SCt 94256

In the Missouri Supreme Court

Ray Charles Bate and Deborah Sue Bate, Appellants

v.

Greenwich Insurance Company, Respondent

Appeal from the Circuit Court of Boone County, Missouri
13th Judicial Circuit
The Honorable Christine Carpenter

Substitute Appellants' Brief

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Table of Contents

Table of Cases and Authorities

Cases

Missouri Statutes and Rules

Statement of the Issues

The trial court erred in setting aside a default judgment properly entered against Greenwich Insurance Company on March 22, 2010 for $3,000,000. Missouri Supreme Court Rule 54.18 states that where a statute contains provisions for a method of service, service may be made pursuant to the provisions of the statute or as provided by rule. Greenwich Insurance Company is a foreign insurance company. The Bates chose to serve Greenwich, in their civil action seeking underinsured motorist benefits, pursuant to §375.906 R.S.Mo., which provides the method of service upon foreign insurance companies. This statute requires service upon the director of the department of insurance who is required to immediately forward the process by first class mail directed to the secretary of the foreign insurance company. The sheriff's return showing service upon the director of the department of insurance, and the department of insurance director's affidavit showing service by first class mail upon Greenwich pursuant to §375.906, were both filed in the action. As the Bates proved proper service and Greenwich's failure to timely respond, the trial court properly entered default judgment against Greenwich.

More than two years later, Greenwich moved to set aside the default as void for lack of personal jurisdiction arguing that Rule 54.15 requires service upon it by certified or registered mail. Greenwich also argued that the trial court lacked subject matter jurisdiction because the petition failed to state a claim and that the trial court's entry of a default judgment after service was made pursuant to §375.906 violated its constitutional

rights. The trial court set aside the default finding no valid service of process and therefore no personal jurisdiction.

The appellate court affirmed the trial court's judgment, determining that Rule 54.18 only provided a choice for the "method" of service, and that even if §375.906 permitted the "method" of serving a foreign corporation by first class mail, Rules 54.20 and 54.15 require "proof" of service by registered or certified mail. The appellate court determined that the Bates' compliance with §375.906 was legally insufficient on its own to confer personal jurisdiction over Greenwich in the absence of proof of notice as required by Rules 54.15(b) and 54.20(c). The appellate court concluded that a foreign insurance company, if served by first class mail pursuant to §375.906 may ignore the service because unless it consents to jurisdiction or waives the objection to personal jurisdiction, service that is accomplished pursuant to §375.906 will not confer personal jurisdiction in the absence of proof of service by registered or certified mail.

The Bates sought transfer to this Court to address and answer: 1) whether this Court intends Rules 54.15 and 54.20 to supplant the method and notice of service expressly provided by the legislature in §375.906 for service upon foreign insurance companies, which requires that the director of insurance provide notice of service to foreign insurance companies by first class mail; and 2) whether this Court intends Rule 54.18, stating that when a statute contains provisions for a method of service, service may be made pursuant to the provisions of the statute or as provided in the rules, to only address the "method" and not the "proof" of service.

The trial court erred in setting aside the default. The Bates chose, accomplished and proved service pursuant to the statutory provisions set forth in §379.906, as is permitted by Rule 54.18. The appellate court's interpretation of Rule 54.18 to apply to the "method" and not the "proof" of service, and its conclusion that Rules 54.15 and 54.20 "supplement" §375.906 and require proof that the director of insurance accomplished service by registered or certified mail is irreconcilable with precedent.

In addition, the trial court erred in setting aside the default because "failure to state a claim" no longer constitutes a subject matter jurisdiction or constitutional due process defect rendering a default judgment void. The trial court did not act arbitrary or unreasonably as Greenwich was served with notice of the action and failed to timely respond. The trial court had proper personal and subject matter jurisdiction over Greenwich and the court did not enter judgment in a manner that violated Greenwich's constitutional rights. The trial court erred in setting aside the default. Under this court's de novo review, the judgment should be reversed with directions upon remand to reinstate the judgment against Greenwich.

Jurisdictional Statement

On January 24, 2013 the trial court entered judgment setting aside a prior default judgment entered on March 22, 2010 against Greenwich Insurance Company. The trial court ruled that there was no valid service of process and therefore no personal jurisdiction. On April 29, 2014, the Missouri Court of Appeals for the Western District issued its opinion affirming the trial court's judgment. Upon the Bates' request, this court

accepted transfer on September 30, 2014 and has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

Statement of Facts

On March 8, 2008, Charles Bate and his wife, Deborah, were seriously injured in a motor vehicle accident, when Rocky Wells drove his car across the centerline of Route Y in Boone County, Missouri and struck the Bate vehicle head-on. (L.F. 11, 12; Tr. 4, 5.) The Bates sued Wells in Boone County and on February 23, 2009, they obtained a judgment against Wells for $2,000,000 in favor of Ray Bate and $1,000,000 in favor of Deborah Bate. (L.F. 13.)

