Reversed and Remanded and Opinion Filed April 3, 2026

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-24-01428-CV

COPA ROOM, LLC, FIVE POINTS HOLDINGS LLC, AND MARK HULME, Appellants
V.
MM MERCER BOARDWALK, LLC, Appellee

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-24-11162

MEMORANDUM OPINION

Before Justices Clinton, Lewis, and Rossini
Opinion by Justice Lewis

In this restricted appeal, Copa Room LLC (Copa Room), Five Points Holdings LLC (Five Points), and Mark Hulme appeal from a no-answer default judgment entered in favor of Appellee MM Mercer Boardwalk, LLC (Mercer). In two issues, Appellants contend the trial court erred by granting the default judgment because the face of the record fails to show that Mercer strictly complied with the rules for service of citation. We reverse the trial court's judgment and remand for further proceedings.

BACKGROUND

This case involves a commercial lease dispute. Mercer was the landlord and Copa Room the tenant under a lease for a restaurant and bar, executed in July 2023. Appellant Five Points guaranteed Copa Room's lease obligations up to $3 million. Appellant Hulme is the founder and managing member of Copa Room and Five Points, and he signed the lease and guaranty on behalf of both entities.

The parties' relationship quickly deteriorated. Mercer alleged that Copa Room failed to obtain the necessary permits for operation of its restaurant as required by the lease and failed to pay monthly rent. Mercer later declared Copa Room in default and demanded payment for all amounts due under the lease. Mercer filed suit against Appellants on July 26, 2024, asserting breach of contract, fraud, and unjust enrichment.

Citation was issued for Copa Room for service on its registered agent Hulme at 1349 Empire Central Drive, Suite 110, Dallas, Texas 75247. Citation was issued for Five Points for service on its registered agent Hulme at 1909 Woodall Rodgers, Suite 300, Dallas, Texas 75201. Finally, citation was issued for service on Hulme individually at 1909 Woodall Rodgers, Suite 300, Dallas, Texas 75201.

Mercer's process server encountered difficulties serving Appellants. Mercer then moved for the court to authorize substitute service on Hulme via email under Texas Rule of Civil Procedure 106(b)(2). In its motion, Mercer indicated that it had attempted to serve Hulme on four separate occasions via process server Caleb Hale.

Mercer attached Hale's declaration in support. Hale's declaration described the four failed service attempts on Hulme at the Empire Central and Woodall Rodgers addresses referenced in the citations and at two McKinney Avenue locations. Hale further declared his belief that effective service could be accomplished on Hulme via email to Hulme at "[XXXX]@fivepointsholdings.com."[1]

The trial court granted Mercer's motion for substitute service on Hulme, authorizing electronic service of the citation and petition via email at "[XXXX]@fivepointsholdings.com and/or [XXXX]@hospitalityinspirado.com." Mercer later filed Hale's declaration of service wherein he stated that, on August 15, 2024, he served Hulme with the order, the citation, and the original petition via email (in accordance with the trial court's order) to "[XXXX]@fivepointsholdings.com and/or [XXXX]@hospitalityinspirado.com."

After Appellants failed to answer, Mercer filed a no-answer motion for default judgment. Mercer relied on the substituted email service on Hulme. Mercer further asserted that it made several unsuccessful attempts to serve Copa Room and Five Points via service on their registered agent Hulme at the Empire Central and Woodall Rogers addresses listed on the citations. In support, Mercer attached additional declarations from Hale describing his attempts to serve the LLCs by serving Hulme at the same Empire Central, Woodall Rodgers, and McKinney Avenue addresses

[1] We have obscured portions of email addresses for privacy.

that Hale attempted service on Hulme in his personal capacity. In its motion for default judgment, Mercer stated that, after these unsuccessful service attempts, it served Copa Room and Five Points through the secretary of state as permitted by section 5.251(B) of the Texas Business Organizations Code. Mercer's motion for default judgment also included affidavits regarding its damages and attorney's fees.

