THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2024-001444

William F. Nickles, IV, Respondent,

v.

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 REPLY BRIEF OF APPELLANT

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REPLY ARGUMENT

The Trial Court made several errors, and instead of defending those errors, Respondent admits one and obfuscates the rest. The Trial Court misapplied a case to find there was no good cause, and Respondent tacitly agrees that the case was misapplied. The Trial Court ignored Appellant's argument that Respondent's Trial Counsel failed to fully disclose evidence, and Respondent cannot defend the Trial Court's silence as to this issue (nor the disclosure failure itself). And finally, the Trial Court erred by placing inappropriate legal significance on the fact of "possession"—Respondent makes no defense of this but champions it. These errors of law and of fact constitute reversible "abuses of discretion." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (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."). This Court should vacate the judgment of default and the entry of default upon which the judgment relies and allow Appellant to defend itself on the merits.

I. APPELLANT PROVIDED GOOD CAUSE BUT THE TRIAL COURT APPLIED INCORRECT STANDARDS TO THE FACTS IN THE RECORD.

a. The Court Misapplied *Dixon*[1] in Finding No Good Cause.

Respondent argues Appellant never provided the trial court with *any* cause to set aside the default. (Respondent's Final Brief at pp. 4-6, 8.) Respondent asks this Court to review a different case and a non-existent order. The Trial Court never found there was *no* cause to set aside the entry of default; the Trial Court instead recognized the "cause" but found that the cause was not "good," based on an incorrect application of *Dixon*:

[1] *Dixon v. Besco Eng'g*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995).

> 1. On April 12, 2021, the Plaintiff filed a Summons and Complaint against KSC and others as a result of his November 10, 2018 injury. KSC Registered Agent and President William Ray Kelley notified Plaintiff's counsel that they did not "deal in" high voltage reels during the time frame of the incident. Based on this information, KSC was dismissed without prejudice on August 23, 2021 and was notified that if it was discovered that this information was inaccurate that they would be added back to the case.
>
> . . .
>
> 10. 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. This scenario is very similar to the law of the case in *Dixon v. Besco Engineering, Inc.* (S.C. App. 1995) 320 S.C. 174, 463 S.E.2d 636, in which the defendant failed to establish sufficient cause for relief from an entry of default judgment where he mistakenly believed that plaintiff's counsel had given him an unlimited extension of time to respond to the complaint, and he thus failed to retain counsel until approximately 2 months after the extended deadline had passed.
>
> . . .
>
> 14. Based upon the foregoing, and in my sound discretion, I find that the entry of default shall not be set aside because the Defendant did not present a *satisfactory* explanation for "good cause" and did not meet the factors set out in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. at 465, 381 S.E.2d at 501–02. . . .

(R. pp. 13-15 at ¶¶ 1, 10, 14 (emphasis added).)

When Respondent addressed the actual argument and issue in this case—that the Trial Court erroneously relied on the unanalogous *Dixon* case, he *agreed* with Appellant: "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.**" (Respondent's Final Brief at p. 8 (emphasis added).) There were no facts in the record of this case that Appellant misunderstood a written extension deadline—the facts overwhelmingly demonstrated that Appellant's President believed the suit was not proceeding against Appellant on the *merits*, as discussed twice with Respondent's counsel. (*See* R. pp. 398-399 at *¶¶* 6-7; p. 337, lines 13-25; p. 338, lines 12-17.) Because the Trial Court relied on *Dixon*—without any similar facts found in our case—to find

Appellant's cause was "inadequate," "unjustifiable," or not "satisfactory," (R. p. 15 at ¶¶ 10, 14), *i.e.*, not "good cause," the Trial Court committed a reversable abuse of discretion. *Sundown Operating Co.*, 383 S.C. at 606, 681 S.E.2d at 888 ("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."). This Court should reverse the Trial Court's Order and vacate the entry of default.

Respondent disputes that Appellant's cause was "good" and hammers on Appellant for finding itself in default by not answering the Amended Complaint. (*See* Respondent's Final Brief at pp. 5-7.) Respondent forgets that defaults are not end-all-be-all, *see Ricks v. Weinrauch*, 293 S.C. 372, 375 360 S.E.2d 535, 536 (Ct. App. 1987), and he glosses over his own trial attorney's role in creating Appellant's President's misunderstanding. Respondent argues:

> [Appellant's President] [M]r. 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 [Appellant] 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. . . . [Kelley's] affidavit does not show what he did with the amended complaint. Nor does any affidavit state that Mr. Kelley was confused over the significance of the summons and amended complaint.

