THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2025-002429

Lower Court Case No. 2022-CP-23-00240

DiscoverFresh Foods, Inc.… ..... Respondent,

v.

Jesus Concepcion, Kendry S. Tavarez a.k.a. Kendry Solange Feliz, and National Risk Solutions, LLC, Defendants, of which Jesus Concepcion is the Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This appeal involves a straight forward entry of default and default judgment entered against Appellant and arising from Appellant's and other defendants' conspiracy to commit fraud and embezzle over Six Million Five Hundred Ninety Thousand Two Hundred Four Dollars and Twenty-Six Cents ($6,590,204.26) of Respondent DiscoverFresh Foods, Inc. ("DiscoverFresh" or "Respondent")'s company funds that was orchestrated by Appellant Jesus Concepcion ("Appellant" or "Concepcion"), while he was the Director of Human Resources at DiscoverFresh, and other defendants, including his wife, Kendry S. Tavarez a.k.a. Kendry Solange Feliz ("Tavarez"), National Risk Solutions, LLC ("NRS"), the company owned by Appellant's wife, and Jeffrey L. Mahon ("Mahon"), who was the Chief Financial Officer ("CFO") of DiscoverFresh during the same time. ("*See* Respondent's Resp. in Opp. to Concepcion's Motions, p. 1 (July 15, 2025); Verified Compl., ¶¶ 1-2, 6-10, 19-47 (Jan. 18, 2022).) DiscoverFresh employed Appellant as the Director of Human Resources from early 2018 until August 2021 when he was arrested on the unrelated federal criminal charges. (*See id*.)

Appellant's embezzlement scheme against DiscoverFresh involved three (3) methods of stealing company funds: (i) fraudulently authorizing, directing and overseeing payments to NRS, a company owned by Appellant's wife, Tavarez, for recruitment and background check services that were never performed; (ii) paying payroll checks to "phantom" employees who did not perform work at DiscoverFresh; and (iii) making unauthorized increases in salaries and bonuses to various employees, including himself, the defendant Jeff Mahon, other DiscoverFresh employees, and "phantom" employees. (*See id*.)

While the procedural history outlined below is lengthy, it is relevant to demonstrating

Appellant's access to attorneys, the Court, family members, and individuals during the pendency of this case, which is especially relevant given the tremendous amount of time this case has been pending, many of these events are not included in Appellant's recitation of the procedural history and further support affirming the circuit court's order.

On January 18, 2022, DiscoverFresh filed a Verified Complaint against Appellant asserting claims of fraud, breach of fiduciary duty, civil conspiracy, unjust enrichment, negligence, violations of the South Carolina Unfair Trade Practices Act, conversion, and trespass to chattels that was supported by an Affidavit filed by forensic accountant and licensed private investigator Mr. Michael O'Shea. (*See id.* at p. 2; *see generally* Ver. Compl., Exh. A.) In conjunction with the Verified Complaint, DiscoverFresh filed two lis pendens on real property Appellant owns in Simpsonville, South Carolina. (*See* Lis Pendens for 10 Howden Place, Simpsonville, SC 29781 (Dec. 29, 2021); Lis Pendens for 5 Mitchell Spring Court, Simpsonville, SC 29681 (Dec. 29, 2021).) DiscoverFresh also filed a Motion for Temporary Restraining Order, a Motion for Temporary Attachment and Emergency Hearing, and subsequently a Motion for Temporary Injunction, all of which was granted by the circuit court. *See* Order (Aug. 8, 2022; Order (Feb. 17, 2022).)

Appellant has been incarcerated since 2021 on federal criminal charges unrelated to this case wherein he plead guilty and was sentenced to thirty (30) years prison. (*See id.*) On March 9, 2022, Appellant was personally served with the Summons, Verified Complaint, Lis Pendens, Motion for Temporary Restraining Order ("TRO") & Prejudgment Attachment, Order Granting the Motion for TRO, and Motion for Emergency Temporary Injunction by Deputy Sherrif R. Garcia of the City and State of New York, at the Metropolitan Detention Center in Brooklyn, New York ("MDC Brooklyn") on March 9, 2022. (*See id.*) A Certificate of Service was filed on March

29, 2022. (*See id.*, Certificate of Service, Exhibit 1.) Appellant's answer or other responsive pleading was due on April 8, 2022. (*See id.*) No answer or responsive pleading was timely filed.

