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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.

FINAL BRIEF OF APPELLANT

Adam Sinclair Ruffin
SC Bar No. 101350
1320 Main Street, Suite 300
Columbia, SC 29201
(803) 470-5629
adam@ruffinappeals.com

Stephanie G. Flynn
Fox Rothschild
SC Bar No. 16653
2 West Washington Street, Suite 1100
Greenville, SC 29601
(864) 751-7607
sgflynn@foxrothschild.com

Attorneys for American International Industries

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	4
STATEMENT OF FACTS	5
ARGUMENT.....	7

1.

The circuit court erred in denying A-I-I's motion to set aside default under Rule 55(c), and default judgment under Rule 60(b) of the South Carolina Rules of Civil Procedure.	7
A. The circuit court abused its discretion in refusing to set aside default and the subsequent default judgment because A-I-I was not properly served with the initial summons and complaint.....	18
B. The circuit court abused its discretion by finding that A-I-I's inability to obtain local counsel due to conflicts of interest did not constitute good cause and further abused its discretion by refusing to consider the <i>Wham</i> factors which all weighed heavily in A-I-I's favor.	21
C. A-I-I's timely answers to the amended complaints cured any previous default as a matter of law because the second amended complaint was the operative complaint and A-I-I was never in default on that complaint.	29
D. The default judgment should be set aside for all the reasons argued above and additionally because A-I-I was not properly noticed of the damages hearing pursuant to Rule 55(b)(2) of the South Carolina Rules of Civil Procedure.	40

2.

A-I-I's federal due process rights were violated because it was improperly defaulted into punitive damages even though none of the three complaints against it alleged specific facts that could support a determination that A-I-I acted fraudulently, willfully, wantonly, or recklessly. 42

CONCLUSION.....49

TABLE OF AUTHORITIES

South Carolina Cases

<i>Beckmann Concrete Contractors, Inc. v. United Fire and Cas. Co.</i> , 360 S.C. 127, 600 S.E.2d 76 (Ct. App. 2004)	40, 41
<i>Branham v. Ford Motor Co.</i> , 390 S.C. 203, 701 S.E.2d 5 (2010)	46
<i>Caldwell v. Wiquist</i> , 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013)	28
<i>Columbia Pools, Inc. v. Galvin</i> , 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986).....	18
<i>Dymon, Inc. v. Hyman</i> , 305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991)	40
<i>Edwards v. Ferguson</i> , 254 S.C. 278, 175 S.E.2d 224 (1970)	26
<i>Ex parte Trustgard Ins. Co.</i> , 442 S.C. 485, 900 S.E.2d 448 (Ct. App. 2023)	24
<i>Ex Parte: DeBordieu Colony Cmty. Ass’n, Inc.</i> , 442 S.C. 285, 898 S.E.2d 179 (Ct. App. 2024)	4
<i>Hagood v. Sommerville</i> , 362 S.C. 191, 607 S.E.2d 707 (2005)	4, 29
<i>Hamilton v. Davis</i> , 300 S.C. 411, 389 S.E.2d 297 (Ct. App. 1990)	19, 20
<i>Honorage Nursing Home of Florence, S.C., Inc. v. Florance Convalescent Center, Inc.</i> , 367 S.C. 108, 623 S.E.2d 853 (Ct. App. 2005)	21
<i>I’On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	4
<i>Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.</i> , 275 S.C. 556, 274 S.E.2d 287 (1981)	40
<i>Limehouse v. Hulsey</i> , 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011)	23

<i>Limehouse v. Hulsey</i> , 404 S.C. 93, 744 S.E.2d 566 (2013)	23
<i>McCall v. IKON</i> , 363 S.C. 646, 611 S.E.2d 315 (Ct. App. 2005)	40
<i>McClurg v. Deaton</i> , 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008)	26
<i>Micronics, Inc. v. S.C. Dep't of Revenue</i> , 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001)	18
<i>Moore v. Simpson</i> , 322 S.C. 518, 473 S.E.2d 64 (Ct. App. 1996)	19, 20, 21
<i>Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC</i> , 432 S.C. 633, 856 S.E.2d 150 (2021)	30, 31
<i>Petty v. Weyerhaeuser Co.</i> , 272 S.C. 282, 251 S.E.2d 735 (1979)	18
<i>Renney v. Dobbs House, Inc.</i> , 275 S.C. 562, 274 S.E.2d 290 (1981)	24, 40
<i>Richardson v. P V, Inc.</i> , 383 S.C. 610, 682 S.E.2d 263 (2009)	4, 17, 23
<i>Ricks v. Weinrauch</i> , 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)	4, 18, 28
<i>Roberson v. S. Fin. of S.C., Inc.</i> , 365 S.C. 6, 15 S.E.2d 112 (2005)	10, 19, 20
<i>Roberts v. Peterson</i> , 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987)	22
<i>Schein v. Lamar</i> , 284 S.C. 252, 325 S.E.2d 573 (Ct. App. 1985)	30, 34
<i>Soto v. Smith</i> , 2021-CP-42-03609 (S.C. Ct. of Common Pleas Nov. 7, 2023)	32, 33
<i>Stark Truss Co. v. Superior Const. Corp.</i> , 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004)	41

<i>Sundown Operating Co. v. Intedged Indus.</i> , 383 S.C. 601, 681 S.E.2d 885 (2009)	17, 23
<i>Thompson v. Hammond</i> , 299 S.C. 116, 382 S.E.2d 900 (1989)	26
<i>Thynes v. Lloyd</i> , 294 S.C. 152, 363 S.E.2d 122 (Ct. App. 1987)	41
<i>Unisun Ins. v. Hawkins</i> , 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000)	33
<i>Weeks v. Drawdy (In re Estate of Weeks)</i> , 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997)	4
<i>Wham v. Shearson Lehman Bros., Inc.</i> , 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989)	11, 25
<i>White Oak Manor, Inc. v. Lexington Ins. Co.</i> , 407 S.C. 1, 753 S.E.2d 537 (2014)	4, 17
<i>Williams v. Watkins</i> , 384 S.C. 319, 681 S.E.2d 914	25
<i>Yoko Kim Melton v. Chong Olenik</i> , 379 S.C. 45, 664 S.E.2d 487 (Ct. App. 2008)	18, 25
Federal Cases	
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996)	46, 47, 48
<i>Colleton Preparatory Acad., Inc. v. Hoover Universal</i> , 616 F.3d 413 (4th Cir. 2010)	28
<i>ConnectU LLC v. Zuckerberg</i> , 522 F.3d 82 (1st Cir. 2008)	30
<i>Cooper Indus. v. Leatherman Tool Grp., Inc.</i> , 532 U.S. 424 (2001)	4, 45, 46
<i>Dluhos v. Floating & Abandoned Vessel</i> , 162 F.3d 63 (2d Cir. 1998)	30
<i>Fawzy v. Wauquiez Boats SNC</i> , 873 F.3d 451 (4th Cir. 2017)	29, 30

<i>Gertz v. Robert Welch</i> , 418 U.S. 323 (1974)	46
<i>Healthier Choices Mgmt. Corp. v. Philip Morris USA, Inc.</i> , 65 F.4th 667 (Fed. Cir. 2023)	30
<i>Lolatchy v. Arthur Murray, Inc.</i> , 816 F.2d 951 (4th Cir. 1987)	18
<i>Massey v. Helman</i> , 196 F.3d 727 (7th Cir. 1999)	30
<i>New Orleans Ass’n of Cemetery Tour Guides & Co. v. New Orleans Archdiocesan Cemeteries</i> , 56 F.4th 1026 (5th Cir. 2023)	30
<i>NOCO Co. v. OJ Commerce, LLC</i> , 35 F.4th 475 (6th Cir. 2022)	30
<i>Ramirez v. Cty. of San Bernardino</i> , 806 F.3d 1002 (9th Cir. 2015)	30
<i>Reynolds v. Behrman Capital IV L.P.</i> , 988 F.3d 1314 (11th Cir. 2021)	30
<i>Rowley v. City of N. Myrtle Beach</i> , 2009 U.S. Dist. LEXIS 22761 (D.S.C. Mar. 16, 2009)	34
<i>Rowley v. City of N. Myrtle Beach</i> , 2009 U.S. Dist. LEXIS 131683 (D.S.C. Feb. 23, 2009)	33, 34
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003)	46, 47
<i>Thomas v. Se. Pa. Transp. Auth.</i> , 1989 U.S. Dist. LEXIS 1400 (E.D. Pa. Feb. 9, 1989)	34
<i>Tufaro v. Okla. ex rel. Bd. of Regents of the Univ. of Okla.</i> , 107 F.4th 1121 (10th Cir. 2024)	30
<i>W. Run Student Hous. Assocs., LLC v. Huntington Nat’l Bank</i> , 712 F.3d 165 (3d Cir. 2013)	30
<i>Webb v. United States Veterans Initiative (US Vets)</i> , 451 U.S. App. D.C. 507, 993 F.3d 970 (D.C. Cir. 2021)	30

<i>Wullschleger v. Royal Canin U.S.A., Inc.</i> , 75 F.4th 918 (8th Cir. 2023)	30
<i>Young v. City of Mount Ranier</i> , 238 F.3d 567 (4th Cir. 2001).....	30
Other State Cases	
<i>Brown v. Funk</i> , 697 S.W.3d 739 (Ky. Ct. App. 2024)	38
<i>Grieco v. Perry</i> , 697 A.2d 1108 (R.I. 1997)	38
<i>Harris v. Shoults</i> , 877 S.W.2d 854 (Tex. Ct. App. 1994).....	38
<i>Hyder v. Dergance</i> , 76 N.C. App. 317, 332 S.E.2d 713 (1985)	38
<i>Ness v. Dig. Dial Communs., Inc.</i> , 227 Wis. 2d 592, 596 N.W.2d 365 (1999)	15, 35, 36
<i>Ness v. Dig. Dial Commun., Inc.</i> , 222 Wis. 2d 374, 588 N.W.2d 63 (Ct. App. 1998).....	36
<i>Pomroy v. Indian Acres Club of Chesapeake Bay, Inc.</i> , 270 A.3d 1014 (Md. Ct. Spec. App. 2022)	37, 38
<i>Reichert v. TRW, Inc.</i> , 531 Pa. 193, 611 A.2d 1191 (Pa. 1992)	38
<i>Spilke v. Wicklow</i> , 138 Conn. App. 251, 53 A.3d 245 (2012)	15
<i>Stack v. Welder</i> , 3 Cal. 2d 71, 43 P.2d 270 (1935)	15
<i>TD Banknorth, N.A. v. Hawkins</i> , 5 A.3d 1042 (Me. 2010)	37
<i>Wells Fargo Bank, N.A. v. Dechert</i> , 12 N.E.3d 262 (Ind. Ct. App. 2014)	15

South Carolina Rules

Rule 4, SCEF	passim
Rule 4, SCRCF	19, 21
Rule 5, SCRCF	passim
Rule 6, SCRCF	7
Rule 15, SCRCF	31, 32, 35
Rule 19, SCRCF	37
Rule 50, SCRCF	3, 44, 45
Rule 55, SCRCF	passim
Rule 59, SCRCF.....	44
Rule 60, SCRCF	passim

Federal Rules

Rule 15, Fed. R. Civ. P.	31
Rule 55, Fed. R. Civ. P.	17

Constitutional Provisions

U.S. Const. amend. XIV	45
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STATEMENT OF ISSUES ON APPEAL

1.