On March 30, 2009, Ray and Deborah Bate filed a petition against Cintas Corporation (Charles Bates' employer) and Cambridge Integrated Services Group, Inc. (the insurance administrator for Cintas) and amended their petition on August 24, 2009 to add Greenwich Insurance Company in their claim seeking underinsured motorist benefits pursuant to a policy of insurance issued by Greenwich to Cintas. (L.F. 1, 10-21.)

Service of the August 24, 2009 amended petition upon Greenwich

The first amended petition identified service to Greenwich Insurance Company, a Delaware Corporation, through Douglas M. Ommen, Missouri Director of Insurance, Truman Building, 301 West High Street, Room 63, Jefferson City, Missouri 65101. (L.F. 10.) The summons to Greenwich was issued on August 25, 2009 and served by the Cole County Sheriff on the Director of the Missouri Department of Insurance on August 31,

2009. (L.F. 41; App. A-5.) The original copy of the sheriff's return was filed with the court on September 18, 2009. (L.F. 41; App. A-5.)

On August 31, 2009 the department of insurance director filed an affidavit of service on September 4, 2009 certifying under oath that the service had been mailed by first class mail prepaid as required by §375.906.5 R.S.Mo. to Greenwich, Vice President Toni Ann Perkins, 70 Seaview Avenue, Stanford, CT 06902-5040. (L.F. 42; App. A-6.)

The default hearing against Greenwich

On March 22, 2010 the trial court conducted a default hearing on the Bates' claims against Greenwich. (Tr. 1-13.) At the default hearing, Charles Bate testified that on March 8, 2008, he and his wife were seriously injured when the car in which they were in was hit head on by a car driven by Rocky Wells who drove across the center line on Route Y in Boone County. (L.F. 11, 12; Tr. 4, 5.)

Charles Bate testified that at the time of the accident, he was employed as a salesman by Cintas, a uniform supply company. (Tr. 5, 6.) Being a part of the sales crew, he was required to purchase a vehicle in his own name that met Cintas' specifications, and lease it back to Cintas through the company's lease program. He was required to supply all fuel and to make sales using the vehicle. (Tr. 6.) Cintas furnished maintenance and insurance for the vehicle. (Tr. 6.) Cintas required him to use the insurance it provided. (Tr. 7.)

At the default hearing, counsel for the Bates explained to the court that after the court entered its judgment against Wells for $3,000,000, the Bates filed suit against

Cintas Corporation, the company that employed Mr. Bate; Cambridge, the insurance administrator for Cintas; and Greenwich who issued the insurance policy in force at the time of the accident. (Tr. 3, 8.)

Counsel for Bate provided a detailed explanation to the court of how the Bate leased vehicle was an insured vehicle and underinsured motorists coverage benefits of $5,000,000 extended to Charles and Deborah Bate. (Tr. 9-12; Default hearing exhibits 1-3.) The Wells vehicle was an "underinsured motor vehicle" within the terms of the insurance policies issued by Cambridge and Greenwich. (L.F. 11, 12.) Bate was an insured under a policy of insurance issued by Cambridge and Greenwich. (L.F. 11.) The court admitted into evidence Exhibit 1 (the February 23, 2009 judgment against Wells); Exhibit 2 (the Bate-Cintas lease for the Mercury Montego); and Exhibit 3 (the certified copy of the Greenwich insurance policy). (Tr. 5-8.)

On March 22, 2010 the trial court entered default against Greenwich finding that it had been duly served, as provided by law, but appeared not and made default judgment against Greenwich in favor of Ray Bate for $2,000,000 and Deborah Bate for $1,000,000. (L.F. 17, 18; App. A-2.)

Greenwich moves to set aside the default judgment

On August 6, 2012, Greenwich filed an entry of appearance for purposes of contesting jurisdiction pursuant to Rule 55.03 and §375.261(2). (L.F. 20, 21; App. A-12, 21.) Greenwich filed a motion to set aside the default judgment pursuant to Rule 74.06(b)(4) and §375.261(2). (L.F. 22-29; App. A-19, 21.) Greenwich argued that

§375.261(2) requires service by certified mail and the filing of an affidavit of plaintiff or plaintiff's attorney showing compliance with the statute provisions and that the Bates had not complied with these provisions. (L.F. 22-29.) Greenwich argued that as service was improper, the court never acquired personal jurisdiction over Greenwich and the default judgment should be set aside. (L.F. 22-29.)

The Bates opposed the motion asserting they had established personal jurisdiction over Greenwich by effectuating service pursuant to the requirements of §375.906 R.S.Mo. by proving service upon the director of the division of insurance by the sheriff's return of service and upon Greenwich by the division of insurance director's affidavit, all previously filed in the action. (L.F. 30-61; App. A-23.)

On September 5, 2012, Greenwich filed an amended motion to set aside the default judgment, this time asserting that the default judgment should be set aside because service was not made according to the requirements of Missouri Rules of Civil Procedure 54.15 and Rule 54.20 that require service by certified or registered mail with proof filed in the court with the return receipt attached. (L.F. 62-123; App. A-8, 10.)

