THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

RECEIVED
AUG 18 2025
SC Court of Appeals

Case No. 2021-CP-01-00076

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 BRIEF OF APPELLANT

WILKES ATKINSON & JOYNER, LLC

C. Daniel Atkinson (S.C. Bar # 72721)
datkinson@wajlawfirm.com
Wilkes Atkinson & Joyner, LLC
127 Dunbar St., Suite 200
Spartanburg, SC 29306
(864) 591-1113

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

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 Appellant demonstrated good cause to do so?

II. Did the Trial Court abuse 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?

III. Did the Trial Court abuse its discretion under Rule 60(b)(2), SCRCP, when it considered evidence in Appellant's possession was, by that fact alone, also deemed within Appellant's knowledge, without making a finding that Appellant 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?

STATEMENT OF THE CASE

On March 24, 2021, Respondent filed the original Complaint against Appellant and another entity, for their respective alleged negligence in handling an electrical reel that broke and fell on Respondent, injuring him on or about November 10, 2018. (*See* R. pp. 31-34.) On or before April 12, 2021, Respondent served Appellant with the Complaint. (*See* R. p. 35.) Respondent's counsel and Appellant's President/Owner, Chuck Kelley, spoke twice about the suit, and Kelley told Respondent that he was not involved with the reel that injured Respondent. (*See* R. p. 337, lines 13-15; p. 338, lines 12-25.) On Friday, April 9, 2021, Appellant's President William "Chuck" Kelley memorialized his own understanding of the call in an email to Respondent's counsel. (R. pp. 403, 407.)

Over a week later, on Saturday, April 17, 2021, Respondent's counsel responded to Chuck Kelley, promising to prepare a Stipulation of Dismissal without Prejudice and to send it to Kelley. (R. pp. 404, 406-407.) Four months passed, and Appellant never filed an Answer to the Complaint, but Respondent never moved for entry of default against Appellant. On August 23, 2021, Kelley followed up with Respondent's counsel about the Stipulation of Dismissal, and a few minutes later, Respondent's counsel responded. (R. pp. 403, 405-406.) The next day, Respondent's counsel emailed Kelley a filed copy of the Stipulation of Dismissal without Prejudice, which neither Kelley nor any representative of Appellant signed before filing. (R. pp. 402, 406; p. 36.)

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.) Instead, Respondent's counsel conducted discovery of the other Defendants but could not prove that such Defendants handled the electrical reel that injured his client, leading Respondent's counsel to believe Respondent must be

liable. (*See* R. p. 340, lines 1-11.) Further, Respondent's counsel believed Respondent's employer's purchase orders from Appellant of other electrical reels "obviously . . . contradict[ed] . . . what Mr. Kelley said." (*See* R. p. 340, lines 14-15; *see also* pp. 79, 83-89.) Respondent's counsel never shared this "contradictory" evidence with Kelley or told Kelley he had changed his mind. (*See* R. pp. 398-399, ¶¶ 6-7.)

Instead, on November 9, 2021—the eve of the statute of limitations deadline for this November 10, 2018 incident—Respondent's counsel obtained the consent of another defendant to amend Respondent's Complaint to add Appellant back as a Defendant, along with two other named defendants and "John Doe Corporation." (*See* R. p. 38; pp. 39-49.) Respondent's counsel never told Kelley why he now thought Appellant responsible, but Respondent filled an Affidavit of Service evidencing service only of a "Summons & Complaint" on or about December 16, 2021. (*See* R. p. 50; pp. 81-82, ¶¶ 4-6.) On the same date that Respondent filed the Affidavit of Service or Non-Service, February 7, 2022, Respondent also filed an Affidavit of Default as to Appellant and filed a Motion to Set Damages and Fees on Default. (R. pp. 51-52; p. 53.)

There is no evidence in the record that Respondent served the Affidavit of Default or the Motion to set Damages and Fees on Default on Appellant. Based on the Trial Court's docket, it appears as though the Motion for Damages was scheduled for hearing on April 8, 2022. (*See* R. p. 396.) On April 8, 2022, Judge Eugene Griffith signed a Motion and Order of Continuance, granting a continuance until the next term, based on "[Respondent] needing more time to properly serve the Pro Se Defendant, KSC Logistics, Inc. with Notice of Hearing." (R. pp. 8-9.)

Respondent did not serve Appellant with Motion to Set Damages and Fees on Default or the Motion and Order of Continuance, and Respondent gave no notice to Appellant of the pending

Motion to Set Damages and Fees on Default for another 19 months. There is nothing in the record to indicate Respondent communicated with Appellant during that period.

On Tuesday, November 21, 2023, almost two years later, during which Respondent had the opportunity to take discovery of the other new defendants and settle his claims with them, (*see* R. p. 339, line 25-p. 340, line 1; p. 340, lines 16-17; p. 370, line 23-p. 371, line 9), Respondent mailed Appellant a Notice of Hearing merely stating "that the hearing on Plaintiff's Motion for Damages has been scheduled in this matter for Monday, December 18, 2023," without any reference to the fact Appellant was in default. (*See* R. pp. 192-193.)

Appellant received this letter six days later, on November 27, 2023, the Monday after Thanksgiving. (*See* R. p. 195.) Appellant advised its insurer, which then inquired with Respondent's counsel on Thursday, November 30, 2023 as to whether Appellant was in default. (*See* R. p. 90; *see also* p. 399 at ¶ 8.) After the undersigned firm was retained and after conferring with Appellant, the undersigned firm filed Kelley's Affidavit and a Motion to Set Aside Entry of Default. (*See* R. pp. 57-58; pp. 398-399.)

On December 12, 2023, Appellant filed a Motion to Continue the December 18, 2023 Hearing on Plaintiff's Motion for Damages, since it had filed a Motion to Set Aside the Default upon which the Damages Hearing was premised. (R. pp. 59-61.) On December 18, 2023, Respondent filed a Memorandum in Response to Appellant's Motion to Set Aside Default. (R. pp. 62-70.) Additionally, on December 18, 2023, Respondent filed his Return to Appellant's Motion for Continuance. (R. pp. 71-72.) The Trial Court conducted the Damages Hearing on December 18, 2023, but took the damages ruling under advisement until such time that the Motion to Set Aside Entry of Default was heard. (*See* R. p. 207, line 13-p. 209, line 6.)

