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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
The Honorable Daniel B. Hocker, Circuit Court Judge

Appellate Case No. 2024-001444
Lower Case Nos. 2021-CP-01-00076

William F. Nickles, IV, Respondent,

vs.

Howar Equipment, Inc., Sonoco Products Company, Palmetto State Transportation, LLC, KSC Logistics, Inc., and John Doe Corporation, defendants,

of which KSC Logistics, Inc. is the Appellant.

FINAL BRIEF OF RESPONDENT

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Statement of the Case

On March 24, 2021, the attorney for William Nickles, Thomas E. Hite, III, filed a Summons and Complaint against Palmetto State Transportation and KSC Logistics, Inc., the Appellant in this appeal. The suit was over injuries suffered by Mr. Nickles when a D-ring on a large steel reel broke causing the reel to topple over and fall on Mr. Nickles. He was seriously injured. KSC is a local company in Abbeville, SC located on the 28 By-Pass next to Prysmian Group North America. They are separated by a railroad with a spur line going on to the property of each company. KSC supplies steel cable reels of various sizes to Prysmian. As one witness stated, "During the period of time, we did service people but KSC applied [sic] a large percentage of the reels since time moved on." ROA at 366, ll 16-18. In addition, in the deposition of Charles Ouzts, he stated, "Primarily, high voltage reels are repaired by KSC." ROA, at 196, ll 19-20.

After the service of the initial summons and complaint, William Ray Kelley, the President of KSC, contacted Mr. Hite by phone. He then ran across Mr. Hite in a local Mexican restaurant and had further conversations. ROA at 337, ll 9-15. He told the attorney that his company had no involvement in the large reel involved in the litigation. In a subsequent conversation, Mr. Hite told Mr. Kelley that he would let KSC out of the suit, but if he subsequently learned KSC was involved with the reel, he would have to bring KSC back into the suit. ROA at 338, ll 10-25. Subsequently, Mr. Hite and Mr. Kelley had several email exchanges as to the order of dismissal. ROA at 149-156 (exhibit 4).

On November 9, 2021, Mr. Hite filed an Amended Complaint adding as parties Howar Equipment, Inc., Sonoco Products Company and John Doe Corporation, as to unknown

companies who may have been involved in the handling of the steel reel. ROA at 041 to 042, ¶ 6. This Amended Complaint, which also included KSC, was served upon Mr. Kelley on December 16, 2021. After service of the Summons and Amended Complaint, Mr. Hite did not receive a phone call nor email communications from Mr. Kelley. Mr. Hite on February 7, 2022 formally filed the Affidavit of Service and Affidavit of Default with the Clerk of Court for Abbeville County.

Over the next year, discovery and negotiations with the new defendants continued. As a result, the two companies agree to make a settlement with Mr. Nickles. Sonoco was dismissed on October 28, 2022. ROA at 054. Howar was dismissed on November 14, 2023. ROA at 010. Palmetto Equipment was dismissed by a Rule 41an Order filed on November 15, 2023.[1] ROA at 010.

After the dismissal of all the other defendants, Mr. Hite scheduled a damages hearing as to KSC. He sent KSC a notice of the damages hearing on November 21, 2023. ROA at 334, ll 6-7. KSC gave the notice to their carrier and a motion to set aside the default was filed on December 7, 2023. ROA at 057. At the December 18, 2023, damages hearing, the motion to set aside the default was, by agreement, set for a later date. ROA at 207, l 22 to 208, l 23.

At the hearing on the motion to set aside the default, KSC presented the affidavit of Mr. Kelley and a memorandum in favor of the motion. As to the service of the summons and amended complaint, the affidavit from Mr. Kelley simply stated, "Other than service on December 21, 2021, the next item related to this lawsuit that KSC Logistics, Inc. received, was

[1] The order of dismissal refers to a copy of this order being sent to "KSC Logistics Inc." No copy of any letter was introduced at the hearings.

the Notice of Hearing for December 18, 2023." ROA at 057 to 058 ¶4, 399, ¶ 7.

By order filed on February 7, 2024, Judge Donald B. Hocker denied the motion to set aside the default. On March 11, 2024, KSC filed a motion to alter or amend the judgment of damages entered on February 29, 2024.[2] The motion to alter or amend contained a motion for set offs for the payments by co-defendants, a Rule 59e request to reconsider and amend "the Order for Damages, and setting aside the entry of default and/or default judgment entered." ROA at 103, ¶ 2. Further, the motion requested a hearing under Rule 60(b) for relief from the damages order and a request to set aside the default judgment based on subsequently discovered evidence that showed KSC had a valid defense. ROA at 103 ¶ 3. By order filed on July 31, 2024, Hocker denied the motion to alter or amend either order but granted the right to a set off in the amount of $30,000. ROA at 024 to 029.

