IN THE SUPREME COURT OF GUAM

KENNARD CRUZ PINEDA,
Plaintiff-Appellant,

vs.

MARIA-THELMA PASCUAL PINEDA,
Defendant-Appellee.

Supreme Court Case No. CVA04-016
Superior Court Case No. DM 0450-03

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on February 18, 2005
Hagåtña, Guam

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BEFORE: FRANCES M. TYDINGCO-GATEWOOD, Presiding Justice[1]; ROBERT J. TORRES, Associate Justice; and JOHN A. MANGLONA, Justice *Pro Tempore*.

TYDINGCO-GATEWOOD, J.:

[1] Plaintiff-Appellant Kennard Cruz Pineda appeals from the trial court's decision and order vacating the default Interlocutory and Final Judgments of Divorce granted in his favor. Although we disagree with the trial court's reasoning, nevertheless, the trial court's vacation of the Interlocutory and Final Judgments of Divorce was proper pursuant to Rule 60(b)(4) of the Guam Rules of Civil Procedure. We therefore affirm.

I.

[2] Kennard filed a Complaint for Divorce on June 23, 2003. He sought, *inter alia*, an award of all the community property of the marriage. The Complaint also stated that the most recent address for Defendant-Appellee Maria-Thelma Pascual Pineda was unknown, but that she was "believed to be in Hawaii." Appellant's Excerpts of Record ("ER"), tab 1 (Complaint). Kennard mailed the summons and complaint but they were returned, stamped: "Returned to Sender, Attempted, Not Known." Appellant's ER, tab 24 (Kennard Pineda Decl., Ex. 1). Upon Kennard's motion, the court issued an Order for Service by Publication. An Alias Summons was filed on July 14, 2003 and published in the *Pacific Daily News* on July 16, 2003. On August 27, 2003, Kennard filed a Request to Enter Default against Maria-Thelma. Proof of publication was filed on September 18, 2003. Kennard filed for Entry of Default on October 3, 2003. At the November 20, 2003 default hearing, the court granted default, and the Interlocutory and Final Judgments of Divorce were filed on November 24, 2003.[2]

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[1] Chief Justice F. Philip Carbullido was not available to participate in this matter. Associate Justice Tydingco-Gatewood, as the senior member of the panel, was designated as the Presiding Justice.

[2] The Superior Court docket sheet does not include an entry for the Interlocutory Judgment. It is unknown whether this is a clerical error. If so, it is remedied by entering the Interlocutory Judgment on the docket. This issue is significant simply because the Interlocutory Judgment awarded the community property to Kennard. The Final Judgment does not contain any reference to an award of the community property and does not incorporate by reference the Interlocutory Judgment.

[3] On April 15, 2004, Maria-Thelma, through counsel, filed a motion to vacate the divorce judgments. The motion was made under Rule 60(b)(3), permitting the trial court to vacate judgments if procured by fraud, and Rule 60(b)(4) for vacating judgments which are void. Maria-Thelma stated that she had never received a complaint, summons or judgment regarding the divorce proceedings, and that if she had received notice, she would have retained counsel to protect her interests. Kennard opposed the motion, arguing that service was proper and that the court correctly granted the default judgments.

[4] A hearing on the motion to vacate was held on June 3, 2004. The court ruled on June 25, 2004, that Kennard had satisfied the requirements, under Rule 4(e) of the Guam Rules of Civil Procedure and Title 7 GCA § 14106, for service upon a party who is not found on Guam. The court did not address Maria-Thelma's arguments raised with respect to Rule 60(b)(3) and (4); instead, it recognized that Rule 60(b)(6) allows a court to "set aside the judgment for any reason that justifies relief from the judgment." Appellant's ER, tab 26 (Decision and Order, June 25, 2004). The court found three reasons to justify setting aside the judgments; first, that the "record is void of any information that [Kennard] represented to the Court that a receipt of mailing the letter was served or received by [Maria-Thelma]"; second, that the court had advised Kennard that despite entry of the default, Maria-Thelma could seek a set aside and request her share of community property; and third, that the court had noted that Maria-Thelma had not been represented by counsel until after the default had been entered. Appellant's ER, tab 26 (Decision and Order, June 25, 2004).