Greenwich argued that the rules provided requirements in addition to those set out in §375.906. Greenwich argued that the failure to comply with the service requirements in Rule 54.15 and proof of service requirement of Rule 54.20, showing service by Rule 54.15, resulted in a void judgment for lack of personal jurisdiction. It also argued that the trial court lacked subject matter jurisdiction to enter the default judgment because the Bates' petition failed to state a claim for relief against Greenwich and that the entry of the

default judgment after service pursuant to §375.906 R.S.Mo violated its constitutional rights. (L.F. 62-123.)

The Bates argued that Rule 54.18 provides that a plaintiff may choose to serve a foreign insurance company pursuant to the special service statute §375.906 or by Supreme Court Rule and that they had chosen and complied with all provisions for service and proof of service as required by §375.906. (App. A-9, 23.) They asserted that Greenwich had failed to timely seek relief under any of the provisions of Rule 74.05 or 74.06 and that it was attempting to collaterally attack the default judgment be untimely asserting defenses. (L.F. 124-159.; App. A-17, 19)

A hearing occurred on October 1, 2012 on Greenwich's motion to set aside the default judgment previously entered against it where the parties presented their respective arguments. (Tr. 14-38.)

On January 24, 2013, the trial court entered judgment setting aside the $3,000,000 default judgment it had entered against Greenwich Insurance Company on March 22, 2010. (L.F. 260; App. A-1.) The trial court ruled that there was no valid service of process and therefore no personal jurisdiction. (L.F. 260; App. A-1.) The Bates timely appealed the judgment. (L.F. 157-162.)

On April 29, 2014, the Missouri Court of Appeals for the Western District affirmed the trial court's judgment. The appellate court determined that the method of serving process described in §375.906 was subject to the proof of service requirements found in Rules 54.15 and 54.20. The appellate court concluded that though the Bates had

complied with the "method" of service by first class mail requirements set forth in §375.906, they had not met the "proof" of service by certified or registered mail requirements found in Rules 54.15 and 54.20.

The Bates sought transfer to this Court, which was granted on September 30, 2014.

Point Relied On

The trial court erred in setting aside the default judgment because the judgment was not void as the court had personal and subject matter jurisdiction and did not act in a manner inconsistent with due process of law in that: 1) as permitted by Rule 54.18, the Bates chose, accomplished and proved proper service by first class mail upon Greenwich, a foreign insurance company, pursuant to §375.906 R.S.Mo. and they did not have to effect or prove service by registered or certified mail under Rules 54.15 and 54.20; 2) the court had subject matter jurisdiction to enter the default judgment against Greenwich in the civil action seeking underinsured motorist benefits; and, 3) the court did not act in a manner inconsistent with due process of law when entering the default judgment as Greenwich had been properly served with notice of the action and failed to timely respond.

Strong v. American States Preferred Ins. Co.,

66 S.W.3d 104 (Mo.App. 2001).

A.D.D. v. PLD Enterprises, Inc.,

412 S.W.3d 270 (Mo.App. 2013).

Forsyth Financial Group, LLC v. Hayes,

351 S.W.3d 738 (Mo.App. 2011).

§537.906 R.S.Mo.

Mo.R.Civ.Proc. 54.18.

Mo.R.Civ.Proc. 54.15

Mo.R.Civ.Proc. 54.20

Argument

The trial court erred in setting aside the default judgment because the judgment was not void as the court had personal and subject matter jurisdiction and did not act in a manner inconsistent with due process of law in that: 1) as permitted by Rule 54.18, the Bates chose, accomplished and proved proper service by first class mail upon Greenwich, a foreign insurance company, pursuant to §375.906 R.S.Mo. and they did not have to effect or prove service by registered or certified mail under Rules 54.15 and 54.20; 2) the court had subject matter jurisdiction to enter the default judgment against Greenwich in the civil action seeking underinsured motorist benefits; and, 3) the court did not act in a manner inconsistent with due process of law when entering the default judgment as Greenwich had been properly served with notice of the action and failed to timely respond.

The trial court erred in setting aside the default previously entered against Greenwich. Prior to entry of the March 22, 2010 default judgment, the Bates proved to the court that Greenwich failed to timely answer or respond after proper service was made by first class mail upon Greenwich pursuant to the requirements of §375.906 R.S.Mo. More than two years after entry of the default judgment, Greenwich moved to set aside the default as void for lack of personal jurisdiction arguing that Rule 54.15 requires service upon it by certified or registered mail. This argument is unpersuasive because

Rule 54.18 gives a plaintiff the choice to effect service through statute or rule and the Bates proved that they effected proper service pursuant to the provisions of §375.906 R.S.Mo. They did not have to additionally comply with the certified or registered mail requirements found in Rules 55.15 and 54.20. The trial court erred in setting aside the default judgment.

Greenwich also argued that the trial court lacked subject matter jurisdiction because the petition failed to state a claim and the trial court's judgment was inconsistent with constitutional protections. These arguments are also unpersuasive. "Failure to state a claim" no longer constitutes a subject matter jurisdiction or constitutional due process defect rendering a default judgment void. The trial court's actions were not arbitrary or unreasonable in entering the default in such a manner that violated due process. Greenwich was properly served with notice of the action and failed to timely respond. The trial court had proper personal and subject matter jurisdiction over Greenwich and the court did not enter judgment in a manner that violated Greenwich's constitutional rights. The trial court erred in setting aside the default judgment. Under this court's de novo review, the judgment should be reversed with directions upon remand to reinstate the judgment against Greenwich.