On January 29, 2024, Appellant filed a Brief in Support of its Motion to Set Aside Entry of Default. (R. pp. 73-78.) On January 30, 2024, Respondent filed his Additional Response to Appellant's Motion to Set Aside Default. (R. pp. 79-102.) The Court heard the matter minutes later on January 30, 2024.

On February 7, 2024, the Trial Court issued an Order Denying Appellant's Motion to Set Aside Entry of Default, generally because the Court did not find Appellant had an adequate explanation for the default (but not due to any action or inaction of Appellant's counsel or due to any fault of the recently retained Appellant's counsel). (R. pp. 13-17.)

On February 29, 2024, the Trial Court issued an Order Assessing Damages Against Appellant in the amount of $972,177.33. (R. pp. 18-23.)

On March 11, 2024, Appellant filed the Second Affidavit of William Ray Kelley, a Motion to Alter or Amend and, in the Alternative, to Provide for Setoff, and a Brief in Support of its Motion to Alter or Amend and, in the Alternative, to Provide for Setoff. (R. pp. 400-408; pp. 103-104; pp. 105-179.)

On May 28, 2024, Respondent filed his Memorandum in Response to Appellant's Motion to Reconsider and Offset. (R. pp. 180-203.) The Trial Court conducted a hearing on May 30, 2024. (*See* R. pp. 345-392.)

On July 31, 2024, the Trial Court issued an Order denying Appellant's Motion to Alter or Amend and granting Appellant's Motion for Setoff. (R. pp. 24-30.)

On August 29, 2024, Appellant filed a Notice of Appeal, appealing the July 31, 2024 Order on Defendant's Motion to Reconsider and Setoff and the interlocutory orders entered on February 7, 2024 and February 29, 2024, leading to the July 31, 2024 Order. Appellant does not contest the Trial Court's July 31, 2024 Order with respect to the ruling as to setoff.

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). If there is a "clear showing of an abuse of that discretion," the trial court's decision must be reversed. *Id.* "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." *Id.*

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT GRANTING THE MOTION TO SET ASIDE THE ENTRY OF DEFAULT, PURSUANT TO RULE 55(c), SCRCP, WHEN APPELLANT DEMONSTRATED GOOD CAUSE TO DO SO.

Appellant gave the Trial Court an explanation for its default and reasons why the vacation of the default would serve the interests of justice: Appellant's President believed he was completely dismissed from the lawsuit after Appellant's President spoke to Respondent's counsel at the outset of the lawsuit to explain that Appellant had no involvement in handling the object that injured Respondent, and Respondent's counsel dropped Appellant from the original Complaint. (*See* R. pp. 398-399, ¶¶ 4-6.) This is good cause and provides sufficient explanation for why Appellant did not respond to pleadings when served. The Trial Court, without explanation, instead found that this case was analogous to *Dixon v. Besco Eng'g*, 320 S.C. 174, 177-78, 463 S.E.2d 636, 638 (Ct. App. 1995), where the *Dixon* defendant misunderstood a 15-day extension letter as one constituting an unlimited extension of time to respond to the original Complaint. (*See* R. p. 15 at ¶ 10.) This error of law, based on facts not demonstrated in the record here, constitutes a reversable abuse of discretion. *See Sundown Operating Co.*, 383 S.C. at 606, 681 S.E.2d at 888.

An entry of default against a defendant, who has not timely appeared, is not immutable: Rule 55(c), SCRCP, allows the Trial Court to set aside the entry of default. "The standard for granting relief from an entry of default under Rule 55(c) is mere 'good cause.'" *Sundown Operating Co.*, 383 S.C. at 607, 681 S.E.2d at 888. A defendant, although appearing in the case untimely, can still demonstrate good cause 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."

Id. Thereafter, the trial court may consider the following "factors"[1]: "(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." *Id.*, 383 S.C. at 607-08, 681 S.E.2d at 888. The trial court should consider the totality of the circumstances when evaluating these factors. *See id.*, 383 S.C. at 609, 681 S.E.2d at 889 (citing *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)).

Although a defendant may be in default, a plaintiff is not, by that technical default, "entitled to" a judgment. *See Ricks*, 293 S.C. at 375, 360 S.E.2d at 536. Rule 55(c), SCRCP is "liberally construed to see that justice is promoted and to strive for disposition of cases on their merits." *Id.*, 293 S.C. at 374-75, 360 S.E.2d at 536 (describing earlier statutory provisions for default judgment). In other words:

> 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. Likewise, a litigant should not unnecessarily be forced into default as a consequence of having reasonably relied upon the word of his fellow, particularly when no innocent party will suffer if the default is opened.

Id., 293 S.C. at 375, 360 S.E.2d at 537 (internal quotations omitted) (quoting *Sears, Roebuck & Company v. Ramey*, 170 Ga. App. 873, 318 S.E.2d 740 (1984)).

a. Respondent's Counsel's Course of Dealing with Appellant Led Appellant to Reasonably Believe He Was Dismissed from the Case as a Matter of Merit.

Respondent filed the original Complaint against Appellant and another entity, for their respective alleged involvement handling an electrical reel that broke and fell on Respondent. (*See* R. pp. 31-34.) Respondent served Appellant with the Complaint. (*See* R. p. 35.) Respondent's counsel happened to run into Appellant's President, Chuck Kelley, at Maria's Mexican Restaurant in Abbeville, and spoke to him about the suit:

---

[1] These factors are sometimes called the "*Wham* factors." *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)).

> I saw him at the -- at the Mexican restaurant, Mari[a]'s, here in – in town . . . and said "Chuck, you need to be -- you need to pass this along. I don't -- you know, I can't give you legal advice, you need to pass this along[.]" [A]nd he said, "[W]ell, I didn't have anything to do with that, I'll call you and let you know about it."
>
> So he called me and said, "I didn't have anything to do with high voltage reels." 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. 337, lines 13-15, p. 338, lines 12-25 (punctuation added).)

