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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2022-000242
Circuit Court Case No. 2019-CP-04-00927

Joyce Porter and Edith Durham, are the ..... Respondents

and

Jimmy L. Davis, Inc. and Jimmy L. Davis Individually, are the..... Appellants.

FINAL BRIEF OF RESPONDENTS JOYCE PORTER and EDITH DURHAM

HOLDER, PADGETT, LITTLEJOHN + PRICKETT, LLC
M. Stokely Holder
S.C. Bar No. 73892
sholder@hplplaw.com

Raford Bussey, Jr.
SC Bar No. 103943
rbussey@hplplaw.com
P.O. Box 1804
Greenville, South Carolina 29602
(864) 335-8808
Attorneys for Respondents Joyce Porter and Edith Durham

Greenville, South Carolina
November 28, 2022

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STATEMENT OF THE CASE

On May 16, 2019, Respondents filed their Summons and Complaint against Appellants in the Court of Common Pleas for Anderson County. On May 22, 2019, Appellants were personally served with Respondents' Summons and Complaint. On June 3, 2019, Respondents filed a valid Affidavit of Personal Service indicating that Appellants were personally served with the Summons and Complaint at 2900 Highway 153, Piedmont SC on May 22, 2019 at 4:06 p.m. EDT.

Appellants, having accepted personal service on May 22, 2019, should have filed a response to Respondents' Complaint with the Court on or before June 21, 2019 in order for their response to be considered timely. However, Appellants failed to respond to Respondents' properly served Summons and Complaint.

Upon Appellants' failure to file a response to the Complaint, on July 2, 2019, Respondents filed a Motion for Entry of Default with supporting Affidavit of Non-Military Service and Affidavit of Default. On July 9, 2019, the Honorable J. Cordell Maddox, Jr. signed the Order of Entry of Default against Appellants.

On September 6, 2019, the Court filed an Order/Form 4 stating that Appellants were in default and that a damages hearing would be held within ninety (90) days. Subsequently, on or about September 24, 2019, the Court sent notice that the damages hearing would be held on October 22, 2019 at 10:00 a.m. After holding the hearing and finding that Appellants had been properly served, the Court filed a Default Judgment against Appellants on November 4, 2019, in the amount of $477,300.75.

On December 11, 2019, Respondents filed a proposed Motion to Execute/Writ of Execution Against Judgment with the Court. The same day, the Honorable Richard A. Shirley,

Anderson County Clerk of Court, signed and filed the Writ of Execution Against Judgment. On December 23, 2019, Appellants' counsel filed a Notice of Appearance. At this point, Appellants had made no attempt to respond to the Complaint, entry of default, and/or judgment. Not until Respondents sought to execute the judgment—approximately seven months after they personally served Appellants with the Summons and Complaint—did Appellants respond.

On December 30, 2019, Appellants filed a Motion to set aside the Default Judgment and to Stay the Execution of Judgment. On April 27, 2020, Appellants filed a request for an "in person" hearing on their motions. In anticipation of the hearing, on June 16, 2020, Appellants filed an affidavit in support of their motions. On August 27, 2020, Respondent filed an Affidavit in response.

On August 31, 2020, an in-person hearing was held on both Appellants' and Respondents' motions before the Honorable R. Scott Sprouse. On September 3, 2020, the Court denied the Appellants' Motion to Dismiss and Motion to Set Aside the Default but granted the Appellants' Motion to Stay the execution of judgment until another damages hearing could be held. On approximately September 4, 2020, Respondents filed supplemental affidavits to the Court. On September 22, 2020, the Court filed a supplemental order finding insufficient new evidence to alter or amend the findings of its prior order and confirming its prior order of September 3, 2020.

The second damages hearing was initially scheduled to be held on January 19, 2021. Appellants filed a motion to continue the hearing on that same day. On January 27, 2021, the Court granted the motion to continue the damages hearing. On June 5, 2021, Appellants' counsel asked for the damages hearing not to be scheduled during his from July 5 to July 19, 2021. The continuance and subsequent request for protection from scheduling further delayed Respondents'

ability to obtain and/or execute on their default judgment. In the interim, another case against Appellants, which was filed after the instant action, was decided and the resulting order executed. Meanwhile, Respondents had to accommodate Appellants' delays for over two years before their damages hearing could take place for a second time.

On July 28, 2021, the second damages hearing was held before the Honorable J. Cordell Maddox, Jr. All parties appeared and were represented by counsel. On July 30, 2021, a list of exhibits was filed. At the Court's request, on August 4, 2021, Respondents filed a Statement of Damages.

On February 1, 2022, the Court filed its order granting the Default Judgment in the amount of $143,391.76. On February 24, 2022, Appellants filed its Notice of Appeal.

STATEMENT OF FACTS

In early 2017, the Respondents discussed the desires and needs of Durham to have her daughter, Porter, move in with her to take care of her during the later stages of her life, rather than having to admit Durham into a retirement or nursing home. The Respondents agreed that their respective houses were not conducive to that arrangement, so they decided it would be best to construct a new home that would accommodate their needs.