[5] Kennard timely filed an interlocutory appeal of the June 25, 2004 Decision and Order with this court on July 23, 2004. He then filed a Statement of Jurisdiction on August 2, 2004. Maria-Thelma filed an Opposition to the Statement of Jurisdiction on August 3, 2004, and then filed a Motion to Dismiss for Lack of Jurisdiction on September 15, 2004. This court denied the motion to dismiss, finding that interlocutory jurisdiction was properly asserted. *See* note 3, *infra*.

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II.

[6] This court has jurisdiction over interlocutory appeals. 48 U.S.C. § 1424-1(a)(2) (West, WESTLAW through Pub. L. 109-20 (2005)); Title 7 GCA § 3108(b) (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)). We have stated that interlocutory jurisdiction is proper pursuant to 7 GCA § 3108(b). Order, Sept. 16, 2004.[3]

III.

[7] We review a trial court's ruling on a Rule 60(b) motion for an abuse of discretion. *Midsea Indus., Inc. v. HK Eng'g, Ltd.*, 1998 Guam 14, ¶ 4.[4] Discretion is abused when the trial court's decision "is based on an erroneous conclusion of law or where the record contains no evidence on which the judge could have rationally based the decision." *Town House Dep't Stores, Inc. v. Hi Sup Ahn*, 2003 Guam 6, ¶ 27 (quoting *Brown v. Eastman Kodak Co.*, 2000 Guam 30, ¶11). Reversal for an abuse of discretion is proper if this court "has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant facts." *Guam Radio Servs., Inc. v. Guam Econ. Dev. Auth.*, 2000 Guam 23, ¶ 6.

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[3] We have recognized that the docket sheet attached to the Notice of Appeal indicates that on November 24, 2003, the Superior Court granted an Interlocutory Divorce Decree, thereby satisfying the definition of an appealable order pursuant to Title 7 GCA § 25102(j). Order, Sept. 16, 2004. Further, we noted that the docket sheet further revealed that the Final Judgment of Divorce was granted on November 24, 2003, and entered on the docket on March 16, 2004; therefore, the June 25, 2004 Decision and Order vacating the Final Judgment of Divorce is "an order made after a judgment appealable by subdivision (a)." Title 7 GCA § 25102(b) (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)).

[4] A trial court's ruling on a Rule 60(b)(4) motion to set aside a void judgment is a question of law and thus, subject to *de novo* review on appeal. *Fed. Deposit Ins. Co. v.Aaronian*, 93 F.3d 636, 639 (9th Cir. 1996) ("We review de novo, however, the district court's decision whether to vacate a judgment as void for lack of personal jurisdiction because this is purely a question of law."); *Retail Clerks Union Joint Pension Trust v. Freedom Food Ctr.*, 938 F.2d 136, 137 (9th Cir. 1991)("[W]we review *de novo* denial of a 60(b)(4) motion to set aside a judgment as void, because the question of the validity of a judgment is a legal one."). The trial court here did not base its ruling on Rule 60(b)(4); therefore, the *de novo* standard of review does not apply.

IV.

[8] Kennard appeals from the trial court's decision granting Maria-Thelma's Rule 60(b) motion to vacate the Interlocutory and Final Judgments of Divorce. Rule 60(b) allows a party relief from final judgment for several reasons, including fraud under subsection (3), void judgment under subsection (4), and "any other reason justifying relief from operation of the judgment" under subsection (6). Guam R. Civ. P. 60(b). The trial court based its ruling only on Rule 60(b)(6).