Standard of review

This court's review of the judgment setting aside the default is reviewed de novo. Sieg v. International Environmental Management, Inc., 375 S.W.3d 145, 149 (Mo.App. 2012). The determination of personal jurisdiction is a question of law. Strong v.

American States Preferred Ins. Co., 66 S.W.3d 104, 106 (Mo.App. 2001). In evaluating whether a defendant received valid service of process, this court reviews the trial court's decision de novo. Id.

The judgment was not void under Rule 74.06(b)(4)

The trial court entered the default judgment against Greenwich on March 22, 2010. Greenwich did not move to set the default judgment aside until August 6, 2012. Greenwich was too late to seek relief under Rule 74.05(d) (relief asserting a claim of a meritorious defense and for good cause shown must be requested within one year of entry of judgment). (App. A-17.) Greenwich proceeded under Rule 74.06(b)(4) asserting that the judgment was void. (App. A-19.)

A judgment is void under Rule 74.06(b)(4) only if the circuit court that rendered it: 1) lacked subject matter jurisdiction; 2) lacked personal jurisdiction; or 3) entered the judgment in a manner that violated due process. Sieg, 375 S.W.3d at 149; Forsyth Financial Group, LLC v. Hayes, 351 S.W.3d 738, 740 (Mo.App. 2011). Courts narrowly restrict the concept of a void judgment because they favor finality of judgments. Sieg, 375 S.W.3d at 149; Forsyth, 351 S.W.3d at 740.

The trial court had personal jurisdiction to enter the default judgment

"Service of process must conform to the manner and form established by law to invoke the court's jurisdiction." Strong, 66 S.W.3d at 107. The Bates proved service upon Greenwich, a foreign insurance company, by meeting the requirements of §375.906

R.S.Mo. entitled "Foreign companies to appoint director to receive service—methods—penalty" that states:

1. No insurance company or association not incorporated or organized under the laws of this state shall directly or indirectly issue policies, take risks, or transact business in this state, until it shall have first executed an irrevocable power of attorney in writing, appointing and authorizing the director of the department of insurance, financial institutions and professional registration of this state to acknowledge or receive service of all lawful process, for and on behalf of the company, in any action against the company, instituted in any court of this state, or in any court of the United States in this state, and consenting that service upon the director shall be deemed personal service upon the company.
2. Service of process shall be made by delivery of a copy of the petition and summons to the director of the department of insurance, financial institutions and professional registration, the deputy director of the department of insurance, financial institutions and professional registration, or the chief clerk of the department of insurance, financial institutions and professional registration at the office of the director of the department of insurance, financial institutions and professional registration at Jefferson City, Missouri, and service as aforesaid shall be valid and binding in all actions brought by residents of this state upon any policy issued or matured, or upon any liability accrued in this state, or on any policy issued in any other state in which the

resident is named as beneficiary, and in all actions brought by nonresidents of this state upon any policy issued in this state in which the nonresident is named beneficiary or which has been assigned to the nonresident, and in all actions brought by nonresidents of this state on a cause of action, other than an action on a policy of insurance, which arises out of business transacted, acts done, or contracts made in this state.

…

5. Whenever process is served upon the director of the department of insurance, financial institutions and professional registration, the deputy director of the department of insurance, financial institutions and professional registration, or the chief clerk of the department of insurance, financial institutions and professional registration under the provisions of this section, the process shall immediately be forwarded by first class mail prepaid and directed to the secretary of the company, or, in the case of an alien company, to the United States manager or last appointed general agent of the company in this country; provided, that there shall be kept in the office of the director of the department of insurance, financial institutions and professional registration a permanent record showing for all process served the name of the plaintiff and defendant, the court from which the summons issued, the name and title of the officer serving same, and the day and hour of the service. (App. A-23.)

The Bates proved that service was properly made pursuant to §375.906

On March 30, 2009, Ray and Deborah Bate filed a petition against Cintas Corporation (Charles Bates' employer) and Cambridge Integrated Services Group, Inc. (the insurance administrator for Cintas) and amended their petition on August 24, 2009 to add Greenwich Insurance Company in their claim seeking underinsured motorist benefits pursuant to a policy of insurance issued by Greenwich to Cintas. (L.F. 1, 10-21.)

The first amended petition identified service to Greenwich Insurance Company, a Delaware Corporation, through Douglas M. Ommen, Missouri Director of Insurance, Truman Building, 301 West High Street, Room 63, Jefferson City, Missouri 65101. (L.F. 10.) The summons to Greenwich was issued on August 25, 2009 and served by the Cole County Sheriff on the Director of the Missouri Department of Insurance on August 31, 2009. (L.F. 41; App. A-5.) The original copy of the sheriff's return was filed with the court on September 18, 2009. (L.F. 41; App. A-5.)