In the Summer of 2017, Respondents agreed to purchase an unimproved lot in the Creekwalk Subdivision in Sandy Springs, South Carolina, with the expectation of building a new home on the lot. Respondents then approached Appellants about constructing a home on the lot.

The Appellants told the Respondents that Appellants would agree to construct a home for the Respondents so long as the Respondents would allow Appellants to subdivide the lot into equal

half-lots for the purpose of Appellants buying one of the subdivided lots for half of the price Respondents paid for their purchase of the full lot. The Appellants made clear they wanted one of the subdivided lots in order to construct a spec home on that lot.

In an effort to induce the Respondents into agreeing to sell Appellants half of the lot, the Appellants expressly warranted to Respondents that the Appellants could legally construct a home on each of the lots in compliance with any and all applicable laws, codes, ordinances and restrictions. In addition, the Appellants expressly warranted to the Respondents that the Appellants would construct a home on the Plaintiff's lot first, which Appellants made clear they could complete no later than Thanksgiving 2017.

The completion of the Project by Thanksgiving 2017 was important to the Respondents because, as they made clear to the Appellants, Porter would be selling her house in reliance upon the Contract, placing most of her belongings in storage, and moving in with Durham on a temporary basis at Durham's existing, small home during the Project. In addition, the Respondents made clear to the Appellants that the home to be constructed by Appellants would be the Respondents' last residence and designed for such end-of-life care, so the quality of the construction and conformance to the Respondents' plans, design and specifications as well as to all applicable laws, codes, ordinances, restrictions and regulations was paramount. The Appellants made it clear to the Respondents that the Appellants understood the importance of the home construction, and assured the Respondents that the construction would be done in a timely manner, with the highest quality, and in conformance with the Respondents' plans, design and specifications as well as all laws, codes, ordinances, restrictions and regulations.

In reliance upon the express representations of Appellants, the Respondents agreed in

August, 2017, to enter into a contract with Appellants (the "Contract") whereby the Respondents would sell Appellants half of the lot, and the Appellants would construct a home for the Respondents on the remaining portion of the lot owned by the Respondents, with the understanding that the home would be constructed by Thanksgiving 2017 in accordance with the Plaintiff's design, plans and specifications as well as all applicable laws, codes, ordinances, restrictions and regulations (the "Project").

In accordance with the Contract, the Appellants agreed to construct the home for a lumpsum amount of $315,968.00, of which the Respondents would pay $94,790.40 upon Contract signing as a deposit towards the above referenced, total Contract amount with the understanding that the deposit would be held in trust by Appellants for the benefit of Respondents to be used by Appellants to pay for the Appellants' costs of constructing the Project once those costs became due.

Porter was able to quickly sell her home, the proceeds of which she was able to use to pay Appellants the $94,790.40 upon signing the Contract. Upon signing the Contract, Durham placed her home on the market in hopes that she could get it under contract for a closing to coincide with the Thanksgiving completion date of the Contract.

Through the end of August and into September, virtually no construction had been performed by Appellants. Throughout this time, the Respondents expressed their concerns and frustrations with the Appellants. In response, the Appellants acknowledged the delays and admitted that they were due to various labor and material issues, which the Appellants further acknowledged were the Appellants' responsibilities, acknowledging too that the Respondents were in no way at fault.

In October 2017, halfway through the term of the Contract, the Project was still moving at a very slow pace with only rough grading and a portion of the foundation being complete. At that time, the Respondents noticed that the Appellants were constructing the foundation in a way that deviated from the Plaintiff's construction plans. In addition, it became apparent to the Respondents that the Appellants had credit issues as the Respondents began to learn that suppliers and subcontractors had not been paid by Appellants. It was becoming increasingly apparent to the Respondents that the Appellants may no longer have the deposit funds, despite the costs of construction to that point being vastly less than the deposit amount.

During this same period of time, Durham was prepared to accept an offer on the purchase of her existing home; however, she was forced to hold off due to the increasing uncertainties regarding the Project's completion.

The Respondents expressed their frustrations to the Appellants in mid-October, which the Appellants again acknowledged and agreed were justified due to the Appellants' failure to construct the Project in accordance with the Contract and failures to pay suppliers and subcontractors. At that time, the Appellants admitted that the Project could not be completed prior to the agreed upon completion date.

In mid-October 2017, the Respondents terminated the Contract for cause based on the Appellants' numerous material breaches of the Contract. The Respondents demanded the return of those funds that should have been remaining from the deposit. During the same time frame, the Respondents learned from their architect that the Respondents would need to have a new architectural design completed because the prior design would not be possible to construct due to the Appellants' improper construction of the foundation. In addition, the Respondents learned that

a pre-fabricated roof-system (custom to the design) had been ordered by the Appellants in accordance with the original plans and left on-site by Appellants exposed to the elements. Not only could those roof components no longer be used due to the Appellants' improper design change, the materials had deteriorated while on-site, which meant there was virtually no resale value for the custom materials.