(Respondent's Final Brief at pp. 5-6.) Appellant's President and Respondent's counsel had a course of dealing, speaking openly about the merits of the case and potential responsible parties:

- In March or early April 2021, Respondent's trial counsel spoke with Appellant's President at a local restaurant about the March 2021 Complaint, and Appellant's President told Respondent's trial counsel that Appellant "'didn't have anything to do with that, I'll call you and let you know about it.'" (*See* R. p. 337, lines 13-25; p. 338, lines 12-17 (punctuation added); pp. 31-34; p. 35.)

- On April 9, 2021, Appellant's President spoke to Respondent's trial counsel over the phone, and Appellant's President emailed Respondent's counsel that day "to confirm" the call, where Appellant's President explained Appellant "never had the size reel that was involved in the accident . . . . Therefore, [Appellant] couldn't have made any modifications to the reel involved in the accident." (R. pp. 403, 407 (emphasis added); *see* pp. 398-399 at ¶¶ 4-6.) Appellant's President even pointed Respondent's trial counsel in the direction of a potential responsible party. (R. pp. 403, 407.)
    - Only at the Motion to Set Aside Default hearing on January 30, 2024 did Respondent's trial counsel add that the following was allegedly discussed in the call: "I said, 'I'll let you out, but if I -- if I find out anything else because my client believes that they were involved,' but he said if – I said, '[I]f I find anything out that you-all were involved with the high voltage reels around this period of time, then I'm gonna have to bring you back in[.]' [A]nd he said, 'okay.'" (R. p. 338, lines 19-25 (punctuation added).)
- On April 17, 2021, Respondent's trial counsel responded to Appellant's President's email promising to file a stipulation of dismissal without prejudice. (R. pp. 404, 406-407.)
- Fourth months passed, and Respondent never filed the stipulation of dismissal and Appellant never answered. (*See* R. p. 36.) Respondent never sought entry of default.
- On August 23, 2021, Appellant's President emailed Respondent's trial counsel to ask about the stipulation of dismissal, and Respondent's trial counsel said he would file it that day. (R. p. 406.) Respondent's trial counsel also updated Appellant's President about the progress of the case: "But I didn't get very much in terms of help from my subpoena from

Prysmian **so I may need some help finding the manufacturer in this case.**" (R. p. 406 (emphasis added).)

- During the pendency of the action, Respondent never subpoenaed Appellant's records, never deposed any representative of Appellant, and never engaged Appellant in discovery in any way. (*See* R. p. 339, line 25-p. 340, line 1; p. 340, lines 16-17.)

Rule 55(c), SCRCP is liberally construed. *Dixon*, 320 S.C. at 178, 463 S.E.2d at 638. Good cause is demonstrated if the defendant "provide[s] an explanation for the default and give[s] reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co.*, 383 S.C. at 607, 681 S.E.2d at 888. The text of Rule 55(c), SCRCP does not require submission of affidavits or oral testimony to demonstrate good cause. *See* Rule 55(c), SCRCP. Yet, Appellant filed its President's first Affidavit with the Motion to Set Aside the Default. (R. pp. 57-58; pp. 398-399.)

South Carolina law required the Trial Court to determine if the cause was "good." The explanation demonstrated that such cause was indeed good: Respondent's trial counsel and Appellant's President had an open line of communication to discuss the merits of the case as to Appellant and its lack of involvement in that size reel, and Respondent said nothing to Appellant's President when he changed his mind. *See Ricks*, 293 S.C. at 375 360 S.E.2d at 537 ("The law should not blindly impose standards which require individuals, in the conduct of their daily business, to distrust the parties with whom they deal.") (internal quotations omitted) (quoting *Sears, Roebuck & Company v. Ramey*, 170 Ga. App. 873, 318 S.E.2d 740 (1984)). Respondent's prior voluntary dismissal of claims against Appellant, without any action taken by Appellant, helped contribute to Appellant's President's misunderstanding of the status for the case. (*See* R. p. 36; p. 406.)