Whether the circuit court erred in denying A-I-I's motion to set aside default under Rule 55(c), and default judgment under Rule 60(b) of the South Carolina Rules of Civil Procedure?

2.

Whether A-I-I's federal due process rights were violated where it was improperly defaulted into punitive damages even though none of the three complaints against it alleged specific facts that could support a determination that A-I-I acted fraudulently, willfully, wantonly, or recklessly?

STATEMENT OF THE CASE

This is an appeal from a default judgment in a mesothelioma case.

Plaintiffs filed a summons and complaint in the Richland County Court of Common Pleas on August 4, 2023, pleading several causes of action against fifty-eight defendants for their alleged roles in causing Michael Perry's mesothelioma. One of those defendants was American International Industries (A-I-I), the Appellant in this appeal.¹

Plaintiffs moved for entry of default against A-I-I on September 26, 2023, alleging A-I-I had not filed its answer. A-I-I answered the initial complaint three days later, on September 29, 2023. The circuit court granted Plaintiffs' motion for default on October 3, 2023. A-I-I filed a motion to set aside default on October 10, 2023, and an amended motion to set aside default on October 24, 2023. After a hearing, the circuit court denied the motion on November 2, 2023.

Plaintiffs subsequently filed an amended complaint on November 30, 2023, and a second amended complaint on February 1, 2024. Each amended complaint added one new defendant, bringing the total number of defendants to sixty. A-I-I was served with both amended complaints via NEF and filed timely answers to both.

Many of the defendants in the case ultimately settled for a total amount of \$11,255,000. By the time of trial, only A-I-I and Johnson & Johnson remained. The case proceeded to trial before the Honorable Jean H. Toal and a jury from August 5 – 15, 2024. Plaintiffs were represented by Theile McVey, Jamie Rutkoski, Rachel Gross, Benjamin Adams, and Jonathan George. A-I-I was represented by Stephanie Flynn and Nicholas Cherry. Johnson & Johnson was represented by Matt Bogan, Mitch Brown, Kim Bueno, Christopher Cowan, and Amy Pepke.

¹ Johnson & Johnson also filed a notice of appeal which is pending before this Court. The appellate case number for that appeal is 2025-000065.

On August 15, 2024, the jury awarded \$32,656,250 in actual damages against A-I-I and Johnson & Johnson. Additionally, the jury awarded \$760,000 in punitive damages against A-I-I and \$30 million in punitive damages against Johnson & Johnson. Judgement was entered on August 19, 2024.

A-I-I filed post-trial motions on August 26, 2024, pursuant to Rules 50(b) and 59(a) of the South Carolina Rules of Civil Procedure. A-I-I also filed post-trial motions pursuant to Rules 60(b) and 62. While those motions were pending, A-I-I served and filed its initial notice of appeal with this Court on September 13, 2024, along with a motion to hold the appeal in abeyance pending resolution of the post-trial motions. This Court granted the motion to hold the appeal in abeyance.

The circuit court held a hearing on the post-trial motions on September 24 – 25, 2024. The court denied all A-I-I's post-trial motions except one. The circuit court granted A-I-I's motion for a new trial nisi remittitur and reduced the jury's actual damages award by a total of \$7 million, leaving a verdict of \$25,656,250. This reduction, in conjunction with the \$11,255,000 set-off from the pretrial settlements with the other defendants left an actual damages award of \$14,401,250. The circuit court did not reduce the punitive damages award against A-I-I. The court did reduce the punitive damages award against Johnson & Johnson to \$25 million.

A-I-I served and filed its amended notice of appeal on December 27, 2024.

STANDARD OF REVIEW

Issue 1

“Determining whether to set aside an entry of default lies solely within the sound discretion of the circuit court and that decision will not be overturned absent a clear showing of an abuse of discretion.” *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 10, 753 S.E.2d 537, 542 (2014) (citing *Richardson v. P.V., Inc.*, 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009)). “An abuse of discretion in setting aside a default judgment occurs when the judge 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. *Weeks v. Drawdy (In re Estate of Weeks)*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997) (citing *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)). “An error of law includes failing to consider all of the factors relevant to a particular decision.” *Ex Parte: DeBordieu Colony Cmty. Ass’n, Inc.*, 442 S.C. 285, 290, 898 S.E.2d 179, 181 (Ct. App. 2024).

However, “[i]n a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court.” *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000)).

Issue 2

Whether an award of punitive damages violated a defendant’s federal due process rights is subject to de novo review. *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 431 (2001) (resolving confusion among appellate courts regarding proper standard of review in constitutional challenges to punitive damage awards).

STATEMENT OF FACTS

Michael Perry and his spouse, Lonnie Long, lived together in Charleston, South Carolina. Mr. Perry was diagnosed with mesothelioma in July of 2023.

Mr. Perry began using talc powder when he was four or five years old in 1974 and used it continuously until 2019. When Mr. Perry was a child, his mother would use Johnson's Baby Powder on him "[e]very single day. Multiple times a day, if there was a second bathing." R. 2186, ll. 3 – 6. Mr. Perry's mother would "pour the powder into her hand, and rub it from [his] high neck down [his] torso, under [his] arms, all the way down [the] trunk of [his] body, into [his] genitalia, buttocks, [and] back." R. 2186, l. 23 – 1648, l. 3. Mr. Perry continued using this same powdering process as an adult. R. 2187, ll. 4 – 8.

Although Mr. Perry testified that he used other brands of talc powder, the powder he used most was Johnson & Johnson Baby Powder. R. 2183, ll. 19 – 25; R. 2203, l. 2 – R. 2207, l. 20. In fact, Mr. Perry testified that the amount of other brands' powder that he used wasn't "even close" to the amount of Johnson's Baby Powder he used. R. 2227, ll. 5 – 17. The reason he used Johnson's Baby Powder was because "it was a family brand. We connected with that whole family concept. It was safe. It was good for babies." R. 2184, ll. 1 – 6.

Mr. Perry moved to South Carolina as an adult and continued using Johnson's Baby Powder but increased his usage due to the hot and humid climate. R. 2189, l. 16 – 2190, l. 1. As an adult, he used Johnson's Baby Powder "a minimum of two times a day," and sometimes he would use it as many as four times a day. R. 2192, ll. 1 – 9.

Mr. Perry was an Eagle Scout and recalled that on camping trips, he would squirt Johnson's Baby Powder in his sleeping bag so that he could "smell something other than the burning of the [camp] fire." R. 2195, ll. 9 – 23. He also played hockey and swam competitively. He used

Johnson's Baby Powder in "[his] gear bag, [his] shoulder pads, [his] leg, and leg pads." R. 2196, ll. 5 – 13. When he swam, he would put Johnson's Baby Powder in his swim cap and "pour it over the top of [his] head right before [he] jumped in the water." R. 2196, ll. 16 – 21.

When Mr. Perry was doing his "sailing adventures" through the Florida Keys and the Bahamas, he used Johnson's Baby Powder even more because the ocean water would dry his skin out. He "used a tremendous amount of talc products on [his] skin to—it being the Johnson & Johnson on [his] skin, to keep [his] shirt from sticking to [him]." R. 2197, ll. 2 – 17. The main reason Mr. Perry used so much Johnson's Baby Powder was because he was allergic to deodorant and the powder helped him to "stay fresh." R. 2198, ll. 3 – 12.

Mr. Perry recalled that the label on Johnson's Baby Powder indicated that adults could "[u]se [it] every day to feel soft, fresh, and comfortable," and that in reliance on that label he "bathed in this product." R. 2194, ll. 1 – 10. He "would never have brought [Johnson's Baby Powder] into [his] house" if he believed the product was dangerous. R. 2200, l. 10 – 2201, l. 2.

Mr. Perry also testified that he believed he may have been exposed to asbestos from the ages of fifteen to eighteen when he regularly changed the brakes on two of his vehicles. R. 2216, l. 17 – 2217, l. 2. Mr. Perry estimated that he installed brakes on those two cars approximately six dozen times. R. 2217, ll. 19 – 24. Each brake installation took about two hours and, although he tried not to breathe in the dust, he acknowledged that there was a dark-colored cloud of dust that he was near. R. 2218, ll. 3 – 22.

Dr. Steven Haber, who was qualified as an expert in internal medicine and pulmonology for Plaintiffs, testified that Johnson's Baby Powder "play[ed] a role" in Mr. Perry's cancer. R. 1131, ll. 2 – 10. Dr. Haber testified that mesothelioma is not curable, and that Mr. Perry's life expectancy was approximately eighteen months from the time he was diagnosed. R. 1146, ll. 9 – 19.

ARGUMENT

1.

The circuit court erred in denying A-I-I's motion to set aside default under Rule 55(c), and default judgment under Rule 60(b) of the South Carolina Rules of Civil Procedure.

Relevant Facts

Initial Complaint, Answer, and First Motion to Set Aside Default

Plaintiffs' initial summons and complaint were filed on August 4, 2023. Plaintiffs moved for entry of default against A-I-I on September 26, 2023. Counsel for Plaintiffs submitted an affidavit indicating that the summons and complaint were served to A-I-I on August 9, 2023, by delivery to its "authorized representative Terri Cooper," and that A-I-I's answer was due on September 9, 2023.² R. 174.

A-I-I filed its initial answer on September 29, 2023, three days after Plaintiffs moved for default. In its answer, A-I-I pleaded numerous defenses, including that it was not the successor-in-interest to Clubman or Pinaud. R. 183-184, def. 21. A-I-I also asserted that none of the products it sold contained asbestos and that it did not cause Mr. Perry's mesothelioma. R. 185, def. 28; R. 190, def. 53.

The circuit court granted Plaintiffs' motion for default without a hearing on October 3, 2023. The court ordered the Plaintiffs to comply with the notice requirements of Rule 55(b)(2), of the South Carolina Rules of Civil Procedure for any damages hearing. R. 5.

² September 9, 2023, was a Saturday and the attached affidavit of service indicated that Terri Cooper received the summons and complaint on August 10, 2023 (not August 9, 2023, as Plaintiffs represented to the circuit court). If A-I-I was properly served, its answer would have been due on September 11, 2023. *See* Rule 6(a), SCRPC.

A-I-I filed a motion to set aside default on October 10, 2023. A-I-I argued that service of the initial complaint was improper and that its failure to file its answer on time was due to a good faith mistake. R. 223. Specifically, A-I-I indicated that the person who was given a copy of the summons and complaint by the Plaintiffs' process server was not authorized to accept service on behalf of A-I-I. R. 224.

Even though service was improper, A-I-I forwarded the pleadings to its national counsel, Julia Gowin. On August 11, 2023, Gowin recommended that a law firm with an office in South Carolina be hired to defend A-I-I in the case. R. 258 pars. 3-4. The insurer acknowledged receipt of the complaint and noted that a conflict check would need to be completed before retaining local counsel. R. 259 par. 5. As of September 11, 2023, conflict checks had still not been completed for local counsel. R. 259 par. 7.

