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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Appellate Case No. 2024-001550

Michael L. Perry and Lonnie L. Long, Respondents,

v.

American International Industries, Atlas Turner Inc., Avon Products, Inc., Barretts Minerals Inc., BlockDrug Company, Inc., Brenntag North America, Inc., Brenntag Specialties, LLC, Bristol-Myers Squibb Company, Buy-Low General Merchandise, Inc., C&S Wholesale Grocers, LLC, Calvin Klein Inc., Chanel Inc., Charles B. Chrystal Company, Inc., Chattem, Inc., Colgate-Palmolive Company, Color Techniques, Inc., Cosmetic Specialties, Inc., Coty Inc., CVS Health Corporation, CVS Pharmacy, Inc., EDC Drug Stores, Inc., Estee Lauder Inc., Estee Lauder International, Inc., The Estee Lauder Companies Inc., Food Lion, LLC, Genuine Parts Company, Glamour Industries Co., Himmel Management Co. LLC, Himmel Media LLC, Honeywell International, Inc., Idelle Labs, Ltd., IMI Fabi (Diana) LLC, IMI Fabi (USA) Inc., IMI Fabi, LLC, Janssen Pharmaceuticals, Inc., Johnson & Johnson, Johnson & Johnson Holdco (NA) Inc., Kenvue Inc.; L'Oreal USA, Inc., L'Oreal USA Products, Inc., LLT Management LLC, Long's Drugstores of South Carolina, Inc., LTL Management LLC, Minerals Technologies Inc., The Neslemur Company, Piggly Wiggly, LLC, Pneumo Abex LLC, Presperse Corporation, The Procter & Gamble Company, PTI Royston, LLC, PTI Union LLC, Ralph Lauren Corporation, Rite Aid of South Carolina, Inc., Shulton, Inc., Specialty Minerals Inc., Sumitomo Corporation of Americas, Union Carbide Corporation, Vi-Jon, LLC; Walgreen Co., Walmart Inc., Defendants,

Of which American International Industries is the Appellant.

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ARGUMENTS IN REPLY

1.

A-I-I demonstrated good cause as to why default should have been set aside and the *Wham* factors should have been addressed by the circuit court.

To demonstrate "good cause" pursuant to Rule 55(c), the defaulting party must "provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014) (quoting *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009)). "In deciding whether good cause exists, the trial court should consider the following factors: (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted." *Richardson v. P V, Inc.*, 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009); *see also Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

Plaintiffs argue that because A-I-I was able to file its answer on the same day Plaintiffs refused to consent to an extension—something Plaintiffs had given to every other defendant who requested it—that A-I-I "could have answered the Complaint at any time." BOR, 16. Plaintiffs' attempt to use A-I-I's expediency in remedying its good faith mistake against it is perplexing given the nature of default. A-I-I's expediency is something this Court should construe in A-I-I's *favor*.

A-I-I filed its answer just eighteen days late. Importantly, A-I-I filed its answer prior to the circuit court finding it in default. A-I-I never asked Plaintiffs to delay their case and fully participated in the case from the time of its initial answer through a two-week jury trial. Plaintiffs suffered *zero* prejudice from the slight delay in receiving A-I-I's initial answer. Plaintiffs continued adding defendants months after A-I-I was fully participating in the case.

Motions to set aside default should be liberally construed in favor of adjudicating cases on their merits rather than procedural technicalities. *See Caldwell v. Wiquist*, 402 S.C. 565, 575, 741 S.E.2d 583, 588 (Ct. App. 2013) ("[O]ur decision to reverse the trial court's refusal to set aside the default judgments is consistent with the policy of our state to resolve cases on the merits."); *See also*, *Ricks v. Weinrauch*, 293 S.C. 372, 374–75, 360 S.E.2d 535, 536 (Ct. App. 1987) ("[Default] is liberally construed to see that justice is promoted and to strive for disposition of cases on their merits. . . . [D]iscretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default"). A-I-I clearly demonstrated good cause for missing the initial deadline to answer, and setting aside entry of default against it would have unquestionably been in the interest of justice.

The *Wham* factors all weigh heavily in A-I-I's favor because A-I-I immediately took efforts to remedy the missing of the initial deadline, A-I-I has a compelling defense on the merits,[1] and setting aside the default posed no prejudice to Plaintiffs. 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989). This Court should reverse the circuit court and remand this case for a trial on the merits.