When Respondent added Appellant and three other Defendants to the case on the eve of the statute of limitations, it is surprising that Respondent's trial counsel did not share his new belief with Appellant's President that he was wrong and that Appellant may have been involved. (*See* R. p. 340, lines 14-15; p. 79; pp. 83-89; pp. 398-399 at ¶¶ 6-7; p. 38; pp. 39-49.) After serving Appellant a "Summons & Complaint" in December of 2021, Respondent never contacted Appellant for two years until serving the November 2023 Notice of Damages Hearing, which made no mention that Appellant was in default. (*See* R. pp. 192-193.) Respondent's trial counsel's post-Amended Complaint actions were out of character with his pre-Amended Complaint course of dealing with Appellant's President. (*See* R. pp. 398-399 at *¶¶* 6-7.)

Despite this record, the Trial Court followed *Dixon* erroneously by equating the *Dixon* lay person's unfounded mistaken belief that an extension letter with a dated deadline constituted an unlimited extension, *Dixon*, 320 S.C. at 177-78, 463 S.E.2d at 638, to Appellant's President's mistaken belief that the case was not proceeding against Appellant after talking with Respondent's trial counsel months prior about the merits and about other responsible parties. (*See* R. pp. 398-399 at *¶¶* 6-7.) The *Dixon* court did not hold that *all* mistaken beliefs arising from a defendant's conversation with a plaintiff's attorney never constitute good cause. *See Dixon*, 320 S.C. at 179, 463 S.E.2d at 639. Yet the Trial Court applied it that way in its February 7, 2024 Order. (*See* R. pp. 13-15 at ¶¶ 1, 10, 14.) Instead, the *Dixon* court simply held that there was no good cause arising from the *Dixon* defendant's representative's mistaken belief of an unlimited extension based on the clear contradictory text of the extension letter. *See id.*

Here, on the other hand, the written emails sent at or around the time of the two conversations between Respondent's trial counsel and Appellant's President do not contain any specific threat of adding Appellant back as a Defendant. (*See* R. pp. 403-407; *see also* pp. 398-399

at ¶¶ 4, 6-7.) The only direct evidence that this specific threat was discussed in the April 9, 2021 call is Respondent's trial counsel's argument 2 1/2 years later at the 2024 hearing. (*See* R. p. 338, lines 19-25.) *Dixon* is not like this case.[2] "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." *Sundown Operating Co.*, 383 S.C. at 606, 681 S.E.2d at 888. The holding of *Dixon* is not as the Trial Court applied it here, and the Trial Court should not have relied on the facts of *Dixon* in light of the facts of our case. As Respondent even recognizes, "KSC may be correct." (Respondent's Final Brief at p. 8.) This Court should reverse based on the Trial Court's error.

b. Respondent Cites No Case Law Disputing Appellant's Demonstration of the "*Wham* Factors"[3] or Supporting the Trial Court's Own Analysis of the Factors.

Respondent cites no case law in his own analysis of the *Wham* Factors in this case, much less supporting the incorrect standards used by the Trial Court. (*See* Respondent's Final Brief at pp. 9-10.) Rather, Respondent sets forth a standard that is self-serving and allows no in-default defendant to ever climb out of default and have their day in court. (*See id.*) Once the defendant "provide[s] an explanation for the default and give[s] reasons why vacation of the default entry would serve the interests of justice," *Sundown Operating Co.*, 383 S.C. at 607, 681 S.E.2d at 888,

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[2] Respondent, but not the Trial Court, also relies on *Roche v. Young Bros.*, 318 S.C. 207, 208-09, 456 S.E.2d 897, 898-99 (1995), (Respondent's Final Brief at p. 6), but that case's facts are nothing like our case. In *Roche*, the defendant went into default because the summons and complaint were lost within the corporation, not because of any misunderstanding arising from the plaintiff's attorney prior discussion of the merits of the case with a representative of the defendant, resulting in an initial dismissal of the defendant. *See Roche*, 318 S.C. at 208-09, 456 S.E.2d at 898-99.

[3] *See Dixon*, 320 S.C. at 178-79, 463 S.E.2d at 639 (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989)).

which Appellant did, then the Court must look at the totality of the circumstances in evaluating the *Wham* Factors. For example, in a case where an in-default defendant had neither "asserted a meritorious defense [n]or argued that [the plaintiff] will not be prejudiced if the entry of default is lifted," a two month period between entry of default and the motion to set aside the default was insufficient. *See Richardson v. P.V., Inc.*, 383 S.C. 610, 619, 682 S.E.2d 263, 267 (2009). But that is not our case.