Upon receiving Plaintiffs' motion for default against A-I-I, Gowin had another attorney in her office, Paula Pendley, who was also involved in representing A-I-I outside of South Carolina, contact Plaintiffs' attorneys to explain their difficulties in securing local counsel and to request an extension to file A-I-I's answer. R. 259 par. 10. Plaintiffs' counsel refused this request. R. 259 par. 11. Upon learning of Plaintiffs' refusal to agree to an extension, Gowin reached out to an Atlanta-based attorney who agreed to file an answer on behalf of A-I-I that same day. *Id.* A-I-I was finally able to obtain local counsel, Stephanie Flynn, on October 9, 2023, just six days after the circuit court signed the order finding A-I-I in default. R. 225.

In its motion to set aside default, A-I-I pointed out that it had consistently indicated its intent to be an active participant in the litigation and that minimal discovery had taken place as of the date of filing its motion to set aside the default. In fact, the deposition of Michael Perry had just begun on the same day A-I-I filed its motion and A-I-I participated in that deposition without

objection from Plaintiffs. R. 226. A-I-I argued that default should be set aside for good cause shown and pointed out that disposition of cases on the merits is favored in South Carolina. R. 227.

Plaintiffs filed a response to A-I-I's motion to set aside default in which they acknowledged that Paula Pendley had reached out to Counsel for Plaintiffs to tell them that A-I-I had been struggling to secure local counsel. Plaintiffs also acknowledged that Ms. Pendley requested an extension to file A-I-I's answer which Plaintiffs' Counsel refused. Plaintiffs admitted they agreed to such requests for other defendants but refused to consent to A-I-I's request because, according to them, A-I-I "was already in default." R. 264-265. Plaintiffs asserted that default should not be set aside because, (1) service was proper, and (2) A-I-I's attorneys were negligent in failing to request an extension to file A-I-I's answer prior to September 11, 2023. R. 266-267.

The circuit court held a hearing on A-I-I's motion to set aside default on October 25, 2023. At that hearing, Stephanie Flynn and Timothy Peck appeared on behalf of A-I-I. Theile McVey appeared on behalf of Plaintiffs. R. 915.

Ms. Flynn pointed out that setting aside default would not cause any prejudice to Plaintiffs and that A-I-I had appeared at Mr. Perry's deposition and cross examined him without objection. R. 920, l. 18 – 921, l. 3. Ms. Flynn acknowledged that, if service was effective on Terri Cooper, the deadline for A-I-I's answer would have been September 11, 2023, and that it had missed that deadline. R. 921, ll. 10 – 16. When Terri Cooper received the initial complaint, A-I-I forwarded it to its insurer with instructions to obtain local counsel which wasn't done. A-I-I was not made aware of the fact that local counsel had not been secured until it received Plaintiffs' motion for default. It was then that A-I-I dispensed with the normal channels of obtaining counsel and sought to obtain counsel on its own. R. 921, l. 17 – 922, l. 1.

The circuit court stated that there are a “wealth of cases that say that if the insurance company drops the ball, that doesn’t cut it. So what we’re left with in this case is ‘Was service proper?’” R. 922, ll. 5 – 14. Ms. Flynn argued that service was not proper because Terri Cooper was not an officer of A-I-I. Ms. Flynn acknowledged that Terri Cooper’s title was “executive vice president,” but explained that A-I-I had given that title to several employees and that none of those employees were officers of the partnership. The only officer of A-I-I is the president. R. 924, ll. 1 – 15. The circuit court responded that if Terri Cooper was being held out as an officer, service could be made on her. The court found that the title “executive vice president” seemed to confer such authority. R. 924, l. 16 – 925, l. 12.

Ms. Flynn cited *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 15 S.E.2d 112 (2005) in support of A-I-I’s position that service on Terri Cooper was insufficient. R. 926, ll. 5 – 23. Ms. Flynn pointed out that Brian Dror is the registered agent for each of the partners of A-I-I and, as such, he was the correct person to serve. R. 926, l. 24 – 927, l. 10. Mr. Dror was in fact served with the initial summons and complaint as to Defendant Glamour Industries which was the managing partner for A-I-I and was also a named defendant in this case.³ R. 927, ll. 11 – 24. Ms. Flynn argued that A-I-I was not attempting to thwart service, it had meritorious defenses, and that South Carolina favors resolution of cases on their merits. R. 928, ll. 6 – 15.

Ms. McVey argued, and the circuit court accepted, that A-I-I’s purported difficulties in obtaining local counsel occurred only after September 11, 2023, and was therefore irrelevant to the question of whether default should be set aside. R. 930, l. 12 – 931, l. 15. Additionally, Ms. McVey argued that Terri Cooper, as executive vice president, was an “officer” of A-I-I which made service on her effective. R. 931, l. 16 – 932, l. 11.

³ Plaintiffs and Glamour entered a joint stipulation of dismissal prior to trial.

The circuit court denied the motion to set aside default finding that Terri Cooper had apparent authority to accept service and that the insurer's failure to obtain an attorney in time to answer the initial complaint did not constitute good cause to be relieved from entry of default. R. 932, l. 12 – 934, l. 1; R. 48. Having concluded that A-I-I failed to show good cause, the circuit court refused to consider the factors outlined by this Court in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

Amended Complaints, Timely Answers, and Renewed Requests to Set Aside Default

Plaintiffs sought leave to file an amended complaint to add a new defendant on November 9, 2023, which was granted by the circuit court on November 21, 2023. Plaintiffs e-filed the amended complaint on November 30, 2023, which named A-I-I as a defendant. This complaint did not incorporate the initial complaint or refer to it at all. Because several lawyers had entered appearances on behalf of A-I-I at that time, they were all automatically served with this amended complaint pursuant to Rules 4(e)(2) and 4(e)(3) of the South Carolina Electronic Filing Policies and Guidelines. Specifically, Stephanie Flynn, Nicholas Cherry, and Allyson Twilley—local attorneys for A-I-I—were all served with the first amended complaint. A-I-I timely filed its answer on December 8, 2023. Plaintiffs did not move to strike this timely answer.

Plaintiffs again sought leave to file a second amended complaint to add another defendant on January 31, 2024, which the circuit court granted. Plaintiffs filed their second amended complaint on February 1, 2024. Again, all counsel of record, including Counsel for A-I-I, were automatically served with this e-filed complaint. As such, A-I-I, through its Counsel, timely filed its answer to Plaintiffs' second amended complaint on February 16, 2024. Again, Plaintiffs did not move to strike A-I-I's answer.

A-I-I continued to actively participate in litigating the case and on April 24, 2024, filed a motion for a protective order seeking to protect its sensitive and private financial information from Plaintiffs' deposition notice with subpoena duces tecum request. R. 627. In that motion, A-I-I pointed out that it was no longer in default because it had timely answered both of Plaintiffs' amended complaints. *Id.*

Plaintiffs filed their own motion for a protective order in response to A-I-I serving notice of intent to subpoena some of Mr. Perry's employment records related to his exposure to asbestos. R. 639. Plaintiffs argued that A-I-I remained in default despite its timely answers to the first and second amended complaints. *Id.* Plaintiffs filed a second motion for a protective order to prohibit A-I-I from participating in "any expert discovery except for the issue of damages." R. 641.

Plaintiffs argued that A-I-I was asserting a novel theory that timely answering an amended complaint moots a prior entry of default. Plaintiffs argued that A-I-I was not required to be served with the amended complaints under Rule 5(a) of the South Carolina Rules of Civil Procedure because the substantive claims against A-I-I were not changed. As such, Plaintiffs maintained that A-I-I could not cure default by timely answering those complaints. *Id.*

A-I-I filed its response to Plaintiffs' motion for protective order reiterating its position that its timely answers to the first and second amended complaints cured its prior default because the second amended complaint was now the operative complaint. R. 645. A-I-I also pointed out that it was served with both amended complaints via NEF and Rule 4(e), of the South Carolina Electronic Filing Policies and Guidelines even if service was not required. R. 652 n.4.

The circuit court granted Plaintiffs' motion for a protective order. The court found A-I-I's argument that its timely answers to Plaintiffs' amended complaints was "unavailing." R. 58. In its order, the court noted that the amended complaints did not change the substantive allegations

against A-I-I and that service of the amended complaints was not required. R. 58-59. The court therefore found A-I-I could not contest liability and that its continued participation in the case was limited to the issue of damages. *Id.*

Additional Pre-trial Litigation and Joint Trial of A-I-I and Johnson & Johnson

A-I-I filed a proffered motion for summary judgment in which it continued to maintain that its timely answers to the amended complaints mooted the prior entry of default against it. R. 664-669. A-I-I also fully briefed its arguments as to why it was entitled to judgment as a matter of law. R. 670-680.

A-I-I filed a petition for a writ of certiorari with the Supreme Court on June 28, 2024, and a motion to stay the trial court proceedings on July 29, 2024, to prevent the case from proceeding to trial without being able to defend itself on the merits. The circuit court held a pre-trial hearing on July 30, 2024, and denied A-I-I's motion to stay the trial pending the Supreme Court's ruling on its petition for a writ of certiorari. R. 950, ll. 16 – 19.

As indicated above in the Statement of the Case, by the time trial came, only A-I-I and Johnson & Johnson remained as defendants. Trial began on August 5, 2024. At the start of trial, the circuit court reiterated its ruling that A-I-I remained in default and that its participation at the trial would be limited to the issue of damages. The court specifically stated that “[d]efault doesn’t give you an opportunity to jump on it again with the second and third amended complaints. You defaulted on the first complaint; therefore, I view [A-I-I as being] in default.” R. 957, l. 17 – R. 959, l. 4.

The trial then proceeded as essentially a trial between only Plaintiffs and Johnson & Johnson. A-I-I was not permitted to give an opening statement and was only allowed to cross-examine witnesses on damages.

At the close of the evidence, A-I-I filed a written motion for directed verdict. R. 762. A-I-I argued, in part, that it was entitled to a directed verdict on Plaintiffs' claim that A-I-I's conduct was willful, wanton, and reckless, because there were no specific allegations in the complaint alleging what A-I-I did that met this requirement. Counsel for A-I-I explained that holding it liable for willful and wanton conduct without specific conduct pled in the complaint violated its due process rights under the United States Constitution. The circuit court rejected this argument and denied A-I-I's motion for a directed verdict. R. 2239, l. 3 – 15.

The circuit court allowed Counsel for A-I-I to give a fifteen-minute closing argument limited to the issue of economic damages to the jury "with trepidation in [her] heart." R. 2242, l. 22 – 2243, l. 4. After closing arguments, the court instructed the jury that it had determined that A-I-I was liable for Mr. Perry's mesothelioma "as a matter of law," and that "[t]he Court has determined that [A-I-I's] conduct was willful, wanton, and reckless, meaning [A-I-I] acted with a conscious indifference to the rights and safety of others." R. 2432, l. 10 – 2433, l. 6.

The jury returned a verdict in excess of \$30 million in actual damages against A-I-I and Johnson & Johnson. The jury returned a verdict of \$760,000 in punitive damages against A-I-I.