Appellant's wife, Tavarez, and NRS were served with DiscoverFresh's Summons and Verified Complaint, two (2) Lis Pendens, Motion for Temporary Restraining Order & Prejudgment Attachment, Affidavit of Michael O'Shea, Order, Motion for Temporary Injunction, Prejudgment Attachment & Emergency Hearing, and Notice of Hearing at Appellant and Tavarez's residence located at 5 Mitchell Spring Court, Simpsonville, South Carolina on February 14, 2022. (*See* Tavarez Affid. of Service (Feb. 14, 2022); NRS Affid. of Service (Feb. 14, 2022).) Tavarez and NRS failed to file any response to DiscoverFresh's Complaint.

Six (6) months later, on October 19, 2022, DiscoverFresh filed a Motion for Entry of Default against Appellant. (*See id.*; Motion for Entry of Default against Respondent (Oct. 19, 2022).) An Order for Entry of Default against Appellant was issued on October 25, 2022. (*See id.*; Order for Entry of Default against Respondent (Oct. 25, 2022).)

On February 9, 2023, DiscoverFresh filed a Motion for Default Judgment for a sum certain amount of $6,590,204.26 against Appellant pursuant to SCRCP 55(b)(1). (*See id.*) An Amended Affidavit of Damages correcting a scrivener's error was filed on February 13, 2023. (*See id.* at pp. 2-3.) The court declined to sign the proposed order on this motion on February 14, 2023, pending resolution of claims against the defendant Mahon, the only defendant to appear in the instant litigation. (*See id.* at p. 3.)

On April 24, 2023, Appellant was personally served with DiscoverFresh's Affidavit of Damages, Amended Affidavit of Damages, Motion for Entry of Default Against Concepcion, Motion for Entry of Default Against Tavarez and NRS, Entry of Default Against Concepcion, Entry of Default Against Concepcion, Amended Affidavit of Damages, and Motion for Default

Judgment by Deputy Sheriff D. Prophete of the City and State of New York, at the Metropolitan Detention Center in Brooklyn, NY ("MDC Brooklyn"). (*See id.* at p. 3, Certificate of Service (Apr. 23, 2025) (Appellant was served on April 24, 2023).)[1]

On June 7, 2023, Appellant's Motion to Stay was filed by his wife Tavarez, in which he acknowledged he had been served and been in contact with an attorney; however, no hearing was requested and no order was entered. (Motion to Stay (June 7, 2023).)

On October 10, 2023, Appellant, Tavarez, and ten (10) other individuals were indicted in the United States District Court for the District of South Carolina for conspiracy to commit bank and wire fraud and conspiracy to commit money laundering of over five million dollars arising from the same fraud and embezzlement scheme that is the subject of the instant litigation. (*See United States of America v. Concepcion, et al.*, CR. No. 6:23-cr-00818, Indictment (Oct. 10, 2023).)

On October 23, 2023, approximately six (6) months after Appellant was served with the Entry of Default and Motion for Default Judgment, Appellant filed a *pro se* Motion to Stay this action. (*See id.* at p. 3; Motion to Stay (Oct. 23, 2023).) No hearing was requested and no order was entered on this motion. (*See id.*)

On December 21, 2023, Appellant mailed a letter to the Clerk of Court essentially making a "notice of *pro se* appearance" in this action. The letter acknowledges Appellant was notified of the Order for Entry of Default and intended the Motion to Stay filed on October 23, 2023 to also serve as a Motion to Set Aside Entry of Default. (*See id.*) Additionally, Appellant included a letter from a New York attorney regarding same.

[1] DiscoverFresh inadvertently failed to file the Certificate of Service until April 23, 2025; however, Appellant was served on April 24, 2023.

Eight months later, on August 30, 2024, DiscoverFresh's claims against the defendant Mahon, were settled and a Stipulation of Dismissal for DiscoverFresh's claim against the defendant Mahon was filed on August 30, 2024. (*See id.*)

On September 19, 2024, DiscoverFresh filed a renewed Motion for Default Judgment for the sum certain amount of $6,523,537.64 against Appellant and the defendants Tavarez and NRS pursuant to SCRCP 55(b)(1), as DiscoverFresh's claims against the defendant Mahon had been settled. (*See id.*)

An Order for Final Default Judgment was issued on October 2, 2024. (*See id.*) On October 11, 2024, Appellant was transferred from federal prison in New York to the Spartanburg County Detention Center for the prosecution of federal criminal charges against him related to the fraud scheme that is the subject of the instant civil litigation. (*See id.* at p. 3, n.1) On June 9, 2025, Appellant pled guilty to the federal criminal charges against him related to the fraud scheme that is the subject of the instant civil litigation, but the amount of monetary damages is still being litigated. (*See* Concepcion Criminal Guilty Plea (June 9, 2025).)