The trial court granted the motion by submission on October 1, 2024, and issued a final judgment on October 7, 2024. The final judgment awarded approximately $4.2 million against Appellants jointly and severally, with Five Points liable for approximately $3 million of that amount under its guaranty of the lease. The judgment further awarded approximately $24,000 in attorney's fees against Appellants jointly and severally.

Appellants did not file any post-judgment motions or requests for findings of fact and conclusions of law. They filed this restricted appeal on December 4, 2024.

ANALYSIS

In two issues, Appellants contend that the trial court erred by granting the default judgment because: (1) Mercer failed to strictly comply with Rule 106(b) regarding substitute service because Mercer's motion and affidavit failed to list locations where Hulme could "probably be found"; and (2) the record does not show the process server used reasonable diligence to serve the LLCs at the registered

office, and the record does not contain *Whitney* certificates.[2] Before addressing the merits of Appellants' restricted appeal, we must address our jurisdiction.

I. We Have Jurisdiction Over the Restricted Appeal

A. Restricted appeals

A party who does not participate in person or through counsel in a hearing that results in a judgment may be eligible for a restricted appeal. *Pike–Grant v. Grant*, 447 S.W.3d 884, 886 (Tex. 2014); TEX. R. APP. P. 30.[3] To sustain a restricted appeal, the appellant must prove: (1) he filed notice of the restricted appeal within six months after the judgment was signed; (2) he was a party to the underlying lawsuit; (3) he did not participate in the hearing that resulted in the judgment complained of and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent on the face of the record.[4] *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004). The first three requirements are jurisdictional; the fourth is not. *Ex parte E.H.*, 602 S.W.3d 486, 497 (Tex. 2020). A court should first inquire about its jurisdiction over a restricted appeal before analyzing its merits. *See id.*

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[2] *See Whitney v. L&L Realty Corp.*, 500 S.W.2d 94, 95–96 (Tex. 1973).

[3] The former "writ of error" practice was replaced by "restricted appeals" under Rule 30. TEX. R. APP. P. 30.

[4] The "face of the record" includes all papers on file in the appeal, including the clerk's record and any reporter's record. *See Norman Commc'ns v. Tex. Eastman Co.*, 955 S.W.2d 269, 270 (Tex. 1997) (per curiam).

B. Application

Appellants timely filed their notice of restricted appeal on December 4, 2024, within six months of the October 7, 2024 final judgment. There is no dispute that Appellants are parties to the underlying lawsuit but failed to answer. The record reflects that Appellants did not file any response to Mercer's motion for default judgment, nor did they file any timely post-judgment motion attacking the default judgment or any request for findings of fact or conclusions of law. We conclude that Appellants have met the first three requirements for a restricted appeal and, therefore, we have jurisdiction. *See E.H.*, 602 S.W.3d at 497. We now turn to the merits of the appeal and whether Appellants have established that error is apparent on the face of the record.

II. Trial Court Erred in Granting Default Judgment Against Hulme

In its first issue, Appellants argue that the trial court erred by granting default judgment against Hulme because Mercer did not strictly comply with Rule 106(b) regarding substitute service. We agree.

A. Service issues - restricted appeals

In a restricted appeal, defective service of process constitutes error apparent on the face of the record. *See Primate Const., Inc. v. Silver*, 884 S.W.2d 151, 152–53 (Tex. 1994) (per curiam). Strict compliance with the rules for service of citation must affirmatively appear on the record in order for a default judgment to withstand direct attack. *Id.* at 152. Because no-answer default judgments are disfavored, and

because trial courts lack jurisdiction over a defendant who was not properly served with process, "strict compliance" means just that. *Spanton v. Bellah*, 612 S.W.3d 314, 316 (Tex. 2020). We indulge no presumptions in favor of valid issuance, service, or return of citation. *Id.* If the record in a restricted appeal fails to affirmatively show strict compliance with the rules of civil procedure governing service of citation, the attempted service of process is invalid and of no effect. *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884, 885 (Tex. 1985). If the record does not affirmatively demonstrate proper service, a no-answer default judgment cannot stand. *Shamrock Enters., LLC v. Top Notch Movers, LLC*, 728 S.W.3d 693, 696 (Tex. 2026). Whether service was in strict compliance with the rules is a question of law that we review de novo. *Pro-Fire & Sprinkler, L.L.C. v. The L. Co., Inc.*, 661 S.W.3d 156, 163 (Tex. App.—Dallas 2021, no pet.).