On Friday, April 9, 2021, Appellant's President William "Chuck" Kelley memorialized his own understanding of the call in an email to Respondent's counsel, Thomas "Tombo" Hite:

> Tombo,
>
> This is to confirm and follow-up on our phone conversation that took place the morning of April 9, 2021. As I stated in the conversation, [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.
>
> I feel Howar Equipment may have been the original manufacturer on this size reel. Yhve [*sic*] locations all over and not sure what location it may have been [delivered] out of.
>
> Please let me know if you have any questions.

(R. pp. 403, 407 (emphasis added).) Respondent filed an Affidavit of Service on April 12, 2021, which reflected service (on an unknown date on or before April 12, 2021) by certified mail restricted delivery on Appellant. (*See* R. p. 337, lines 13-15, p. 338, lines 12-25.)

Over a week later, on Saturday, April 17, 2021, Respondent's counsel responded to Chuck Kelley as follows: "Thank you for your email. As discussed I will prepare a stipulation of dismissal without prejudice and get it filed with the court. I will get that to you first of next week. Thank you for your information." (R. pp. 404, 406-407.)

Four months passed, and Appellant never filed an Answer to the Complaint, but Respondent never moved for entry of default against Appellant. On August 23, 2021, Kelley followed up with Respondent's counsel about the Stipulation of Dismissal: "Tombo, Did this get filed?" (R. pp. 403, 405.) A few minutes later, Respondent's counsel responded:

> Chuck,
>
> No, I am going to file it today. It was just oversight on my part.
>
> 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.
>
> I will email you a copy of the stipulation of dismissal in just a minute.

(R. p. 406 (emphasis added).) The next day, Respondent's counsel emailed Kelley a filed copy of the Stipulation of Dismissal without Prejudice, which neither Kelley nor any representative of Appellant signed before filing. (R. pp. 402, 406; p. 36.)

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 ("... [Appellant] [has] not participated in this litigation"), p. 340, lines 16-17 ("So for [Appellant] to be able to basically not participate in the litigation of the case for over two years now ....").) Instead, Respondent's counsel conducted discovery of the other Defendants but could not prove that such Defendants handled the electrical reel that injured his client, leading Respondent's counsel to think: "Therefore, the only other potential repair defendant that's responsible for this case is [Appellant]." (*See* R. p. 340, lines 1-11.) Further, Respondent's counsel believed Respondent's employer's purchase orders from Appellant of *other* electrical reels "obviously ... contradict[ed] ... what Mr. Kelley said." (*See* R. p. 340, lines 14-15; *see also* pp. 79, 83-89.)

Respondent's counsel never shared this "contradictory" evidence with Kelley or told Kelley he had changed his mind. (*See* R. pp. 398-399 at ¶¶ 6-7.) Instead, on November 9, 2021—the eve of the statute of limitations deadline for this November 10, 2018 incident—Respondent's counsel obtained the consent of another defendant to amend Respondent's Complaint to add Appellant back as a Defendant, along with two other named defendants and "John Doe Corporation." (*See* R. p. 38; pp. 39-49.)

Respondent's counsel never told Kelley why he now thought Appellant responsible, but Respondent had Appellant served with a "Summons & Complaint" on or about December 16, 2021. (*See* R. p. 50; pp. 81-82 at ¶¶ 4-6.) On the same date that Respondent filed the Affidavit of Service or Non-Service, February 7, 2022, Respondent also filed an Affidavit of Default as to Appellant and filed a Motion to Set Damages and Fees on Default. (R. pp. 51-52; p. 53.)

There is no evidence in the record that Respondent served the Affidavit of Default or the Motion to set Damages and Fees on Default on Appellant. Based on the Trial Court's docket, it appears as though the Motion for Damages was scheduled for hearing on April 8, 2022. (*See* R. p. 397.) On April 8, 2022, Judge Griffith signed a Motion and Order of Continuance, granting a continuance until the next term, based on "[Respondent] needing more time to properly serve the Pro Se Defendant, KSC Logistics, Inc. with Notice of Hearing." (R. pp. 8-9.) Respondent did not serve Appellant with Motion to Set Damages and Fees on Default or the Motion and Order of Continuance, and Respondent gave no notice to Appellant of the pending Motion to Set Damages and Fees on Default for another 19 months. There is nothing in the record to indicate Respondent communicated with Appellant during that period.

On Tuesday, November 21, 2023, almost two years later, during which Respondent had the opportunity to take discovery of the other new defendants and settle his claims with them, (*see* R.

p. 339, line 25-p. 340, line 1; p. 340, lines 16-17; p. 370, line 23-p. 371, line 9), Respondent mailed Appellant a Notice of Hearing merely stating "that the hearing on Plaintiff's Motion for Damages has been scheduled in this matter for Monday, December 18, 2023," without any reference to the fact Appellant was in default. (*See* R. pp. 192-193.)

Appellant received this letter six days later, on November 27, 2023, the Monday after Thanksgiving. (*See* R. p. 195.) Appellant advised its insurer, which then inquired with Respondent's counsel on Thursday, November 30, 2023 as to whether Appellant was in default. (*See* R. p. 90; *see also* p. 399 at ¶ 8.) After the undersigned firm was retained and after conferring with Appellant, the undersigned firm filed Kelley's Affidavit and a Motion to Set Aside Entry of Default. (*See* R. pp. 57-58; pp. 398-399.)

The above circumstances are nothing like those in the *Dixon* case the Trial Court relied upon to determine there was no good cause here. (*See* R. p. 15 at ¶ 10) (citing *Dixon v. Besco Eng'g*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995).) In *Dixon*, the defendant company was served with an original Complaint via registered agent, which forwarded the Complaint to a company employee, Mr. Thomas. *Dixon*, 320 S.C. at 177, 463 S.E.2d at 638. Mr. Thomas forwarded the Complaint to the company's out-of-state attorney, who obtained a 15-day extension from the plaintiff's attorney, which plaintiff's attorney confirmed in a letter. *Id.* The company's out-of-state attorney sent a copy of the extension letter to Mr. Thomas and told him to obtain South Carolina counsel. *Id.*, 320 S.C. at 177-78, 463 S.E.2d at 638. Despite the extension letter's text, Mr. Thomas believed the company had an ***unlimited*** extension to respond to the Complaint. *See id.* Mr. Thomas waited several days to contact potential attorneys, who did not respond to him for weeks. *Id.*, 320 S.C. at 178, 463 S.E.2d at 638. The company finally secured counsel and filed an

Answer three months later. *Id.* The *Dixon* Court found there was no good cause under these circumstances. *See id.*, 320 S.C. at 179, 463 S.E.2d at 639.