On August 31, 2009 the department of insurance director filed an affidavit of service on September 4, 2009 certifying under oath that the service had been mailed by first class mail prepaid as required by §375.906.5 R.S.Mo. to Greenwich, Vice President Toni Ann Perkins, 70 Seaview Avenue, Stanford, CT 06902-5040. (L.F. 42; App. A-6.)

As the Bates proved proper service upon Greenwich by meeting the requirements of §375.906 R.S.Mo., the trial court's original finding that it had personal jurisdiction was correct. Its later judgment setting aside the prior default judgment finding there was no valid service of process and therefore no personal jurisdiction was wrong.

Rule 54.18 permits a plaintiff may choose service by statute or by rule and as the Bates chose service pursuant to §375.906, they did not have to additionally comply with the registered or certified mail provisions of Rules 54.15 and 54.20

Greenwich argued that compliance with the service by first class mail requirement §375.906 R.S.Mo was ineffective to confer personal jurisdiction upon it because Rule 54.15 requires service upon foreign insurance companies to be made by registered or certified mail and Rule 54.20 requires the filing of proof of the receipt of registered or certified mail.

54.15 Service on Secretary of State, Secretary of Public Service Commission and Director of Insurance states:

> (a) Service of Process. Service of process on the secretary of state, secretary of the public service commission or director of insurance shall be made by serving a copy of the summons and petition, together with any remittance fixed by statute, on the respective official. The service of process shall be made as provided in Rule 54.13 or Rule 54.16.
>
> (b) Notice to Defendant. The secretary of state, secretary of the public service commission or director of the department of insurance shall forthwith mail to the defendant at the defendant's last known address a copy of such service and a copy of the summons and petition. The mailing shall be by registered or certified mail requesting a return receipt signed by addressee only. (App. A-8.)

Rule 54.20 Proof of Service

(b) Outside the State—Officer's Returns—Affidavits of Service

(1) Every officer to whom summons or other process shall be delivered for service outside the state shall make an affidavit before the clerk or judge of the court of which affiant is an officer or other person authorized to administer oaths in such state stating the time, place and manner of such service, the official character of the affiant, and the affiant's authority to serve process in civil actions within the state or territory where such service was made. The court may consider the affidavit or any other evidence in determining whether service has been properly made.

(c) Certificate of Service of State, Secretary of Public Service Commission and Director of Insurance—Mailing of Notice. The notice specified in Rule 54.15 shall be proved by the affidavit of the official mailing such notice. The affidavit shall be endorsed upon or attached to the original papers to which it relates and it, together with the return registered or certified mail receipt, shall be forthwith filed in the court in which the action is pending. (App. A-10.)

Greenwich's argument ignores Rule 54.18 that specifically provides: "[w]here a statute contains provisions for a method of service, service may be made pursuant to the provisions of the statute or as provided by these Rules." Mo.R.Civ.Proc. 54.18 (emphasis added) (App. A-9.). An argument similar to Greenwich's was previously rejected:

> Other methods of service may have adequately conferred personal jurisdiction over Insurer on these facts. See section 375.276 and Rule 54.18. Insured's service on Director nonetheless was in compliance with section 375.906 and sufficed to confirm personal jurisdiction on Insurer as a foreign company. Strong, 66 S.W.3d at 107, 108.

In Strong, the defendant foreign insurer argued that the first class mail service as permitted under §375.906 R.S.Mo. was not sufficient to confer personal jurisdiction, instead, the additional requirements of serving by registered or certified mail as found in §375.261 R.S.Mo. was required. The appellate court rejected that argument, as alternative methods of service exist pursuant to statute and rules. Id. The court recognized that statutes mandate the requirements for process and service and courts "therefore look first to the applicable statutes to determine whether the requisites for effective service of process were met." Strong, 66 S.W.3d at 107. The court noted that §375.906 R.S.Mo. establishes requirements for service on foreign insurance companies doing business within the state:

> Before these foreign insurance companies can conduct business in Missouri, they must execute in writing an irrevocable power of attorney authorizing Director to acknowledge or receive service of process on their behalf in any action. (internal citation omitted) This power of attorney must include an insurer's consent 'that service upon the director shall be deemed personal service upon the company.'

(internal citation omitted) If a company does not execute the requisite power of attorney, it forfeits the right to do business in the state. Id.

The court rejected the insurer's attempt to set aside a default judgment because it argued it never received the service. The court noted that the director had filed an affidavit that the notice was mailed to the insurer by first class mail as required by §375.906:

> When deciding to conduct business in Missouri, Insurer, as a foreign company, consented that service upon Director constituted personal service upon itself. Sections 375.906.1, 375.256. In effect, Insured authorized Director to receive process on its behalf…There is no dispute that director received and acknowledged service of process on Insurer's behalf in this case, and that Director forwarded it to Insurer as required by section 375.906. Id.

