THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
Scott F. Talley, Special Referee

Appellate Case No. 2025-001073
Civil Action No. 2022-CP-11-00021

Angelica Shelest, ... Respondent,

v.

Martin Maina Gitau and Mark One Freight & Logistics, LLC..... Appellants.

MOVANTS' REPLY TO RESPONDENT'S RETURN TO MOTION FOR LIMITED REMAND

Martin Maina Gitau and Mark One Freight & Logistics, LLC ("Movants") seek this Court's leave to file a timely Rule 60(b)(4) motion in the circuit court because the Special Referee's default judgment is void, meaning it "is, in legal effect, nothing." *Turner v. Malone*, 24 S.C. 398, 401 (1886). A limited remand that would require the circuit court to confront (for the first time) whether the Special Referee was lawfully appointed makes sense. If the circuit court agrees with Movants, it can remedy proceedings that violated state law; and even if the circuit court disagrees with Movants, this Court would nevertheless benefit from having its opinion included in what it considers on appeal.

Respondent Angelica Shelest's return to Movants' motion seeks to plow forward and presents the Special Referee's excessive judgment as virtually unassailable on appeal. Shelest is incorrect for several reasons.

First, Shelest argues the Special Referee's appointment was immediately appealable and, because no interlocutory appeal was taken, that his appointment is now law of the case. Return at 5. As authority, she cites cases in which a party's request for a jury trial was denied and the case was instead referred to a master. *See* Return at 5 (citing *Edwards v. Timmons*, 297 S.C. 314, 316 (1988); *Creed v. Stokes*, 285 S.C. 542, 543 (1985)). But these cases are readily distinguishable.

"Generally only final judgments are appealable" and "[a] final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution." *Tillman v. Tillman*, 420 S.C. 247, 248–49 (Ct. App. 2017). There are also "a few, limited categories of appealable" interlocutory orders. *Doe v. Howe*, 362 S.C. 212, 216 (Ct. App. 2004). One such category includes orders "affecting a substantial right." S.C. Code § 14-3-330(2). But Shelest does not explain why the order appointing the Special Referee falls within one of these "few, limited categories." *Doe*, 362 S.C. at 216.

When a plaintiff's request for a jury trial is denied, as in *Edwards* and *Creed*, that order is immediately appealable because they "affected the mode of trial," which is "a substantial right." *Creed*, 285 S.C. at 543. Here, the Special Referee's appointment violated Movants' right to due process because Movants never agreed to it and the appointment was ordered by the clerk of court, not "the presiding circuit judge." S.C. Code § 14-11-60. This violation, while worthy of reversal on appeal, was not immediately appealable, and the Special Referee's appointment is not "law of the case" as Shelest contends. Return at 5.

Second, Shelest argues "issue preservation" stops this Court from permitting a limited remand. Return at 5–6. But the motion's entire point is to simply *obtain the required permission* from this Court so Movants can timely move under Rule 60(b)(4) in the circuit court. Moreover, Shelest ignores the axiomatic rule that jurisdictional challenges cannot be waived. And nearly a

century ago the South Carolina Supreme Court treated an analogous challenge—to a statute permitting a circuit judge from an adjoining circuit to hear default matters in circuits without a resident judge—as an argument that "cannot be waived." *Truesdell v. Johnson*, 144 S.C. 188, 201 (1928). Because this matter is on appeal, Movants cannot simply file the Rule 60 motion in the circuit court; it must get permission to do so from this Court.

Shelest also claims Movants "conceded" the Special Referee's appointment was valid when they agreed he could hear their Rule 60(b)(1) motion. Again, however, jurisdictional challenges cannot be waived. *Id.* Moreover, there is a difference between agreeing to the scope of a Special Referee's order – which may include by its language his ability to resolve a motion to set aside the default judgment he entered, and "conceding" to his appointment in the first place. Shelest did not concede to the appointment.

Third, Shelest argues that Movants seek to file a "second Rule 60(b) motion" and that the motion would be untimely. Return at 8. She ignores both that a) Movants seek to file an *initial* Rule 60(b)(4) motion; and b) Rule 60(b) contains a more lenient timeliness standard for motions brought under Rule 60(b)(4) than Rule 60(b)(1). *See* Mot. at 4. If this Court grants Movants' motion, the Rule 60(b)(4) motion would "be made within a reasonable time" and, therefore, would be timely. Rule 60, SCRCP. Nothing in Rule 60 prevents a party from filing separate motions under Rule 60(b)(1) and Rule 60(b)(4), provided the motions are timely, and there is nothing "disingenuous" about Movants' attempt to have the circuit court weigh in on an important jurisdictional question. Return at 10.

Fourth, Shelest makes an argument about the case's merits. However, all Movants seek is leave to file a Rule 60(b)(4) motion in the circuit court to challenge the Special Referee's

appointment. If this Court grants the permission to file that motion in the circuit court, Shelest will have every opportunity to the oppose the motion.

A limited remand to permit Movants to file a Rule 60(b)(4) motion would help ensure that a judgment of more than $5 million was entered by someone with authority to do so under South Carolina law. This Court should grant the motion and let the circuit court answer this important question in the first instance.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants Martin Maina Gitau and Mark One Freight & Logistics, LLC , certify that I have served all counsel in this action with a copy of the document(s) specified below by electronic mail to each attorney listed using their primary email address listed in the Attorney Information System.

Pleading(s): Movants' Reply to Respondent's Return to Motion for Limited Remand

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