The transcript of the judgment was entered on October 21, 2024. (*See* Tr. of Jdt. (Oct. 21, 2024).) An Execution Against Property to the Greenville County Sheriff was filed on October 28, 2024. (*See* Execution (Oct. 28, 2024).) Nulla Bonas as to Appellant and the defendants Tavarez and NRS were filed on March 12, 2025. (*See* (Nulla Bonas (Mar. 12, 2025).) On January 22, 2025, Appellant mailed a letter to the clerk of Court acknowledging he had been served with the Order for Final Default Judgment and again requesting a stay/the entry default be set aside. (*See* Appellant Ltr. (Jan. 22, 2025).) No motion cover sheet was included nor was a motion filing fee paid. (*See id.*)

On February 11, 2025, Appellant filed a *pro se* Emergency Motion to Stay and Motion to Vacate Default Judgment. Appellant's Motion purported to be on behalf of Appellant and the defendants Tavarez and NRS. (*See* Emergency Motion to Stay and Motion to Vacate Default Judgment (Feb. 11, 2025).) Defendant Concepcion is *pro se* and is not an attorney and does not have any standing or ability to file a motion on behalf of the defendants Tavarez or NRS.

On April 1, 2025, Appellant filed a Motion for the first time requesting Appointment of Guardian ad Litem & Renewed Motion to Stay in this matter. (*See* Motion for Appointment of Guardian ad Litem & Renewed Motion to Stay (Apr. 1, 2025).) On April 21, 2025, the Honorable Judge Gravely issued an Order holding that because the October 2, 2024 Default Judgment Order was issued without addressing Appellant's pending Motion to Stay, that a hearing must be held on Appellant's pending motions and DiscoverFresh's Motion for Default Judgment. (*See* Order (Apr. 21, 2025).) On July 21, 2025, Judge Gravely issued an order continuing the hearing until the parties could obtain a Writ from Federal Court facilitating Appellant's transport from the Spartanburg County Detention Center to the hearing so that he could attend in person. (*See* Order (July 21, 2025).)

On August 27, 2025, Appellant filed a Motion to Set Aside Default Judgment, Final Judgment, and Dismiss Plaintiff's Claim with Prejudice. (*See* Appellant Motion to Set Aside Default Judgment (Aug. 27, 2025).) On September 30, 2025, DiscoverFresh filed a Supplemental Memorandum in Opposition to Appellant's Motions. (*See* Resp. Supp. Memo. in Opp. to Appellant's Motions (Sept. 30, 2025).)

On October 6, 2025, the circuit court held a hearing for Appellant's Motion to Stay and Vacate Default Judgment filed on February 11, 2025, Motion for Appointment of Guardian ad Litem filed on April 1, 2025, and a Motion to Set Aside Default Judgment, Final Judgment, and

Dismiss filed on August 27, 2025 (collectively the "Motions"). (*See* Order, p. 1 (Oct. 14, 2025).) Appearing at the hearing were Appellant, pro se, and Ms. Sarah Timmons, Esq., on behalf of DiscoverFresh. (*See id.*)

After considering the pleadings, Appellant's motions, the briefs and exhibits submitted by Appellant and DiscoverFresh, the record, and after considering and reflecting upon the arguments of the parties, the Honorable Judge Gravely correctly denied Appellant's Motions by Order dated October 14, 2025. (*See id.*)

In so ruling, Judge Gravely denied Appellant's motions for a stay of proceedings holding that Appellant failed to establish a basis for a stay of proceedings and cited no authority for such a stay because he was incarcerated at MDC Brooklyn in New York until his transfer to the Spartanburg County Detention Center on October 11, 2024 for the prosecution of federal criminal charges against him related to the fraud scheme that is the subject of the instant civil litigation. (*See* Order, p. 2.) Notably, Appellant was served with the Summons and Complaint on March 9, 2022, the affidavit of default and motion for default was filed on October 19, 2022, an Order of Default was entered on October 25, 2022, and Default Judgment was entered against Appellant and other defendants on October 2, 2024, all before Appellant was transferred to Spartanburg County Detention Center on October 11, 2024. (*See id.* at pp. 1-2.)

Judge Gravely further correctly denied Appellant's motion to vacate and motion to set aside default judgment holding the record established that Appellant "was properly served through the New York prison system on March 9, 2022" and that "[i]n the hearing, Mr. Concepcion conceded that he was properly served and had no issues with that service." (*See id.* at p. 2; Tr. of Hearing (Oct. 6, 2025), p. 5:8-13.) Notably, Appellant represented during the hearing that he was properly served and had contact with not only, Tavarez, his wife who resides in Greenville County, South

Carolina, but two attorneys, located in Greenville, South Carolina and New York, early on. (*See* Tr., pp. 5-7.) The circuit court further found that despite being properly served, Appellant "failed to file an Answer for over seven months before Default was entered against him." (*See id.*) Judge Gravely acknowledged that Appellant argued that he had retained counsel to represent him in this matter; however, the firm never filed a Notice of Appearance with the Court, nor requested an extension to Answer. (*See id.* at pp. 2-3.) The Court held "this does not rise to the level necessary to set aside default judgment." (*See id.* at p. 3.)