On October 23, 2017, the Respondents sent a demand letter to the Appellants outlining the list of growing issues, confirming the prior termination, and demanding the return of their deposit monies.

After correspondence between Respondents and Appellants regarding the Appellants' purported inability to pay, the Appellants agreed to enter into a conditional Settlement Agreement with Respondents. In accordance with the conditional Settlement Agreement, the Appellants agreed to pay the Respondents $25,000.00, with $1,000.00 due upon execution of the Settlement Agreement, followed by five equal consecutive monthly installments of at least $1,000.00, and then a balloon payment of the balance on or before June 30, 2018.

In the Settlement Agreement, the Appellants released and forever discharged the Respondents from any and all claims; however, the Respondents specifically conditioned any release of Appellants upon the Appellants' prior, full satisfaction of the payment terms referenced above.

The Appellants made the first $1,000.00 payment[1], but failed and refused to make any further payments.

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1 Appellants initially delivered a check with no signature and the wrong version of the agreement signed. Days later, the check was signed and the proper agreement executed by Appellants.

After entering into the conditional Settlement Agreement, the Respondents were contacted by the HOA for the Creekwalk Subdivision. The HOA informed the Respondents that the home construction on their lot violated the applicable covenants and restrictions of the Creekwalk Subdivision, as it was improperly subdivided. As a result, the HOA informed the Respondents that a home could not be constructed on their lot, or on the lot purchased by Appellants from the Respondents.

The Respondents later learned that the Appellants sold their lot to the HOA for $25,000.00 (profiting $12,500), in recognition of the violation of the Subdivision's covenants and restrictions.

The Respondents, left with no other option, were then forced to sell their distressed lot back to the HOA for a significant loss. The materials left on-site were deemed worthless. The underlying suit followed whereby the Respondents sought damages against the Appellants for the extraordinary losses suffered by Respondents, which included, without limitation, the $94,790.40 paid to Appellants, design fees, storage fees, legal fees, delay damages, lost profits, and punitive damages resulting from the Appellants' egregious conduct.

ARGUMENT

I. WHETHER THE TRIAL COURT, IN DENYING THE MOTION TO SET ASIDE THE ENTRY OF DEFAULT, ABUSED ITS DISCRETION AND ISSUED AN ORDER THAT WAS WHOLLY UNSUPPORTED BY THE EVIDENCE OR MANIFESTLY INFLUENCED OR CONTROLLED BY ERROR OF LAW.

In its first Assignment of Error, Appellants argue that the service of process was invalid and therefore did not give the trial court personal jurisdiction over the Appellants. As such, Appellants argue that the lack of jurisdiction constituted "good cause" to set aside the entry of

default and/or justified the dismissal of the action and/or that the default judgment is otherwise void.

Despite being personally served with Respondents' Summons and Complaint, following the entry of default and a default judgment against Appellants in favor of Respondents, Appellants filed a Motion to Dismiss and to Set Aside Default and Default Judgement pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure, as well as under Rule 55(c) and Rule 60(b) of the SCRCP. Despite the captioning of the motion as one to dismiss *and* set aside default and default judgment, the arguments presented by Appellants fall under Rule 60 for relief from judgment. *See Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 265, 750 S.E.2d 615, 619 (Ct. App. 2013).

Following a hearing on the motion wherein both Respondents and Appellants presented affidavits, witness testimony, and exhibits in support, the Honorable R. Scott Sprouse found that Appellants were properly served with the Summons and Complaint, that the Court had jurisdiction over the Appellants, and therefore denied Appellants' Motion to Dismiss. In his order, Judge Sprouse notes specifically that he found the testimony of Respondents' process server, Michael McNamara, to be credible and compelling. Because Appellants' evidence focused on service of process, they failed to present other evidence of any conditions identified in Rule 60(b) of the SCRCP or of excusable neglect or any good cause to set aside the default. Accordingly, Judge Sprouse also denied Appellants' Motion to Set Aside Default.

"Questions of fact arising on a motion to quash service of process for lack of jurisdiction over the defendant are to be determined by the court." *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001); *Lawson v. Jeter*, 243 S.C. 103, 106, 132 S.E.2d 276, 277 (1963). "The findings of the circuit court on such issues are binding

on the appellate court, unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law." *Brown* at 583. "The decision of whether to grant relief from an entry of default is solely within the sound discretion of the trial court." *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989) (citing *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)); accord *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). The Court of Appeals has therefore reasoned that it cannot substitute its judgment for that of the trial judge and will not disturb the trial court's decision absent a clear showing of abuse of discretion." *Ricks*, 293 S.C. at 374, 360 S.E.2d at 536; *Ammons v. Hood,* 288 S.C. 278, 279, 341 S.E.2d 816, 818 (Ct. App. 1986).

The important distinction in determining an abuse of discretion is looking to see if the trial court's determination is without any evidentiary support or an error of law. Specifically, the Court of Appeals stated the following in *Delta Apparel, Inc. v.Farina:*

> "'An abuse of discretion in setting aside a default judgment occurs when the [trial court] issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.' *Id.* (quoting *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997))."