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. (R. pp. 403, 407.) Respondent's counsel agreed to *dismiss* Appellant from the case, and later even indirectly solicited Appellant's President's help in finding the responsible party. (*See* R. p. 406 (emphasis added).) Respondent never subpoenaed Appellant's records nor deposed any witnesses related to 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.) For four months, Appellant never filed an Answer to the original Complaint, despite Respondent's counsel's promise to file a Stipulation of Dismissal, because Appellant's President relied upon the representation of Respondent's counsel. (R. pp. 403, 405-406.)

Respondent's counsel had a direct course of dealing with Appellant's President, and Appellant "should not unnecessarily be forced into default as a consequence of having reasonably relied upon the word of his fellow, particularly when no innocent party will suffer if the default is opened." *See Ricks*, 293 S.C. at 375, 360 S.E.2d at 537 (internal quotations omitted) (quoting *Sears, Roebuck & Company v. Ramey*, 170 Ga. App. 873, 318 S.E.2d 740 (1984)). Vacation of the default in this case serves the interests of justice by providing Appellant due process to defend the merits of the suit—which he defended in Maria's Mexican Restaurant and over the phone and in his emails with Respondent's counsel—in a court of law.

b. The Totality of the Circumstances Surrounding this Entry of Default, Respondent's Opportunity to Discover the Facts of the Case, and Appellant's Prompt Response in Moving to Vacate Default Once Realized Together Constitute Good Cause to Vacate the Default and Allow Appellant to Put On Its Defense in Court.

When served with the Notice of Hearing, Appellant quickly moved to vacate the default so it could demonstrate in the Trial Court that it had no involvement with the subject reel and the case, which Respondent had almost two years to litigate and conduct discovery. Again, once an explanation for the default and the interests of justice supporting vacation of the default are given, the Trial Court must consider at least three factors, the "*Wham* Factors," in the totality of the circumstances: "(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." *Sundown Operating Co.*, 383 S.C. at 607-08, 681 S.E.2d at 888. Here, the *Wham* Factors were met and therefore good cause existed to vacate the default and to allow the case to be litigated on the merits.

i. Appellant Promptly Filed a Motion to Set Aside Default Judgment After Service of the Notice of Damages Hearing.

First, Appellant filed a Motion to Set Aside the Default Judgment and a Motion for Continuance of the Damages Hearing mere days after being served with the Notice of Hearing. (*See* R. p. 195; pp. 57-58; pp. 59-61.) Again, besides the November 2022 Amended Complaint at issue, the November 2023 Notice of Hearing was the only subsequent filing or notice served upon Appellant, which caused Appellant to realize the suit, which its President thought it had resolved with Respondent's counsel in April 2021, was actually proceeding.

Here, the Trial Court incorrectly focused on the time gap between the February 2023 Affidavit of Default, which was never served on Appellant, and the December 2023 filing of the Motion to Vacate. (*See* R. pp. 14-15, ¶¶ 3-8, 11.) The Trial Court's focus on immaterial facts was in error. *See Sundown Operating Co.*, 383 S.C. at 606, 681 S.E.2d at 888. Instead, the Trial Court

should have considered the short time between Appellant's realization of default and the rapid filing of a Motion to Vacate such default. Again, a filing of a default always means a defendant is untimely, but that untimeliness alone does not foreclose a defendant from the ability to demonstrate good cause. Importantly, a plaintiff is not required to serve an affidavit of default on a defendant in default, a plaintiff *is* required to serve a notice of hearing for a hearing on unliquidated damages. Rule 55(b)(2), SCRCP. When the Damages Hearing was finally re-scheduled and Respondent served Appellant the Notice of the Hearing, Appellant promptly filed a Motion to Vacate the Default. The timing of the Motion to Vacate was logical and prompt under the facts which the Trial Court should have considered material.

ii. Appellant Never Dealt in the Size Reel that Injured Respondent at or around the Time of the Accident.

"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." *McClurg v. Deaton*, 380 S.C. 563, 575, 671 S.E.2d 87, 93-94 (Ct. App. 2008). 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." *Id.* (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).

Appellant has a meritorious defense: It had no involvement in the size of reel that allegedly injured Respondent. (R. p. 398 at ¶ 5; pp. 403, 407.) Respondent's counterargument to this, and the reason Respondent brought Appellant back as a defendant, was that Respondent could not find evidence of *others'* liability and Appellant happened to sell *some* reels to Respondent's employer. (*See* R. p. 340, lines 1-11, 14-15; *see also* pp. 79, 83-89.) However, Respondent never subpoenaed

the files of Appellant, never deposed 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.) This patchwork of Respondent's inferences and suspicions does not negate that Appellant has a defense with merit. At the very least, the Trial Court should have seen there was "a real controversy as to real facts arising from conflicting or doubtful evidence." *McClurg*, 380 S.C. at 575, 671 S.E.2d at 93-94 (internal citations and quotations omitted).

When Respondent amended his Complaint, he did not allege any materially different theory of liability against Defendant. (*Compare* R. pp. 32-34 at ¶¶ 3, 5-7, *with* pp. 41-44 at ¶¶ 5, 8-13, 17-20.) Ultimately, however, Respondent's own counsel recognized Appellant's defense was meritorious when he decided to drop Appellant from the original Complaint, ostensibly based on Appellant's President's statement to him that Appellant did not have that size reel in the months before or after the accident. (*See* R. pp. 403, 407; p. 36.) Here, the Trial Court erred by incorrectly finding there was insufficient evidence presented when sufficient evidence was presented of the existence of Appellant's meritorious defense. (*See* R. p. 15 at ¶ 12.)

iii. <u>There Was No Evidence Before the Court that Respondent Would Suffer Meaningful Prejudice If Respondent Had to Litigate His Claim against Appellant on the Merits</u>.