The court noted the argument would be different if the plaintiff had not complied with the requirements of the service requirements of the method chosen:

> There is no dispute that the Director received and acknowledged service of process on Insurer's behalf in this case, and that Director forwarded it to Insurer as required by section 375.906.5. *Cf. Grooms*, 32 S.W.3d at 621 (*reversing* trial court's refusal to set aside default judgment where the director undeniably returned the summons and petition to the insured and failed to forward them to the insurer). Insurer claims that it did not receive the service of process from Director. The statute, however, merely requires that Insurer's *de facto* agent, Director, receive

process and mail it to Insurer, to which Director attested having done. *See* section 375.906. As the requirements of section 375.906 have been met, Insurer's first point is denied. Strong, 66 S.W.3d at 107, 108 (original emphasis).

In Grooms v. Grange Mutual Casualty Co., 32 S.W.3d 618, 621 (Mo.App. 2000), the director of insurance found the summons and petition to be insufficient and immediately returned them to plaintiff without ever forwarding to the insurer. The director sent a letter with the returned documents stating: "The Department will endeavor to effect service of process pursuant to statute when the above defects are cured and the corrected documents are served upon us." Grooms, 32 S.W.3d at 619, 620. Plaintiff never attempted to resend the documents and the alleged defects were never cured and no further pleadings or summons was sent to the department of insurance. Id.

In Strong, the appellate court rejected the defendant insurer's argument that though the plaintiff had affected service by the first class mail method outlined in §375.906, the additional requirement of certified or registered mail required in §375.261 should have been met in order to confer personal jurisdiction as to the insurer. Strong, 66 S.W.3d at 107, 108. The appellate court noted the difference between not properly following the requirements of the particular method chosen for service (as in Grooms) versus an argument that service should have been attempted pursuant to a different statute or rule. Id.

Greenwich makes a similar argument and it should be rejected. Before the trial court Greenwich relied heavily upon Maddox v. State Auto. Mut. Ins. Co., 356 S.W.3d

231 (Mo.App. 2011) for its assertion that in addition to meeting the service requirements of §375.906 R.S.Mo, the Bates must also meet the service requirements of Rule 54.15 and proof of service requirements of Rule 54.20. Maddox is not persuasive authority for several reasons. As in Grooms, plaintiff in Maddox did not effectively serve the division of insurance director. In Maddox, the director returned the pleadings to plaintiff with a letter stating: "You failed to include the proper forms or number of forms for acknowledgment of service." Maddox, 356 S.W.2d at 232. As in Grooms, the plaintiff in Maddox did not attempt to correct the alleged defects and because there was no indication that the director ever mailed the petition to the insurer, the default was properly set aside. Id.

Accordingly, in Maddox, there was no proof of compliance with any method of service, whether by statute or rule. The appellate court did not end its analysis there, but instead went on to determine that: "To establish the proof necessary to supply the circuit court with personal jurisdiction to enter the default judgment, the requirements of Rule 54.15 and Rule 54.20 must also be met." Maddox, 356 S.W.3d at 234. The appellate court explained:

> Rule 54.15 supplements §375.906 by additionally requiring the Director to request a signed return receipt from the addressee when forwarding the pleadings. Rule 54.20 establishes the proof which must be presented to the court to establish that, in fact, the defendant has been notified of the pendency of the action. In the absence of proof of service established by the Supreme Court as necessary to

determine that the court has jurisdiction of the person of the defendant. Id., at 234, 235.

This analysis is flawed. Notwithstanding that it is dicta, it also is irreconcilable with the legislature's clear allowance of the method of service set forth in §375.906 R.S.Mo. and this Court's recognition in Rule 54.18 that when a statute provides for a method of service, service may be accomplished by compliance with the statute or by rule. The "proof" requirement in Rule 54.20 of a registered or certified mail receipt appears to be in direct reference to service attempted by Rule 54.15: "The notice specified in Rule 54.15 shall be proved by the affidavit of the official mailing such notice." Rule 54.20(c). The requirement to file proof of the registered or certified mail receipt is required when service is attempted by Rule 54.15, which requires service by registered or certified mail. This analysis is consistent with Strong, wherein the court distinguished between proving service was made pursuant to the method of service chosen versus requiring a different method of service. Strong, 66 S.W.3d at 107, 108. To the extent Maddox is interpreted to require service and proof of service upon a foreign insurance company only by registered or certified mail the opinion should not be followed. It is undisputed in this case that the Bates complied with the statutory requirements of §375.906 and the default judgment should not have been set aside for lack of personal jurisdiction.

Rules 54.15 and 54.20 do not supplement §375.906

Greenwich is a foreign insurance company. In order to do business in Missouri, the legislature requires Greenwich to consent to the methods of service contained in §375.906.1. Greenwich filed the required affidavit and consented to service on the director of the department of insurance as service on Greenwich, as long as the director sent the notice by first class mail as required by §375.906. Section 375.906.5 does not require the director of insurance to provide notice to a foreign insurance company by registered or certified mail. In fact, it mandates notice is to be sent to the foreign insurance company by first class mail. The Department of Insurance has enacted regulations, following the statutory directive, for service on foreign insurance companies, instructing its employees to serve by first class mail, not registered mail. 20 CSR 800-2.010. (App. A-27.)