B. Rule 106

Texas Rule of Civil Procedure 106 provides:

> (a) Unless the citation or court order otherwise directs, the citation must be served by:
>
> > (1) delivering to the defendant, in person, a copy of the citation, showing the delivery date, and of the petition; or
> >
> > (2) mailing to the defendant by registered or certified mail, return receipt requested, a copy of the citation and of the petition.
>
> (b) *Upon motion supported by a statement—sworn to before a notary or made under penalty of perjury—listing any location where the defendant can probably be found and stating specifically the facts showing that service has been attempted under (a)(1) or (a)(2) at the*

> *location named in the statement but has not been successful*, the court may authorize service:
>
> > (1) by leaving a copy of the citation and of the petition with anyone older than sixteen at the location specified in the statement; or
> >
> > (2) in any other manner, including electronically by social media, email, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit.

TEX. R. CIV. P. 106 (emphasis added). Strict compliance with Rule 106(b) is required to effectuate service. *See Uvalde Country Club* 690 S.W.2d at 885.

C. Application

Here, Mercer moved for substitute service on Hulme under Rule 106(b)(2). In the motion, Mercer alleged that it had attempted to serve Hulme on four separate occasions by having private investigator Caleb Hale travel to four business addresses "associated with" Hulme. According to Mercer, Hale also attempted to contact Hulme to obtain an address for service by emailing Hulme at "[XXXX]@fivepointsholdings.com." Mercer indicated that attempts at service had been unsuccessful under Rule 106(a)(1) and requested the trial court to authorize substituted service on Hulme by email to "[XXXX]@fivepointsholdings.com and/or [XXXX]@hospitalityinspirado.com." Mercer further indicated that service by email would be reasonably effective to give Hulme notice of the suit because Mercer's

counsel had personally communicated with Hulme at the foregoing email addresses a month prior to the motion (as of July 2, 2024).[5]

Mercer attached to its motion a "Declaration in Support of Substitute Service" from process server Hale. Therein, Hale stated, in relevant part:

> The following came to hand on 5th day of August 2024 at 10:22 o'clock AM,
>
> CITATION; PLAINTIFF'S ORIGINAL PETITION
>
> For delivery to MARK HULME AT 1909 WOODALL RODGERS SUITE 300 DALLAS, TX 75201
>
> 1) Unsuccessful Attempt: 08/05/2024 3:03 PM at 1909 Woodall Rodgers Suite 300 Dallas, Texas 75201
>
> Suite 300 is RREAF Holdings. They said Mark Hulme rented that suite about 5 years ago.
>
> 2) Unsuccessful Attempt: 08/05/2024 4:10 PM at 1349 Empire Central Suite 110, Dallas. TX 75247-0002
>
> Suite 100 is a cancer treatment business and suite 110 is UT Southwestern
>
> 3) Unsuccessful Attempt: 08/07/2024 3:07 PM at 1919 Mckinney Ave, Suite 100 Dallas, Texas 75201
>
> There's no suites in this building anymore, the entire building is a Frontier Communications
>
> 4) Unsuccessful Attempt: 08/07/2024 3:23 PM at 3699 Mckinney Suite 106 Dallas, Texas 75204
>
> Suite 106 is a completely vacant suite and there is not a suite labeled for 5 points or for Copa Room in the building. I also sent Mark Hulme an email to [XXXX]@fivepointsholdings.com but have yet to receive a response from him.

[5] The motion for substitute service was filed August 9, 2024.

> I have made diligent efforts to deliver said papers to Mark Hulme. I believe an efficient way to effect service is to serve the documents to the registered agent, Mark Hulme via email at [XXXX]@fivepointsholdings.com or in any other manner the affidavit or evidence before the court shows will be reasonably effective to give the defendant notice of the suit.