Here, Respondent concedes that Appellant acted promptly when it was notified it was in default: "Mr. Nickles agrees they responded promptly after the damages hearing notice was sent." (Respondent's Final Brief at p. 9.) Respondent then faults Appellant for not "act[ing] promptly as it relates to the service of the summons and amended complaint." (*Id.*) An in-default defendant is *always* "not prompt" when it relates to the service of a summons and complaint. Rule 55(c) exists to provide in-default defendants an opportunity to get out of default *in spite of* the defendant's tardiness in responding to a complaint. *See* Rule 55(c), SCRCP; *Dixon*, 320 S.C. at 178, 463 S.E.2d at 638 ("This section [Rule 55(c)] is liberally construed to promote justice and dispose of cases on the merits."). The Trial Court erred by not considering Appellant's promptness in moving for vacation of the default when Appellant received the Notice of the Damages Hearing. (*See* R. p. 15 at ¶ 11.)

The Amended Complaint was ostensibly served to Appellant on December 16, 2021. (*See* R. p. 50; pp. 81-82 at ¶¶ 4-6.) On February 7, 2022, Respondent filed an Affidavit of Service, Affidavit of Default, and a Motion to Set Damages and Fees on Default. (*See* R. p. 50; pp. 51-52; p. 53.) The hearing was set for April 8, 2022, but the Court continued the hearing to give Respondent—whose trial counsel had Appellant's President's email and phone number—more time to serve Appellant with a Notice of Hearing. (*See* R. p. 396; pp. 8-9; pp. 404-407.) The hearing

was eventually rescheduled for December 18, 2023, after Respondent prosecuted his case against other defendants, and Respondent mailed a Notice of the Hearing (which did not state Appellant was in default) to Appellant, and it arrived on November 27, 2023. (*See* R. p. 339, line 25-p. 340, line 1; p. 340, lines 16-17; p. 370, line 23-p. 371, line 9; pp. 192-193, 195.) Respondent concedes Appellant acted promptly from this point. (Respondent's Final Brief at p. 9.) Respondent cannot fault Appellant for not acting on the February 2022 entry of default when Respondent did not serve Appellant with a notice of the April 2022 hearing on damages. This timeline—taken in totality together with the other factors—demonstrates that once Appellant had notice of the default, he acted promptly.

Second, without citing a case, Respondent creates a new standard for "meritorious defense": "[Appellant] is **required to prove** they had **no** involvement with the reel that caused the injuries to [Respondent]." (Respondent's Final Brief at p. 9 (emphases added).) This ignores the actual standard provided: If the defense at least "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," the defense is "meritorious" even though it is imperfect or is not "one which can be guaranteed to prevail at a trial." *McClurg v. Deaton*, 380 S.C. 563, 575, 671 S.E.2d 87, 93-94 (Ct. App. 2008) (citing *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989)) (quoting *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)) (internal quotations omitted). As Appellant's President explained to Respondent's trial counsel over the phone and wrote to him:

> [Appellant] never had **the size reel** that was involved in the accident that took place on November 10, 2018. **This size reel** was not in possession by [Appellant] for 6 months prior to the accident and for 4 months after the accident. Therefore, [Appellant] couldn't have made any modifications to the reel involved in the accident.

(R. pp. 403, 407 (emphasis added).) While the Trial Court did not have this quoted email before it at the time, the Court did have Appellant's President's affidavit containing substantially the same conflicting facts. (*See* R. p. 398 at ¶¶ 4-5.) The Trial Court also knew that Respondent dismissed Appellant from the case based on the conversation. (*See* R. p. 338, lines 19-25.) Clearly, this evidence meets the minimum "conflict" that is required to find a "meritorious defense." *See McClurg*, 380 S.C. at 575, 671 S.E.2d at 93-94. Namely, the testimony of Appellant's President conflicts Respondent's allegation in the Amended Complaint that *Appellant* negligently stored, refurbished, or repaired the subject reel. (*See* R. p. 398 at ¶¶ 4-5; pp. 43-44 at ¶¶ 13, 18.) The Trial Court erred by not applying the *McClurg* conflict standard in light of the facts presented when it found insufficient evidence to establish a meritorious defense. (R. p. 15 at ¶ 12.)