[9] The ultimate issue on appeal is whether the trial court abused its discretion in relying on Rule 60(b)(6) to vacate the Interlocutory and Final Judgments, which terminated the marital relationship and awarded the community property of the marriage.[5] Kennard argues that the trial court abused its discretion because it vacated the judgments without considering the three-factor *Midsea* test for analyzing Rule 60(b) motions. *See Midsea*, 1998 Guam 14 at ¶ 5. Maria-Thelma maintains the court correctly vacated the judgments, arguing that Kennard's service by mail was unfair and violated her due process rights because he used an address where she would not receive the mail.

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[5] During oral argument, the attorney for Maria-Thelma indicated that the purpose of Interlocutory Judgment was for division of property, while the purpose of the Final Judgment was to restore the parties' status to unmarried persons. He cited no authority for this proposition, and we find none. Rather, Title 19 GCA § 8202 states only that "[t]he effect of a judgment decreeing a dissolution of marriage is to restore the parties to the state of unmarried persons." Title 19 GCA § 8202 (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)). This same language is found in Title 19 GCA § 8322, which states that "final judgment shall restore the parties to status as single persons." It is not disputed that a final judgment restores the parties' status as single persons. Title 19 GCA § 8322 (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)). However, it is not entirely clear that the division of property division is limited to interlocutory judgments alone. Interlocutory judgments are governed by Title 19 GCA § 8321, which states in its entirety:

> **§8321. Decision, Interlocutory Judgment.** In actions for dissolution of marriage, the Court must file its decision and conclusions of law as in other cases, and if it determines that no dissolution of marriage shall be granted, final judgement must thereupon be entered accordingly. If it determines that the dissolution of marriage ought to be granted, interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a dissolution of marriage. After the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other. An interlocutory decree of divorce granted pursuant to the provisions of this §8321 must include the social security numbers of both parties, and of all children.

19 GCA § 8321 (West, WESTLAW through Guam Pub. L. 28-027 (Apr. 22, 2005)). Nothing in this provision limits the purpose of an interlocutory judgment to determining the division of the property. Nothing in the above provisions reveal that property division may not be included in final judgments of divorce.

A. Service of Process

[10] It is well settled that when a default judgment is entered without proper service, such default is void. This is because the trial court lacks personal jurisdiction if service is defective, and thus, any judgment rendered is void. *See M & K Welding, Inc. v. Leasing Partners L.L.C.*, 386 F.3d 361, 364 (1st Cir. 2004) (explaining as the "governing principles . . . that a default judgment issued without jurisdiction over a defendant is void, that it remains vulnerable to being vacated at any time, and that such jurisdiction depends on the proper service of process or the waiver of any defect"); *U.S. v. One Toshiba Color Television*, 213 F.3d 147, 156 (3rd Cir. 2000) ("As a general matter, we have held that the entry of a default judgment without proper service of a complaint renders that judgment void."); *Dodco, Inc. v. Am. Bonding Co.*, 7 F.3d 1387, 1388 (8th Cir. 1993) ("If a defendant is improperly served, the court lacks jurisdiction over the defendant."); *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir. 1992) ("A person is not bound by a judgment in a litigation to which he or she has not been made a party by service of process.); *Recreational Props., Inc. v. Southwest Mortgage Serv. Corp.*, 804 F.2d 311, 314 (5th Cir. 1986) ("If a court lacks jurisdiction over the parties because of insufficient service of process, the judgment is void and the district court must set it aside.").

[11] In *Feore v. Feore*, the plaintiff in a divorce case effected service by publication and by mailing to a Guam address she shared with the defendant, and obtained a default judgment against the defendant. *Feore*, Civ. No. 93-00043A, 1993 WL 128361 (D.Guam. App. Div. Apr. 8, 1993). Prior to the filing of the complaint, the defendant had left Guam for Alabama with the couple's children. *Id.* at *1. The defendant later sought to set aside the judgment on the ground that the judgment was procured through fraud. *Id.* He argued that the plaintiff knew his Alabama address because she had called them and had written to the children at the Alabama address. *Id.* at *1-2. The trial found there was no fraud and denied the motion. *Id.* at *2. The Appellate Division reversed, noting that under Rule 4(a) of the Rules of Civil Procedure, "the plaintiff or plaintiff's counsel '*shall be responsible for prompt service of the summons and a copy of the complaint.*' Thus,

it was the responsibility of [the plaintiff] and her lawyer to ensure that service of process was constitutionally effective and proper under the rules." *Id.* at *3 (quoting Guam. R. Civ. P. 4(a)). The Appellate Division further stated that:

> The Rule imposes no time limit or deadline after which the plaintiff is absolved of that responsibility. The law prefers that cases be decided on their merits, hence, default judgments are generally disfavored. . . . It follows logically, therefore, that Rule 4(a) implicitly requires that the plaintiff use due diligence to ensure that effective service is perfected so as to avoid the entry of default.

Id. at *4 (citation omitted). The Appellate Division concluded that service of process on the defendant was not effective and thus, the judgment was void. *Id.* at *4-5.

[12] Similarly, we first examine the trial court's finding that Kennard had "met the requirements under Rule 4(e) and 7 G.C.A. § 14106 for service upon a party not found within Guam." Appellant's ER, tab 26 (Decision and Order, June 25, 2004). Rule 4(e) of the Guam Rules of Civil Procedure states in relevant part:

> Whenever a statu[t]e or order of court thereunder provides for service of a summons, or of a notice . . . upon a party not an inhabitant of, [or] found within Guam, *service shall be made by publication* in a newspaper of general circulation for the prescribed time *and by mailing such summons [or] notice . . . to the last known residence (or post office box)* of such party. . . . Publications shall be proved by affidavit of an officer or agent of the publisher, stating the dates of publication with an attached copy of the order as published. Service by mail shall be accomplished by any form of U.S. postal delivery that provides for written proof of mailing, written proof of delivery and restricted delivery to the addressee only. *Mailing shall be proved by affidavit establishing that the address employed is the most current mailing address known for the party being served, that a copy of the summons (notice or order) and the complaint were deposited with the U.S. Post Office, properly addressed, and having attached thereto the Postal receipts reflecting a form of mailing prescribed above.*

Guam R. Civ. P. 4(e) (emphases added). In addition, 7 GCA § 14106 states in relevant part:

> (a) *Where the person on whom service is to be made has departed from Guam, and cannot, after due diligence, be found in Guam*, or conceals himself to avoid the service of summons . . . and the fact appears by affidavit to the satisfaction of the court, or a judge thereof, and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made . . . *such court or judge may make an order that the service be made by the publication of the summons and by mailing the complaint and summons*.

> (b) Service by mail shall be by any kind of U.S. Postal Service delivery that provides for written proof of mailing, written proof of delivery and restricted delivery to the addressee only.

Title 7 GCA § 14106 (emphases added). Thus, both Rule 4(e) and 7 GCA § 14106 require both publication and mailing.

[13] It is undisputed that the trial court's order provided only that service be made by publication, and did not address the mailing requirement as required by statute. Notwithstanding the omission in the court's order, proper service under Rule 4(e) and 7 GCA § 14106 requires that Kennard also mail the summons to Maria-Thelma. In short, the order's omission does not excuse Kennard from complying with service by mail as required by Guam law. *See Feore*, 1993 WL 128361 at *3-4.

[14] Kennard asserts that he complied with the trial court's order. We agree, insofar as he complied with all aspects of service by publication. The summons was printed "for the prescribed time" in the *Pacific Daily News*, which the parties did not dispute (either at trial or in this proceeding) is a "newspaper of general circulation." GRCP 4(e). Further, Kennard filed an affidavit from the *Pacific Daily News*, which indicated the days of publication, and attached a copy of the summons as it was published. Kennard's compliance with service by publication is not disputed; however, we are mindful that:

> Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

Feore, 1993 WL 128361, at * 4 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 315, 70 S. Ct. 652, 658 (1950)).

