THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Hon. Honorable Martha M. Rivers

Magistrate Case No.: 2024-CV-26-1040781
Circuit Case No.: 2024-CP-26-05611
Appellate Case No.: 2024-002158

D.R. Horton, Inc.....Appellant,

v.

Edward and April Mannone.....Respondents.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. FACTS NOT INCLUDED IN THE RECORD ON APPEAL CANNOT BE CONSIDERED BY THE COURT.

The Respondents' Initial Brief does not provide any legal arguments to contradict D.R. Horton's position that the circuit court order should be reversed and case mandated back to magistrates' court. In fact, a large portion of the Respondents' Initial Brief relies heavily on facts not included in the Record on Appeal, and such evidence cannot be considered by the Court under South Carolina law.

Rule 210(h) of the South Carolina Appellate Court Rules (hereinafter "SCACR") explicitly states that the appellate court will not consider any fact that does not appear in the Record on Appeal. The South Carolina Supreme Court and Court of Appeals have consistently ruled and emphasized that facts or issues not included in the record on appeal will not be considered.[1] Overall, this principle ensures that an appellate review is confined to the evidence and arguments properly presented and preserved in the lower courts.

In *Sierra Club v. South Carolina Department of Health & Environmental Control*, the South Carolina Supreme Court declined to consider findings from a report that were not part of the record on appeal. *Sierra Club v. S.C. Dep't of Health & Envtl. Control*, 426 S.C. 236, 259, 826 S.E.2d 595, 608 (2019) (citing Rule 210(h), SCACR). The court noted that the record on remand would be open, allowing the operator of a radioactive waste facility to present evidence addressing compliance issues, but reiterated that appellate courts cannot consider facts outside the record. *Id*.

[1] *See, e.g.*, *Sierra Club v. S.C. Dep't of Health & Envtl. Control*, 426 S.C. 236, 259, 826 S.E.2d 595, 608 (2019); *Higgins v. Medical Univ.*, 326 S.C. 592, 599, 486 S.E.2d 269, 272-73 (Ct. App. 1997). *See also S.C. State Highway Dep't v. Meredith* 241 S.C. 306, 311-12, 128 S.E.2d 179, 182 (1962) (noting that trial courts can certify parts of the record before them to the appellate court where it appears the record on appeal is incomplete or inaccurate).

In *Higgins v. Medical University of South Carolina*, the South Carolina Court of Appeals noted that reliance on unpublished orders and factual statements by attorneys, which are not part of the record, is improper. *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 599, 486 S.E.2d 269, 272-73 (Ct. App. 1997). "[F]actual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists. *Id*. (citing *Gilmore v. Ivey,* 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986)). In *South Carolina State Highway Department v. Meredith*, the South Carolina Supreme Court held that the trial judge has the duty to settle the record for appeal when there is a disagreement between the parties about its contents. *S.C. State Highway Dep't v. Meredith*, 241 S.C. 306, 314-15, 128 S.E.2d 179, 183-84 (1962). The court emphasized that it would not consider any fact not included in the transcript of record and that the record must be complete to allow for proper understanding and decision-making. *Id*. As such, testimony not included in the Record on Appeal cannot be considered by the Court.

In Respondents' Initial Brief, they provide testimony for several justifications regarding the reasons for the improper service and improper naming of D.R. Horton. First, the Respondents had no counsel and were not "legally advised at the time that [they] filled out [their] claim form." (*See* Initial Brief of Respondent, p.2.) Additionally, Respondents' Initial Brief states that when filling out the complaint, they named D.R. Horton as D.R. Horton Builder because D.R. Horton's "sign states on their place of business 'D.R. Horton American Builders.'" (*Id*.) Additionally, Respondents' Initial Brief states that they served D.R. Horton at its Myrtle Beach Divisional Office because that was "where the field manager, warranty manager and construction manager/supervisors responded from, and where [they] were told to correspond when we had any

concerns or problems." (*Id*.) These facts have not previously been provided by the Respondents during the previous Appeals, nor can they be found in the Record on Appeal.[2]

The Respondents continued to present new testimony regarding the hearing that took place. Respondents claim that D.R. Horton "agreed and acknowledged that they were at default." (*Id.* at pp.2-3). Respondents claim that Appellant's representative made rebuttals regarding the statements made by Respondents and Appellant had the opportunity to present evidence. (*Id.* at p.3) Not only can this evidence not be found in the Record on Appeal but it is simply untrue, as the Magistrate Court improperly found D.R. Horton in default. Additional testimony presented by Respondents in their Initial Brief that cannot be found in the Record on Appeal includes:

- Purchasing the home through Real Estate Agent Charles DeMatteo and his observations of the construction of the home, including installation of the LV Flooring on the first floor around April 25, 2022. (*Id*. at p.4)

[2] Even if the Court were to consider the new evidence presented by the Respondents, Appellant did not receive proper service of the complaint, which caused Appellant's answer to be late. *Cf. Roche v. Young Bros.*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995) (noting that default judgment can be set aside if a defendant shows that an unauthorized person accepted service via certified mail). Further, Appellant promptly filed an answer, *at most* two weeks after the deadline for its response. (*See* Answer); *see also Columbia Pools, Inc. v. Galvin,* 288 S.C. 59, 60, 339 S.E.2d 524, 524-25 (Ct. App. 1986) (discussing an answer that was filed one day late).

Appellant has a meritorious warranty defense. (*See* Answer.) *Compare Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (stating that a party seeking a tax exemption raised a meritorious defense when its prehearing statement outlined the basis for receiving the exemption), with *Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 214–15, 321 S.E.2d 179, 181 (Ct. App. 1984) (finding no abuse of discretion in denying a motion to file a late answer where the answer contained only a general denial of liability).