Third, Respondent's prejudice arguments are convoluted. Respondent claims that if it has to prove his case on the merits against Appellant that (1) the discovery process itself prejudices Respondent, and (2) Appellant will point the finger at the co-Defendants with whom *Respondent* chose to settle.[4] (Respondent's Final Brief at p. 10.) This is not prejudicial—this is the result of any vacation of an entry of default. Respondent never provided evidence that it *cannot* engage in discovery at this point: There was no evidence presented that any witnesses are dead or unavailable. (*See* R. p. 336, line 23-p. 337, line 1.) Unfortunately, despite no meaningful facts of prejudice in the record, the Trial Court adopted Respondent's argument that "further litigation"

[4] Respondent was confident that Appellant was to blame when it added Appellant back into the suit, (R. p. 340, lines 1-15), but now Respondent is not so sure: "To permit [Appellant] . . . to defend this action would permit them to attempt to place blame on one of the three other companies . . . . Under those circumstances, [Respondent] would not be able to obtain a judgment against any of the three other companies as they have been dismissed with prejudice." (Respondent's Final Brief at p. 10.) Respondent could have avoided this "prejudice" by having its counsel call or email Appellant's President to let him know that Appellant was back in the case. Respondent chose not to do so, quietly pursue an entry of default, and settle with the other Co-Defendants without involving Appellant in his litigation against the other co-Defendants.

would be an "undue burden." (R. p. 15 at ¶ 13.) The Trial Court's adoption of that argument, based on a higher standard, was an abuse of discretion. *See Sundown Operating Co.*, 383 S.C. at 606, 681 S.E.2d at 888 ("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.").

The totality of the circumstances demonstrate good cause. Appellant acted promptly when it received Notice of the Damages Hearing, and Respondent admits this. (Respondent's Final Brief at p. 9.) Respondent appeared to believe that Appellant had a meritorious defense that conflicted with his claim and *dismissed* Appellant from the original Complaint, based on the "testimony" of Appellant's President over the phone. (*See* R. p. 338, lines 19-25; p. 398 at ¶¶ 4-5; pp. 43-44 at ¶¶ 13, 18.) The Court knew this. (*See* R. p. 338, lines 19-25; p. 398 at ¶¶ 4-5; pp. 43-44 at ¶¶ 13, 18.) Respondent made no case for prejudice other than it would have to prove its case as it did for the non-defaulting Defendants, and this unjustifiable position was adopted by the Trial Court. (*See* R. p. 339, line 25-p. 340, line 1; p. 340, lines 16-21.) The Trial Court erred by not assessing the totality of the record and by applying incorrect, higher standards when analyzing the *Wham* Factors. These errors are reversable, and this Court should reverse them. *See Sundown Operating Co.*, 383 S.C. at 606, 681 S.E.2d at 888.

II. RESPONDENT'S TRIAL COUNSEL OVERSTATED THE STRENGTH OF DISCOVERY OBTAINED AS "CONTRADICTI[NG]" APPELLANT'S MERITORIOUS DEFENSE WHEN SUCH TESTIMONY DID NOT DO SO.

Rule 60(b)(3), SCRCP applies to both judgments entered after a fully litigated case and to judgments entered based on a default judgment without litigation or discovery by the in-default defendant. (*See* Rule 60(b)(3), SCRCP.) Respondent inadvertently admits that Appellant had a meritorious defense when Respondent's trial counsel represented to the Court that the discovery

he obtained in years of litigation—and which Appellant had no power to obtain or know the full extent thereof—"obviously . . . contradict[ed]" Appellant's President's statements to Respondent's trial counsel. (*See* R. p. 340, lines 1-15.) Respondent's trial counsel characterized this discovery, and the depositions generally referenced, as evidence proving that Appellant *did* handle the size reels at issue in the subject incident at the time of the subject incident. (*See* R. p. 340, lines 1-15.) Again, twenty-six minutes before this hearing, Respondent filed a supplemental brief opposing Appellant's Motion to Set Aside the Default, which contained Purchase Orders and accused Appellant's President of making a "false statement." (R. p. 79; pp. 83-89; *see also* p. 332, lines 1-2.) The characterization of this discovery was misleading—it only revealed that Appellant was involved in the business of repairing reels, and Respondent's own summary of these depositions in his Brief demonstrates that. (*See* Respondent's Final Brief at p. 11.) This evidence only shows that Appellant was involved in this trade—it does not "obviously . . . *contradict*[ ]" Appellant's President's claim that Appellant was not involved in *this type* of reel. (*See* R. p. 340, lines 1-15 (emphasis added); p. 398 at ¶¶ 4-5). Respondent's trial counsel's characterization of the evidence was misleading, because both the evidence *and* Appellant's President's statement to Respondent's trial counsel can be true simultaneously. That is not "contradictory." (*See* "Contradictory" at sense 2, *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/contradictory (last accessed June 25, 2025) ("'Contradictory' is a "proposition . . . so related to another that if either of the two is true the other is false and if either is false the other must be true.")). Appellant made a threshold showing of misrepresentation under Rule 60(b)(3), SCRCP, and raised this issue to the Court. (*See* R. pp. 103-104 at ¶ 3; pp. 113-114.) The Trial Court should have addressed it directly. (*See* R. pp. 26-29.)