[1] In their statement of facts section, Plaintiffs cite several documents that were never presented to the jury, and that were not attached to their complaint. These include Mr. Perry's deposition testimony and expert testimony and reports from *other cases*. BOR, 7-10. Interestingly, the citations to Mr. Perry's deposition testimony directly contradict the testimony he gave at trial. Tr.1689, ll. 5 – 17.

2.

Timely answering an amended complaint cures a prior entry of default.

As an initial matter, Plaintiffs agree with A-I-I that whether timely answering an amended complaint cures a prior entry of default is a novel legal question in South Carolina that is subject to de novo review. BOR, 6. And despite their contrary position below, Plaintiffs now seem to agree that A-I-I *was* served with the amended complaints in this case. Acknowledging A-I-I was served via NEF, Plaintiffs argue that they did not intend to serve A-I-I, and they were not required to serve A-I-I. BOR, 2 n.1; BOR, 19. In any event, A-I-I was unequivocally served with both amended complaints the moment they were e-filed in the circuit court. *See* Rule 4(e)(2), SCEF; Rule 5(b)(1), SCRCP. This factual agreement between the parties on appeal is significant because the circuit court's refusal to set aside the default judgment was predicated in significant part on its erroneous view that A-I-I was not served with the amended complaints—an erroneous view that was repeatedly pressed by Plaintiffs below. Order on post-trial motions, 2-4.

Plaintiffs continue to maintain that A-I-I had no right to be served under Rule 5(a), of the South Carolina Rules of Civil Procedure and that A-I-I had no right to answer. BOR, 19-20. While Plaintiffs *might* be correct that A-I-I had no right to be served, Plaintiffs are wrong that A-I-I had no right to answer. Rule 5(b)(1) provides that amended complaints are to be served on the attorneys who have entered appearances on behalf of a party—exactly what happened in this case—and that once a party is so served it "shall" file an answer within fifteen days. Rule 15(a), SCRCP. It is difficult to square Plaintiffs' and the circuit court's position that A-I-I had no right to answer the amended complaints it was served with where our rules *required* A-I-I to file an answer.

Plaintiffs rely entirely on out-of-state cases in support of their argument, including an opinion by a trial judge in Nevada[2], while ignoring the decisions by South Carolina judges in *Soto v. Smith*, No. 21-CP-42-03609 (S.C. Ct. of Common Pleas Nov. 7, 2023), and *Rowley v. City of N. Myrtle Beach*, 2009 U.S. Dist. LEXIS 131683 (D.S.C. Feb. 23, 2009). In both *Soto* and *Rowley*, trial judges in South Carolina rejected the exact arguments Plaintiffs have made in this case. In *Soto*, the circuit court found that a "defendant's default on a superseded complaint is mooted when an amended complaint becomes the operative pleading, even if the amended complaint asserts the same claims against the defaulting defendant." *Soto*, at 2-3. The trial judge in *Rowley* found that the defendants did not need to move to answer the initial complaint out of time because the plaintiffs had filed an amended complaint. The judge noted that "although the individual Defendants were technically in default when they failed to file an Answer to the original Complaint, their default was essentially cured by the filing of an Amended Complaint and their timely Answer to the Amended Complaint." *Rowley* at 6.

Plaintiffs continue to assert that allowing a defaulting defendant to cure its default by timely answering an amended complaint would result in plaintiffs being forced to choose between adding new defendants and maintaining the default against another. In reality, plaintiffs never have to make this choice. A plaintiff can add new defendants that she believes are responsible for her injuries pursuant to Rules 19 or 20 of the South Carolina Rules of Civil Procedure. To the extent adding a new defendant in this manner requires the serving and filing of an amended complaint, this Court *could* fashion a rule that allows a plaintiff to incorporate by reference its original pleadings to maintain the default against any defaulting defendants. *See Brown v. Funk*, 697 S.W.3d

[2] *Koninklijke Philips Elecs. N.V. v. KXD Tech., Inc.*, 2008 U.S. Dist. LEXIS 135766 (D. Nev. May 9, 2008).