Section 375.906.5 states that service of process "shall be made" by delivery of a copy of the petition and summons to the director of the department of insurance who "shall" immediately forward "by first class mail" to the secretary of foreign insurance company. The statute expressly states that service as provided in the statute "shall be binding" in all actions brought by residents of this state upon any policy issued or matured, or upon any liability accrued in this state. The statute requires that the director "shall" keep a permanent record showing for the process served, the name of the plaintiff and defendant, the court from which the summons issued, the name and title of the officer serving, and the day and hour of the service. Section 375.906.5.

Prior to the appellate court's opinion, parties interpreted Rule 54.18 to mean that a party could choose to serve a foreign insurance company pursuant to the requirements set forth in §375.906 and the Director of Insurance was permitted to follow the clear language of the statute and the Division of Insurance regulations and provide notice of service upon the Director of Insurance by prepaid first class mail. Strong v. American States Preferred Ins. Co., 66 S.W.3d 104, 107 (Mo.App. 2011) (the Director of Insurance was not required to send notice to the foreign insurance company by registered or certified mail as required in §375.261 because §375.906 permits the Director to forward process to the foreign insurance company by first class mail and Rule 54.18 gives the choice of the method of service requested).

The appellate court's determination that service in compliance with statutory methods must also comply with Rule 54 methods and proof requirements is irreconcilable with prior cases that held that service pursuant to statutory requirements was sufficient, even if compliance with the service requirements set forth in this Court's rules were not, including: Strong; Collector of Revenue of City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens, 585 S.W.2d 486, 488 (Mo. banc 1979) (notice of foreclosure without personal service as provided for by statute is not improper for failure to conform to the standards of procedure as established by Rule 54 because Rule 54.18 provides that where a statute contains provisions for a method of service, service may be made pursuant to the provisions of the statute or by the rules of civil procedure as promulgated by the court); Hometown Lumber and Hardware, Inc. v. Koelling, 816

S.W.2d 914, 916, 917 (Mo. banc 1991) (having complied with the mandatory requirements of §517.041, the summons was not invalid for failure to conform to the requirements of Rule 54.02); State ex rel. Nixon v. Overmyer, 189 S.W.3d 711, 715 (Mo.App. 2006) (when a statute provides for a method of service of process, service by either that method, or a method provided in the rules is adequate and if service by statute is made, the court is to determine whether service of process was adequate through statutory interpretation, ascertaining the intent of the legislature from the language used).

The import of the appellate court's decision is that if strict compliance with §375.906 is made, service is defective if it does not meet the additional service requirements found in Rule 54.15 and proved by the requirements found in Rule 54.20. This Court has never declared that it meant for Rules 54.15 and 54.20 to supplant the legislature's enactment of §375.906, which provides how service is to be made upon foreign insurance companies.

There appears to be an irreconcilable conflict between §375.906 and Rules 54.15 and 54.20 and interpretive cases, including Strong, where the appellate court found that when the statutory steps for serving the director of insurance was followed, a default judgment was properly entered, even in spite of evidence that the defendant, in fact, did not receive service by registered or certified mail, and Maddox v. State Auto. Mut. Ins. Co., 356 S.W.3d 231 (Mo.App. 2011) and the underlying opinion, (relying on Industrial Personnel Corp. v. Corcoran, 643 S.W.2d 816 (Mo.App. 1981)), that find that even if

service is properly made pursuant to §375.906, proof of service pursuant to the requirements of Rules 54.15 and 54.20 must also be made.

There is no limiting language contained in Rule 54.18 that gives parties the option of serving pursuant to the requirements set forth in statute or in rule. There is also no mention made in Rule 54.20 for "proof" of service that has been made by statute. With respect to service upon the Director of Insurance under Rule 54.20, this Court only referenced "proof" of service requirements, if service was made by Rule 54.15. If Rule 54.20 governs proof of service, there is a question as to whether this Court has the rulemaking power under Article V §5 of the Missouri Constitution to order the Department of Insurance to send notice of service by registered or certified mail when the statute and regulations require the Department of Insurance to send notice of service by first class mail. (App. A-26.) In addition, there is a question as to whether plaintiffs can compel and prove notice sent by the Department of Insurance by registered or certified mail because the statute requires the Director of Insurance to send notice of service by first class mail only.

The more appropriate rule interpretation is for this Court to conclude that if service by is made pursuant to Rule 54.15, then the proof requirements of Rule 54.20 must be met. However, when a plaintiff opts to effect service pursuant to statute, the requirements of Rule 54.20 are inapplicable. In this case, as the Bates chose, complied and proved service pursuant to §375.906, the trial court's judgment setting aside the default should be reversed.