Next, with respect to the four factors,[5] Respondent does not contest that Appellant was not prompt in filing its Motion to Alter or Amend, nor does Respondent make any case for prejudice other than the arguments previously made. (*See* Respondent's Final Brief at pp. 10, 12-13.) Respondent, however, continues to rely on too high of a standard for "meritorious defense," because Respondent requires Appellant to absolutely prove it was *not* responsible and also to prove who *was* responsible. (*See* Respondent's Final Brief at pp. 12-13.) In demonstrating a "meritorious defense," South Carolina law does not require an in-default defendant to prosecute a plaintiff's case against another party/defendant.[6] South Carolina law simply requires the in-default defendant to "raise[ ] a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence," making the defense "meritorious" even though it is imperfect or is not "one which can be guaranteed to prevail at a trial." *See McClurg*, 380 S.C. at 575, 671 S.E.2d at 93-94 (citing *Thompson*, 299 S.C. at 120, 382 S.E.2d at 903) (quoting *Graham*, 272 S.C. 442, 248 S.E.2d 594) (internal quotations omitted). Appellant was not required to do Respondent's work for him, it was required only to provide evidence of a meritorious defense, which Appellant did. (*See* R. p. 398 at ¶¶ 4-5.) Appellant met all four factors under a Rule 60(b)(3), SCRCP motion. *See McClurg*, 380 S.C. at 573, 671 S.E.2d at 93.

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[5] If a misrepresentation is shown, the Court then analyzes the following four factors: "(1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties." *See McClurg*, 380 S.C. at 573, 671 S.E.2d at 93.

[6] Such a standard would be problematic, because it would assume as true the very causes of action that a plaintiff has a burden to prove. That is not the standard. *McClurg*, 380 S.C. at 575, 671 S.E.2d at 93-94 ("To establish that he has a meritorious defense, a complainant need not show that he would prevail on the merits, but only that his defense is meritorious.").

Respondent's trial counsel characterized the body of discovery as "obviously . . . contradicti[ng]" Appellant's President's statement that Appellant was not involved in that size reel. (*See* R. p. 340, lines 1-15.) The actual substance of the evidence, however, was not contradictory—it could co-exist as true *with* Appellant's meritorious defense. Trial counsel's characterization was a misrepresentation, although inadvertent. Further, Appellant moved promptly for relief when it investigated and obtained the deposition testimony referenced at the hearing. Respondent does not contest this promptness. (*See* Respondent's Final Brief at pp. 10-13.) Finally, Respondent would suffer no prejudice in litigating his case, especially if Respondent believed Appellant's evidence was "obviously . . . contradict[ory]." (*See* R. p. 340, lines 1-15.) The misrepresentation of the evidence by Respondent's trial counsel should have been sufficient for the Court to relieve Appellant of the default judgment under Rule 60(b)(3), SCRCP. The Trial Court erred by failing to consider this analysis in its Order on Defendant's Motion to Reconsider when it was raised. (*Compare* R. pp. 103-104 at ¶ 3, *and* pp. 113-114, *with* pp. 26-29.)

III. THE TRIAL COURT ERRONEOUSLY RELIED ON POSSESSION ALONE TO FIND A MATERIAL EMAIL WAS NOT NEWLY DISCOVERED EVIDENCE AND DID NOT CONSIDER WHEN APPELLANT'S PRESIDENT TESTIFIED HE LACKED KNOWLEDGE AND APPELLANT TOOK LABORIOUS EFFORTS TO FIND SUCH EMAILS WITH THE TIME-CONSUMING HELP OF THIRD PARTIES.

a. Appellant's Office Manager's Email Chain Among Millions of Emails Was Not Known to Appellant in the Same Way a Contract Was Known to the *Lanier* Plaintiff.