739, 745 (Ky. Ct. App. 2024). Although this approach is followed in some jurisdictions, A-I-I urges this Court not to adopt such a rule because allowing for this kind of gamesmanship by plaintiffs in an effort to maintain a procedural default over a defendant that is making a good faith effort to participate in litigating a case against it is inconsistent with South Carolina's preference that cases be decided on their merits. *See Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (South Carolina's policy is to favor disposition of cases on the merits).

Finally, if a plaintiff's desire is to strategically avoid giving a defaulting defendant a way to cure its default, the plaintiff can sue the additional defendants in separate lawsuits—this is true even if this Court adopts A-I-I's position. *See Simon v. Strock*, 209 S.C. 134, 138-39, 39 S.E.2d 209, 211 (1946) ("It is well established in this jurisdiction that one who is injured by the wrongful act of two or more joint tort-feasors has an election or option to sue each of such tort-feasors separately or to join them as parties defendant in a single action"). These options completely eliminate Plaintiffs' concerns.

The policy preferences advanced by Plaintiffs and the circuit court are nothing more than an endorsement that plaintiffs should be permitted to maintain a permanent technical advantage over a defendant who files its answer late, no matter what happens after. This policy is unpersuasive, especially given the specific facts of this case. A-I-I has never disregarded its opportunity to defend itself. Indeed, it answered Plaintiffs' original complaint before the default was entered, participated in Mr. Perry's deposition, and timely answered Plaintiffs' two amended complaints. A-I-I has consistently acted in a good faith effort to respond to Plaintiffs' lawsuit against it and participate in litigating this case on the merits.

The position advanced by A-I-I is consistent with South Carolina's policy favoring disposition on the merits and consistent with the interests of justice. *See Yoko Kim Melton v. Chong Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008) (defaults are disfavored and motions to set them aside should be "liberally construed to promote justice and dispose of cases on the merits"); *Ricks v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535, 536 (Ct. App. 1987) ("the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default").

This Court should hold that timely answering an amended complaint after service cures a prior entry of default.

3.

A-I-I's federal due process rights were violated by the imposition of punitive damages.

None of the complaints in this case alleged specific facts against A-I-I that could support a determination that A-I-I acted fraudulently, willfully, wantonly, or recklessly. Plaintiffs acknowledge as much because in their brief of respondent, each of the allegations quoted from their complaint are allegations against "defendants" collectively. Plaintiffs make no reference to specific allegations against A-I-I because there are none. BOR, 31-32. Instead, Plaintiffs assert that they weren't required to allege specific facts against A-I-I and that the conclusory allegations they made against all sixty defendants[3] were sufficient to satisfy the demands of federal due process. BOR, 31-33. Plaintiffs are incorrect.

[3] Plaintiffs did plead specific facts against some of the defendants, just not A-I-I. For instance, in their initial complaint, the seventh cause of action is pled specifically against Johnson & Johnson. Initial complaint, pars. 210-260. Additionally, in their second amended complaint, Plaintiffs added numerous specific allegations against Brenntag, Johnson & Johnson, IMI FABI, and PTI Royston, all companies that were named as defendants in the initial complaint. Second amended complaint, pars. 24-58.

In support of their argument that collectively pleading punitive damages against sixty defendants using the exact same language for each, Plaintiffs cite several cases that have nothing to do with due process. For instance, Plaintiffs cite *Green v. Indus. Life & Health Ins. Co.*, 199 S.C. 262, 18 S.E.2d 873 (1942). The question in *Green* was whether a case was removable to federal court based on diversity jurisdiction. *Id*. at 263-64, 18 S.E.2d at 874. The plaintiff in *Green* was a South Carolina resident and had sued two defendants; one an individual resident of South Carolina, and another a nonresident corporation. The defendant corporation sought to remove the case to federal court based on diversity of citizenship and argued that the allegations against it were separable from the allegations against the individual defendant. *Id*. at 264, 18 S.E.2d at 874.

Contrary to Plaintiffs' suggestion, the complaint in *Green* alleged very specific conduct against both the individual and corporate defendants. *Id*. at 264-69, 18 S.E.2d at 874-76. The *Green* Court determined that the complaint alleged a fraudulent breach of contract against the corporate defendant and not against the individual defendant. As such, the Court concluded that the breach of contract cause of action against the corporate defendant was separable from the individual defendant and removable to federal court. *Id*. at 270, 18 S.E.2d at 876. The Court went on to find that even if the complaint also alleged a joint cause of action against both defendants, the corporate defendant would still have the right to separate and remove the cause of action solely brought against it. *Id*. at 272-73, 18 S.E.2d at 877.