And Respondents will not be unfairly prejudiced, as D.R. Horton did not unreasonably delay the proceedings and seeks merely to have the case resolved on its merits, not dismissed. *See Mictronics*, 345 S.C. at 512, 548 S.E.2d at 226 (concluding that there was no prejudice where the action "ha[d] not been substantially delayed by the parties' actions").

In short, in this case there was "a good faith mistake of fact, and[] no attempt to thwart the judicial system"; therefore, "there is basis for relief." *Columbia Pools*, 288 S.C. at 61, 339 S.E.2d at 525.

- Respondents' neighbors Richard "Ricky" Cinetti and Chuck Obsenshuen, who offered to "keep an eye on things" for the Respondents while they were not there. (*Id.*)
- Conversations between Charles DeMatteo and D.R. Horton's employee Rob Shaw. (*Id.* at pp. 4-5.)
- Conversations between Respondents and Mr. Cinetti, and the subsequent facetime calls between the Respondents and their neighbors. (*Id.* at pp.4-5.)
- D.R. Horton attempt to place liability on the flooring company, the floor installers, the floor, and then eventually the homeowners and the dog. (*Id.*at p.5.)
- Allegations that Appellant dragged the issue of the floors out past the warranty period. (*Id.*)

While the Respondents heavily rely on evidence not included in the Record on Appeal, even if the Court takes that evidence into consideration, Respondents have failed to provide a legal basis that contradicts D.R. Horton's position that the circuit court order should be reversed.

II. ENTRY OF DEFAULT WAS AN ABUSE OF DISCRETION.

In deciding whether to grant relief from default judgment, courts should consider the promptness of the response, the reason for the default, whether there is a meritorious defense, and whether opposing parties will be prejudiced. *See, e.g.*, *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct. App. 2001) (discussing the standard in the context of an appeal from an administrative law judge). In this case, these factors weigh in Appellant's favor.

Respondents did not properly serve their complaint on Appellant. As a result, Appellant's counsel did not become aware of the action soon enough to file a timely answer. However,

assuming a service date of May 9, Appellant's answer was due June 10, 2024.[3] After becoming aware of the Lawsuit, Appellant promptly filed an answer on June 25, at most 15 days after Appellant's answer was due. (*See* R. pp. 17-18 (Answer).) In the answer, Appellant identified a substantive defense to liability—the Subject Property was outside the warranty period. (*Id.*) At the same time, Appellant authorized two non-attorney employees to represent the company before the magistrate court. (*See* R. pp. 15-16 (Authorization for Non-Lawyer Representative, June 25, 2024).) At the magistrate court hearing, however, the court simply found Appellant in default and prevented the employees from questioning Respondents or testifying about anything other than damages. (*See* R. p. 2 (Default J. Order, July 17, 2024).) The circuit court exacerbated this error on appeal.

South Carolina courts "have consistently held [that] relief from default is solely within the sound discretion of the trial judge." *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987). However, that discretion is not absolute, and this Court will not defer to the trial court if that court "applie[s] an erroneous standard of review and fail[s] to accord the contested facts the scrutiny" required by law. *Burns v. Wannamaker*, 281 S.C. 352, 357, 315 S.E.2d 179, 182 (Ct. App. 1984). In this case, the magistrate court failed to consider any basis for relief from default, and the circuit court considered only improper service as a standalone defense. (*See* R. p. 3 (Order, Nov. 22, 2024.) There is no evidence that either the magistrate court or the circuit court considered the basis for Appellant's late response or the nature of its substantive defense, nor did either court identify any prejudice to Respondents. The failure to take these factors into account

[3] Thirty days after May 9, 2024, was June 8, a Saturday. Therefore, the answer deadline extended to the next Monday. *See* Rule 3, SCRMC.

conflicts with "South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities." *Mictronics*, 345 S.C. at 511, 548 S.E.2d at 226.

Appellant had good cause for relief from default, and the magistrate court abused its discretion by refusing to entertain Appellant's arguments. Moreover, the circuit court erred by making the same mistake and affirming the magistrate court.

III. APPELLANT DID NOT WAIVE IMPROPER SERVICE.

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Richardson v. P.V., Inc.*, 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009). An abuse of discretion 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***." *Ricks*, 293 S.C. at 375, 360 S.E.2d at 536–37 (emphases added). Therefore, the issue on appeal "is not whether . . . good cause existed to set aside the default, but rather, whether the [trial court's] determination is *supportable by the evidence* and *not controlled by an error of law*." *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994) (emphasis added).

As this action took place in magistrate court, "[a]t the default hearing, the defendant [in default] may participate only by cross-examining witnesses and objecting to evidence." Rule 10(b), SCRMC. That is what occurred in this case. After filing the answer, Appellant's non-attorney representatives appeared at the hearing before the magistrate court. However, they were unable to present any arguments unrelated to Respondents' alleged damages. Appellant's failure to raise the issue of improper service should not be held against Appellant now where Appellant

filed an answer, appeared for a hearing, and followed the magistrate court's instructions to limit testimony to damages.

Finally, it bears repeating that Appellant does not raise the issue of improper service to have Respondents' claim dismissed or to have a judgment on the merits reversed. *Cf. Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 202–03, 723 S.E.2d 597, 602 (Ct. App. 2012) (stating that a credit union's argument that the plaintiff failed to plead a cause of action was not preserved for appellate review where the credit union raised it for the first time in a motion to reconsider or for relief from default judgment). To the contrary, Appellant raises this issue so that a further decision can be made "consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities." *Mictronics*, 345 S.C. at 511, 548 S.E.2d at 226.

CONCLUSION

For the reasons stated herein, the circuit court should be reversed and this case remanded to the magistrate court for further proceedings.

Respectfully submitted,

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