The Trial Court ignored the black and white text of the *Lanier* test for whether evidence is not "newly discovered": "the evidence was (1) known to the party at the time of trial, **and** (2) in the party's possession." *Lanier v. Lanier*, 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005) (emphasis added). The Trial Court erroneously substituted "and" for "or" and never made a finding of "knowledge" independent of mere "possession." (*See* R. pp. 27-28.) This was in error.

Respondent minimizes this error by making an unqualified claim that knowledge of any employee at any time is imputed to a business entity at the time of filing a Motion under Rule 59(e) or Rule 60(b)(2), SCRCP. (*See* Respondent's Final Brief at p. 14.) This broad claim forgets the facts in *Lanier*.

In *Lanier*, this Court held a specific document known to exist by the party at the time of filing suit was not newly discovered evidence despite being lost in a drawer. *Lanier*, 364 S.C. at 219, 612 S.E.2d at 460. In *Lanier*, a Wife sought to divorce her husband and filed a divorce action, despite knowing about a specific antenuptial agreement but not knowing where it was located. *Id.*, 364 S.C. at 218, 612 S.E.2d at 460. She never pleaded the contents of the agreement, which limited Husband's rights to Wife's property upon divorce. *Id.*, 364 S.C. at 214, 218, 612 S.E.2d at 458, 460. Wife even negotiated a consent judgment, despite knowing about the lost agreement. *Id.*, 364 S.C. at 218, 612 S.E.2d at 460. In *Lanier*, Wife's knowledge was actual knowledge about a specific document, which she chose not to find before filing suit. *Id.* In *Lans*, which the *Lanier* Court found analogous to the case, Lans, the moving party, knew of the existence of a specific document (the "Clarification Contract"), but he knew the document was lost and never asked the court for more time prior to the court's entry of summary judgment. *See Lanier*, 364 S.C. at 218, 612 S.E.2d at 459-60 (quoting *Lans v. Gateway 2000, Inc.*, 110 F. Supp. 2d 1, 5 (D.D.C. 2000)). Our case is not analogous.

Here, Appellant's President had no knowledge of the existence of a specific document—an exculpatory email he was never copied on—between the receipt on the Monday after Thanksgiving 2023 of the Notice of Motion for Damages and the hearing on January 30, 2024. (*See* R. p. 354, lines 11-17; p. 195.) Appellant merely possessed this one of millions of emails on an old email server, only locatable due to the information provided by third parties. (*See* R. p. 354,

lines 6-10; p. 354, line 24-p. 355, line 2; p. 357, line 18-p. 358, line 7; p. 358, lines 12-16; p. 358, lines 18-20; p. 359, lines 1-13; p. 360, line 22-p. 361, line 1.) This email was not a known email that was "lost"; it was an unknown email that was found. One of Appellant's employees copied on the email, Brenda Nance, Appellant's Office Manager and "financial lady," did not recall the June 2022 email "until after the Court denied [Appellant's] Motion to Set Aside Entry of Default." (R. p. 353, line 22-p. 354, line 2; p. 164, ¶¶ 3, 7.)

Respondent spends considerable time attacking the strength of the evidence of the found email, but Respondent ignores that the Trial Court disagreed with him: "[T]he evidence submitted by Defendant KSC is likely enough to establish factors 1, 2, 4 and 5[.]"[7] (*See* R. p. 27; Respondent's Final Brief at pp. 14-15.) This was a material email that was not known to Appellant's President at any time prior to its discovery. (*See* R. p. 354, lines 11-17.) The copying of Appellant's employees on the email at the time it was exchanged over a year prior should not be sufficient to impute knowledge of the specific email to Appellant. "Possession" is not "knowledge"—the *Lanier* Court did not write a holding with surplusage when it wrote "and." *See Lanier*, 364 S.C. at 218, 612 S.E.2d at 459. But Respondent wishes possession was knowledge: "To the extent [Appellant] argues that it did not know of the emails until after the January 30, 2024 hearing, the affidavit [of Brenda Nance] establishes that the information was in the possession of [Appellant] before the hearing." (Respondent's Final Brief at p. 16). No one disputes Appellant possessed this email, there was insufficient evidence that Appellant *knew* of it before the January 30, 2024 hearing.

[7] "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.**" *Lanier*, 364 S.C. at 217, 612 S.E.2d at 459 (internal quotations omitted) (emphases added).