Plaintiffs likewise point to *McKellar v. Stanton*, a case where "the only question raised by exceptions is whether the cause as raised by the pleadings is an action at law or in equity." 104 S.C. 248, 249, 88 S.E. 527, 527 (1916). Nothing in the *McKellar* opinion suggests that the allegations against the defendants were pled using the exact same language, nor would the answer

to that question have had any relevance to the question the Court was being asked to decide. In no way do *Green* or *McKellar* support Plaintiffs' position in this case.

Plaintiffs also point to the Eleventh Circuit's decision in *Crowe v. Coleman*, 113 F.3d 1536, 1539 (11th Cir. 1997) which suggested that when allegations in a complaint are made against multiple defendants collectively, the complaint can be read to be making those allegations about each defendant individually. Like in *Green*, the question presented in *Crowe* was whether a case was removable to federal court based on diversity jurisdiction. Also like in *Green*, the plaintiffs in *Crowe* had sued an individual defendant who was a resident of Georgia, and a nonresident corporation. *Id*. at 1537. The defendants sought to remove the case to federal court alleging that the plaintiffs had fraudulently named the individual defendant for the purpose of defeating diversity jurisdiction. *Id*. The individual defendant also moved for summary judgment, and, in response, the plaintiffs moved to remand to state court and to amend their complaint to add a new cause of action against the individual defendant. *Id*. The district court denied the plaintiffs' motions and granted summary judgment to the individual defendant.

The context of removal to federal court in *Crowe* is important because, under the standard for removal based on fraudulent joinder, "the removing party has the burden of proving that either: (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court." *Crowe*, 113 F.3d at 1538. Furthermore, in considering whether the case should be remanded to state court, "the district court must evaluate the factual allegations in the light most favorable to the plaintiff and must resolve any uncertainties about state substantive law in favor of the plaintiff." *Id*.

"If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court." *Id*. (quoting *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1440-41 (11th Cir. 1983)). The *Crowe* Court ultimately concluded that the district court erred in denying the plaintiffs' motion to remand the case to state court only because the complaint "arguabl[y]" stated a cause of action against the individual defendant. The Court stressed that given the procedural posture of the case, "any ambiguity or doubt about the substantive state law favors remand to state court." *Crowe*, 113 F.3d at 1539.

Crowe does not support Plaintiffs' position and has no application here. The issue in this case is not whether the complaint was sufficient to state a claim against A-I-I such that it could survive a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure or whether the case should be removed to federal court. The issue here is whether the complaint, coupled with evidence of A-I-I's net worth, was sufficient to warrant the imposition of punitive damages without violating federal due process. When asked whether to impose punitive damages against A-I-I, the jury was presented with only two things to consider: (1) the conclusory statement by the judge that A-I-I's conduct was willful, wanton, and reckless; and (2) A-I-I's net worth. This was wholly insufficient to support the award of punitive damages against A-I-I. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

CONCLUSION

By reason of the arguments made in A-I-I's opening brief, and this reply brief, this Court should reverse the entry of default and default judgment against A-I-I and remand this case for a trial on the merits, or in the alternative, vacate the jury's punitive damages award against A-I-I because it was imposed in violation of A-I-I's federal due process rights.

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This 19th day of May 2025.

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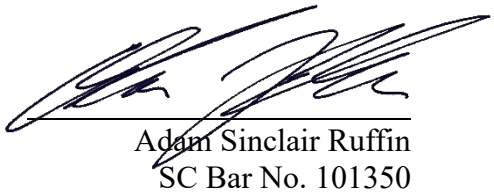
Of which American International Industries is the Appellant.

PROOF OF SERVICE

Pursuant to Rule 262(c)(3), SCACR, undersigned counsel hereby certifies that a true copy of the initial reply brief of appellant in the above-referenced case has been served upon Theile McVey and John Kassel, at the primary e-mail address listed in the Attorney Information System (AIS), this 19th day of May 2025.



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