Finally, there is no prejudice to Respondent if the default is vacated. Respondent was able to take depositions and subpoena documents for several months from the other Defendants. (*See* R. p. 339, line 25-p. 340, line 1 ("... [Appellant] [has] not participated in this litigation"), p. 340, lines 16-21 ("So for [Appellant] to be able to basically not participate in the litigation of the case for over two years now and now say well, I would have -- I should be allowed to participate because I just misunderstood what I was being served with the second time is an extreme injustice to my client[.]").) Respondent chose not to involve Appellant in the discovery process. (*See id.*) Respondent's counsel mistakenly characterized Appellant's *inability* to participate in our

adversarial system as a *benefit* to Appellant that *prejudiced* Respondent. Respondent's inverse characterization of the prejudice at issue was adopted by the Trial Court. (*See* R. p. 15 at ¶ 13.) Further, there was no evidence presented that any witnesses are dead or unavailable. (*See* R. p. 336, line 23-p. 337, line 1.) The fact that the evidence discovered since the Hearing on the Motion for Default is evidence that would exonerate Appellant and undermine the justice of the default judgment is no prejudice to Respondent. (*See generally* R. p. 369, lines 15-21.) No plaintiff is entitled to a default judgment—only one earned on the merits. *See Ricks*, 293 S.C. at 375, 360 S.E.2d at 536. This default judgment was not earned, and it does not prejudice Respondent to vacate this default and to allow Appellant to enjoy due process in Court.

The totality of the circumstances here demonstrates that Appellant had every intention to defend a claim it knew it had no involvement in causing. Appellant's President explained its lack of involvement to Respondent's counsel within days after being served with the original Complaint. (R. p. 337, lines 13-15; p. 338, lines 12-25; pp. 304, 307.) Respondent's counsel worked with Appellant to dismiss it from the suit. (R. pp. 402, 404, 406-407; p. 36.) Respondent's counsel even indirectly asked Appellant for help to find the entity responsible for manufacturing the reel that caused the harm to Respondent. (R. p. 106.) Yet, Respondent's counsel never told Appellant he had changed his mind and would add Appellant back before he filed or served the Amended Complaint. (*See* R. pp. 398-399 at ¶¶ 6-7.)

These circumstances provide a logical explanation for why Appellant misunderstood that it was truly being added back as a Defendant at the time it was served with the Amended Complaint. While Appellant sat in default for months without notice, Respondent took discovery but chose not to subpoena or depose Appellant, and Respondent settled with two defendants. (*See* R. p. 339, line 25-p. 340, line 1; p. 340, lines 16-17; p. 370, line 23-p. 371, line 9.) The next time

Appellant was served, with the Notice of Damages Hearing, it acted promptly to secure counsel to file the Motion to Vacate the Judgment.

The Trial Court erred by relying on an unanalogous case and by considering inapposite facts. The Trial Court should not have relied on *Dixon* because it did not fit the facts of this case where Respondent's counsel and Appellant's President spoke concerning the merits of the case rather than a deadline to respond. The Trial Court should not have conflated the time gap between the entry of default and the Motion to Vacate with the short time between when Appellant realized it was in default and when it filed the Motion to Vacate. The record before the Trial Court contained ample evidence demonstrating good cause. These missteps by the Trial Court constitute 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 Court of Appeals should reverse the default judgment and vacate the default upon which it relies.

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.

At the Hearing on the Motion to Set Aside Default, Respondent had access to and characterized deposition testimony and documents obtained in discovery as evidence that "contradict[ed]" Appellant's lack of involvement. (*See* R. p. 340, lines 1-15.) Appellant, a default defendant without any ability to take or obtain discovery, did not have an opportunity to evaluate Respondent's evidence and dispute such facts at the hearing. (*See* R. pp. 105-106.) When Appellant obtained such deposition transcripts (not from Respondent), it was apparent that Respondent's

characterization of the testimony was incomplete. This misrepresentation to the Trial Court, and brought to the Trial Court's attention in Appellant's Motion to Alter or Amend, should have been considered by the Trial Court as sufficient grounds to vacate the default judgment, pursuant to Rule 60(b)(3), SCRCP. (R. pp. 103-104 at ¶ 3; pp. 113-114.) Yet, the Trial Court never considered this issue in its Order on Defendant's Motion to Reconsider and Setoff. (*Compare* R. pp. 103-104 at ¶ 3, *and* pp. 113-114, *with* pp. 26-29.) Accordingly, the Order on Defendant's Motion to Reconsider was based on an error of law in that regard[2] and thereby constituted an abuse of discretion. *See Sundown Operating Co.*, 383 S.C. at 606, 681 S.E.2d at 888.

Under Rule 60(b)(3), SCRCP, a Trial Court may "relieve" a party from any final judgment (not only default judgments) for reason of "misrepresentation . ... of an adverse party." *See* Rule 60(b)(3), SCRCP. Like the analysis a Trial Court takes when deciding a motion to vacate an entry of default, when deciding a motion to vacate a default judgment the trial court similarly considers "the following relevant 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." *McClurg*, 380 S.C. at 573, 671 S.E.2d at 93. When Rule 60(b)(3), SCRCP is implicated, the defendant must also "make a prima facie showing of a meritorious defense." *Id.*, 380 S.C. at 574, 671 S.E.2d at 93.[3] Again, "[t]o establish that he has a meritorious defense, a

---

[2] Appellant does not appeal the Order with respect to the Trial Court's ruling as to Setoff.