Delta Apparel, Inc. v. Farina, 406 S.C. 257, 265, 750 S.E.2d 615, 619 (Ct. App. 2013).

Rule 4 of the South Carolina Rules of Civil Procedure outlines the requirements of personally serving a corporation. In pertinent part, it states that:

> **(a) Summons: Issuance**. The summons shall be issued by plaintiff or plaintiff's attorney. Copies of the original summons shall be served upon each defendant.
>
> [...]
>
> **(c) By Whom Served.** Service of summons may be made by the sheriff, his deputy, or by any other person not less than eighteen (18) years of age, not an attorney in or a party to the action. Service of all other process shall be made by the sheriff or his deputy or any other duly constituted law enforcement officer or by any person designated by the court who is not less than eighteen (18) years of age and not an

attorney in or a party to the action, except that a subpoena may be served as provided in Rule 45.

(d) Summons: Personal Service. The summons and complaint must be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Voluntary appearance by defendant is equivalent to personal service; and written notice of appearance by a party or his attorney shall be effective upon mailing, or may be served as provided in this rule. Service shall be made as follows:

[...]

(3) Corporations and Partnerships. Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Rule 4, SCRCP.

In reviewing Rule 4 of SCRCP in conjunction with a Rule 60(b) motion, the Court of Appeals in *Delta Apparel, Inc.* stated:

> "[W]e inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *Id.* at 210, 456 S.E.2d at 899. **"Further, an [officer's] return of process creates the legal presumption of proper service that cannot be 'impeached by the mere denial of service by the defendant.'"** *Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct. App. 2005) (quoting *Richardson Constr. Co. v. Meek Eng'g and Constr., Inc.*, 274 S.C. 307, 311, 262 S.E.2d 913, 916 (1980)).

Delta Apparel, Inc., supra at 267 (emphasis added).

Appellants argue that the personal service of Appellants did not actually occur. This argument is made despite the evidence in the record of the signed Affidavit of Service (Affidavit of Service; R. pp. 64-65). The Affidavit of Service indicates Michael McNamara, the process server, successfully served Jimmy L. Davis, as registered agent for Jimmy L. Davis, Inc. on May 22, 2019, 4:06 pm EDT at 2900 Highway 153, Piedmont, SC 29683 (Affidavit of Service; R. p. 64). It is signed and notarized on May 26, 2019. (Affidavit of Service; R. p. 64). Therefore,

pursuant to *Delta, supra*, there is a legal presumption of proper service that cannot be impeached by Appellants' mere denial.

Additionally, Respondents' process server, Michael McNamara, attended the motion hearing on August 31, 2020 whereby the Court took evidence on the Appellants' Motion to Dismiss and Set Aside Default and Default Judgment (8/31/2020 Hrg Transcript; R. pp.106-145). At the hearing, Mr. McNamara testified that, before his current employment, he was a police officer for twenty-seven years, including as a homicide investigator and sergeant in charge of investigations. He then testified that he already knew Jimmy L. Davis as a result of having served him multiple times in other matters prior to May 22, 2019. (8/31/2020 Hrg Transcript; R. p. 132, line 10-p. 133, line 2). He knew what Mr. Davis looked like, correctly identified Mr. Davis in court, and testified that Mr. Davis had in the past accepted service and was typically very polite and nice about taking the papers. (8/31/2020 Hrg Transcript; R. p. 133, line 12-p. 134, line 16) Also, Mr. McNamara knew Mr. Davis' usual vehicle that he drove. (8/31/2020 Hrg Transcript; R. p. 134, lines 2-8)

McNamara further testified that on May 22, 2019, Mr. McNamara went to 2900 Hwy 153 Piedmont, South Carolina, which was a gas station that was being renovated by Appellants. (8/31/2020 Hrg Transcript; R. p. 133, line 25-p. 134, line 3) Upon arriving at the site, Mr. McNamara noted that there were several vehicles present, including one small, white pick-up truck with the words "Jimmy L Davis Building" or "Jimmy L. Davis Inc." printed on the side. (8/31/2020 Hrg Transcript; R. p. 134, lines 3-6) Mr. McNamara recognized and knew this pick-up to be the vehicle that Jimmy L. Davis usually drove. (8/31/2020 Hrg Transcript; R. p. 134, lines 3-8)

Upon looking around the site, Mr. McNamara recognized Mr. Davis. (8/31/2020 Hrg Transcript; R. p. 134, lines 9-13) He approached Mr. Davis, told him he had legal papers for him and handed the papers to Mr. Davis. (8/31/2020 Hrg Transcript; R. p. 134, lines 10-16) Mr. Davis took the papers and went to his vehicle and placed the papers in his truck. (8/31/2020 Hrg Transcript; R. p. 134, lines 14-16) Then, Mr. Davis went back to work at the site. (8/31/2020 Hrg Transcript; R. p. 134, lines 14-15)