The circuit court noted that Rule 55(c) of the *South Carolina Rules of Civil Procedure* ("SCRCP") "requires that a party must establish 'good cause' to set aside the entry of default. However, once judgment is entered, default judgment may be set aside according to Rule 60(b)." (*Id.*) The circuit court held that "[b]ecause judgment had been entered when these motions were filed, Rule 60(b), and not Rule 55(c), is applicable" and Appellant "failed to establish 'mistake, inadvertence, surprise, or excusable neglect,' new discovered evidence, fraud, misrepresentation, etc." (*See id.* (citing SCRCP 60(b) (1-5)).) The circuit court further rejected Appellant's arguments that "during his incarceration he did not have access to the law library, had limited access to a telephone and relied on his purported counsel" holding "[n]one of these mitigating factors fall within the categories listed in Rule 60(b)" and "Mr. Concepcion clearly had access to the Court system as shown by his filing numerous motions over more than a 2-year period." (*See id.*) The circuit court similarly found that, "even if Rule 55(c) was applicable, Mr. Concepcion has failed to establish 'good cause'" and therefore Appellant "failed to establish a basis for setting aside entry of Default under Rule 55(c) or Default Judgment under Rule 60(b)." (*See id.*)

The circuit court next denied Appellant's motion to dismiss wherein he alleged Plaintiff had committed fraud during Plaintiff's deposition on July 9, 2024 and again reiterated his

incarceration in both New York and South Carolina, holding the Appellant was already in default when the deposition was taken. (*See id.*) The circuit court held that Appellant failed "to establish a basis for dismissing the action, especially in light of the Court's ruling validating the Default Judgment against him." (*See id.*)

Finally, the circuit court addressed Appellant's motion for appointment of guardian ad litem ("GAL"). (*See id.* at p. 4.) The circuit court noted that "Mr. Concepcion not only asserts that a GAL should be appointed, but that this is also a basis for setting aside the Default and Default Judgment for the failure of the Court to appoint one." (*See id.*) The circuit court noted that Rule 17(c), SCRCP, requires the following:

> A person imprisoned outside this State shall appear by guardian ad litem in an action by or against him; but if imprisoned in this State, and not a minor or incompetent, the court may, in its discretion appoint a guardian ad litem …

(*See id.* (quoting Rule 17(c), SCRCP).) The circuit noted, "A GAL can be appointed upon application of 'relative or friend' or by 'any party to the action' within 30 days after being served. SCRCP 17(d) (4,6), none of which occurred here." (*Id.*)

The circuit court found, "As confirmed by Mr. Concepcion, at the time of filing his Motion on April 1, 2025, he was imprisoned in this State and being housed at the Spartanburg Detention Center awaiting sentencing on federal charges." (*See id.*) The circuit court further found,

> Based on the holding in *McCuen v. McCuen*, 348 S.C. 179 (2002), Rule 17 does not impose a mandatory requirement for the appointment of a GAL. Although *McCuen* was an appeal from Family Court, the ruling of the Court is very germane to the issue before this Court: "While the language of Rule 17(c) does not expressly so provide, it is clear from applicable case law that the right to appearance by guardian ad litem is not absolute."

(*Id.* (quoting *McCuen*, 348 S.C. at 182).) The circuit court noted, "The Courts have found that there is a distinction between a party that is limited by infancy or mental deficiency and the

'physical restraint of imprisonment,' which allows for an imprisoned party to 'waive the appointment of a guardian ad litem.'" (*See id.* (quoting *McCuen*, 348 S.C. at 182; *In the Matter of Bishop*, 272 S.C. 306, 309 (1979)).) The circuit court further found, "This possibility of a waiver by an imprisoned party is not limited by the use of the word "shall" in SCRCP Rule 17." (*Id.* quoting *McCuen*, 348 S.C. at 184).) The circuit court further found, "In *Green v. Boney*, 233 S.C. 49, 66 (1958), the Supreme Court held that a defendant in a civil suit waived his right to appointment of a GAL by filing pleadings with the Court and failing to raise the issue of the appointment of GAL until the case was called to trial." (*Id.*)