KSC Logistics, Inc., then filed its Notice of Appeal on August 29, 2024.

[2] The tenth day, March 10, 2024, fell on a Sunday.

ARGUMENT

Question I

Did the trial court abuse its discretion by not granting the motion to set aside the entry of Default, pursuant to Rule 55(c), SCRCP, when the appellant demonstrated good cause to do so?[3]

The quick answer to the first issue is that KSC Logistics, Inc. has demonstrated no cause to set aside the entry of default judgment, much less a good cause. In a case considering the opening of a default judgment, this court has said, "Because we find the master did not err in finding Owens failed to show good cause for failing to answer the complaint, we need not consider the *Wham* factors." *Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct. App. 2013). *See, also, Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 444 S.C. 328, 340, 907 S.E.2d 129, 135 (Ct. App. 2024)("[T]he master did not make findings of fact regarding the factors to relieve default other than stating Appellants had not shown good cause. However, if the record reveals sufficient facts to support this finding, then the other factors do not have to be addressed."); *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009)("The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause.")

In this case, the record supports the determination of the trial court that KSC failed to show any cause for failing to respond to the complaint. The affidavit of William Ray Kelley provides no cause as to why his company did not answer the amended complaint served upon

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[3] For the ease of the reader, the Respondent adopts the statement of the issue used by the Appellant. Corrections to the Issues, when necessary, will be discussed in Respondent's brief.

him. The affidavit states, "Other than service on December 21, 2021, the next item related to this lawsuit that KSC Logistics, Inc., received was the Notice of Hearing for December 18, 2013." ROA at 057 to 058 ¶4, 399 ¶ 7. The affidavit does not state what Mr. Kelley did with the summons and amended complaint after he received it. The fact should also be noted that the amended complaint is different from the complaint previously served upon his company. The amended complaint added three additional parties, Howar Equipment, Inc., Sonoco Products Company, and John Doe Corporation. The record establishes that Mr. Kelley after service of the initial summons and complaint had phone and email contact with Mr. Hite, the attorney for Mr. Nickles. In response to the amended complaint, which added additional parties and had KSC as a party, Mr. Kelley did not engage in the simple task of calling or emailing Mr. Hite to ask him about the amended complaint. Mr. Kelley did not simply take the document to his attorney to get any advice. In fact, in its brief seeking to set aside the default, the document says, "KSC is uncertain of the document received, as it does not have the served document." ROA at 075, ¶ 1. If Mr. Kelley mistakenly failed to understand he was being sued again, that is not a basis for giving relief from a default judgment. The record is simply devoid of any cause as to why Mr. Kelley did not respond to the amended complaint, much less a good cause. Based upon this record, the trial court was justified in finding that KSC failed to establish good cause for not filing an answer.

In *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995) the facts were, "Mr. Thomas admitted he overlooked the January 4 deadline in the letter, and believed Besco had an unlimited extension of time to respond to Dixon's complaint." This mistaken belief was insufficient to show a good cause for not answering. Here, there was no

attempt to contact the attorney for Mr. Nickles. The affidavit does not show what he did with the amended complaint. Nor does any affidavit state the Mr. Kelley was confused over the significance of the summons and amended complaint. The supreme court has also held, "Losing a summons and complaint within the corporation is not a ground to set aside a default judgment." *Roche v. Young Bros. of Florence*, 318 S.C. 207, 212, 456 S.E.2d 897, 900 (1995).

Initially, KSC took the position that Mr. Kelley took no action on the summons and amended complaint as he believed the action was going to be dismissed. ROA at 076. At the hearing held on January 30, 2024, counsel initially repeated this claim. ROA at 334 l 23 to 335, l 3. This incorrect point was clarified and KSC acknowledged that no representative of KSC had any contact with Mr. Hite after service of the summons and amended complaint. ROA at 337, ll 9-25.

