VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court building in the City of Richmond on Thursday the 21st day of May, 2020.

Present: Lemons, C.J., Goodwyn, Powell, Kelsey, McCullough, and Chafin, JJ., and Millette, S.J.

August McCarthy, Appellant,

against Record No. 190672
Circuit Court Nos. CL2016-10982 and
CL2018-6275

Phillip Ben-Zion Leiser, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Fairfax County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is error in the judgment of the circuit court.

I. BACKGROUND

August McCarthy was previously employed by the law firm Leiser, Leiser & Hennessey, PLLC ("the LLC") where Phillip and Karen Leiser (collectively, "the Leisers") were partners. McCarthy left the firm in 2007. During the pendency of various lawsuits between McCarthy and the Leisers, McCarthy's counsel, Daniel Hawes, discovered that the LLC's State Corporation Commission ("SCC") registration had lapsed. Hawes re-registered the LLC's name, adding a comma to create "Leiser, Leiser, & Hennessey, PLLC" ("LLH"). Hawes listed himself as the registered agent for LLH. He also filed "Articles of Amendment" that listed McCarthy as the "sole member" of LLH. McCarthy denied knowing this information.

In August 2016, Hawes filed suit on behalf of LLH against the Leisers alleging unauthorized use of the LLH's name in violation of Code § 8.01-40. McCarthy was not a named party to the 2016 lawsuit. McCarthy was never served with pleadings in the case. The complaint requested $188,332.09 in damages, $350,000 in punitive damages, and attorney's fees and costs. Hawes, however, did not serve the complaint on the Leisers until May 2017.

In July 2017, the Leisers filed a motion pursuant to Code § 8.01-271.1 asking for sanctions against Hawes and McCarthy. McCarthy received a witness subpoena to appear at the sanctions hearing but failed to do so. On November 2, 2017, the circuit court issued an opinion letter in which it found that McCarthy, while not a party, could be sanctioned as an alter ego of LLH. On November 15, 2017, McCarthy filed a Notice of Special Appearance arguing that because he was neither a plaintiff or defendant and had not been served with any papers in the case the circuit court lacked personal jurisdiction over him. No action was taken on the Notice of Special Appearance. The circuit court entered a final order on November 20, 2017, imposing $80,697.50 in sanctions against Hawes and McCarthy.

In April 2018, McCarthy filed another lawsuit, pursuant to Code § 8.01-428, asking the circuit court to vacate the 2017 order that imposed sanctions against him. McCarthy argued that the court should find that the 2017 order was void because he was not a party, was not consulted with by Hawes, and the court lacked personal jurisdiction over him. The Leisers filed a "Motion to Consolidate Cases and for Other Relief" asking the circuit court to consolidate the 2016 and 2018 cases. In the motion, the Leisers represented that McCarthy's Notice of Special Appearance filed on November 15, 2017, was before the court. The Leisers also requested additional sanctions against McCarthy due to alleged misrepresentations in his Notice of Special Appearance and in the 2018 complaint.

The circuit court consolidated the cases and held a hearing on the matter. In December 2018, the court advised the parties that it had conducted its own independent investigation to determine whether the parties were misleading the court. The circuit court marked the documents as "Court's Exhibit Number 1", stating that it

> found it was [the court's] duty to make sure that there hasn't been a terrible mistake. So I did go on the information site of the [SCC]. . . . I printed it as of that date so that there would be a record as of November 18, 2017 [sic] that the [c]ourt takes its duties seriously. . . . [T]he [c]ourt has an independent duty to make sure it has not been misled.

The circuit court then examined McCarthy on the witness stand about the documents in Court's Exhibit Number 1. After the examination, the court stated it was admitting Court's Exhibit Number 1 into evidence. McCarthy's counsel objected. The court sustained the objection and kept the documents marked for identification purposes only.

Following the hearing, McCarthy filed a motion asking the judge to recuse himself for violating Canon 3 of the Canons of Judicial Ethics. McCarthy also requested a new trial. The circuit court denied the motions by order dated January 25, 2019. It stated that it was permitted to take judicial notice of public records on the SCC website and did not violate Canon 3(B)(7). The court also stated that it was permitted to conduct an investigation to ensure that the court was not being misled by counsel.

The circuit court entered a final order on February 22, 2019. The court found that McCarthy was the alter ego of LLH and as such, the court had personal jurisdiction over him in the 2016 case. The circuit court listed several examples of "untruthfulness" by McCarthy and Hawes. The court found that McCarthy knew of the existence of LLH's suit against the Leisers and willfully ignored a subpoena. The court sanctioned McCarthy in the amount of $6,000 for misrepresentations in the initial filing of November 15, 2017, the Notice of Special Appearance. This appeal followed.