[15] The record does not support Kennard's contention that he complied with the mailing requirement. Rule 4(e) requires that "[s]ervice by mail shall be accomplished by any form of U.S. postal delivery that provides for written proof of mailing, written proof of delivery and restricted delivery to the addressee only." GRCP 4(e). In virtually identical language, 7 GCA § 14106(b) requires that "[s]ervice by mail shall be by any kind of U.S. Postal Service delivery that provides for written proof of mailing, written proof of delivery and restricted delivery to the addressee only."

Certified Mail through the U.S. Postal Service provides written proof of mailing, and Return Receipt service provides written proof of delivery. *See* http://www.usps.com. The Postal Service also offers Restricted Delivery service that restricts delivery only to the addressee. *Id.*

[16] Kennard offers, as proof of compliance with the mailing requirement, a photocopy of an envelope addressed to Maria-Thelma at 4745 Bongainville Dr., Honolulu, HI 96818. Appellant's ER, tab 24 (Kennard Pineda Decl., Ex. 1). The statutory proof of mailing is satisfied by the "Certified Mail" label on the envelope. However, Guam law also requires proof of delivery (such as by Return Receipt service) and restricted delivery. In a Declaration, Kennard states that his attorney served Maria-Thelma "by return receipt mail at the address of 4745 Bongainville Dr., Honolulu, HI 96818." Appellant's ER, tab 24 (Kennard Pineda Decl., ¶ 5). He further stated that the letter was sent out July 15, 2003 but was returned when Maria-Thelma failed to pick it up.

[17] Kennard's contentions reveal, at most, only marginal compliance with the mailing requirement. Clearly, the letter was sent by Certified Mail, but there is no way to verify Kennard's declaration that Return Receipt was used. The letter was simply returned with a stamp stating: "Returned to Sender, Attempted, Not Known." Appellant's ER, tab 24 (Kennard Pineda Decl., Ex. 1). Furthermore, the envelope and Kennard's Declaration do not indicate use of Restricted Delivery service, as required by Guam law.[6] It is virtually impossible to verify the mailing date of July 15, 2003 because any date on the envelope is very difficult to read. Even more troubling is the inadequacy of the affidavit submitted by Kennard to support the mailing requirement. The affidavit was filed May 21, 2004, almost a year after the letter was mailed to Maria-Thelma. Furthermore, Kennard did not attach to the affidavit "the Postal receipts reflecting a form of mailing prescribed" by the statute. GRCP 4(e).

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[6] Restricted Delivery through the U.S. Postal Service is separate from, and is not included as a part of, Certified Mail or Return Receipt service. *See* http://www.usps.com. Guam law requires that service by mailing comply with all three requirements. *See* GRCP 4(e), 7 GCA § 14106.

[18] Upon review of the relevant facts, we hold that Kennard failed to comply with the service by mailing requirements under Guam law. In so holding, we join the majority of jurisdictions that have adopted a rule of strict compliance of statutory service requirements.[7] *See e.g.*, *In re Marriage of Zacher*, 98 P.3d 309, 312 (Mont. 2004) ("Rules for service of process are mandatory and must be strictly followed.); *Lunt v. Gaylor*, 834 A.2d 367, 368 (N.H. 2003) ("We consistently require strict compliance with statutory requirements for service of process."); *Gookin v. State Farm Fire and Cas. Ins. Co.*, 826 P.2d 229, 233 (Wyo. 1992) ("The general rule requires strict compliance with statutes or rules setting forth the requirements for service of process."); *Aaron v. Aaron*, 571 So. 2d 1150, 1151 (Ala. Civ. App. 1990) ("Strict compliance regarding service of process is required."). "Personal jurisdiction may be obtained 'only through strict compliance' with the rules governing service of process." *Zacher*, 98 P.3d at 312 (quoting *In re Marriage of Blaskovich*, 815 P.2d 581, 582 (Mont. 1991); *see also Lunt*, 834 A.2d at 368 ("Because . . . the out-of-state defendants were never properly served, the court never obtained personal jurisdiction over them.").