Therefore, the circuit court found, "Mr. Concepcion was not restrained from availing himself of the Court system as evidenced by his filing of a Motion to Stay prior to the Default Judgment being issued, and two additional Motions before filing his Motion for Appointment of a GAL thirty-seven months after he had been served with the Summons and Complaint and six months after final judgment had been entered against him." (*Id.*) Therefore, the circuit court held, "Mr. Concepcion waived his right to the appointment of a GAL during his incarceration in New York and subsequently in South Carolina. No Motion was filed by Mr. Concepcion nor anyone on his behalf, until after the Default Judgment was entered, so this would not be a basis for setting aside or vacating the Default Judgment." (*Id.*)

On October 21, 2025, Appellant filed a Motion to Reconsider the Court's Order dated October 14, 2025. (*See* Motion to Reconsider (Oct. 21, 2025).) On October 30, 2025, the circuit court issued an order denying Appellant's Motion to Reconsider by Form 4 Order. (*See* Order (Oct. 30, 2025).) This appeal followed. (*See* Appellant's Notice of Appeal (Nov. 10, 2025).)

STATEMENT OF THE FACTS[2]

This case arises out of a conspiracy to commit fraud and embezzle over Six Million Five Hundred Ninety Thousand Two Hundred Four Dollars and Twenty-Six Cents ($6,590,204.26) of Respondent DiscoverFresh Foods, Inc. ("DiscoverFresh" or "Respondent")'s company funds that was orchestrated by Appellant Jesus Concepcion ("Appellant" or "Concepcion"), and other defendants Kendry S. Tavarez a.k.a. Kendry Solange Feliz ("Tavarez"), National Risk Solutions, LLC ("NRS") and others. DiscoverFresh employed Appellant as the Director of Human Resources from early 2018 until August 2021. (*See* Respondent's Resp. in Opp. to Concepcion's Motions, p. 1 (July 15, 2025); Compl. ¶ 19.)

Appellant's embezzlement scheme against DiscoverFresh involved three (3) methods of stealing company funds: (i) fraudulently authorizing, directing and overseeing payments to NRS, a company owned by Appellant's wife, Tavarez, for recruitment and background check services that were never performed; (ii) paying payroll checks to "phantom" employees who did not perform work at DiscoverFresh; and (iii) making unauthorized increases in salaries and bonuses to various employees, including himself, the defendant Jeff Mahon, other DiscoverFresh employees, and "phantom" employees. (*See id*.; Compl. ¶ 2.)

Appellant's answer or other responsive pleading was due on April 8, 2022. (*See* Cert. of Serv. (Mar. 29, 2022).) No answer or responsive pleading was timely filed. (*See* Order, pp. 1-2 (Oct. 14, 2025); Entry of Default (Oct. 25, 2022).) On October 19, 2022, DiscoverFresh filed a Motion for Entry of Default against Respondent. (*See* Motion for Entry of Default (Oct. 19, 2022).) An Order for Entry

[2] Because Appellant failed to timely respond to DiscoverFresh's Complaint and the circuit court granted Respondent's Motion for Entry of Default and Motion for Default Judgment against Appellant, the Statement of Facts includes some of the relevant allegations contained in the Complaint, which are deemed admitted as a matter of law due to Appellant's default.

of Default against Respondent was issued on October 25, 2022. (*See* Order for Entry of Default against Respondent (Oct. 25, 2022).)

On February 9, 2023, DiscoverFresh filed a Motion for Default Judgment for a sum certain amount of $6,590,204.26 against Appellant pursuant to SCRCP 55(b)(1). (*See* Mot. for Default Judt. (Feb. 9, 2023).) An Amended Affidavit of Damages correcting a scrivener's error was filed on February 13, 2023. (*See* Am. Affid. Damages (Feb. 13, 2023).) The court declined to sign the proposed order on this motion on February 14, 2023, pending resolution of claims against the defendant Mahon, the only defendant to appear in the instant litigation. (*See* Resp.'s Resp. in Opp. to Concepcion's Motions, at p. 3.)

Appellant was personally served with the Summons and Complaint, Motion for Entry of Default, Order for Entry of Default, Amended Affidavit of Damages, and Motion for Default Judgment by Deputy Sheriff D. Prophete of the City and State of New York, at the Metropolitan Detention Center in Brooklyn, NY ("MDC Brooklyn") on April 24, 2023. (Certificate of Service (Apr. 24, 2023) (filed Apr. 23, 2025).)

On October 10, 2023, Appellant, Tavarez, and ten (10) other individuals were indicted in the United States District Court for the District of South Carolina for conspiracy to commit bank and wire fraud and conspiracy to commit money laundering of over five million dollars arising from the same fraud and embezzlement scheme that is the subject of the instant litigation. (*See United States of America v. Concepcion, et al.*, CR. No. 6:23-cr-00818, Indictment (Oct. 10, 2023).)