II. ANALYSIS

A. The Circuit Court Lacked *In Personam* Jurisdiction Over McCarthy in 2016

McCarthy contends on appeal that the circuit court erred in finding that it had personal jurisdiction over him in 2016 and in imposing sanctions against him. McCarthy argues that he was not a party to the 2016 lawsuit and was never served with process. We agree.

Service of process is required to obtain personal jurisdiction over a party to a lawsuit. "'It is elementary that one is not bound by a judgment *in personam* resulting from litigation . . . to which he has not been made a party by service of process.'" *McCulley v. Brooks & Co. General Contractors*, 295 Va. 583, 589 (2018) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc*., 395 U.S. 100, 110 (1969)) (alteration in original). "The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant." *Id*. (citation omitted).

Under our Rules, the "process" is "[t]he summons with a copy of the complaint attached" and these documents "shall constitute and be served as one paper." Rule 3:6. "Without service of the 'process,' the court acquires no jurisdiction." *Lifestar Response of Maryland, Inc. v. Vegosen*, 267 Va. 720, 724 (2004). *See Spiller v. Wells*, 96 Va. 598 (1899) ("jurisdiction is acquired by the issue and service of process"). Consequently, a judgment against a party not before the court in any way will be as utterly void as though the court had undertaken to act

when the subject-matter was not within its cognizance," *McCulley*, 295 Va. at 589 (citation omitted). *See id*., 295 Va. at 588 n.1, 589 n.2 (collecting cases and treatises). McCarthy was not a listed party to the 2016 lawsuit. Nor was he served with process in that matter at any point during that lawsuit. Therefore, the circuit court did not acquire jurisdiction over McCarthy and the judgment awarding sanctions against him was void.[*]

B. The Court Lacked Jurisdiction to Impose Sanctions for the Notice of Special Appearance McCarthy argues that the circuit court's additional sanction imposed against him in 2018, for his actions in filing a Notice of Special Appearance challenging the court's jurisdiction in the 2016 lawsuit, is also void and must be reversed. Again, we agree.

McCarthy filed his Notice of Special Appearance on November 15, 2017. The circuit court entered a final order in that case on November 20, 2017. Nothing in the circuit court's final order in the 2016 lawsuit suspended the finality of that order. "All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer." Rule 1:1. "The running of the twenty-one day time period prescribed by Rule 1:1 may be interrupted only by the entry, within the twenty-one day time period, of an order modifying, vacating, or suspending the final judgment order." *Super Fresh Food Markets of Virginia, Inc. v. Ruffin*, 263 Va. 555, 560 (2002). Once a final judgement has been entered and the twenty-one day time period of Rule 1:1 has expired, the trial court is thereafter without jurisdiction in the case. The circuit court did not enter "an order modifying, vacating, or suspending" the November 20, 2017 final order. Thus, that order became final twenty-one days after it was entered divesting the circuit court of jurisdiction to impose sanctions in that case.

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[*] McCarthy's Notice of Special Appearance contesting the court's jurisdiction over him also did not confer jurisdiction on the circuit court during the 2016 lawsuit.

> A person, upon whom process has not been served within one year of commencement of the action against him, may make a special appearance, which does not constitute a general appearance, to file a motion to dismiss.

Code § 8.01-277(B). *See Norfolk & O.V. Ry. Co. v. Consolidated Turnpike Co*., 111 Va. 131, 136 (1910) ("[a]n appearance for any other purpose than questioning the jurisdiction of the court—because there was no service of process . . . —is general, and not special").

Nor could the circuit court reopen the case, as it did, and sanction McCarthy for "misrepresentations" in his Notice of Special Appearance filed in the previous matter.

> [A] trial court's authority to award sanctions under Code § 8.01-271.1 is triggered by the filing of a pleading, motion, or other paper or making of a motion in violation of the statute, while not expressly stated, the clear implication is that the filing or making of the motion must occur in the same action and same court that subsequently awards the sanctions. To hold otherwise would contravene the finality guaranteed by Rule 1:1, because a trial court's authority to award . . . sanctions to related but previously litigated matters could be extended beyond 21 days after final judgment has been entered.

EE Mart F.C., L.L.C. v. Delyon, 289 Va. 282, 286 (2015). The 2016 case was final. The 2018 case was a different action. Therefore, the circuit court erred in sanctioning McCarthy $6,000 in 2018 for misrepresentations made when filing the Notice of Special Appearance in the 2016 lawsuit.

Because we find that the circuit court lacked personal jurisdiction over McCarthy in 2016 and erred in imposing additional sanctions against him in 2018, we need not address the remaining assignment of error dealing with the recusal motion. We will reverse the judgment of the circuit court and enter final judgment for McCarthy.

This order shall be certified to the Circuit Court of Fairfax County.

A Copy,

Teste:

Clerk