[19] We are left with a definite and firm conviction that the trial court made a mistake in finding that Kennard had satisfied the requirements for service upon Maria-Thelma. A trial court has "no discretion to refuse vacating a judgment if it is void. When it is found that there has been defective service of process, the judgment is void . . . ." *In re Cossio*, 163 B.R. 150, 154 (B.A.P. 9th Cir. 1994) (citation omitted). The Interlocutory and Final Judgments were granted despite Kennard's failure to comply with service requirements, therefore, the judgments are void.

[20] Although the trial court correctly vacated the judgments, we do not agree with the analysis adopted by the trial court in reaching the correct result. First, the trial court did not use Rule 60(b)(4) as the basis to grant the motion. Our examination reveals that because of Kennard's failure to

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[7] We do not today reach the issue of whether actual notice may cure a technical defect in service, because in the record before us, there is no evidence that Maria-Thelma had actual notice and Kennard does not argue that she had actual notice. *See, e.g., Gibble v. Car-Lene Research, Inc.*, 78 Cal. Rptr. 2d 892, 903 (Ct. App. 1998) ("[T]he statutory provisions regarding service of process should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant."); *cf. Williams v. Williams*, 150 S.W.3d 436, 444 (Tex. App. 2004) ("As long as the record as a whole . . . shows that the citation was served on the defendant in the suit, service of process will not be invalidated.").

comply with statutory service requirements, the trial court's judgment is void. *In re Cossio*, 163 B.R. at 154. Second, the trial court should not have relied on Rule 60(b)(6) as the basis for granting the motion. We have stated that "if the circumstances alleged fall into any of the other [Rule 60(b)] subsections allowing set aside, then relief under subsection (6) cannot be had." *Brown v. Eastman Kodak Co.*, 2000 Guam 30, ¶ 14. Here, the judgments should have been set aside for void judgment pursuant to Rule 60(b)(4), thus, relief should not have been granted under Rule 60(b)(6).

[21] The trial court abused its discretion in setting aside the judgment pursuant to Rule 60(b)(6), rather than Rule 60(b)(4). "There is an abuse of discretion if the trial court did not apply the correct law, [or] erroneously interpreted the law . . . ." *In the Interest of N.A.*, 2001 Guam 7, ¶ 13; *see also People v. Tuncap*, 1998 Guam 13 ¶ 13 ("[A] court abuses its discretion by not applying the correct law . . . . [and] when the law is erroneously interpreted.") (citation omitted).

B. *Midsea* factors

[22] Kennard argues that the trial court abused its discretion because it vacated the judgments without considering the three-factor *Midsea* test for analyzing Rule 60(b) motions. *See Midsea*, 1998 Guam 14 at ¶ 5. We stated in *Midsea* that: "A court will deny a motion to set aside a default judgment if it is shown that (1) the defendant's culpable conduct led to the default; (2) the defendant has no meritorious defense, or (3) the plaintiff would be prejudiced if the judgment is set aside." *Id.*

[23] Kennard's reliance on *Midsea* is misplaced; the test should be applied when a court is evaluating whether to *deny* setting aside the judgment. *Id.*; *see also In re the Matter of the Petition of Quitugua*, 2004 Guam 19, ¶ 30 (recognizing that the *Midsea* factors apply "in denying a Rule 60(b) motion"). Here, the trial court *granted* the motion to set aside. Thus, there was no need for the trial court to consider the *Midsea* factors.

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V.

[24] We hold first, that Guam's service requirements are to be strictly construed; thus, the trial court abused its discretion in finding that Kennard had complied with statutory service requirements. Furthermore, the trial court abused its discretion in relying on Guam Rule of Civil Procedure 60(b)(6) to set aside the judgments, rather than relying on Guam Rule of Civil Procedure 60(b)(4), because the judgments were void for improper service of process. Notwithstanding these errors, the trial court properly vacated the Interlocutory and Final Judgments, and thus, the trial court is **AFFIRMED**.