Approximately seven (7) months after the Entry of Default was entered against Appellant, on October 23, 2023, Appellant filed a *pro se* Motion to Stay this action. (*See* Mot. to Stay (Oct. 23, 2023).) No hearing was requested, and no order was entered on this motion. (*See id.*) On December 21, 2023, Appellant mailed a letter to the Clerk of Court essentially making a "notice of *pro se* appearance" in this action. (*See* Ltr. to Ct. (Dec.21, 2023).) The letter acknowledges Appellant was

notified of the Order for Entry of Default and intended the Motion to Stay filed on October 23, 2023 to also serve as a Motion to Set Aside Entry of Default. (*See id.*)

DiscoverFresh's claims against the defendant Mahon, the only defendant to appear in the action, were settled and a Stipulation of Dismissal for DiscoverFresh's claim against the defendant Mahon was filed on August 30, 2024. (*See* Stip. Dismissal (Aug. 30, 2024).)

On September 19, 2024, DiscoverFresh filed a renewed Motion for Default Judgment for the sum certain amount of $6,523,537.64 against Appellant and the defendants Tavarez and NRS pursuant to SCRCP 55(b)(1), as DiscoverFresh's claims against the defendant Mahon had been settled. (*See* Mot. Default Jdt. (Sept. 19, 2024).)

An Order for Final Default Judgment was issued on October 2, 2024. (*See* Order (Oct. 2, 2024).) In October 2024, Appellant was transferred from federal prison in New York to the Spartanburg County Detention Center for the prosecution of federal criminal charges against him related to the fraud scheme that is the subject of the instant civil litigation where he was appointed criminal counsel. (*See U.S. v. Concepcion*, 6:23-cr-818 (D.S.C.), Indictment (Oct. 10, 2023); Arrest Warrant (Oct. 15, 2024); Text Order (Oct. 15, 2024).) On June 9, 2025, Appellant pled guilty to the federal criminal charges against him related to the fraud scheme that is the subject of the instant civil litigation, but the amount of monetary damages is still being litigated. (*See* Guilty Plea (June 9, 2025).)

STANDARD OF REVIEW

Standard of Review for Motion for a Stay of Proceedings

Counsel for Respondent has not found the standard of review for denial of motion to stay proceedings; however, generally the appellate standard is an abuse of discretion. While not on all fours with this case, as it dealt with the denial of a motion to stay pending arbitration, the Court of Appeals held that the standard of review for reviewing denials of a motion to stay proceedings pending arbitration appears to be within the discretion of the trial court with deference given to the findings of the trial judge. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-655, 521 S.E.2d 749 (Ct. App. 1999) (affirming the circuit court's denial of a motion to stay pending arbitration). Notably, the South Carolina Supreme Court has reversed the circuit court's granting of a stay in post-conviction relief proceedings of inmate who was incompetent and held that a post-conviction relief action ("PCF") constituted a civil action and "[t]herefore, the constitutional protections that forbid a criminal trial of a mentally incompetent defendant do not apply" and the action should proceed. *Council v.* Catoe, 359 S.C. 120, 125, 130, 597 S.E.2d 782 (2004) (holding the prisoner's incompetency was not sufficient to warrant staying the PCR hearings).

Standard of Review for Motion to Set Aside Entry of Default and Default Judgment

"The decision whether to set aside entry of default or a default judgment lies solely within the sounds discretion of the trial [court]." *Graham v. Full Logistics, Inc. (In re Trustgard Ins. Co.)*, 442 S.C. 485, 511 (2023) (quoting *Roberson v. S. Fin. of S.C, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005)); *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 503, 510, 602 S.E.2d 99, 102-03 (Ct. App. 2004). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Graham*, 442 S.C. at 511 (quoting *Roberson*, 365 S.C. at 9, 615 S.E.2d at 114). "'An abuse of discretion in setting aside a default judgment occurs when' some error of law controlled the court issuing the order 'or when the order, based upon factual, as

distinguished from legal conclusions,' lacks evidentiary support." *Id.* (quoting *Roberson*, 365 S.C. at 9, 615 S.E.2d at 114; *In re Est. of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)) (citing *Fassett v. Evans*, 364 S.C. 42, 49, 610 S.E.2d 841, 845 (Ct. App. 2005) ("[T]he power to set aside a default judgment is addressed to the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion."); *Stark Truss Co., Inc. v. Superior Constr. Corp.*, 360 S.C. 503, 510, 602 S.E.2d 99, 102-103 (Ct. App. 2004) ("In reviewing the court's exercise of discretion, the issue before the appellate court is not whether it believes good cause existed to set aside the default, 'but rather, whether the [circuit court's] determination is supportable by the evidence and not controlled by an error of law.'" (quoting *Pilgrim v. Miller*, 350 S.C. 637, 641, 567 S.E.2d 527, 528 (Ct. App. 2002))).