Post-trial Motion to Vacate Default Judgment and Final Order

A-I-I filed several post-trial motions, including a motion pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure to vacate the default judgment. R. 810. A-I-I argued that the judgment should be set aside because it was void for improper service. A-I-I also argued that its timely answers to the amended complaints cured the prior default and that it was never in default on the second amended complaint which was the operative complaint at trial. Additionally, A-I-I argued that the default judgment was void because A-I-I was not properly noticed of the damages hearing pursuant to Rule 55(b)(2) of the South Carolina Rules of Civil Procedure. Finally, A-I-I

argued that it was improperly defaulted into punitive damages without there being any specific allegations in the complaint that were sufficient to make a finding that its conduct was willful, wanton, or reckless. *Id.*

Plaintiffs asserted that A-I-I was not required to be served with their amended complaints, and that A-I-I had “no right to answer” the amended complaints. R. 865-867. Plaintiffs relied on *Ness v. Dig. Dial Communs., Inc.*, 227 Wis. 2d 592, 596 N.W.2d 365, 367 (1999), *Wells Fargo Bank, N.A. v. Dechert*, 12 N.E.3d 262 (Ind. Ct. App. 2014), *Spilke v. Wicklow*, 138 Conn. App. 251, 53 A.3d 245 (2012), and *Stack v. Welder*, 3 Cal. 2d 71, 43 P.2d 270 (1935) in support of their argument that a timely answer to an amended complaint by a defaulting defendant does not cure the prior entry of default. R. 864-870.

The circuit court held a hearing on the post-trial motions on September 24 – 25, 2024. Counsel for A-I-I argued that it was not in default on the operative complaint and that its timely answers to the amended complaints cured the default. The court again ruled against A-I-I. R. 2522, l. 23 – 2523, l. 12. Counsel for A-I-I pointed out that each of the cases cited by Plaintiffs in support of their argument were from other states but that A-I-I had cited cases from both South Carolina Circuit Court and the District of South Carolina which agreed with A-I-I’s position. R. 2523, ll. 13 – 25.

The circuit court denied A-I-I’s motion to vacate the default judgment pursuant to Rule 60(b). The court repeated Plaintiffs’ inaccurate statement that A-I-I was not served with either amended complaint. R. 2. The circuit court also found that A-I-I’s timely answers to the amended complaints did not cure its default on the original complaint. The court noted that there was no clear authority in South Carolina on this issue. However, the court reasoned that Rule 5(a) does not require a defendant in default to be served with amended complaints unless the allegations

against it are changed. The court again stated, incorrectly, that A-I-I was not served with the amended complaints and had “no right to answer” the amended complaints. R. 3-4. The court relied on the out-of-state cases cited by Plaintiffs and found that the “policy reasons” in those cases persuaded her that answering an amended complaint does not cure an earlier default. R. 5.

The circuit court, noting that the standard for relief under Rule 60(b) to set aside a default judgment is higher than the standard for relief under Rule 55(c) to set aside default, found that default judgment should not be set aside for the same reasons she had previously refused to set aside the default. R. 5-6.

Discussion

Argument Summary

The circuit court abused its discretion in its initial refusal to set aside default against A-I-I because A-I-I made a sufficient showing of good cause pursuant to Rule 55(c). A-I-I was not properly served with the initial summons and complaint. Its failure to timely answer was due to its inability to obtain local counsel because of conflicts of interest. Having established good cause, the circuit court was required to consider the *Wham* factors, which weighed heavily in A-I-I’s favor.

If this Court determines that the circuit court did not abuse its discretion in failing to set aside default upon A-I-I’s first motion to do so, this Court should hold that A-I-I’s timely answers to Plaintiffs’ subsequent amended complaints cured the prior default as a matter of law. Although this rule has been explicitly adopted in other States, this is a novel legal question in South Carolina. As such, the standard of review this Court should employ is *de novo*.

Finally, the circuit court abused its discretion in refusing to vacate the default judgment under Rule 60(b) of the South Carolina Rules of Civil Procedure for each of the previously

mentioned reasons, and because Plaintiffs failed to properly notice A-I-I of the damages hearing as required by Rule 55(b)(2).

Legal Framework

Rule 55(c), SCRCP

At the outset, it is important for this Court to note that the standard for setting aside a default pursuant to Rule 55(c) is lower than the standard for setting aside a default judgment under Rule 60(b). Rule 55(c) permits a defaulting party to move to set aside the entry of default upon a showing of “good cause.” This South Carolina Rule is substantively identical to its federal counterpart. *See* Rule 55(c), Fed. R. Civ. P.

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. Intedger Indus.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009)). Because this standard is lower than the standard for setting aside a default judgment under Rule 60(b), “an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment.” *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888.

“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).

Rule 60(b), SCRCP

Relief from default judgment carries a more rigorous standard because the final judgment carries with it more finality than the clerk’s entry of default. *Sundown*, 383 S.C. at 608, 681 S.E.2d

at 888-89. Rule 60(b), as relevant to this case, allows a court to vacate a default judgment for “mistake, inadvertence, surprise, or excusable neglect,” or when “the judgment is void.”

South Carolina’s Policy Favoring Disposition on the Merits

South Carolina has a long-standing preference for disposing of legal disputes on their merits. As such, it is well established that defaults and default judgments are disfavored and motions to set aside defaults should be “liberally construed to promote justice and dispose of cases on the merits.” *Yoko Kim Melton v. Chong Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008); *see also Ricks v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535, 536 (Ct. App. 1987) (the discretion given to circuit courts “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”).

Public policy favors the disposition of cases “on their merits rather than on technicalities.” *Micronics, Inc. v. S.C. Dep’t of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (citing *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986)). South Carolina views default judgment as a harsh and drastic action. *Petty v. Weyerhaeuser Co.*, 272 S.C. 282, 251 S.E.2d 735 (1979). The Fourth Circuit has also indicated that motions to set aside default “must be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments.” *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954 (4th Cir. 1987) (internal quotations omitted). And although a decision to set aside default is committed to the sound discretion of the trial court, such abuse of discretion “need not be glaring to justify reversal.” *Id.*

A. The circuit court abused its discretion in refusing to set aside default and the subsequent default judgment because A-I-I was not properly served with the initial summons and complaint.

A-I-I is entitled to relief from the entry of default and the subsequent default judgment because it was void for improper service. Plaintiffs’ August 10, 2023, attempted personal service

of the initial summons and complaint was improper because it was accepted by an employee and not an authorized agent.

“[A]ny . . . default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person.” Rule 4(d)(8), SCRCP. Pursuant to Rule 4(d)(3) of the South Carolina Rules of Civil Procedure, service is proper “upon a partnership . . . 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.” Rule 4(d)(3), SCRCP.

“An agent’s authority is composed of his or her actual authority, whether express or implied, together with the apparent authority which the principal by his or her conduct is precluded from denying.” *Roberson*, 365 S.C. at 10, 615 S.E.2d at 115. “[A]n agent’s authority must be either expressed, implied, or apparent.” *Id.*

To be expressly authorized to accept service, the principal must grant that authority to the agent. *See Moore v. Simpson*, 322 S.C. 518, 523-24, 473 S.E.2d 64, 67 (Ct. App. 1996) (“Without specific authorization to receive process, service is not effective when made upon an employee of the defendant, such as a secretary”). “[A]ctual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant’s agent for some purpose does not necessarily mean that the person has authority to receive process.” *Hamilton v. Davis*, 300 S.C. 411, 414, 389 S.E.2d 297, 298 (Ct. App. 1990).

Terri Cooper did not have express authority to accept service on behalf of A-I-I. As such, service on her could only be effective if she had apparent authority to accept service. Whether an agent has apparent authority to accept service of behalf of a company must be “based upon manifestations by the principal, not the agent.” *Roberson*, 365 S.C. at 11, 615 S.E.2d at 115.

“Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. Rather, there must be evidence the defendant intended to confer such authority.” *Moore*, 322 S.C. at 523, 473 S.E.2d at 67; *see also Roberson*, 365 S.C. at 11, 615 S.E.2d at 115 (“An apparent agency may not be established solely by the declarations and conduct of an alleged agent”). The fact that Terri Cooper signed an acceptance of service is not enough. There must be evidence that A-I-I intended to confer such authority on her.

In *Roberson*, the Supreme Court found that an employee was not authorized to accept service on behalf of a company where there was no evidence presented that the employee had actual or apparent authority to receive service. 365 S.C. at 11, 615 S.E.2d at 115. In *Roberson*, the plaintiffs argued in part that the employee had accepted service on behalf of the company in the past in other lawsuits and that such behavior showed apparent authority. While the Court recognized that past behavior may be relevant to show agency, it would be the past behavior of the principal, not the agent. And the *Roberson* Court found that there was no evidence presented that the company held out its employee as an agent authorized to accept service or that the principal was even aware that this employee had previously accepted service on its behalf. *Id.* at 11-12, 615 S.E.2d at 115. Likewise, this Court upheld a trial judge’s decision to set aside default for improper service in *Hamilton v. Davis*, finding that service on an employee of the defendant was insufficient because the employee was not an authorized agent. 300 S.C. at 414, 389 S.E.2d at 298.

Here, Plaintiffs served the initial summons and complaint on Terri Cooper, a non-officer employee of A-I-I, in Los Angeles. R. 174. Plaintiffs indicated in their attached affidavit that Terri Cooper was an “authorized representative.” R. 175. However, A-I-I has not authorized Terri Cooper to receive or accept service on its behalf. R. 242 par. 4. Because the summons and complaint were not accepted by an officer, a managing or general agent, or an agent authorized to

accept service, Plaintiffs' attempted service was ineffective. *See Moore*, 322 S.C. at 524, 473 S.E.2d at 67 (quashing service of summons and complaint where receptionist did not have authority to accept service of process).

The mere title given to Terri Cooper of "executive vice president" does not in-and-of-itself give apparent authority to accept service of process on A-I-I's behalf as the circuit court found. As Counsel for A-I-I pointed out at the hearing, A-I-I has given that title to other employees as well but not authorized them to accept service. R. 924, ll. 1 – 15. The affidavit of Brian Dror established that Terri Cooper did not have authority to accept service and as such, A-I-I proved that she was not an authorized person. Brian Dror is the registered agent for each of the partners of A-I-I including the managing partner, Glamour Industries. Mr. Dror was the correct person to serve and was in fact served with the initial summons and complaint as to Defendant Glamour Industries. The entry of default must be set aside. Rule 4(d)(8), SCRCPP; *Honorage Nursing Home of Florence, S.C., Inc. v. Florance Convalescent Center, Inc.*, 367 S.C. 108, 113, 623 S.E.2d 853, 855-56 (Ct. App. 2005) (holding that plaintiff failed to properly serve defendant and entry of default was correctly set aside).

B. The circuit court abused its discretion in finding that A-I-I's inability to obtain local counsel due to conflicts of interest did not constitute good cause and further abused its discretion in refusing to consider the *Wham* factors which all weighed heavily in A-I-I's favor.