[3] If "fraud" is the basis of a Rule 60(b)(3), SCRCP Motion for any judgment (not only default judgments), then the following applies: "[A] party may not prevail on a Rule 60(b)(3) motion on the basis of fraud where he or she has access to disputed information or has knowledge of inaccuracies in an opponent's representations at the time of the alleged misconduct." *See Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 21, 594 S.E.2d 478, 484 (2004) (internal quotation omitted). Of course, being in default, Appellant had no access to the deposition transcripts referenced at the Hearing on the Motion to Vacate Default. And Appellant raised the basis of "misrepresentation"—not "fraud." (*See* R. pp. 103-104, at ¶ 3; pp. 113-114.)

complainant need not show that he would prevail on the merits, but only that his defense is meritorious." *Id.*, 380 S.C. at 575, 671 S.E.2d at 93-94. 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 its "meritorious" even though it is imperfect or is not "one which can be guaranteed to prevail at a trial." *Id.* (citing *Thompson*, 299 S.C. at 120, 382 S.E.2d at 903) (quoting *Graham*, 272 S.C. at 248) (internal quotations omitted).

a. The Characterization of Discovery Obtained as "Contradicting" Appellant's President's Statements that Appellant Was Not Involved Was a Misrepresentation.

Because Appellant was in default, Appellant could not compel discovery or easily or quickly obtain a copy of all discovery previously taken. (*See* R. pp. 105-106.) At the Hearing on the Motion to Set Aside Default, Respondent's counsel claimed the depositions and documents discovered "contradict[ed]" Appellant's President's claim of noninvolvement:

> I've had to depose employees from Prysmian and I've had to impose -- depose employees from Palmetto State. We've gone through protracted discovery with Palmetto State Transport, which they turned over everything to us, and Prysmian produced only two contractors did repairs and did transportation, only two, and Palmetto State Transport was able to produce witnesses that testified that they did not perform this particular repair on reels for Prysmian. Therefore, the only other potential repair defendant that's responsible for this case is [Appellant]. Not to mention what I've just provided is Mr. Kelley saying that they did not deal in high voltage reels or weren't working on reels out there at the time. **When Prysmian submitted their evidence, it was obviously in contradiction to what Mr. Kelley said.**

(R. p. 340, lines 1-15 (emphasis added).) Twenty-six minutes before this hearing, Respondent filed a supplemental brief opposing Appellant's Motion to Set Aside the Default, which contained Purchase Orders described as follows:

> Attached hereto are exhibits that clearly link [Appellant] to storage and repairs of high voltage reels for Prysmian Cable at the critical times prior to the [Respondent's] injury. [Appellant] through its CEO, William Kelley, had previously made statements that it was not involved in high voltage reels for Prysmian during the time of the Plaintiff's injury. **This was clearly a false statement.**

(R. pp. 79 (emphasis added) and 83-89; *see also* p. 332, lines 1-2.)

The depositions, in which Respondent participated, demonstrated that Respondent's counsel's characterization of the discovered evidence was misleading. The deposition testimony showed that all high voltage shipping reels at Prysmian have serial numbers on them. (R. p. 124, lines 12-20.) Interestingly, Respondent's counsel asked Charles Ouzts if he could find all reels completed at the Prysmian plant on the high voltage line for the week leading up to the Accident, and Ouzts responded "I would expect [the SAP program used to track reels] to be able to." (R. p. 127, line 16-p. 128, line 9.) Ouzts said he had no knowledge of whether the reel at issue had ever been repaired after it was purchased from the manufacturer. (R. p. 129, line 25-p. 130, line 16.) Ouzts testified it was possible that the reel was stored with Appellant but never could say whether it was. (R. p. 125, lines 2-8.) When Ouzts testified that high voltage reels "are primarily repaired by [Appellant]," he used the present tense, in November, 2021, which only references what was being done then, not in 2018—this analysis is supported by Ouzts' testifying that Palmetto State had done it in the past. (R. p. 126, lines 10-24.)

At the hearing on Appellant's Motion to Set Aside Default, Respondent's counsel made reference to the deposition of Cecil Talley as a basis to amend to add claims against Appellant. (*See* R. p. 340, lines 1-15.) Talley was director of operations for Prysmian's Abbeville facility. (R. p. 135, line 24-p. 136, line 12.) Talley testified that the high-voltage reel in the Accident would have come from the manufacturer with a D-Ring on it.[4] (R. p. 141, lines 16-19.) Respondent did not disclose (and Appellant did not know about) the following testimony:

Q: And [Appellant] has repaired high-voltage reels in the past?

---

[4] As mentioned below, this is the part that allegedly failed, causing the reel to fall and hit Respondent. (*See* R. pp. 117-119.)

A: I don't know that. You know, that's something, when this came up, I can't – I can't confirm or deny that either way, to be honest with you.

(R. p. 146, lines 1-4.) That testimony provides no evidence that Appellant made any repairs, and Talley deferred to Ouzts, (R. p. 146, lines 1-8,) who also provided no evidence that Appellant had made any repairs on the reel at issue. Talley also conceded that, after the accident, a Prysmian employee, and not one of Appellant's, replaced D-ring with eyebolts. (R. p. 147, lines 8-20.)

Similarly, Randall Gary testified that he had no personal knowledge of whether the reel at issue was supplied by Appellant. (R. p. 160, lines 23-25.) Gary also had no knowledge of whether the reel had ever been refurbished. (R. p. 161, lines 4-10.)

Finally, Appellant obtained Respondent's own deposition testimony. (R. p. 106.) Exhibit 1 to Respondent's deposition included his employer Prysmian's Accident report, which: (1) identified a failed D-ring as the cause of the accident, (2) called for removal of all D-Rings from all high-voltage reels, and (3) ordered that such D-Rings to be replaced with eye bolts. (R. pp. 117-119.) This is significant, because Appellant did not do work on reels with D-Rings. (*See* R. p. 401, ¶ 8.)

Respondent offered to the Trial Court one purchase order as evidence that Appellant worked on the reel at issue—it did not prove such work. (*See* R. p. 79; pp. 83-89.) The deposition testimony in Respondent's hands at the time it offered the purchase order to the Trial Court shows that there is no evidence that Appellant worked on the reel at issue. Rule 60(b)(3), SCRCP, allows a court to set aside a default judgment based on a "misrepresentation . . . of an adverse party." By failing to disclose the deposition testimony of Ouzts, Talley, and Gary, all of which stated that they had no knowledge of whether the reel at issue had even been repaired, much less repaired by Appellant, constituted a misrepresentation of known facts. (R. p. 125, lines 2-8; p. 146, lines 1-4; p. 160, lines 23-25.)

b. Appellant Promptly Filed Its Motion to Alter or Amend Based in Part on Rule 60(b)(3), SCRCP.