Mr. McNamara further testified that the next day, May 23, 2019, he went again to 2900 Hwy 153 Piedmont, South Carolina to serve Mr. Davis with additional legal papers that were unrelated to this action. (8/31/2020 Hrg Transcript; R. p. 134, lines 17-22) Mr. McNamara saw him at the same site and handed him the unrelated legal papers. (8/31/2020 Hrg Transcript; R. p. 134, line 17-p. 135, line21) Again, Mr. Davis accepted the papers and was polite. (8/31/2020 Hrg Transcript; R. p. 135, lines 18-21)

Appellants' argument to rebut the legal presumption of proper service is based upon the premise that they provided alleged evidentiary support for their motion to vacate the default which conflicted with Respondents' evidence of service and that merely presenting conflicting evidence should entitle Appellants to relief from the default. However, Appellants cannot discount the factual evidence that Respondents submitted in support of the proper service, nor did Appellants present any evidence that undercut the reliability of Mr. McNamara as a witness or of his testimony. As such, it was the trial court's determination as to what evidence it considered credible and not credible. Such determination of credibility cannot be overturned by this Court.

Further, the trial court made no error of law. Appellants argue that the trial court failed to address whether "good cause" existed under Rule 55(c). They further allege that the trial court

failed to make a "'good cause' analysis". Rule 55(c) of the SCRCP states that "[f]or good cause shown the court *may* set aside an entry of default and, if a judgment by default has been entered, *may* likewise set it aside in accordance with Rule 60(b)." Rule 55(c), *SCRCP (emphasis added).*

The plain language of the rule and subsequent caselaw make clear that, when considering whether to set aside an entry of default for good cause shown, the decision is entirely within the discretion of the trial court. *See Wham* at 465, 381 S.E.2d at 501. Thus, upon review, the Appellate Court should only disturb the trial court's decision where there is a clear showing of abuse of discretion. *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987). Further, in *Bage, LLC v. Southeastern Roofing Co. of Spartanburg, Inc.*, which Appellants cite to and rely on, the Court of Appeals stated just the opposite of Appellants' assertion:

> "In reviewing a trial judge's exercise of discretion, the issue before an appellate court is not whether it believes good cause existed to set aside the entry of default, but whether the trial judge's determination is supported by the evidence and not controlled by an error of law."

Bage, LLC v. Southeastern Roofing Co. of Spartanburg, Inc., 373 S.C. 457, 464-465, 646 S.E.2d 153, 156-157 (Ct. App. 2007), *vacated on other grounds following settlement by the parties*, 383 S.C. 489, 681 S.E.2d 867 (2009). Although the opinion was later vacated by the Supreme Court due to an agreement by the parties, Respondents agree that the Court of Appeals' opinion and reasoning in *Bage* are nonetheless applicable to this case.

Finally, Appellants argue that the trial court erred in failing to make a "good cause" analysis of the factors outlined in *Wham v. Shearson Lehman Bros., Inc. See Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989)(holding a master shall consider the following factors in deciding whether to grant relief from an entry of default: (1) the

timing of the motion for relief; (2) whether the defendant-movant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted). However, the Court of Appeals has specifically declined to read *Wham* as requiring a trial judge to identify and make specific findings of the *Wham* factors. *Dixon v. Besco Eng'g*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995). "The trial judge will not be reversed for failing to make specific findings of fact on the record for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause." *Id.* at 179, 463 S.E.2d at 639.

In his Order, Judge Sprouse correctly identified the applicable standard, stating that "Rule 55(c) provides that default can be set aside for 'good cause shown.'" (9/03/2020 Order, R. p. 24). When recounting the evidence presented by both sides, he specifically identified certain portions of the testimony of Michael McNamara that lent credibility to the witness's testimony, including his background in law enforcement and familiarity with Appellants. (9/03/2020 Order, R. p.24). In doing so, Judge Sprouse identified the evidence as presented that he considered most persuasive when determining whether good cause existed to set aside the entry of default. Judge Sprouse stated that he found "McNamara's testimony credible and compelling" and therefore he did not find "that the [Appellants] have produced sufficient evidence to warrant [the trial Court] vacating its previous Order holding the [Appellants] in default." (9/03/2020 Order, R. pp.24-25).

In the same Order, Judge Sprouse specifically notes that the only issue identified and argued by Appellants was the service of Appellants. (9/03/2020 Order, R. p. 25). As a result, the only evidence presented by Appellants regarding "good cause" to set aside the entry of default focused on their allegations of improper service of process. Because Appellants denied service altogether and the evidence presented in support of their Motion focused solely on the issue of

service, the issue of service became determinative for whether "good cause" existed to set aside the default. Therefore, when the trial court held that Appellants were properly served based on the evidence presented, it became self-evident that the evidence fully supported a finding that no evidence of "good cause" had been presented.

There exists absolutely no evidence in the record that the Trial Court issued an order that was wholly unsupported by the evidence or manifestly influenced or controlled by error of law. Therefore, this Court should hold that the trial court did not abuse its discretion in denying Appellants' Motion to Dismiss and to Set Aside Default and affirm the judgment.