A-I-I faced unprecedented challenges in retaining local counsel in South Carolina due to conflicts of interest. After receiving the initial complaint, A-I-I forwarded it to its insurer who noted the need to run conflict checks before hiring local counsel. Unfortunately, those conflict checks had not been completed by September 11, 2023. This led to delayed retention of local counsel and a delay in filing its initial answer. R. 258-259 pars. 3-7.

Despite the difficulty A-I-I faced in retaining local counsel, A-I-I's response to Plaintiffs' motion for default exemplified its commitment to litigating this case on the merits. Without delay, an attorney who represents A-I-I outside of South Carolina, Paula Pendley, reached out to Plaintiffs' Counsel to explain the difficulties A-I-I was having with securing local counsel. Ms. Pendley asked Plaintiffs to consent to an extension for A-I-I to file its initial answer, and requested Plaintiffs withdraw their motion. R. 262-263 pars. 3-5. Despite having consented to such requests by other defendants in this case, Plaintiffs' Counsel refused to consent to A-I-I's request. R. 264-265.

After Plaintiffs' Counsel refused to agree to the extension and withdraw their motion, Julia Gowin suggested that A-I-I retain counsel based in Atlanta, Georgia, to file its answer while continuing to seek local counsel. R. 243 par. 9; R. 259 par. 11; R. 263 par. 6. A-I-I's initial answer was filed on the same day. *Id.* After filing its answer, A-I-I continued to actively seek local counsel and retained Stephanie Flynn on October 9, 2023. R. 244 par. 13. A-I-I did not ask Plaintiffs to delay this case in any way. A-I-I filed its initial answer before the circuit court entered its order holding A-I-I in default.

The timeline reflects a demonstrable pattern of good faith and proactivity by A-I-I, sufficient to evidence a "good faith mistake of fact" with "no attempt to thwart the judicial system." Indeed, courts have found good cause existed in situations involving simple errors and genuine mistakes like here. *See Roberts v. Peterson*, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987) (teacher provided her suit papers to her employer who failed to properly answer and court granted relief to the defaulting defendant in the interest of trying the case on the merits).

In its order denying A-I-I's motion to set aside default, the circuit court noted that the decision to set aside default is within the discretion of the trial court. R. 49. Here, however, in

exercising its discretion, the circuit court disregarded the long-standing preference to determine cases on their merits instead of procedural technicalities. Instead, the court relied on *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011) (*Limehouse I*), for a singular acknowledgement that our courts impute negligence of an attorney onto the client when determining whether good cause exists. R. 50-51.

Justice Few, then the Chief Judge of this Court, dissented in *Limehouse I*, noting that many of our State's appellate decisions imputing a lawyer's negligence in timely answering a complaint to the defaulting party dealt with the lawyer's *failure to attempt to answer*, not their *failure to answer*. 397 S.C. at 92, 723 S.E.2d at 234 (Few, C.J., dissenting) *rev'd*, 404 S.C. 93, 744 S.E.2d 566. As Justice Few pointed out then, "[t]he fact that the lawyer was trying to correctly follow the rules is particularly relevant to 'the interests of justice.'" *Id.* The Supreme Court overruled *Limehouse I* and clarified that it was unreasonable for the *Limehouse* defendant to assume that the time to file an answer "start[ed] completely anew upon remand from federal court." *Limehouse v. Hulsey*, 404 S.C. 93, 112, 744 S.E.2d 566, 576 (2013) (*Limehouse II*).

The proper standard for imputing negligence of an attorney to a client is to consider the alleged negligence as one of many factors in the totality of the circumstances relating to the default. *Sundown*, 383 S.C. at 609, 681 S.E.2d at 889 ("Although the presence of other factors, in the totality of the circumstances, may amount to a showing of 'good cause,' a defendant may not be relieved from the entry of default *solely because* it relied to its detriment on a negligent insurance agent") (emphasis added). Though A-I-I does not agree that its attorneys were negligent, under the proper *Sundown* standard, the circuit court abused its discretion when it failed to consider the totality of the circumstances in denying A-I-I's motion to set aside default.

Additionally, A-I-I's behavior in this case is readily distinguishable from the actions of the defaulting defendants in *Sundown* and its progeny. Here, unlike the default line of cases, A-I-I filed its answer a mere *eighteen days* after the initial answer deadline *and prior to* the circuit court finding it in default. A-I-I never sought to skirt the jurisdiction of the court, nor did it lie in wait for finality and then seek to collaterally attack an entry of default judgment. Rather, A-I-I's delay was attributable to its difficulty securing local counsel who were located in South Carolina. *See Ex parte Trustgard Ins. Co.*, 442 S.C. 485, 511, 900 S.E.2d 448, 461-62 (Ct. App. 2023) (finding that "[w]hen a party has made a 'good faith mistake of fact' and has not attempted 'to thwart the judicial system,' the court has a basis to vacate a default judgment").

It should not be lost on this Court that A-I-I is a California General Partnership with no employees or facilities in South Carolina. The lawyers regularly employed by A-I-I are not licensed in South Carolina, but A-I-I actively sought to obtain local counsel so that A-I-I could participate in this case. Additionally, fifty-eight defendants were named in the initial lawsuit here. Several of them requested extensions to file their answers and Plaintiffs agreed. It was only for A-I-I that Plaintiffs' Counsel refused to consent. R. 264.

Because A-I-I's answer was already on file when the circuit court entered its order of default, and subsequently denied A-I-I's motion to set aside the default, the court improperly put form over function and disregarded the long-standing preference to determine cases on the merits. *See Renney v. Dobbs House, Inc.*, 275 S.C. 562, 567, 274 S.E.2d 290, 292 (1981) ("courts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits").

A-I-I provided its explanation for default and good cause through Mr. Dror's, Ms. Pendley's, and Ms. Gowin's affidavits. Therefore, the discussion turns to the factors outlined in

Wham v. Shearson Lehman Bros., Inc. including: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

The circuit court refused to consider the *Wham* factors having concluded it was unnecessary. However, application of the criteria from *Wham* weigh heavily in A-I-I's favor. First, A-I-I's immediate and proactive efforts to remedy the missing of the initial deadline exemplified its commitment to participating in the case and remedying the situation in a timely manner. Second, A-I-I's defense is not merely meritorious but compelling. Third, setting aside the default posed minimal, if any, prejudice to Plaintiffs whereas leaving the default in place unjustly deprived A-I-I of its ability to defend itself on the merits.

1) A-I-I acted quickly in remedying its late answer.

South Carolina courts have held a defendant acts timely in seeking relief to set aside default when the defendant acts promptly upon learning of the entry of default. *Williams v. Watkins*, 384 S.C. 319, 326, 681 S.E.2d 914, 917 (motion for relief was within reasonable time as defendant sought relief as soon as he discovered default); *Yoko Kim Melton*, 379 S.C. at 56, 664 S.E.2d at 493 (finding motion for relief was timely because defendant filed motion for relief a little over a month after learning of the default).

When A-I-I learned that a motion for default had been filed, outside counsel for A-I-I called Plaintiffs' Counsel in South Carolina the very next day to ask for a routine professional courtesy due its struggle with securing local counsel. Despite having granted this professional courtesy to every other defendant who requested it, Plaintiffs' Counsel refused to consent for A-I-I. A-I-I secured counsel from Atlanta who filed its initial answer that same day. A-I-I filed its motion to

set aside default just days after the circuit court entered its order on Plaintiffs' motion. There is no evidence of unreasonable delay by A-I-I.

2) A-I-I had a meritorious defense

To establish a meritorious defense, defendants do not have to show they would prevail on the merits. *McClurg v. Deaton*, 380 S.C. 563, 575, 671 S.E.2d 87, 93-94 (Ct. App. 2008). Rather, a meritorious defense “need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.” *Id.* at 575, 671 S.E.2d at 94 (citations omitted); *see also Edwards v. Ferguson*, 254 S.C. 278, 282, 175 S.E.2d 224, 225 (1970) (defendant in an automobile accident case made a “prima facie showing of meritorious defenses” through written statements claiming: “(1) that the defendant was not driving the vehicle, and (2) that even if the defendant was driving the vehicle, the plaintiff was guilty of contributory negligence and recklessness”); *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) (defendants met the meritorious defense requirement where they supplemented their motion for relief from default judgment with “testimony showing that a real controversy existed” as to whether the plaintiffs' claims were true and accurate).

Here, A-I-I's meritorious defense was manifest. Plaintiffs claimed that Mr. Perry's mesothelioma diagnosis was caused by inhaling asbestos while performing repairs on automobiles and personal use of talc powder. R. 67. A-I-I's answer contained eighty-five substantive defenses, and robustly countered Plaintiffs' allegations. R. 179. A-I-I categorically denied having played any role in Mr. Perry's mesothelioma. Indeed, no formulation of any A-I-I product, including Clubman Talc, has ever used asbestos as an ingredient. R. 254 par. 34. From the time A-I-I began to blend and sell Clubman talc, it only used USP (pharmaceutical grade) talc. R. 254 par. 35. Further, the

USP talc A-I-I received was consistently certified not to contain asbestos. R. 255 par. 37. A-I-I hired an independent laboratory to test its USP talc samples and no asbestos was detected. R. 255 par. 38.

A-I-I's defenses presented substantial questions worthy of investigation. A-I-I should have, in the interest of justice and fairness, been given the opportunity to rigorously defend its position and should not have been deprived of that right due to a procedural technicality.

3) Setting aside default would not have prejudiced Plaintiffs.

Setting aside the entry of default would not have resulted in any prejudice to Plaintiffs, nor would it have caused any hardship because discovery could proceed as normal, and the case would have been ready for trial in the same time frame. The discovery process had barely commenced at the time of entry of default. Aside from Plaintiffs providing generic responses to standard interrogatories before Mr. Perry's deposition, no significant discovery had been exchanged. A-I-I was in possession of Plaintiffs' responses, ensuring that it was on equal footing with the other parties. Additionally, the first day of Mr. Perry's deposition was conducted only one week after the circuit court held A-I-I in default and the same day that A-I-I filed its motion to lift the default. A-I-I was present and participated in Mr. Perry's deposition. R. 920, l. 18 – 921, l. 3.

A-I-I filed its answer to the complaint on the very day Plaintiffs' Counsel refused to consent to an extension. As previously indicated, A-I-I's answer was due, at the earliest, on September 11, 2023. The error was identified on September 27, 2023, when the motion for default was provided to A-I-I, and it immediately requested an extension. On September 29, 2023, after Plaintiffs' Counsel refused to withdraw their motion or consent to an extension, A-I-I secured counsel from Atlanta to file its answer that very day. This was only two days after learning that the motion for default had been filed.

There was no indication that any evidence was lost or compromised due to the very short procedural delay in A-I-I filing its answer. Similarly, there was no risk of witness testimony going missing or being rendered unavailable. Plaintiffs were still adding new defendants to the case as late as February 1, 2024, showing there was little to no prejudice to them in setting aside default as to A-I-I.

Conclusion on Argument 1 B

Given the specific facts in this case, it is apparent that allowing A-I-I to defend itself on the merits would not have disadvantaged or prejudiced Plaintiffs in any way. To the contrary, holding A-I-I in default due to missing the initial deadline to answer by just eighteen days due to its inability to obtain conflict-free local counsel resulted in a gross injustice.