At the May 30, 2024 hearing, counsel for KSC argued as to "good cause," "Mr. Kelley was dismissed from the case after talking to Mr. Hite and explaining why he believed they were not involved and that is why he made the mistake and didn't timely respond, he thought he had been dismissed from the case." ROA at 374, ll 15-19. The problem with this theory is Mr. Kelley in two affidavits and his testimony never stated these facts. Mr. Kelley never gave any explanation as to why he neglected to respond to the summons and amended complaint. In neither his testimony nor his affidavits, he never explained what he did with the summons and amended complaint. Without KSC giving a cause, the lower court could not determine if the cause was good.

KSC has argued the agreement by Mr. Nickles counsel to dismiss KSC from the suit is a valid reason to excuse KSC from ignoring the service of the summons and amended complaint.

Br. of App. at 9. No case has ever come close to holding the misunderstanding of the significance of a document is a basis for finding good cause. Secondly, KSC ignores the facts in the case where Mr. Hite advised the owner of KSC, "[I]f I find anything out that you-all were involved with high voltage reels around this period of time, then I'm gonna have to bring you back in, and he said okay." ROA at 338, ll 22-25.[4] This statement was not denied by Mr. Kelley in his subsequent affidavit or his testimony. Thus, the record shows that KSC was aware they could be brought back into the suit.

The lower court found, "KSC has not provided an adequate explanation for the default. KSC's excuse set forth in the Affidavit of President and Registered Agent of KSC, William Ray Kelley, is not a justifiable explanation for KSC's failure to Answer." ROA at 015, ¶ 10. The record in this case well supports this conclusion. While the Order went further and rejected the factors set forth in *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989), such was not necessary.

As previously mentioned, once the trial judge finds no-good cause for not filing an answer, the court is not required to consider the *Wham* factors. This Court has said, "An abuse of discretion in setting aside a default judgment arises 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 v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535, 536–37 (Ct. App. 1987). Thus, the proper questions before this court is, Did the

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[4] The depositions in this case did establish the KSC was in fact involved in the high voltage reels. Charles Ouzts, a Prysmian employee, stated in his deposition, "Primarily, high voltage reels are repaired by KSC." ROA at 196, ll 19-20. This deposition was taken on November 5, 2021, shortly before the complaint was amended.

lower court err as a matter of law in holding KSC was in default or did the lower court make its decision to hold KSC in default based upon a factual finding that does not exist in the record. This court is not permitted to substitute its opinion as to the conclusions from the facts for the opinion of the lower court. To do otherwise is to ignore the abuse of discretion standard.

KSC suggests that an error of law occurred when the trial judge equated this case to *Dixon*. Br. of App. at 9. KSC seems to suggest that a misunderstanding as to 15 days extension as opposed to an unlimited one is not analogous to this case. To some extent, KSC may be correct. A misunderstanding as to the length of an extension is at least a cause, and the court found it not to be a good one. Here, KSC has not given a cause as to why the summons and amended complaint were simply ignored. KSC did not even give a cause. As previously noted, KSC was well aware the previous dismissal was not with prejudice and was well-aware KSC may be brought back into the suit. The facts of this case are stronger for a showing of lack of good cause than *Dixon*. At least in *Dixon* the defendant told the court what they did with the summons and complaint.

KSC also attempts to distinguish *Dixon* by saying, "Here, unlike in *Dixon*, Respondent's counsel directly conferred with Appellant's non-attorney President at or about the time of service regarding the *merits* of the complaint - not any deadline to respond." Br. of App. at 15-16. This is absolutely correct as to the initial complaint which was dismissed without prejudice. KSC ignores in its brief the fact that its president was told that if the plaintiff's attorney learns that KSC was involved with high voltage reels, they would be brought back into the suit. None of what KSC has argued applied to the summons and amended complaint. Again, no explanation is offered as to what was done with the document served upon Mr. Kelley in December of 2021.

KSC has argued that Mr. Hite mislead Mr. Kelley by dismissing the original complaint without prejudice. Br. of App. at 19. What is ignored is what is mentioned above when Mr. Hite also told Mr. Kelley if he learned he was involved in high voltage reels, he would bring KSC back into the suit. Mr. Kelley was told he might be brought back in.

In this case, KSC has not pointed to any error in law or erroneous factual determination as to the order of the lower court that would require this court to overturn the decision.

The Wham Factors

While not necessary to this case, the *Wham* were adequately considered by the trial judge and supported under the facts of this case. In *Wham*, this court said the lower "shall consider the following factors: (1) the timing of Shearson Lehman's motion for relief; (2) whether Shearson Lehman has a meritorious defense; and (3) the degree of prejudice to Wham if relief is granted." *Wham* at 465, 381 S.E.2d at 501–02.