II. WHETHER THE TRIAL COURT'S AWARD OF DAMAGES IS SUPPORTED BY EVIDENCE.

In Appellants' second Assignment of Error, they argue that the damages awarded were not supported by evidence. Respondent need only prove the amount of damages by a preponderance of the evidence. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238 (1978). Specifically, the Appellants argue that the Respondents did not prove by competent evidence the damages awarded, and further Appellants argue that they were not afforded the opportunity to conduct a full adversarial contest by presenting their own evidence.

The seminal case with regard to the process for ascertaining damages as a result of a default judgment is *Howard, supra*. Specifically, the Supreme Court of South Carolina stated the following:

> Traditionally, the judges in this jurisdiction have permitted counsel for a defaulting defendant, upon request, to cross-examine the witnesses and object to evidence. In O'Dell v. United Ins. Co. of America, 243 S.C. 35, 132 S.E. (2d) 14 (1963), and in Cabler v. Hart, 251 S.C. 576, 164 S.E. (2d) 574 (1968), the opinions recite that defense counsel were

> permitted, without objection, to appear and contest the issue of damages. There are three possible approaches. We could (1) allow damages to be determined in an *ex parte* proceeding, denying the defendant any right to participate; (2) allow damages to be ascertained after a full adversary contest, including the right of the defendant to produce evidence in rebuttal or in mitigation; or (3) allow damages to be ascertained with defense counsel's participation limited to cross-examination and objection to plaintiff's evidence. We hold that this third approach is the proper one and approve it for use in the courts of this state.

Id. at 241.

The Supreme Court explained its reasoning as follows:

> In Morgan's Inc. v. Surinam Lumber Corp., supra, this Court pointed out that there is a difference between a defendant being declared in default and subsequently having judgment entered against him for damages. By defaulting, a defendant forfeits his "right to answer or otherwise plead to the complaint." 251 S.C. at 66, 160 S.E. (2d) at 193. In essence, the defaulting defendant has conceded liability. However, a defaulting defendant does not concede the *amount* of liability.

Id. at 241-242.

The decision in *Howard, supra*, predates the adoption of Rule 55(b)(2) of the SCRCP in 1985. Rule 55(b)(2) states in pertinent part:

> (2) All Other Cases
>
> In all other cases, the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against a minor or incompetent person unless represented in the action by guardian ad litem who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the motion or application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties if a proper demand therefor has been made pursuant to Rule 38 and not withdrawn, or when and as required by any statute. Pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action.

However, despite the addition of Rule 55 (b)(2), the reasoning from *Howard* has been further explained and upheld. In *Ammons v. Hood*, 288 S.C. 278 (Ct. App. 1986), the Court of Appeals states in pertinent part:

> In a default action, the default judgment settles the issue of liability. The hearing is held solely to determine what damages should be awarded. The trial judge properly allowed Hood to cross-examine the witnesses regarding damages and Hood is entitled to no more. *See* Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E. (2d) 880 (1978), appeal after remand 276 S.C. 502, 280 S.E. (2d) 204 (1981).

Id. at 282. See also, *Doe v. S.B.M.* 327 S.C. 352, 488 S.E.2d 878 (Ct. App. 1997).

The Supreme Court of South Carolina reiterated its position from *Howard* in *Limehouse v. Hulsey, 404 S.C. 93 (2013)*. In *Limehouse*, the Supreme Court stated:

> This case presents an opportunity for this Court to re- examine our decision in *Howard* in conjunction with *Rule 55(b)(2), SCRCP*. As will be more thoroughly discussed, we reaffirm our decision in *Howard* and the procedures adopted therein.

Id. at 114.

The Supreme Court went on to explain why *Howard* should still be followed today:

> Despite these concerns and the authority from other jurisdictions, we adhere to the procedures adopted in Howard. If our courts were to allow a defaulting defendant to fully participate in a post-default hearing, we believe there would be no consequence of default. *See* Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability."). Furthermore, unlike Hulsey, we discern no basis in the language of Rule 55(b)(2) that would require us to depart from *Howard.*
>
> Finally, we note there are due process safeguards for cases involving punitive damages. It is well established that the relief granted in a default judgment is limited to that supported by the allegations in the Complaint and the proof submitted at the damages hearing. Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988) ("In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only

> with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered." (citations omitted)). Moreover, trial judges and appellate courts conduct a review of the award to ensure the verdict is not excessive and is supported by the evidence.

Id. at 116.

Turning to the standard applicable to the determination of a damages award, the evidence must only be sufficient to enable the court or jury to determine the amount of damages with reasonable certainty or accuracy. Although a damages award cannot be based upon conjecture or speculation, it is not a necessity that the amount of damages or quantity of loss be proven with mathematical certainty. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981); *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010). Further, a property owner may give her estimate as to the property's value or the damage inflicted upon it even though she is not otherwise an expert. *Id.*; *See South Carolina State Highway Department v. Wilson*, 254 S.C. 360, 175 S.E. (2d) 391 (1970).