After the January 30, 2024, Hearing on the Motion to Vacate Default, Appellant acted promptly to obtain these deposition transcripts. (*See* R. pp. 105-106.) On February 29, 2024, the Trial Court entered its Order Assessing Damages against KSC Logistics, Inc., based on the default, which the Trial Court refused to vacate. (R. p. 19.) On March 11, 2024, Appellant promptly filed its Motion to Alter or Amend and, in the Alternative, to Provide for Setoff.

c. Appellant Made a Prima Facie Showing of a Meritorious Defense.

Appellant incorporates by reference the Argument laid out in the above Argument Section I regarding its meritorious defense. In addition, as outlined above, the deposition testimony cast significant doubt that Appellant was involved with this particular reel.

d. Respondent Suffers No Prejudice Litigating His Case on the Merits.

Appellant incorporates by reference the Argument laid out in the above Argument Section I regarding prejudice to Respondent. Respondent had to litigate his claims on the merits against the other defendants but decided to not discover any information from Appellant. Appellant should be given an opportunity to present its case upon the merits and obtain access to discovery. "The McClurgs made no showing of how they would be prejudiced if the default judgment were to be set aside, and the law favors the resolution of disputes based upon all parties having their day in court." *McClurg*, 380 S.C. at 580, 671 S.E.2d at 96 (Hearn, C.J., concurring in part and dissenting in part). Again, no plaintiff is entitled to a default judgment—only one earned on the merits. *See Ricks*, 293 S.C. at 375, 360 S.E.2d at 536. This default judgment was not earned, and it does not prejudice Respondent to vacate this default and to allow Appellant to enjoy due process in Court.

The Trial Court erred by not considering this analysis at all in the Order on Defendant's Motion to Reconsider. Thus, such Order was based by an error of law in that regard[5] and thereby constituted an abuse of discretion. *See Sundown Operating Co.*, 383 S.C. at 606, 681 S.E.2d at 888.

III. THE TRIAL COURT ABUSED ITS DISCRETION UNDER RULE 60(b)(2), SCRCP, WHEN IT CONSIDERED EVIDENCE IN APPELLANT'S POSSESSION WAS, BY THAT FACT ALONE, ALSO DEEMED WITHIN APPELLANT'S KNOWLEDGE, WITHOUT MAKING A FINDING THAT APPELLANT 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.

Out of "millions" of emails between Appellant and the other defendants, in February or March of 2024, Appellant discovered a June 2022 email chain on an old company server, to which Appellant's "operations lady" and "financial lady" were copied but not Appellant's President. (R. p. 353, line 22-p. 354, line 17; p. 360, lines 22-25.) This email chain evidenced that Appellant never had in its inventory records system the serial number of the subject reel that injured Respondent. (R. pp. 167-168.) Appellant truly never touched the subject reel.

Under Rule 60(b)(2), SCRCP, a Trial Court may "relieve" a party from any final judgment (not only default judgments) for reason of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." *See* Rule 60(b)(2), SCRCP. "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 v. Lanier*, 364

---

[5] Again, Appellant does not appeal the Order with respect to the Trial Court's ruling as to Setoff.

S.C. 211, 217, 612 S.E.2d 456, 459 (Ct. App. 2005) (quoting James F. Flanagan, *South Carolina Civil Procedure* 484 (2d ed. 1996) (internal quotations omitted).

In the Order on Defendant's Motion to Reconsider and Setoff, the Trial Court found that the evidence Appellant submitted "is likely enough to establish factors 1, 2, 4 and 5" but not factor 3. (R. p. 27.) Of course, Appellant does not contest the Trial Court's finding that the evidence Appellant submitted met four of the five factors. Appellant instead appeals the Trial Court's ruling that the evidence "could have [ ] been discovered before the trial." *See Lanier*, 364 S.C. at, 217, 612 S.E.2d at 459. The "trial" here is the Hearing on the Motion to Set Aside Default, which occurred on January 30, 2024. (*See* R. p. 332, lines 1-2.) The evidence before the Trial Court was insufficient for the Trial Court to make a finding that Appellant knew about this email or that Appellant failed to exercise due diligence to find it.

a. The Trial Court Incorrectly Deemed an Email in Appellant's Old Server to Which Appellant's Employees Were Copied to Be an Email Known to Appellant Without Evidence that Appellant's President Actually Knew About Such Email Before the Hearing on the Motion to Set Aside Default.

Appellant's President, Chuck Kelley, did not know about the exonerating email chain prior to the January 30, 2024 Hearing on the Motion to Set Aside Default. (R. p. 354, lines 11-17.) Under the text of *Lanier*, "evidence is not newly discovered evidence for the purposes of Rule 60(b)(2) where the evidence was (1) **known** to the party at the time of trial, **and** (2) in the **party's possession.**" *Lanier*, 364 S.C. at 218, 612 S.E.2d at 459 (emphasis added). The Trial Court considered that because the email was in Appellant's old email server, and thus in Appellant's possession, Appellant *knew* about the email. The Trial Court erred as a matter of law and as a matter of fact, because (1) the text of *Lanier* test has an "and" not an "or," and (2) Appellant's President and Office Manager both testified they did not know or recall (respectively) the

discovered email chain. Therefore, the Court abused its discretion. *Sundown Operating Co.*, 383 S.C. at 606, 681 S.E.2d at 888.

Kelley, Appellant's President, testified that he "had no knowledge of this email until we found it," which happened in February or March 2024, after the January 30, 2024 Hearing on the Motion to Set Aside Default. (*See* R. p. 354, lines 11-17.) Nor was Kelley copied on the June 2022 email. (R. p. 354, lines 15-17.)

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.)