KSC argues the timing was proper as they responded quickly after receiving the notice of the damages hearing. Mr. Nickles agrees they responded promptly after the damages hearing notice was sent. KSC did not act promptly as it relates to the service of the summons and amended complaint. Based upon that date, KSC acted almost two years later and with no explanation as to why they did not respond sooner. As discussed in this brief KSC has not offered any evidence of a meritorious defense. They have merely alleged that Mr. Nickles did not prove his case. A meritorious defense means more as a party in default has admitted liability and the Plaintiff can rely upon that fact. KSC is required to prove they had no involvement with the reel that caused the injuries to Mr. Nickles. That fact would constitute a meritorious defense. They offered no such proof.

Prejudice to Mr. Nickles

Aside from the standard prejudice of having to engage in the discovery process with KSC and to deprive Mr. Nickles of payment for his injuries and damages, Mr. Nickles has another unique prejudice in this matter. Upon learning of the other possible defendants in this matter, Mr. Hite amended his pleadings to bring in two new corporations. Of the four corporate defendants, Mr. Hite made a financial settlement with two of them. The other was dismissed with prejudice. The cases against all other parties were dismissed with prejudice. To permit KSC to now be allowed to defend this action would permit them to attempt to place blame on one of the three other companies to avoid placing blame on themselves. Under those circumstances, Mr. Nickles would not be able to obtain a judgment against any of the three other companies as they have been dismissed with prejudice.

Question II

The trial court abused its discretion by failing to consider under Rule 60(b)(3), SCRCP, the Respondent's failure to disclose the existence of material deposition testimony to the trial court, for which appellant could not compel production and which testimony tended to exonerate Appellant from liability, at the hearing on the motion to set aside default.[5]

As this issue was raised at the Rule 60(b) hearing, the issue has to be addressed under cases setting forth the proper standard of review. The quick answer to this claim is what the

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[5] In its brief, KSC refers to the actions of Mr. Nickles counsel as "Respondent's characterization of the testimony was incomplete" and "This misrepresentation to the Trial Court." Br. of App. at 22. At the hearing, the representation was different. As counsel stated, "I am not accusing Mr. Hite of doing anything wrong, I am not accusing him of malfeasance and I want to be clear on the record. . . ." ROA at 368, ll 6-8.

South Carolina Supreme Court said, "Having concluded the trial court did not abuse its discretion in finding the Appellant was not entitled to relief on any of the grounds specified in Rule 60(b), SCRCP, we need not address whether the Appellant has a meritorious defense." *ITC Com. Funding, LLC v. Crerar*, 393 S.C. 487, 496, 713 S.E.2d 335, 339–40 (Ct. App. 2011). And in this case the record amply supports the findings of the trial judge.

KSC correctly notes that there is no discovery in a motion asking relief from a default judgment. In this case, the record does not reflect KSC ever asked Mr. Hite for copies of any depositions. KSC obviously obtained copies. KSC did not before the January 30, 2024 hearing ask for a continuance for it to obtain any documents it believed it needed for the hearing. The deposition was obviously available before the hearing.

At the hearing on the motion to alter or amend, KSC never identified the specific reel which was involved in the accident. The depositions do not exonerate KSC. When asked about two reels, neither of which is identified as the reel in question, Charles Ouzts said the two reels were stored at either Prysmian, Palmetto State or KSC. ROA at 125, ll 2-14. He also testified that high voltage reels are primarily repaired by KSC. ROA at 126, ll 13-20. Cecil Talley, another Prysmian employee stated, "KSC repairs reels, and we also store reels at KSC." ROA at 139, ll 2-3. Prysmian would not have welded a D-ring onto a reel. ROA at 141, ll 14-15. KSC was described by Mr. Ouzts as "the reel repair depot." ROA at 197, ll 20-23. Also, Mr. Talley testified KSC does reel repair work of Prysmian. ROA at 201, ll 5-20.

KSC argues, "[T]he Trial Court never considered this issue in its Order on Defendant's Motion to Reconsider and Setoff." Br. of App. at 22. This is simply not correct. The Order denying the Rule 59 and Rule 60 motions says, "Based on the memorandum of law submitted by

the parties, witnesses testimony, oral arguments presented at the hearing, and other evidence submitted to the Court, ..." ROA at 024. The order further provided, "[A]s mentioned above, the evidence [the depositions] should have been known to the party because Plaintiff referenced the depositions at issue in a Memorandum filed with this Court and served on Defendant's counsel." ROA at 027. The memorandum cited by the trial judge stated, "On November 4th and 5th, 2021 Plaintiff's counsel deposed several representatives of Prysmian Cable and discovered that KSC was in fact a major party in the storage and repairing of high voltage reels at Prysmian Cable." ROA at 063. If counsel for KSC ever asked Mr. Hite for the depositions, the record does not reflect that fact.