"The trial judge has considerable discretion regarding the amount of damages, both actual or punitive." *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310-311, 594 S.E.2d 867, 873 (Ct. App. 2004). Because of the discretion allowed to the trial judge, the Appellate Court's review on appeal is limited to the correction of errors of law. *Santoro v. Schulthess*, 384 S.C. 250, 267, 681 S.E.2d 897, 906 (Ct. App. 2009); *See Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. at 310-311, 594 S.E.2d at 873. The Appellate Court's "task in reviewing a damages award is not to weigh the evidence, but to decide if any evidence exists to support the damages award." *Santoro*, 384 S.C. at 267, 681 S.E.2d at 906.

The Respondents' Complaint contained numerous well-pled, detailed allegations of the facts, and included six (6) causes of action. (Complaint, R. pp. 46-63). The first cause of action was for breach of contract; specifically, for Appellants' breach of the contract to build a home for Respondents on the subject property. (Complaint, R. p. 53). This cause of action included a prayer for actual and consequential damages, as well as interest, costs and legal fees. (Complaint, R. p. 53). The second cause of action was also for breach of contract, however the subject contract was the prior settlement agreement, which was conditioned upon the full payment by Appellants. That condition was never fulfilled. (Complaint, R. pp. 53-54) Respondents concede that this second cause of action for breach of contract is moot as the payment condition was never fulfilled by Appellants.

The remaining causes of action were for negligence, fraud, constructive fraud and negligent misrepresentation. (Complaint, R. pp. 54-58). Respondents' prayer for relief for these causes of action sought actual, consequential, special and resulting damages as well as interest, costs, legal fees and punitive damages. (Complaint, R. pp. 58-59).

The trial court held a damages hearing on July 28, 2021. (7/28/21 Hrg. Transcript, R. pp. 146-192). Appellants attended this hearing and were permitted to cross examine the sole witness, Carolyn Joyce Porter. (7/28/21 Hrg. Transcript, R. p. 170, line 2-p. 185, line 8; R. p. 188, line 15-p. 189, line 6). Additionally, Appellants were given the opportunity to object to any exhibits offered as proof damages by Respondents. (7/28/21 Hrg. Transcript, R. p. 157, lines 2-9; R. p. 161, lines 5-11; R. p. 165, line 21-p. 166, line 4). Appellants did not object to the admissibility of any of the documents offered by Respondents. (7/28/21 Hrg. Transcript, R. p. 157, lines 2-9; R. p. 161, lines 5-11; R. p. 165, line 21-p. 166, line 4). Further, the trial court allowed the Appellants to

submit five (5) exhibits as part of the record (over the objection of Respondents' counsel that it exceeded the scope of cross examination). (7/28/21 Hrg. Transcript, R. p. 171, line 21-p. 173, line 3; R. p. 191, lines 12-19).

Appellants argue that the trial court should have allowed them to submit evidence of the value of the labor and materials up to the point that the construction agreement was terminated. However, this would be contrary to the rules outlined in *Howard, Ammons,* and *Limehouse*. During damages hearings following the entry of default, Appellants are only allowed to cross examine and object to Respondents' evidence. *Howard* at 241. Appellants are not entitled to submit their own evidence. See *Id.*; *Ammons v. Hood*, 288 S.C. at 282.

Next, Appellants argue that the settlement agreement conclusively establishes proof of the amount of damages. This argument disregards the fact that the settlement agreement was rendered moot as its validity was conditioned on full payment by Appellants in accordance with the terms set forth in the settlement agreement. (7/28/21 Hrg. Transcript, R. p. 183, line 2-p. 184, line 4; p. 187, line 10-p. 188, line 8). There is no dispute that full payment of the amounts set forth in the settlement agreement did not occur; Appellants defaulted on their monthly payment obligation almost immediately. (7/28/21 Hrg. Transcript, R. p. 182, line 16-p. 183, line 15; p. 187, line 10-p. 188, line 8). Further, Rule 408 of the SCRE states:

> "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim **or its amount**. Evidence of conduct or statements made in compromise negotiations is likewise not admissible."

Rule 408, SCRE *(emphasis added)*.

It is a clear and established rule in our courts that a settlement agreement is a compromise to a dispute and that the terms of the compromise are not admissible to prove the dollar amount of the underlying claim. Parties enter into settlement agreements for a myriad of reasons, the foremost of which is to avoid the time, stress, and expense of a trial or continued litigation. Parties commonly accept less than full compensation as a compromise in recognition of the time and expense they are saving. As such, the trial court agreed that the settlement agreement was conditioned on complete payment, which was never effectuated, and therefore no longer controls. (2/1/22 Default Judgment Order, R. p. 43).