Both South Carolina and the Fourth Circuit have repeatedly held that 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”); *Colleton Preparatory Acad., Inc. v. Hoover Universal*, 616 F.3d 413, 417 (4th Cir. 2010) (“We have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits”).

Respectfully, if ever it were an abuse of discretion to refuse to set aside an entry of default, this is it. Assuming service was proper and A-I-I's answer was in fact due on September 11, 2023, A-I-I clearly demonstrated good cause for missing that initial deadline and setting aside entry of default against it would have unquestionably been in the interest of justice. This Court should reverse the circuit court and remand this case for a trial on the merits.

C. A-I-I's timely answers to the amended complaints cured any previous default as a matter of law because the second amended complaint was the operative complaint and A-I-I was never in default on that complaint.

When Plaintiffs filed their first amended complaint on November 30, 2023, which A-I-I timely answered, the circuit court's entry of default on the now-superseded original complaint was rendered moot. Plaintiffs amended their complaint a second time on February 1, 2024. A-I-I again filed a timely answer. Plaintiffs' second amended complaint became the operative complaint under which the case proceeded. As such, the initial complaint, and A-I-I's default on that complaint became moot.

Standard of Review

Although the standard of review for setting aside default or default judgment is generally abuse of discretion, whether timely answering an amended complaint cures a prior entry of default against a defendant is a pure question of law. A-I-I respectfully submits that the proper standard of review this Court should employ in reviewing this question is *de novo*. *See Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (“[i]n a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court”).

Discussion

It is well-established, both in South Carolina and elsewhere, that an amended complaint supersedes an earlier complaint such that the amended complaint becomes the operative pleading

and renders the earlier complaint of *no legal effect*. See *Schein v. Lamar*, 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985) (“Since the First Amended Complaint has been superseded by the Second Amended Complaint, it is no longer the operative pleading in the case”).

“Because a properly filed amended complaint supersedes the original one and becomes the operative complaint in the case, it renders the original complaint of ‘no effect.’” *Fawzy v. Wauquiez Boats SNC*, 873 F.3d 451, 455 (4th Cir. 2017) (quoting *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001)). In addition to the Fourth Circuit where South Carolina is situated, every other federal circuit court of appeals has recognized this basic legal principle. See *ConnectU LLC v. Zuckerberg*, 522 F.3d 82 (1st Cir. 2008); *Dluhos v. Floating & Abandoned Vessel*, 162 F.3d 63 (2d Cir. 1998); *W. Run Student Hous. Assocs., LLC v. Huntington Nat’l Bank*, 712 F.3d 165 (3d Cir. 2013); *New Orleans Ass’n of Cemetery Tour Guides & Co. v. New Orleans Archdiocesan Cemeteries*, 56 F.4th 1026 (5th Cir. 2023); *NOCO Co. v. OJ Commerce, LLC*, 35 F.4th 475 (6th Cir. 2022); *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999); *Wullschleger v. Royal Canin U.S.A., Inc.*, 75 F.4th 918 (8th Cir. 2023); *Ramirez v. Cty. of San Bernardino*, 806 F.3d 1002 (9th Cir. 2015); *Tufaro v. Okla. ex rel. Bd. of Regents of the Univ. of Okla.*, 107 F.4th 1121 (10th Cir. 2024); *Reynolds v. Behrman Capital IV L.P.*, 988 F.3d 1314 (11th Cir. 2021); *Webb v. United States Veterans Initiative (US Vets)*, 451 U.S. App. D.C. 507, 993 F.3d 970 (D.C. Cir. 2021); *Healthier Choices Mgmt. Corp. v. Philip Morris USA, Inc.*, 65 F.4th 667 (Fed. Cir. 2023).

In *Schein v. Lamar*, this Court dismissed an appeal from a first amended complaint because a second amended complaint had been filed which mooted the first amended complaint. 284 S.C. at 255, 325 S.E.2d at 574. Functionally, there is no procedural difference here. Orders denying a party’s motion to set aside default are not immediately appealable. *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 640, 856 S.E.2d 150, 153 (2021) (“[T]he court of

appeals correctly determined the order refusing to set aside the entry of default was not immediately appealable”).

Where, as here, the operative complaint is no longer the complaint from which a procedural order stems, that procedural order is void under the newly operating complaint. By failing to recognize this procedural function, in its May 29, 2024, order granting Plaintiffs’ motion for a protective order, the circuit court improperly found that A-I-I was still beholden to Plaintiffs’ initial complaint while all other defendants were operating under the second amended complaint. There cannot be multiple operative complaints governing the actions of co-defendants. As such, the second amended complaint is the operative complaint for all defendants, and A-I-I’s initial default, though controlled by an abuse of discretion, was cured when it timely answered Plaintiffs’ subsequent amended complaints.

Plaintiffs and the circuit court repeatedly and mistakenly asserted that A-I-I was not served with the amended complaints. At the time the amended complaints were filed, A-I-I was represented by three local attorneys—Stephanie Flynn, Nicholas Cherry, and Allyson Twilley. These attorneys had entered notices of appearances for A-I-I and were all “Authorized E-filers” in the case pending before the circuit court. All of them were served with the amended complaints the moment they were e-filed. *See* Rule 4(e)(2), SCEF (Authorized E-Filers are automatically served with documents that are e-filed). A-I-I was served with the amended complaints through its attorneys. *See* Rule 5(b)(1), SCRCF (providing that amended complaints are to be served on represented parties by serving their attorneys unless the court orders service on the party itself).

Once A-I-I was served with the amended complaints, it was required to file an answer within fifteen days, which it did, twice. Rule 15(a), of the South Carolina Rules of Civil Procedure—which is substantially the same as its federal counterpart, Rule 15(a) of the Federal

Rules of Civil Procedure—instructs that “[a] party *shall* plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading” (emphasis added). This rule does not say that a party *may* plead in response or that an answer is only necessary if a new claim was added. There is also no exception in the text of the rule to parties previously found to be in default. Accordingly, in stark contrast to the claim made by Plaintiffs and the circuit court that A-I-I had no right to file an answer, A-I-I was required to file an answer.

South Carolina Cases and Rules

While South Carolina recognizes the self-evident and widely-accepted rule that an amended complaint supersedes a prior complaint, whether a timely answer to an amended complaint by a defaulting defendant cures a prior entry of default has not been directly answered by our appellate courts. This question has, however, been directly addressed by South Carolina trial courts—both state and federal.

In *Soto v. Smith*, 2021-CP-42-03609 (S.C. Ct. of Common Pleas Nov. 7, 2023), the plaintiff in a wrongful death action moved to strike the timely answers filed by two defaulting defendants to the plaintiff’s amended complaint. Specifically, in *Soto*, two defendants defaulted on the first amended complaint. *Id.* at 1-2. The defendants moved to set aside the default, which the court denied, and subsequently moved the court to reconsider, which the court also denied. Six months later, the plaintiff filed a second amended complaint, which “included no additional claims against [the defaulting defendants]” and which “[the defaulting defendants timely] answered.” *Id.* The plaintiff moved to strike the answers to the second amended complaint. The defendants argued that their default on the earlier complaint had “been mooted by the filing of the Second Amended Complaint.” *Id.*

When presented with this question, the trial judge noted that there were no South Carolina appellate decisions on this issue and that “[i]n the absence of prior state law on the issue in question, federal cases interpreting the rule[s] are persuasive.” *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000).” *Id.* at 2. The trial judge found that:

Federal court opinions support Defendants’ position that an amended complaint moots a prior entry of default. *See Anselme v. Griffin*, 2021 WL 2152512 *1, *3 (W.D.Va. 2021); *Rice v. M-E-C Co.*, 2022 WL 20138734 1,*2 (D.S.C. 2022) (citing *Anselme*, 2021 WL 2152512 *1, *3 in support of the court’s decision). *Anselme* states, “[u]nless an amended complaint specifically . . . adopts or incorporates’ a prior complaint by reference, ‘the amended complaint supersedes’ its predecessor ‘and renders the original complaint without legal effect.’” *See Anselme*, at *3 (quoting *In re Lowe’s Fair Labor Standards Act Wage & Hour Litig.*, 517 F. Supp. 3d 484, at 511-512, 2021 WL 374976, at *17 (W.D.N.C. Feb. 3, 2021)).

Id. at 2-3. The trial judge concluded 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.” Accordingly, the trial judge in *Soto* denied the plaintiff’s motion to strike the defaulting defendants’ timely answers to the amended complaint.

By filing two amended complaints, Plaintiffs superseded their initial complaint. In turn, because A-I-I timely and properly responded to Plaintiffs’ operative complaint and continued participating in the case as an active defendant, its prior default was mooted. And unlike the plaintiffs in *Soto*, the Plaintiffs here never moved to strike either of A-I-I’s timely answers to their amended complaints.

This question has also been presented in South Carolina District Court. In *Rowley v. City of N. Myrtle Beach*, the defendants failed to timely answer the initial complaint but did timely answer the plaintiff’s subsequent amended complaint. 2009 U.S. Dist. LEXIS 131683, at 4-5

(D.S.C. Feb. 23, 2009). Even though the defendants timely answered the amended complaint, they filed a motion to file an answer to the original complaint out of time “out of an abundance of caution.” In its Report and Recommendation, the Magistrate Judge denied the defendants’ motion to file an answer to the initial complaint out of time because it was “not necessary.” The judge noted that “[t]he original Complaint is no longer controlling and the . . . Defendants need not file an Answer to it in light of the fact that an Amended Complaint is in place and Defendants timely filed an Answer to the Amended Complaint.” *Id.* at 5. The judge noted that “the original complaint was, in a sense, amended out of existence.” *Id.* (quoting *Thomas v. Se. Pa. Transp. Auth.*, 1989 U.S. Dist. LEXIS 1400, at 4 (E.D. Pa. Feb. 9, 1989)). The judge thus recommended that the plaintiff’s motion for default judgment against the defendants be denied because “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.” *Id.* at 6. Judge Wooten, United States District Judge, accepted the Magistrate Judge’s Report and Recommendation. *Rowley v. City of N. Myrtle Beach*, 2009 U.S. Dist. LEXIS 22761 (D.S.C. Mar. 16, 2009).

The trial courts’ decisions in *Soto* and *Rowley* are instructive that the entry of default against A-I-I based on the original complaint should be set aside. Moreover, a damages hearing against A-I-I could not be properly had on Plaintiffs’ initial, inoperative complaint. *See Schein*, 284 S.C. at 255, 325 S.E.2d at 574. Because A-I-I timely answered both of Plaintiffs’ amended complaints, and those answers were never challenged by Plaintiffs, the prior entry of default was mooted and there was no basis for default against A-I-I on the second amended complaint.

The circuit court here acknowledged that there was no clear authority from this Court or our Supreme Court on this issue. The court relied on Rule 5(a) of the South Carolina Rules of Civil

Procedure which does not require a defendant in default to be served with amended complaints unless the allegations against it are changed, and the out-of-state cases cited by Plaintiffs. The court found that the “policy reasons” stated in those cases persuaded her that answering an amended complaint does not cure an earlier default. R. 5. The court again stated, incorrectly, that A-I-I was not served with the amended complaints and had “no right to answer” the amended complaints. R. 3-4.