Appellants argue that the motion and Hale's declaration do not list any location "where the defendant can probably be found" as required by Rule 106(b) and in fact, the declaration shows that the addresses where service was attempted were not places where Hulme could probably be found.

We addressed a similar fact pattern in *In re F.H.*, No. 05-23-01038-CV, 2024 WL 4198024, at *1 (Tex. App.—Dallas Sept. 16, 2024, no pet.) (mem. op.). There, the plaintiff moved for substitute service and attached two affidavits in support. *Id.* The motion contained an unsworn statement by plaintiff's counsel that described the affidavits as "indicating [defendant's] usual place of business, usual place of abode, or other place where [she] can probably be found[,]" but neither affidavit made any such references. *Id.* Not only did each affidavit fail to refer to the attempted service addresses as defendant's "usual place of business, usual place of abode, or other place where [she] can probably be found," each affidavit also included information which indicated that, in fact, the opposite was true. *Id.* The affiant described two service attempts at one address as "No answer – left door hanger" and "Homeowner . . . answered door and stated he's lived in home 2 years and subject is unknown to him. Confirmed with next door neighbor." *Id.*, n.8. As to a second address, the affiant stated, "I attempted to hand deliver the citation along with associated

documents to [defendant and] was informed . . . that [she] works remotely and not at this office." *Id.*

We held that error was apparent from the face of the record because the record did not affirmatively show strict compliance with service under Rule 106(b):

> [D]espite rule 106's requirements, the record reflects that [plaintiff's] motion was not "supported by a statement—sworn to before a notary or made under penalty of perjury—listing any location where [defendant] can probably be found." *See* TEX. R. CIV. P. 106(b). In fact, the record contains sworn information suggesting the opposite is true, as [plaintiff's] motion was accompanied by affidavits suggesting that the addresses where service was attempted were not, in fact, [defendant's] usual places of business or abode or places w[h]ere [defendant] could probably be found.

Id. at *4.

The same is true here. Hale's declaration does not state or suggest any location where the defendant "[could] probably be found." Instead, his declaration listed four unsuccessful service attempts suggesting that the addresses where service was attempted were not, in fact, places where Hulme could probably be found. *See id.* Mercer's unsworn motion states that service was attempted at "four business addresses associated with Defendant Hulme," citing Hale's declaration in support. However, even assuming "business addresses associated with" a defendant is equivalent to a place the defendant "can probably be found," Hale's declaration does not state that any of the addresses are currently associated with Hulme. Instead, the declaration indicates that each of the locations were vacant or had businesses unassociated with Hulme. *See id.*

As such, the record does not affirmatively show strict compliance with the rules for service of citation. *See id.*; *Gryder v. Cook*, No. 02-23-00434-CV, 2024 WL 4562493, at *3 (Tex. App.—Fort Worth Oct. 24, 2024, no pet.) (mem. op.) (plaintiffs' motion for substituted service did not strictly comply with Rule 106(b), where affidavit of non-service contained no statement that the attempted service address was a place where the defendant could probably be found and provided no probative evidence from which it could be inferred).

Mercer asserts that trivial deviances from the rules or variances in an affidavit do not invalidate service and "strict compliance does not equate to obeisance to the minutest detail," citing *Spanton*, *Costley*[6], *and May*[7] in support. However, Mercer's reliance on those cases is misplaced.

While the *Spanton* court recognized the general idea that "strict compliance does not equate to obeisance to the minutest detail," the court also recognized that discrepancies—even minor ones—are not trivial when the trial court authorizes substitute service. *Spanton*, 612 S.W.3d. at 317–18. The court ultimately held that a minor variance between the order authorizing service at "Heathers Hill Drive" and the return showing service at "Heather Hills Drive" showed a failure to strictly comply with the trial court's order. *Id.* Furthermore, *Spanton* did not involve the

[6] *State Farm Fire & Cas. Co. v. Costley*, 868 S.W.2d 298 (Tex. 1993).

[7] *Full of Faith Christian Center, Inc. v. May*, No. 05-20-00859-CV, 2022 WL 3273726, at *5 (Tex. App.—Dallas Aug. 11, 2022, pet. denied).

argument here: that the motion and supporting affidavit themselves failed to comply with Rule 106(b).