Standard of Review for Denial of Motion to Dismiss

"Although a pre-trial motion to dismiss based on lack of personal jurisdiction is not usually immediately appealable, it can be considered when other appealable issues are presented to an appellate court." *QZO, Inc. v. Moyer*, 358 S.C. 246, 252-53, 594 S.E.2d 541 (Ct. App. 2004) (holding the circuit court did not err in denying defendant's motion to dismiss for lack of personal jurisdiction) (citations omitted). "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Grimsley v. S.C. Law Enf't Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)).

Standard of Review for Denial of Motion for Appointment of Guardian ad Litem

The denial of a motion to appoint a guardian ad litem for a prisoner is within the sound discretion of the trial judge under Rule 17, SCRCP and is reviewed for an abuse of discretion. *Gossett v. Gilliam*, 317 S.C. 82, 84, 452 S.E.2d 6 (Ct. App. 1995). Rule 17(c) provides in relevant part that if a party is imprisoned in this State, 'the court may, in its discretion appoint a guardian ad litem or order

[the party] to be brought personally to the trial to testify in accordance with Rule 43(a).'" *Id.* (quoting Rule 17(c), SCRCP). "Rule 17(d)(4) provides: 'The guardian ad litem for an imprisoned person shall be appointed upon application of such person or of a relative or friend.'" *Id.* (quoting Rule 17(d)(4), SCRCP). "Also Rule 17(d)(6) states that if 'no application for appointment of a guardian ad litem be made by or on behalf of minor, imprisoned or incompetent party within thirty (30) days after service of the summons upon such party, then the guardian ad litem may be appointed upon application of any party to the action....'" *Id.* (quoting Rule 17(d)(6), SCRCP) (holding because the defendant was represented by counsel, there was no need to appoint a guardian ad litem).

ARGUMENT

I. The Circuit Court Correctly Denied Appellant's Motions to Stay.

The circuit court's denial of Appellant's motions to stay proceedings was not an abuse of discretion and they were properly denied.

Appellant attempts to hinge his appeal on the fact that the motions to stay were not ruled upon in a timely manner, but fails to acknowledge the substantial time that passed after he was placed on notice of the complaint, entry of default, and motion for default judgment during which time he did not request a hearing, nor did he or a family member request the appointment of a guardian ad litem.

The timeline is critical to analyzing whether the circuit court abused its discretion. Namely, that Appellant was served with the Summons and Verified Complaint along with other injunctive and attachment motions on March 9, 2022. (*See* Certificate of Service (Mar. 29, 2022). Despite having his wife Tavarez file a Motion to Stay on his behalf showing he had been served and in contact with multiple attorneys, as of June 7, 2022, neither Appellant, nor his wife or any other person requested a hearing or moved to appoint him a guardian ad litem. (*See* Motion to Stay (June 7, 2023).)

Over ten (10) months later, Appellant was served on April 24, 2023 with the Entry of Default filed on October 25, 2022 and original Motion for Default Judgment filed on February 9, 2023, which the court declined to grant until after DiscoverFresh resolved its claims with the defendant Mahon, which did not happen until August 30, 2024, over a year and a half later. (*See* Certificate of Service (Apr. 24, 2023); Stipulation of Dismissal (Aug. 30, 2024).) Over five (5) months later, Appellant was indicted for federal criminal charges relating to the fraud on October 10, 2023. On October 23, 2023, Appellant filed another Motion to Stay in which he still did not request the appointment of a guardian ad litem or request a hearing. (*See* Motion to Stay (Oct. 23, 2023).)

On September 19, 2024, almost two (2) years after Appellant was served with the Entry of Default and original Motion for Default Judgment, DiscoverFresh renewed its Motion for Default Judgment. (*See* Renewed Motion for Default Jdt. (Sept. 19, 2024).) The first order granting default judgment was issued without a hearing on October 2, 2024. (*See* Order (Oct. 2, 2024).)

Indeed, Appellant did not request the appointment of a guardian ad litem until April 1, 2025, three (3) years after Appellant was first served with the Summons and Verified Complaint (on March 29, 2022), and two years after Appellant was served with the Entry of Default (April 24, 2023), and one and a half years after Appellant was indicted on federal criminal charges in South Carolina (October 10, 2023), and almost six (6) months after Appellant was transferred to prison in South Carolina and appointed counsel in his criminal matter in October 2024. (*See* Cert. of Serv. (Mar. 29, 2022); Cert. of Serv. (dated Apr. 24, 2023) (filed Apr. 23, 2025); Indictment (Oct. 10, 2023); Text Order Appointing Counsel (Oct. 15, 2024).)