Whether Plaintiffs were *required to serve* A-I-I with the amended complaints is not the issue. Rather, what matters is whether A-I-I timely responded to those amended complaints as Rule 15(a) required it to do. Here, A-I-I indisputably did just that. The effect of its timely answers to the amended complaints was A-I-I was no longer in default and was an active litigant.

Out-of-state Cases

The circuit court relied primarily on a case from the Wisconsin Supreme Court indicating that it found the policy reasons for refusing to set aside default even after the defaulting party timely answers an amended complaint to be persuasive. In *Ness v. Dig. Dial Communs., Inc.*, the Wisconsin Supreme Court held that “[a] defaulting party cannot answer an amended complaint, thereby attempting to cure its default, when the party is already in default at the time the amended complaint is filed.” 227 Wis. 2d 592, 595, 596 N.W.2d 365, 367 (1999). The *Ness* Court acknowledged that its holding created an exception to “the basic rule that an amended complaint supersedes an original complaint.” The Court attempted to justify this exception on the fact that amended complaints which make no new additional claims against defaulting defendants are not required to be served on them. *Id.* at 600, 596 N.W.2d at 370.

The policy reasons given by the Wisconsin Supreme Court for creating this exception were that allowing a defaulting defendant to cure its default by timely answering a subsequent amended

complaint “would mean that ‘the defaulting party [who] has previously disregarded its opportunity for defending itself or presenting additional issues or claims in the action . . . is fortuitously allowed to ‘restart the clock’ for filing a response.’” *Ness v. Dig. Dial Communs., Inc.*, 227 Wis. 2d 592, 605, 596 N.W.2d 365, 372 (1999) (quoting *Ness v. Dig. Dial Commun., Inc.*, 222 Wis. 2d 374, 382-83, 588 N.W.2d 63, 66 (Ct. App. 1998)). The *Ness* Court went on to say that allowing a defaulting party to cure its default “runs contrary to [Wisconsin’s] long-standing preference . . . for parties who have met their burden and are in good standing, over those who have failed to meet their burden and are in default” and that by allowing a defaulting defendant to cure its default “we would, in fact, punish the party in good standing by being lenient with the defaulting party.” *Id.* at 605, 596 N.W.2d at 372.

Respectfully, the policy positions argued by Plaintiffs and adopted by the circuit court and the *Ness* Court stand in stark contrast to South Carolina’s own long-standing policy preference that legal disputes be decided on their merits. The purpose of default and default judgments are not to punish a defendant for being late. The purpose of default is to move a case forward and to promote the expedient resolution of civil cases. Default is not a prize a plaintiff wins because a defendant shows up late. Instead, it allows a plaintiff to pursue its cause of action against a defendant who refuses to participate in the case and to prevent a defendant from stopping a legal dispute in its tracks simply by putting his head in the sand.

These concerns are of course not present in this case. Although A-I-I arrived to this legal dispute eighteen days late—assuming initial service was proper—it has actively participated ever since, including participating in a two-week long jury trial as much as the circuit court would allow. Additionally, Plaintiffs here never had to make the supposed Hobson’s choice of whether to amend their pleadings (thereby giving A-I-I an opportunity to cure its default) or not amending

their pleadings (so as to keep A-I-I in default). All Plaintiffs did was add additional defendants in the case. They did not have to file amended complaints to do that. Plaintiffs could have joined the new defendants pursuant to Rule 19 of the South Carolina Rules of Civil Procedure. Plaintiffs also could have incorporated the original complaint by reference in their amended pleadings.

Additionally, A-I-I's position here is far from novel as Plaintiffs have suggested. In fact, A-I-I's position is supported by several other states. For instance, the Supreme Judicial Court of Maine has instructed that, "when a complaint is amended, any default on the initial complaint, even as to claims unaltered by the amendment, must be set aside and the defendant be given an opportunity to respond to the amended complaint." *TD Banknorth, N.A. v. Hawkins*, 5 A.3d 1042, 1048 (Me. 2010). The *Hawkins* Court reasoned, just as A-I-I has argued throughout this case, that an amended complaint supersedes the earlier complaint and that "[o]n this basis, the majority of jurisdictions require that a default be set aside when the complaint on which the default is entered is subsequently amended." *Id.* at 1047.

So too, in Maryland. In *Pomroy v. Indian Acres Club of Chesapeake Bay, Inc.*, the Court of Special Appeals of Maryland found that when the plaintiff filed their amended complaint, "it became the operative complaint, and the original complaint was withdrawn." 270 A.3d 1014, 1021 (Md. Ct. Spec. App. 2022). The Court went on to find that, "[c]onsequently, the existing order of default became a legal nullity, as the claims in the original complaint had been abandoned in favor of the amended complaint." *Id.* The Court reasoned that "[a]n order of default loses its legal foundation when the plaintiff withdraws the complaint to which the defendant failed to file a timely answer." *Id.* And even though the amended complaint in *Pomroy* added a new claim for relief, the Court's position was clear that "an order of default based on the original complaint would also be withdrawn" even in the absence of new claims or allegations. *Id.* at 1022.

Likewise, North Carolina “does not distinguish between minor and major amendments,” and given “the general principle that an amended complaint has the effect of superseding the original complaint,” a defendant has an opportunity to answer the amended complaint and it is “error as a matter of law for the court to refuse to set . . . aside” any entry of default or default judgment on the original complaint. *See Hyder v. Dergance*, 76 N.C. App. 317, 319-20, 332 S.E.2d 713, 714-15 (1985).

The Supreme Court of Rhode Island has also held that, after a plaintiff has been granted permission to and does in fact file an amended complaint, even where the amended complaint does not include any substantive changes, the previous complaint is “no longer an active pleading in the action” and, as such, a defendant “could not have been defaulted” on the previous complaint. *Grieco v. Perry*, 697 A.2d 1108, 1109 (R.I. 1997) (citing *Reichert v. TRW, Inc.*, 531 Pa. 193, 611 A.2d 1191 (Pa. 1992) and *Harris v. Shoults*, 877 S.W.2d 854 (Tex. Ct. App. 1994)).

Kentucky also follows this approach. The Kentucky Court of Appeals held that “an amended complaint effectively supersedes the original complaint, and the defendant is allotted time to respond to the amended complaint.” *Brown v. Funk*, 697 S.W.3d 739, 745 (Ky. Ct. App. 2024). There, the appellate court affirmed the trial court’s order setting aside the default judgment on the original complaint because the plaintiff filed an amended complaint, which was timely answered. *Id.* at 746. The Court there reasoned that, unless an amended complaint specifically “incorporate[s] by reference or expressly reiterate[s] the allegations of the original complaint,” it would be legal error “for the trial court to decline to set aside the default judgment since that judgment was based on a superseded, inoperative pleading.” *Id.*

Conclusion on Argument 1 C

Respectfully, the circuit court's continuous and repeated refusals to set aside the entry of default and its subsequent refusal to vacate the default judgment against A-I-I represent a plain and unmistakable injustice. The circuit court erred, repeatedly, in its constant refusal to set aside default against A-I-I despite A-I-I having established good cause for being late, demonstrating that every *Wham* factor weighed in its favor, filing timely answers to both Plaintiffs' amended complaints, and actively participating in discovery and a two-week jury trial.

If this case were to be litigated on the merits, it is likely A-I-I would win. Plaintiffs cannot prove that A-I-I's Clubman Talc ever contained asbestos because no formulation of any A-I-I product included asbestos as an ingredient. And even if the product had trace asbestos contamination, which A-I-I denies, there is no epidemiological evidence supporting Plaintiffs' theory that cosmetic talc causes mesothelioma. And while A-I-I disputes the claim that cosmetic talc causes mesothelioma, Mr. Perry's testimony made it abundantly clear that it was Johnson's Baby Powder that he "bathed" in every day for more than fifty years. As such, it's no surprise that Plaintiffs refused to consent to A-I-I filing its initial answer out of time and have continued to fight at every turn to cling to the default against A-I-I.

The circuit court erred as a matter of law in refusing to set aside the default after A-I-I filed timely answers to Plaintiffs' amended complaints. 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.

D. The default judgment should be set aside for all the reasons argued above and additionally because A-I-I was not properly noticed of the damages hearing pursuant to Rule 55(b)(2) of the South Carolina Rules of Civil Procedure.

Entry of default judgment requires multiple levels of procedural safeguards, all of which were either disregarded by the circuit court or which compliance with was never even attempted by Plaintiffs. It is axiomatic that proper notice of a damages hearing must be given to a defaulting defendant that has appeared in an action before there is any consideration of unliquidated damages. *Beckmann Concrete Contractors, Inc. v. United Fire and Cas. Co.*, 360 S.C. 127, 131, 600 S.E.2d 76, 78 (Ct. App. 2004). “If the party against whom judgment by default is sought has appeared in the action, the party . . . *shall* be served with written notice of the motion or application of judgment at least 3 days prior to the hearing.” Rule 55(b)(2), SCRCP (emphasis added).

“Participation by the defending party will give to the judge and/or jury a broader understanding of the amount which should be awarded and will tend to insure a [fairer] verdict and judgment.” *Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981). In *Dymon, Inc. v. Hyman*, this Court held that, where a defaulting party has “appeared” in an action and the claiming party did not give notice of the application for default judgment, the order for default judgment is void and must be set aside upon motion of the defaulting party. 305 S.C. 170, 171-72, 406 S.E.2d 388, 389 (Ct. App. 1991).

Notice requirements of Rule 55 are not optional technicalities. “Rather, this requirement serves an essential function—ensuring that notice is properly received by all entitled to it.” *McCall v. IKON*, 363 S.C. 646, 655, 611 S.E.2d 315, 319 (Ct. App. 2005). The notice requirements of Rule 5(a), incorporated into Rule 55(b)(2), require “notice of any trial or hearing on unliquidated damages . . . 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.” *Id.* at 654, 611 S.E.2d at 319. Failure

to give this notice results in a void judgment that must be set aside upon petition by the defaulting party. A-I-I appeared in this action, and the damages sought by Plaintiffs were unliquidated. *See Beckmann Concrete*, 360 S.C. at 131, 600 S.E.2d at 78 (“unliquidated damages . . . are damages that . . . cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury”). Thus, Rule 55(b)(2) controls.

Plaintiffs were required to provide three days’ formal notice to A-I-I of a damages hearing. This did not happen and, up to the eve of trial, even the circuit court was unsure of how to proceed to the trial of Plaintiffs and Johnson & Johnson, with A-I-I in default. Specifically, at the pre-trial hearing, the circuit court indicated that it had not ruled yet on whether a default hearing would take place but asked Counsel for A-I-I whether she would be present for the Johnson & Johnson trial and she indicated that she would be present. R. 949, l. 24 – 950, l. 6.