In a footnote, the *Costley* court stated that "[u]nder Rule 106(b), a party need only show that attempts have failed under either Rule 106(a)(1) or Rule 106(a)(2)." *Costley*, 868 S.W.2d at 299, n.2. However, *Costley* did not discuss any dispute as to the affidavit's requirements, and the affidavit affirmatively stated the defendant's "usual place of abode" as required by former Rule 106(b). *Id.* at 298. Here, Hale's declaration did not state or suggest that any of the addresses where service was attempted were locations where Hulme "could probably be found" as required by the current rule. Instead, the declaration suggested that the locations were *not* places that Hulme could probably be found.

Finally, our decision in *May* is distinguishable for a number of reasons. *May* was not a restricted appeal but a standard appeal after the denial of a motion for new trial, a fact we acknowledged in the opinion: "[A]lthough the rule in a restricted appeal is that there are no presumptions in favor of the valid issuance, service, and return of citation, 'our analysis is different when, as here, a default judgment is attacked by a motion for new trial.'" *May*, 2022 WL 3273726, at *3 (quoting *Sutherland v. Spencer*, 376 S.W.3d 752, 754 (Tex. 2012)). *May* involved the prior version of Rule 106 which required that a motion for substitute service be supported by an affidavit stating the location of the defendant's "usual place of business or usual place of abode or other place where the defendant can probably be found." *Id.*

at *4. The appellants complained that substitute service was improper because the supporting affidavit did not state the "usual place of abode" of the defendant in that case, Peggy Calhoun. *Id.* at *5. We held that the use of magic words, such as "usual place of abode," was not required because the affidavit identified the DeSoto address listed in the petition as Peggy's "home address." *Id.* And, the process server indicated that during two service attempts at the "home address," the server had spoken to the husband, who confirmed Peggy was his wife but that he would not allow service upon her. *Id.* at *4–5.

We do not hold that a Rule 106(b) affiant's failure to use the express words "can probably be found" will violate the strict service requirement. However, there must be some indication to support a conclusion that the defendant can probably be found at the location. Here, the fact remains that nothing in the motion or Hale's affidavit provided facts to support that the listed addresses were locations that Hulme "[could] probably be found." *See F.H.*, 2024 WL 4198024, at *4. We conclude that the record does not show strict compliance with service under Rule 106(b), and therefore the attempted service of process on Hulme is invalid and of no effect. *Id.*; *see Uvalde Country Club*, 690 S.W.2d at 885. The defective service of process constitutes error apparent on the face of the record. *See Primate Const.*, 884 S.W.2d at 152–53. Accordingly, we sustain Appellants' first issue.

III. Trial Court Erred by Granting Default Judgment Against the LLCs

In their second issue, Appellants contend the trial court erred by granting default judgment against Copa Room and Five Points because the process server did not use reasonable diligence to attempt service on the registered agent and because the record does not contain *Whitney* certificates. We do not address the process server's diligence because we agree that the record before the trial court failed to include *Whitney* certificates and, therefore, the default judgment cannot stand.

A. Service on the secretary of state

The secretary of state is an agent of an entity for purposes of service of process on the entity if "the entity is a filing entity and . . . the registered agent of the entity cannot with reasonable diligence be found at the registered office of the entity." TEX. BUS. ORGS. CODE § 5.251(1)(B). A party effects service on the secretary of state under Section 5.251 by delivering to the secretary duplicate copies of the process, notice, or demand, along with any fees required by law. *Id.* § 5.252. If the secretary of state is served under section 5.252, the secretary must immediately send one of the copies of the process to the named entity by certified mail to the most recent address of the entity on file with the secretary. *Id.* § 5.253(a)–(b).