In response to Appellants' arguments regarding Respondents' damages related to the deposit paid to Appellants, loss of value, design plans, moving expenses and storage fees, Respondents reiterate that Appellants had the opportunity to cross examine Ms. Porter with regard to these damages and Respondents' exhibits in support. (7/28/21 Hrg. Transcript, R. p. 170, line 2-p. 185, line 8; R. p. 188, line 15-p. 189, line 6). Additionally, Appellants did not object to Respondents' exhibits with regard to their admissibility. (7/28/21 Hrg. Transcript, R. p. 157, lines 2-9; R. p. 161, lines 5-11; R. p. 165, line 21-p. 166, line 4). At the damages hearing, Respondent Joyce Porter testified extensively regarding the damages suffered by Respondents, including, without limitation, the deposit paid to Appellants (7/28/21 Hrg. Transcript, R. p. 156, line 4-p. 157, line 9), the lack of any value received from Appellants' alleged work on the project (7/28/21 Hrg. Transcript, R. p.158, lines 6-9; R. p. 187, lines 1-9), the cost of obtaining new design plans due to Appellants' deviations from the initial plans (7/28/21 Hrg. Transcript, R. p. 160, line 6-p. 161, line 16), the loss in property value due to Appellants' actions (7/28/21 Hrg. Transcript, R. p. 161, line

17-p. 164, line 5), and the storage and moving fees incurred by Respondents due to Appellants' delays (7/28/21 Hrg. Transcript, R. p. 164, line 6-p.166, line 4).

After the trial court reviewed the well-pled—and admitted—allegations in the Complaint, heard witness testimony, reviewed exhibits entered into the record, and considered the Parties' respective Statement of Damages, the trial court identified the below damages that Appellants owed to Respondents, which the trial court found to be supported by the evidence:

1. $94,790.40 for repayment of the full deposit paid to the Appellants at the time the parties entered into the agreement;
2. $1,003.00 for repayment of costs incurred by the Respondents in purchasing new design plans after the Appellants' deviation from the original design plans;
3. $12,500.00 for the loss of value in resale price of the subject property;
4. $1,320.00 for storage fees incurred by the Respondents while searching for alternative housing;
5. $601.72 for costs incurred by the Respondents for hiring movers; and
6. $33,176.64 in pre-judgment interest based on the contract down payment accruing at a rate of 8.75%.

As the Court stated in its Order, the court had the opportunity to consider the credibility of the witnesses as to the issue of damages, along with Respondents' other evidence, and found it compelling. Accordingly, the court awarded a default judgment against the Appellants, jointly and severally, in the amount of $143,391.76. (2/1/22 Default Judgment Order, R. p. 42; R. p. 44). The trial court specifically did not award any damages for lost profits and appreciation of the property after finding the amounts sought to be too speculative. (2/1/22 Default Judgment Order, R. p. 42). Additionally, the trial did not find that punitive damages were appropriate. (2/1/22 Default Judgment Order, R. pp. 42-43).

In short, the trial court found that Respondents established their damages in the amount of $143,391.76 by a preponderance of evidence and, more importantly for the issue presented upon appeal, the award of damages by the trial court was clearly supported by the evidence. The trial court found there to be sufficient evidence to determine the amount of Respondents' damages with reasonable certainty and accuracy, which is supported by the Complaint, testimony, exhibits, and Statement of Damages comprising the record of this matter. However, the trial court did not merely grant a blanket award of the amounts sought by Respondents; Judge Maddox identified those categories of damages for which he found there to be sufficient evidence while specifically excluding those damages for which he did not find that Respondents had met their burden of proof. (2/1/22 Default Judgment Order, R. p. 42).

CONCLUSION

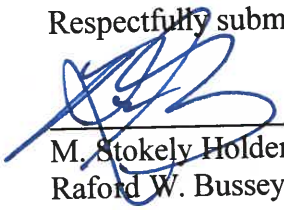
As to the service of process, it remains abundantly clear that the lower court properly determined that the Appellants had not rebutted the legal presumption of proper service. Between the Affidavit of Service and the testimony by Respondents' process server, the trial court was presented with more than sufficient evidence to affirm its entry of default judgment. Accordingly, there exists absolutely no evidence in the record that the trial court issued an order that was wholly unsupported by the evidence or manifestly influenced or controlled by error of law. Therefore, this Court should hold that the trial court did not abuse its discretion in denying Appellants' Motion to Dismiss and to Set Aside Default.

Additionally, as to damages and the trial court's award thereof, the record in this matter reflects that ample evidence exists to support the trial court's damages award. Therefore, the trial

court had more than sufficient evidence to support the damages awarded to Respondents, there was no error of law, and the award should be affirmed.

For the foregoing reasons, Respondents respectfully asks this Court to affirm the trial court's Order denying Appellants' motion to overturn the default, affirm the trial court's Order granting the default judgment, and to affirm the trial court's Order granting the award of damages.

Respectfully submitted,



M. Stokely Holder (SC Bar #73892)
Raford W. Bussey, Jr. (SC Bar #103943)
P.O. Box 1804
Greenville, SC 29602
(864) 335-8808
sholder@hplplaw.com
rbussey@hplplaw.com
Attorneys for Respondents Joyce Porter and Edith Durham

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Greenville, South Carolina