The jury returned its verdict for actual damages on August 15, 2024. After a truncated “hearing” on punitive damages, the jury returned its verdict for punitive damages the same day. Plaintiffs, however, never renewed their motion for default and never made a motion for the circuit court to enter default judgment after the verdict. Because default is ministerial, action by Plaintiffs was a prerequisite to the circuit court entering a default judgment against A-I-I. *See Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004) (“[b]ecause no notice was given and no hearing was held, the default judgment was void.”); *see also Thynes v. Lloyd*, 294 S.C. 152, 153–54, 363 S.E.2d 122, 123 (Ct. App. 1987) (“Entry of default is a ministerial act which a clerk was required to perform once the default was made to appear by the affidavit” of the moving party).

Here, the circuit court entered judgment against A-I-I and non-defaulting defendants on August 19, 2024. This independent action was improper and renders the judgment against A-I-I

void because the procedural predicate to default judgment is application by the plaintiff for judgment. This Court should reverse the circuit court's refusal to vacate the default judgment entered against A-I-I because it was void for improper notice in compliance with Rule 55(b)(2).

2.

A-I-I's federal due process rights were violated because it was improperly defaulted into punitive damages even though none of the three complaints against it alleged specific facts that could support a determination that A-I-I acted fraudulently, willfully, wantonly, or recklessly.

Relevant Facts

Plaintiffs' initial complaint alleged that Mr. Perry was exposed to asbestos-containing talc products from his birth until 2018. R. 78 par. 9. The complaint also alleged that Mr. Perry was exposed to asbestos through his employment at various hotels and his work maintaining his vehicles. R. 78 pars. 10-11. The complaint listed numerous talc products alleged to have been used by Mr. Perry, including Clubman Talc. R. 79 par. 13. The complaint further alleged that Mr. Perry's "cumulative exposure to asbestos as a result of acts and omissions of Defendants and their defective products, individually and together, was a substantial factor in causing [his] mesothelioma." R. 79 par. 16.

Specifically as to A-I-I, the complaint alleged that A-I-I was "engaged, directly or indirectly, in the business of mining, designing, manufacturing, processing, importing, converting, compounding, supplying, installing, replacing, repairing, using, and/or retailing substantial amounts of asbestos-containing talc products, including but not limited to, asbestos-containing Clubman talc products and Pinaud talc products used by Plaintiff and others living in the same household with Plaintiff." R. 89-90 pars. 28-29.

Except for the seventh cause of action which was directed solely at Johnson & Johnson, the remainder of the complaint made allegations against all defendants jointly. For instance, the complaint alleged:

[E]ach of the named Defendants . . . engaged in the business of researching, studying, manufacturing, fabricating, designing, modifying, labeling, instructing, assembling, distributing, leasing, buying, offering for sale, supplying, selling, inspecting, servicing, installing, contracting for installation, repairing, marketing, warranting, re-branding, manufacturing for others, packaging and advertising a certain product, namely asbestos-containing talc products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry on himself.

R. 125 par. 103. It also alleged that all the defendants:

[S]ingularly and jointly, negligently and carelessly researched, manufactured, fabricated, designed, modified, tested or failed to test, abated or failed to abate, inadequately warned or failed to warn of the health hazards, failed to provide adequate use instructions for eliminating the health risks inherent in the use of the products, labeled, distributed, bought, offered for sale, supplied, sold, inspected, marketed, rebranded, manufactured for others, packaged and advertised, a certain product, namely asbestos-containing talc products manufactured for foreseeable personal use by individuals like Plaintiff Michael L. Perry, in that said products caused personal injuries to Plaintiff Michael L. Perry and others similarly situated, (hereinafter collectively called “exposed persons”), while being used for their intended purpose and in a manner that was reasonably foreseeable.

R. 125-126 par. 104. The complaint claimed that the conduct of every defendant was “willful, malicious, fraudulent, and outrageous and in conscious disregard and indifference to the safety and health of persons foreseeably exposed.” R. 130 par. 117. The complaint did not specifically identify a single action by A-I-I that purportedly made its conduct willful, malicious, fraudulent, or outrageous.

At the close of the evidence, A-I-I argued that it was entitled to a directed verdict on the fraudulent misrepresentation claim and on Plaintiffs’ plea for punitive damages because none of

Plaintiffs' three complaints alleged *specific facts as to A-I-I* to support these claims against A-I-I. R. 764-770. The circuit court rejected A-I-I's arguments and denied its motion for a directed verdict. R. 2239, l. 3 – 15. A-I-I renewed its directed verdict motion after the close of all evidence and again the circuit court denied it. The judge ruled that liability, including liability as to punitive damages, "had already been established by the default." R. 2241, ll. 5 – 13.

During the punitive damages phase of trial, the only evidence presented was the net worth of A-I-I and Johnson & Johnson. The jury was told that A-I-I's net worth was \$76 million. Johnson & Johnson's was \$70 billion. R. 2494, ll. 6 – 19. The jury was instructed that in determining the amount of punitive damages, it "may consider all relevant evidence, including but not limited to defendants' degree of culpability, the severity of the harm caused by the defendant, the duration of the conduct, the defendants' awareness and any concealment by the defendant, the existence of similar past conduct, the profitability of the conduct of the defendant, the defendants' ability to pay, the likelihood that the award would deter the defendant or others from like conduct." R. 2493, l. 14 – 2494, l. 5. As previously indicated, the jury awarded \$760,000 in punitive damages against A-I-I and \$30 million in punitive damages against Johnson & Johnson.

A-I-I filed a post-trial motion pursuant to Rules 50(b) and 59(a) of the South Carolina Rules of Civil Procedure renewing its motion for a directed verdict, requesting a JNOV, and requesting a new trial. R. 772. Plaintiffs responded arguing that they were not required to plead specific facts against A-I-I to establish its liability for their fraudulent misrepresentation or punitive damages claims. Plaintiffs maintained that pleading these against all defendants collectively was sufficient to satisfy federal due process. R. 829-835.

The circuit court held a hearing on the post-trial motions on September 24 – 25, 2024. Counsel for A-I-I noted that a defendant in default can still challenge the sufficiency of the

pleadings. Because the pleadings only alleged fraudulent misrepresentation and willful, wanton, and reckless conduct against the defendants collectively and did not contain specific allegations against A-I-I, the pleadings were insufficient to default A-I-I into punitive damages. R. 2521, ll. 11 – 25.

In its written order, the circuit court found that the allegations in the complaint made against all the defendants collectively were sufficient to default A-I-I into punitive damages. R. 11-12. The court found that this did not violate A-I-I's federal due process rights. R. 14-15.

Discussion

Punitive damages are punishment. Under the Fourteenth Amendment to the United States Constitution, no state may impose punishment without due process. U.S. Const. amend. XIV, § 1. It is a fundamental tenet of due process that a defendant is entitled to notice and an opportunity to be heard before he is punished. Because no such opportunity was afforded to A-I-I, defaulting it into punitive damages violated A-I-I's constitutional rights.

In all three of their complaints, Plaintiffs pled their causes of action for fraudulent misrepresentation and punitive damages against all defendants collectively. This collective pleading, especially in a case against *sixty defendants*, is insufficient to satisfy the demands of federal due process. Accordingly, A-I-I's due process rights were violated when it was defaulted into punitive damages based on claims made collectively against sixty defendants and where the complaints failed to include even a single specific allegation of fact that would support Plaintiffs' claim that A-I-I acted fraudulently, willfully, wantonly, or recklessly.

There are federal constitutional limitations on the circumstances under which punitive damages may be imposed. *See Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001) ("Despite the broad discretion that States possess with respect to the imposition of criminal

penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion”). Our own Supreme Court has recognized the existence of these limitations. *See Branham v. Ford Motor Co.*, 390 S.C. 203, 240, 701 S.E.2d 5, 25 (2010) (“Because the United States Supreme Court has discovered that a state court’s punitive damages award implicates federal substantive due process, this Court is not the final arbiter of determining what financial evidence is proper in assessing punitive damages”).

In *Cooper*, the Supreme Court noted that compensatory and punitive damages serve very different purposes. 532 U.S. 424, 432 (2001). The Supreme Court in *Cooper* noted that punitive damages are “quasi-criminal” and operate as “private fines intended to punish the defendant and to deter future wrongdoing.” *Id.* (internal quotations omitted). *See also Gertz v. Robert Welch*, 418 U.S. 323, 350 (1974) (punitive damages “are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence”).

Additionally, federal due process requires that a defendant have fair notice of the conduct that will subject him to punishment and be able to defend against it. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment”). This basic protection against “judgments without notice” afforded by federal due process is implicated by civil penalties. *Id.* at 574, n. 22.

In determining whether a punitive damage award violates a defendant’s constitutional rights, courts should consider “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *State Farm Mut. Auto. Ins. Co. v.*

Campbell, 538 U.S. 408, 418 (2003). The Supreme Court has explained that “the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” *Gore*, 517 U.S. at 575.

In this case, there was absolutely no consideration by the jury or the circuit court as to the reprehensibility of A-I-I’s conduct. Nor could there have been any such consideration. Plaintiffs’ complaints do not allege any specific facts regarding the reprehensibility of A-I-I’s conduct. Rather, each of the three complaints merely alleged that all sixty defendants’ conduct was reprehensible. There is simply no way that any trier of fact could determine, based on Plaintiffs’ complaint alone, what amount of punitive damages could be awarded against A-I-I in accordance with the guideposts articulated by the Supreme Court of the United States so as to ensure the award of punitive damages was constitutional.

The only information given to the jury to assess punitive damages against A-I-I was its net worth and the circuit court’s statement that it had already determined A-I-I’s conduct was willful, wanton, and reckless. The Supreme Court specifically warned in *Campbell* that “the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses.” *Campbell*, 538 U.S. at 417. The *Campbell* Court noted that it was concerned with the “imprecise manner in which punitive damages systems are administered” because “punitive damages pose an acute danger of arbitrary deprivations of property.” *Id.* The Court continued: “Our concerns are heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded.” *Id.* at 418. Even though net worth is a relevant factor in punitive damages, “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” *Id.* at 427. Jury considerations of a defendant’s net worth in calculating punitive damages “cannot make up for the

failure of other factors, such as ‘reprehensibility,’ to constrain significantly an award that purports to punish a defendant’s conduct.” *Gore*, 517 U.S. at 591 (BREYER, J., concurring).

Consistent with these federal constitutional limitations, this Court should hold that the imposition of punitive damages against A-I-I violated its federal due process rights. Plaintiffs’ complaints contained no specific allegations of fraudulent, willful, wanton, reckless, or malicious conduct sufficient to impose punitive damages against A-I-I. A-I-I cannot be defaulted into punitive damages based on a complaint that made no specific claim of reprehensible conduct by A-I-I.

CONCLUSION

By reason of the foregoing arguments, 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. Alternatively, this Court should vacate the punitive damages award against A-I-I because it violated A-I-I's federal due process rights.

s/Adam Ruffin
Adam Sinclair Ruffin
SC Bar No. 101350
1320 Main Street, Suite 300
Columbia, SC 29201
(803) 470-5629
adam@ruffinappeals.com

Stephanie G. Flynn
Fox Rothschild
SC Bar No. 16653
2 West Washington Street, Suite 1100
Greenville, SC 29601
(864) 751-7607
sgflynn@foxrothschild.com

Attorneys for American International Industries

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