KSC is correct that the testimony in the deposition was that the high voltage reels have serial numbers on them. If this is correct, the exact reel that broke and injured Mr. Nickles should be easily identifiable. In no documents submitted by KSC has the reel been specifically identified. As the party in default, KSC has the burden of establishing they have a meritorious defense. "At such hearing the wife was the moving party and the burden of proof was on her to make a prima facie showing of excusable neglect and of a meritorious defense." *Rajcich v. Rajcich*, 256 S.C. 121, 124, 181 S.E.2d 11, 12 (1971). Mr. Nickles contends, as noted above, this case does not even get to the issue of a meritorious defense.

In reviewing the brief of KSC in this appeal, as to the issue of a meritorious defense, they appear to argue that Mr. Nickles failed to provide proof that the high voltage reel in question was possessed or repaired by KSC. KSC fails to appreciate the burden of proof it has. KSC must prove they have a meritorious defense, not that Mr. Nickles did not prove his case. A meritorious defense is not established by proving Mr. Nickles failed in his proof. By being in default, KSC

has admitted liability. KSC bears the burden of proving they did not possess or repair the high voltage reel in question. As KSC claims that all high voltage reels have serial numbers, the task of proving that the serial number on the reel in question was never in their possession should not be difficult. The serial number should establish who possessed the reel and when it was delivered to Prysmian Cable. KSC has not provided the lower court with the required evidence to show a meritorious defense. This is especially true considering their close working relationship with Prysmian. The record establishes that the trial judge did not err as a matter of law in finding a meritorious defense was lacking. Also, the record does not establish that the decision of the trial court was based upon an erroneous interpretation of the facts nor based upon a lack of facts to support the conclusion.

Question III

The trial court abused his discretion under Rule 60(b)(2), SCRCP, when it considered evidence in Appellant's possession was, by that fact alone, also deemed within appellants' knowledge, without making a finding that Appellant had knowledge had actual knowledge of the evidence or without making a finding that Appellant failed to exercise due diligence to discover the existence of such evidence prior to the hearing on the motion to set aside default.

In reviewing this issue, this court needs to be mindful of the higher standard to set aside a judgment under Rule 60. As this court has stated, "Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the 'good cause' standard established in Rule 55(c)." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 608,

681 S.E.2d 885, 888 (2009). KSC, at the May 30, 2024 hearing stipulated the hearing was only a 59e motion as to the setoff from the judgment. ROA at 349, ll 14-18. So, the order on not setting aside the default judgment is on direct appeal with no Rule 59e motion. The claim as to after discovered evidence is reviewed under the stricter Rule 60(b) standards.

KSC fails to appreciate that even if Mr. Kelley did not know of the email chain, it was known to the employees of KSC. As such, the knowledge of any employee was imputed to KSC for the company can only operate through its employees. Secondly, the record in this case fails to establish what steps KSC took from November 27, 2023 until January 30, 2024 to discover the evidence in its possession. The only evidence concerning the discovering of the evidence was that it was discovered in February or March of 2024. Nothing in this record shows when the alleged due diligence started. The fact that the emails were found with due diligence, makes the claim they could not have been found with due diligence ring hollow. Finally, KSC fails to appreciate the fact that the emails do not establish KSC has a meritorious defense. The emails make reference to the fact that two high voltage reels with certain serial numbers could not be found in the records of KSC. This fact proves nothing. KSC has offered no evidence that either of the two high voltage reels was actually the one that caused the injury to Mr. Nickles. The evidence only establishes an email says the specific reels are not in their records. KSC did not even produce the records to establish that fact.

What the new evidence is required to prove is that KSC has a meritorious defense and not that Mr. Nickles did not prove his case against KSC. As previously discussed, a meritorious defense would show a specific high voltage reel caused the injuries to Mr. Nickles. As KSC has acknowledged that the reels have serial numbers, the proof as to which reel injured Mr. Nickles

should be ale to be established. If KSC then actually produced the printout of the serial numbers of the reels they repaired or possessed, and that number was missing, then KSC would have some basis to say it has a meritorious defense. They failed in this regard.

