on its face, are met. Simply going through the motions in mailing complaints, requesting acknowledgments of the court, and proceeding to trial will not always be

25. *Id.*, ___ S.W.3d at ___ (citing ARK. R. CIV. P. 55(c) (2010)).

26. *Scott*, 2011 Ark. App. 438, at 8, ___ S.W.3d at ___ (citing Grand Slam Stores, LLC v. L & P Builders, Inc., 92 Ark. App. 210, 213 S.W.3d 6, 8 (2005)).

27. *Scott*, 2011 Ark. App. 438, at 8, ___ S.W.3d at ___ (citing Nucor Corp. v. Kilman, 358 Ark. 107, 186 S.W.3d 720 (2004)).

28. *Scott*, 2011 Ark. App. 438, at 7, ___ S.W.3d at ___ (citing ARK. R. CIV. P. 4(f)(1)).

29. *Scott*, 2011 Ark. App. 438, at 7, ___ S.W.3d at ___ (citing Smith v. Edwards, 279 Ark. 79, 82, 648 S.W.2d 482, 484 (1983)).

30. *Scott*, 2011 Ark. App. 438, at 8, ___ S.W.3d at ___ ("Comment 12 to Rule 4(f) states that the rule requires service resulting in actual notice in all cases where the identity or whereabouts of the defendant is known.").

31. *Id.* at 4, 7, ___ S.W.3d at ___.

32. *Id.* at 8, ___ S.W.3d at ___ (citing ARK. R. CIV. P. 4(f)).

33. *Scott*, 2011 Ark. App. 438, at 8, ___ S.W.3d at ___ (citing Wilson v. Beckett, 95 Ark. App. 300, 236 S.W.3d 527 (2006)).

sufficient. The court took the opportunity to highlight the necessity of using common sense in the reasonable practice of law and its willingness to hold attorneys and their clients accountable for their uses of the judicial system.

** J. Andy Marshall*