The Trial Court should have made an independent analysis that Appellant "knew" of the existence of the email under the clear text of *Lanier*. The Trial Court only focused on the fact of mere possession to count for both the possession and knowledge elements. (R. p. 27.) This was inconsistent with the word "and" in the *Lanier* Court's construction of the rule, which governs practice in South Carolina. *See Lanier*, 364 S.C. at 218, 612 S.E.2d at 459. This error of law is reversable. *Sundown Operating Co.*, 383 S.C. at 606, 681 S.E.2d at 888.

b. Appellant's Due Diligence in Finding this One-in-a-Million Email Chain Could Not Have Been Performed without the Voluntary Help of Third Parties and Could Not Have Been Accomplished Between the Monday After Thanksgiving and January 30, 2024.

As to Appellant's due diligence to find relevant emails, Respondent argues the following: "The fact that the emails were found with due diligence, makes the claim they could not have been found with due diligence ring hollow." (Respondent's Final Brief at p. 14.) Due diligence here required voluntary help from third parties and several weeks to search for a serial number that Appellant never had amongst millions of emails on an old server. (*See* R. p. 354, lines 6-10; p. 354, line 24-p. 355, line 2; p. 357, line 18-p. 358, line 7; p. 358, lines 12-16; p. 358, lines 18-20; p. 359, lines 1-13; p. 360, line 22-p. 361, line 1.) "Diligence looks not to what the litigant actually discovered, but what he or she could have discovered." *Lanier*, 364 S.C. at 220, 612 S.E.2d at 460 (internal quotations omitted). This could not have happened between November 27, 2023, the Monday after Thanksgiving when Appellant received the Notice of Damages Hearing, and the January 30, 2024 hearing on the Motion to Set Aside the Default. (*See* R. p. 195.) It is incredible that the email was even found, given that the email contained no reference to Respondent or the litigation, and Appellant never possessed the subject reel. (R. p. 355, line 36; p. 358, lines 11-16.)

The Trial Court made no explicit finding that Appellant failed to exercise due diligence to search for this email. (*See* R. pp. 27-28.) The Trial Court erroneously relied upon mere possession

to find that the email—which the Trial Court agreed was material and exculpatory—was not "newly discovered." (*See* R. pp. 27-28.) This is reversable error.

CONCLUSION

The Trial Court "abused its discretion" in failing to vacate the entry of default and failing to vacate the default judgment. *See Sundown Operating Co*, 383 S.C. at 606, 681 S.E.2d at 888 ("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."). Respondent tacitly agrees that the Trial Court erroneously relied on an unanalogous case to find there was no good cause. That is an "abuse of discretion." The Trial Court failed to consider Appellant's argument that Respondent's trial counsel's overstatement of evidence as "contradict[ory]" was a Rule 60(b)(3) "misrepresentation," and Respondent does not demonstrate the evidence was contradictory. And Respondent, like the Trial Court, erroneously relies on the fact of mere possession to constitute Appellant's knowledge in failing to recognize that a needle-in-a-haystack email was newly discovered evidence. Respondent cannot defend the Trial Court's errors, and these errors must be reversed.

Appellant respectfully requests that this Court reverse the Order on Defendant's Motion to Reconsider and Setoff with respect to the default judgment, vacate the underlying default, and allow Appellant to respond to the Amended Complaint on its merits.

Respectfully submitted,

August 11, 2025

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2021-CP-01-00076

RECEIVED
Aug 12 2025
SC Court of Appeals

William F. Nickles, IV, Respondent,

v.

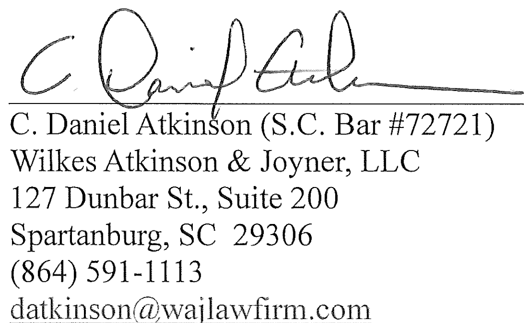
Howar Equipment, Inc., Sonoco Products Company, Palmetto State Transportation, LLC, KSC Logistics, Inc., and John Doe Corporation, Defendants,

of which KSC Logistics, Inc. is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing Final Reply Brief contains all material proposed to be included by any of the parties and not any other material.

August 11, 2025



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