In *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) this court stated:

> To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence:
>
> > (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.

This was the standard used by the trial court. *Lanier* also cited, with approval, *Coastal Transfer Co. v. Toyota Motor Sales,* U.S.A., 833 F.2d 208, 212 (9th Cir. 1987). In that case the court stated, "On the first point, Coastal's argument falls short because the evidence upon which the expert's testimony was based had been in Coastal's possession since the start of litigation. Evidence is not 'newly discovered' under the Federal Rules if it was in the moving party's possession at the time of trial or could have been discovered with reasonable diligence." *Id.* at 212. *Lanier* also cited with approve the South Carolina Supreme Court decision in *Johnston v. Belk-McKnight Co. of Newberry*, 188 S.C. 149, 198 S.E. 395 (1938). In that case, the supreme court held the standard for after discovered by holding:

> In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear, (1) that the evidence is such as will probably change the result, if a new trial is granted. (2) That it has been discovered since the trial. (3) That it could not have been discovered before the trial by the exercise of due diligence. (4) That it is material to the issue. (5) That it is not merely cumulative or impeaching. *Id.* at ___, 198 S.E. at 397.

Nothing in *Lanier* indicates the court intended to lessen the burden on the moving party

to a standard less than what the supreme court used in *Johnston*. Nothing in *Lanier* suggests that the mere lack of actual knowledge as to facts in the possession of a defendant excuses a defendant from presenting that evidence at a hearing. Simply put, ignorance of facts in the possession of a defendant is no excuse.

KSC, as noted previously, has introduced no evidence as to what it did to find the email chain from November 27, 2023 until January 30, 2024. Nor did KSC ask to continue the case because they were having trouble finding the email chain in the old server. For what this record shows, no effort was made to find the emails until after the January 30, 2024 hearing. The affidavit of Brenda Nance, the office manager for KSC, made two ambiguous statements. First, she said, "In June of 2021, when KSC had been told it would be dismissed from this case, I engaged in email correspondence with Charles Ouzts and Heath Booton of Prysmian" and "I did not recall or discover this correspondence until after the Court denied KSC's Motion to Set Aside Entry of Default." ROA at 164, ¶¶ 4, 7. First, the emails were from June 21-24, 2022. This was a year after the initial suit was dismissed. The search obviously was not related to the dismissal of the initial suit. Second, the affidavit implies that the search of the emails did not begin until after the trial court denied the motion to set aside the entry of default. When the search began after the hearing, KSC cannot now claim it could not have been found before the January 30, 2024 hearing. To the extent KSC argues that it did not know of the emails until after the January 30, 2024 hearing, the affidavit establishes that the information was in the possession of KSC before the hearing. A new trial under Rule 60(b)(2) should not be granted simply because an employee forgot some information. If that were the standard, finality of judgments would be difficult to obtain.

As the South Carolina Supreme Court has said, "We consider it unnecessary to explore the differing standards between Rule 60(b)(2) and (3) as advanced by Husband, for we conclude that South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here, the party could have discovered the evidence prior to trial." *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004). This rule should apply in this case. KSC could have discovered the emails prior to the January 30, 2024 hearing. At the very least, KSC should have produced evidence that they did not simply forget about the evidence. Forgetting evidence is not a justification for opening a judgment.

CONCLUSION-

For the foregoing reason, this court should affirm the decision of the lower court as the record amply supports the factual findings of the lower court, and the lower court made no error of law in applying the fact.

August 6, 2025

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
The Honorable Daniel B. Hocker, Circuit Court Judge

Appellate Case No. 2024-001444
Lower Case Nos. 2021-CP-01-00076

William F. Nickles, IV, Respondent,

vs.

Howar Equipment, Inc., Sonoco Products Company, Palmetto State Transportation, LLC, KSC Logistics, Inc., and John Doe Corporation, defendants,

of which KSC Logistics, Inc. is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

August 6th, 2025

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CERTIFICATE OF SERVICE

Sandy Traynham certifies that she as the Secretary for C. Rauch Wise, Attorney for the Respondent in the above entitled case did on August 6, 2025, deposit via email a bound copy of the Final Brief of Respondent in the above case to Charles Daniel Atkinson at datkinson@wajlawfirm.com and US Mail at Wilkes Atkinson & Joyner, LLC, 127 Dunbar St., Ste. 200, Spartanburg, SC 29306.

August 6, 2025

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