The trial court had subject matter jurisdiction to enter the default judgment

Greenwich made an alternative argument to the trial court, asserting that it lacked subject matter jurisdiction to enter the default because the Bates' petition failed to state a claim. This argument fails following J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249, 253 (Mo. banc 2009). Cases issued after Webb recognize that default judgment will no longer be set aside as void for the reason that the trial court lacked subject matter jurisdiction because the petition failed to state a claim against the defendant. A.D.D. v. PLD Enterprises, Inc., 412 S.W.3d 270, 276 (Mo.App. 2013) (following Webb moving to set aside a default judgment for failure to state a claim does not raise an issue of the circuit court's subject matter jurisdiction); Ground Freight Expeditors, LLC v. Binder, 407 S.W.3d 138, 142 (Mo.App. 2013) (the fact that a plaintiff's pleading is deficient and fails to state a claim for relief does not render the resulting judgment void); Unifund CCR Partners v. Kinnamon, 384 S.W.3d 703, 707 (Mo.App. 2012) (the fact that a plaintiff's pleading is deficient and fails to state a claim for relief does not render the resulting judgment "void"); Forsyth, 351 S.W.3d at 741 (a judgment is not void merely because it is erroneous).

The trial court's subject matter jurisdiction is governed directly by this state's constitution: §14 of article V of the Missouri Constitution declares that the circuit courts shall have "original jurisdiction over all cases and matters, civil and criminal." (App. A-25.) Because the Bates' action was a civil matter, seeking underinsured motorist coverage benefits, the circuit court had subject matter jurisdiction over the case and

authority to enter the default judgment. (Tr. 1-13; L.F. 10-19; default exhibits 1-3.) As there was proper subject matter jurisdiction, the underlying default should be reinstated.

The entry of the default judgment against Greenwich did not violate due process

Greenwich's other alternative argument to the trial court was that its constitutional rights were violated and the judgment should be set aside as void. The concept of a void judgment is "narrowly restricted" under Rule 74.06. Forsyth, 351 S.W.3d at 740, quoting, Baxi v. United Technologies Automotive, 122 S.W.3d 92, 95 (Mo.App. 2003). In cases where personal and subject matter jurisdiction are established, "a judgment should not be set aside unless the court 'acted in such a way as to deprive the movant of due process.'" Forsyth, 351 S.W.3d at 741, quoting State ex rel. Koster v. Walls, 313 S.W.3d 143, 145 (Mo.App. 2010), quoting, Franken v. Franken, 191 S.W.3d 700, 702 (Mo.App. 2006).

Due process does not require actual notice in every case. Sieg, 375 S.W.3d at 155. Notice must be reasonably calculated, under the circumstances, to notify the defendant of the lawsuit and to afford the defendant an opportunity to defend against it. Id., Jones v. Flowers, 547 U.S. 220, 226 (2006).

It was not arbitrary or capricious to permit service by the method set forth in the statute. "Once a foreign corporation seeks permission to do business in a State, that State may, consistent with due process, provide a mechanism for its residents to serve the corporation within the State…" Sieg, 375 S.W.3d at 155. It is only when the State-chosen means of service is "arbitrary or unreasonable that such service violates due process." Id. In Sieg, the appellate court determined that it was not arbitrary or

unreasonable for Missouri to allow service upon a foreign corporation's registered agent after the corporation has been administratively dissolved. Id.

The Bates proved that service was made upon Greenwich pursuant to the requirements of §375.906 R.S.Mo. As Greenwich was served and received notice of the petition and the court acted in conformity with Rule 54.18 and §375.906, its constitutional rights were not violated. A.D.D. 412 S.W.3d at 275; Forsyth, 351 S.W.3d at 741. See Penn. Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917) (predecessor statute found to be constitutional).

To the extent that Greenwich's due process argument rests upon its assertion that the petition failed to state a claim (arguing that the Bates did not adequately pleaded entitlement to serve process under §375.906 R.S.Mo.)--this argument has been rejected. A.D.D., at 276; Forsyth, 351 S.W.3d at 741. Whether or not the judgment was erroneous is not sufficient to rise to an assertion of a constitutional violation of Greenwich's due process rights. See Forsyth, 351 S.W.3d at 741 (court properly denied request to set aside default judgment for due process reasons recognizing that due process concerns typically do not arise in default judgment cases where the defendant received proper notice and waived rights as a result of the failure to appear); A.D.D., 412 S.W.3d at 275, 276 (court erred in setting aside default judgment, rejecting defendant's due process argument); Sieg, 375 S.W.3d at 155 (court properly denied defendant's request to set aside judgment as void for alleged due process violations).

As a foreign insurance company seeking to do business in Missouri, Greenwich is bound by the provisions of §375.906. Any argument that this statute is unconstitutional or that the trial court acted arbitrarily or unreasonably to deny Greenwich's constitutional due process rights should be rejected. The trial court's default judgment should be reinstated.

Conclusion

Wherefore, for the above set forth reasons, Appellants Charles and Deborah Bate move that this court reverse the trial court's judgment and remand with directions to reinstate the default judgment against Greenwich and for whatever further relief this court deems fair and just.

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Appendix—electronically filed separately

Certificate of Service and Compliance

Susan Ford Robertson, of lawful age, first being duly sworn, states upon her oath that on October 20, 2014, a copy of Appellants' Substitute Brief and Substitute Brief Appendix were served by electronic mail upon Mr. Steven Hughes at hughes@pspclaw.com as counsel for Respondent Greenwich Insurance Company. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 8,017 words, excluding the cover, the certification and the appendix as determined by Microsoft Word software.

/s/ Susan Ford Robertson
SUSAN FORD ROBERTSON, Attorney