The evidence received by the Court demonstrated that Appellant had no actual knowledge of the email prior to the "trial" of the Hearing on the Motion to Set Aside Default, which occurred on January 30, 2024. As Appellant's counsel reminded the Trial Court: "I want to briefly just touch on the case cited[, *Lanier*]. I want to be clear. You have to be in possession of the document and know it at the time, **it is not either or.**" (R. p. 375, lines 16-18 (emphasis added).) Yet, the Court counted the "possession" element as *both* the "possession" and "knowledge" elements in *Lanier*:

> The *Lanier* court expounded upon factor 3, holding "evidence is not newly discovered evidence for the purposes of Rule 60(b)(2) where the evidence was (1) known to the party at the time of trial, **and** (2) in the party's possession." *Lanier*, 364 S.C. at 218, 612 S.E.2d at 459. **If either or both** of these factors are found in the affirmative, then the party's attempt to find the evidence "newly discovered" fails. There is no question the evidence was in the party's possession, as the e-mails Defendant references were accessible to the office manager and located on Defendant's computer / hardware. . . . At a minimum, the Defendant had constructive knowledge of the existence of the evidence at issue. Further, it is without question that the evidence was in the possession of the Defendant.

(R. p. 27 (emphasis added).) The Trial Court's deviation from the clear biconditional requirement in *Lanier*, despite the evidence of Appellant's lack of knowledge, was an 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.").

b. The Trial Court Failed to Make a Finding that Appellant Failed to Exercise Due Diligence to Discover the Existence of the Subject Email in the Period Prior to the Hearing on the Motion to Set Aside Default.

Appellant realized it was in default shortly after being served with the Notice of Damages Hearing on November 27, 2023, the Monday after Thanksgiving. (*See* R. p. 195; *see also* p. 90 (Nov. 30, 2023 email from Appellants insurer to Respondent's counsel asking if Appellant was in default).) Appellant exercised due diligence prior to the December 18, 2023 Motion for Damages Hearing and the January 30, 2024 Hearing on Motion to Set Aside Default to search, and thankfully discover, this needle in a haystack email out of "millions" between it and the other parties. (R. p. 360, lines 22-25.)

"[I]f the newly discovered evidence could not have been discovered by due diligence prior to trial," then the Trial Court may grant a new trial under Rule 60(b)(2), SCRCP. *Lanier*, 364 S.C. at 220, 612 S.E.2d at 460. "*Black's Law Dictionary* defines 'due diligence' as 'the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.'" *Id.*, 364 S.C. at 220, 612 S.E.2d at 460. "Diligence looks not to what the litigant actually discovered, but what he or she *could* have discovered." *Id.* (emphasis in original) (internal quotations omitted).

It is incredible that Appellant even found the subject email chain: (1) The email chain at issue was on an old email server, (R. p. 354, lines 6-10; p. 354, line 24-p. 355, line 2.); (2) it was between individuals that have exchanged millions of emails in the course of other business, (*see* R. p. 360, line 22-p. 361, line 1.); (3) the email contained no reference to Respondent or the

litigation, (R. p. 355, lines 3-6.), and (4) Appellant never possessed the subject reel, (*see* R. p. 358, lines 11-16.)

Moreover, in order to even narrow down the search of these emails, Appellant required the help of third-party individuals to help locate the unique serial number of the subject reel: (1) Charles Ouzts told Chuck Kelley that he had "got some emails that have the reel numbers," which took Ouzts two or three weeks to locate, (R. p. 357, line 18-p. 358, line 7; p. 359, lines 1-8.); and (2) Appellant found the university student who wrote Appellant's inventory computer program to search the old server for serial numbers based on Ouzts' information, (*see* R. p. 358, lines 18-20; p. 359, lines 9-13.) According to Chuck Kelley: "[W]e were looking more and scouring for certain reel numbers because we knew we didn't have that side [*sic*] of reel on our property but we were trying to make absolutely sure we never had those reel numbers." (R. p. 358, lines 12-16.) Even after having all the external information, it still took Appellant "three, four or five days of searching before we found it." (R. p. 362, line 11.)

From the receipt of the Noice of Damages Hearing on November 27, 2023 to the Hearing on the Motion to Set Aside Default on January 30, 2024, Appellant exercised due diligence to search for relevant exculpatory emails: It could not have discovered this one without the help of third parties. The Trial Court made no explicit finding that Appellant failed to exercise due diligence to search for this email. (*See* R. pp. 27-28.) Instead, the Trial Court instead found that the possession of the email alone by Appellant was sufficient to deny relief *despite* Appellant's "reasonable efforts to track down this information as soon as possible." (*See* R. p. 28.) The Trial Court's unjustified giving of weight to the fact of possession alone was an error of law not based on the total scope of the facts presented. *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."). This Court should vacate the judgment and allow Appellant to have its day in Court.

CONCLUSION

The Trial Court "was controlled by some error of law" and/or ruled without evidentiary support, thereby constituting an abuse of discretion. *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). When Appellant demonstrated a course of dealing with Respondent's counsel regarding the merits of the case, the Trial Court disregarded it and instead found that an unanalogous case applied. The default should have been vacated. When Appellant argued to remove the default, Respondent's counsel misrepresented to the Court the strength of the discovered evidence against Appellant. Meanwhile, like a needle in a haystack, Appellant found an email, which the Court recognized exonerated Appellant from liability. Yet, the Court did not consider the evidence of Appellant's lack of knowledge of that email prior to the Hearing on the Motion to Set Aside the Default, and instead focused on the possession element only. These errors coalesced in the Trial Court's July 31, 2024 Order on Defendant's Motion to Reconsider and Setoff.

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

s/ C. Daniel Atkinson
C. Daniel Atkinson (S.C. Bar # 72721)
datkinson@wajlawfirm.com

WILKES ATKINSON & JOYNER, LLC
127 Dunbar St., Suite 200
Spartanburg, SC 29306
(864) 591-1113

Attorneys for Appellant

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 18 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 Brief contains all material proposed to be included by any of the parties and not any other material.

August 11, 2025

C. Daniel Atkinson (S.C. Bar #72721)
Wilkes Atkinson & Joyner, LLC
127 Dunbar St., Suite 200
Spartanburg, SC 29306
(864) 591-1113
datkinson@wajlawfirm.com

Attorney for Appellant