"[F]or a default judgment to survive a restricted appeal, the face of the record must reflect that service was forwarded to the address required by statute." *Shamrock Enters.*, 728 S.W.3d at 697 (quoting *Wachovia Bank of Del., N.A. v. Gilliam*, 215 S.W.3d 848, 850 (Tex. 2007)). This is accomplished through a

certificate from the secretary of state certifying that the secretary forwarded a copy of the citation to the defendant. *See Whitney*, 500 S.W.2d at 95–96 (a trial court lacks jurisdiction to issue a default judgment based on substituted service on the secretary of state unless the secretary has certified that a copy of the citation was forwarded to the defendant). Such a certificate is known as a "*Whitney* certificate."

The record before the trial court must contain a *Whitney* certificate; without that showing, the trial court does not have jurisdiction over the defendant. *U.S. Bank Nat'l Ass'n as Tr. for Residential Asset Mortg. Prods., Inc., Mortg. Asset-Backed Pass-Through Certificates Series 2005-EFC2 v. Moss*, 644 S.W.3d 130, 132 & n.2 (Tex. 2022); *MC Phase II Owner, LLC v. TI Shopping Ctr., LLC*, 477 S.W.3d 489, 494 (Tex. App.—Amarillo 2015, no pet.).

B. Application

Here, after attempting service on Copa Room and Five Points by service on registered agent Hulme at the Empire Central, Woodall Rodgers, and McKinney Avenue addresses, Mercer served Copa Room and Five Points by delivering citation and the petition to the secretary of state.

However, the record does not show that *Whitney* certificates as to Copa Room and Five Points were on file at the time the trial court rendered the default judgment. Mercer supplemented the appellate record with these certificates, but they indicate they were issued on March 25, 2025, almost six months after the default judgment. This supplemental record will not sustain the default judgment against the LLCs.

MC Phase II Owner, 477 S.W.3d at 494 (because the record did not contain *Whitney* certificates at the time of the default judgment, the trial court did not have personal jurisdiction over defendant LLCs, even though *Whitney* certificates were filed after the default judgment); *COR 1558 Props., LLC v. Sunbelt Rentals, Inc.*, No. 13-22-00487-CV, 2023 WL 4499885, at *3 (Tex. App.—Corpus Christi–Edinburg July 13, 2023, no pet.) (mem. op.) (trial court lacked personal jurisdiction over defendant LLC because the *Whitney* certificate was not filed).

Mercer cites *Bank Repossessed Car Co. v. Who's Calling, Inc.*, No. 14-05-01251-CV, 2007 WL 2481168, at *2 (Tex. App.—Houston [14th Dist.] Sept. 4, 2007, no pet.) (mem. op.) for the proposition that, so long as the appellate record contains a *Whitney* certificate, there is no error on the face of the record. However, in *Bank Repossessed*, the *Whitney* certificate was dated about a month prior to the default judgment. *Id.* at *1–2 & n.4. Here, the *Whitney* certificates in Mercer's supplemental record were not issued until March 25, 2025, nearly six months after the trial court rendered default judgment. Furthermore, the opinion in *Bank Repossessed* does not indicate whether the *Whitney* certificate was on file with the trial court before it rendered the default judgment. To the extent it was not, we disagree with our sister court's conclusion that supplementing the appellate record would suffice, because the Supreme Court has clearly indicated that the *Whitney* certificate must be on file with the trial court before it renders a default judgment. *Moss*, 644 S.W.3d at 132, n.2; *see General Elec. Co. v. Falcon Ridge Apartments,*

Joint Venture, 811 S.W.2d 942, 944 (Tex. 1991) (evidence not before the trial court prior to final judgment may not be considered in a restricted appeal).

The record must affirmatively show that *Whitney* certificates were on file with the trial court before it rendered the default judgment. *Moss*, 644 S.W.3d at 132 & n.2; *Whitney*, 500 S.W.2d at 95–96. Because the record does not affirmatively demonstrate proper service, the trial court did not acquire personal jurisdiction over Copa Room and Five Points, and the default judgment will not stand. *See Shamrock Enters.*, 728 S.W.3d at 696. We sustain Appellants' second issue.

CONCLUSION

The trial court erred by granting a default judgment against Appellants. Accordingly, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

/Jessica Lewis/
JESSICA LEWIS
JUSTICE