Moreover, Appellant pled guilty to the federal criminal on June 9, 2025, four (4) months prior to Judge Gravely holding a hearing on the motions presently on appeal where Appellant appeared in person. (*See* Guilty Plea (June 9, 2025); Order (Oct. 14, 2025).)

Appellant cannot claim that he was deprived of time necessary to obtain a guardian ad litem or an attorney or that he was denied access to the court, especially given his demonstrated access to legal counsel, family members, counsel for defendant Mahon, and continued failure to request a hearing on his motions to stay, given the significant amounts of time that passed prior to the circuit court's hearing on October 6, 2025 on the motions currently on appeal, which Appellant appeared for in person.

The circuit court was well within its discretion to deny Appellant's motions to stay under those circumstances and the years that had passed without Appellant, Appellant's family members, or a third-party requesting a hearing on Appellant's motions or a guardian ad litem. The circuit court has discretion on whether to grant a motion to stay and deference is given to the findings of the trial judge. *See Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-655, 521 S.E.2d 749 (Ct. App. 1999) (affirming the circuit court's denial of a motion to stay pending arbitration). The South Carolina Supreme Court has held that indefinite stays for an inmate are improper and there are no constitutional protections that apply to a criminal defendant in a civil proceeding. *Council v.* Catoe, 359 S.C. 120, 125, 130, 597 S.E.2d 782 (2004) (reversing the circuit court's granting a stay in post-conviction relief proceedings of inmate who was incompetent and holding the PCR action should proceed).

In the instant case, a stay may have been warranted where a defendant did not have sufficient time to obtain legal representation or a guardian ad litem. However, that is not the case in the instant litigation. As Judge Gravely noted in his order, Appellant failed to establish a basis for a Stay of proceedings and cited no authority for same. (*See* Order, p. 2 (Oct. 14, 2025).) Appellant demonstrated multiple times that he had access to the court, attorneys, and time to request a guardian ad litem or obtain counsel and failed to do same. "[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court

will not hold a layman to any lesser standard than is applied to an attorney." *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (alteration by court) (quoting *Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988)) (affirming circuit court's order of default judgment against a defendant even where the defendant claims ignorance or mistake). Therefore, the circuit court's order denying Appellant's motions to stay should be affirmed.

II. The Circuit Court Correctly Denied Appellant's Motion to Vacate and Set Aside Default Judgment.

The decision whether to set aside entry of default or a default judgment lies solely within the sound discretion of the trial [court]." *Graham v. Full Logistics, Inc. (In re Trustgard Ins. Co.)*, 442 S.C. 485, 511 (2023) (quoting *Roberson v. S. Fin. of S.C, Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005)); *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 503, 510, 602 S.E.2d 99, 102-03 (Ct. App. 2004). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Graham*, 442 S.C. at 511 (quoting *Roberson*, 365 S.C. at 9, 615 S.E.2d at 114). "'An abuse of discretion in setting aside a default judgment occurs when' some error of law controlled the court issuing the order 'or when the order, based upon factual, as distinguished from legal conclusions,' lacks evidentiary support." *Id.* (quoting *Roberson*, 365 S.C. at 9, 615 S.E.2d at 114; *In re Est. of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)) (citing *Fassett v. Evans*, 364 S.C. 42, 49, 610 S.E.2d 841, 845 (Ct. App. 2005) ("[T]he power to set aside a default judgment is addressed to the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion."); *Stark Truss Co., Inc. v. Superior Constr. Corp.*, 360 S.C. 503, 510, 602 S.E.2d 99, 102-103 (Ct. App. 2004) ("In reviewing the court's exercise of discretion, the issue before the appellate court is not whether it believes good cause existed to set aside the default, 'but rather, whether the [circuit

court's] determination is supportable by the evidence and not controlled by an error of law.'" (quoting *Pilgrim v. Miller*, 350 S.C. 637, 641, 567 S.E.2d 527, 528 (Ct. App. 2002))).

"Rule 55(a) [, SCRCP] provides that when a party fails to respond to a complaint, the clerk shall record an entry of default." *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. "However, Rule 55(c) [, SCRCP,] permits a party to move to set aside the entry of default." *Id.* "The standard for granting relief from an entry of default under Rule 55(c) is mere 'good cause.'" *Id.* "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Id.* "**[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney**." *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (alteration by court) (emphasis added) (quoting *Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988))). "The [circuit] court need not make specific findings of fact for each [*Wham*] factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause." *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888.

In contrast, "[o]nce a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP." *Graham v. Full Logistics, Inc. (In re Trustgard Ins. Co.)*, 442 S.C. 485, 510 (2023) (quoting *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888). "The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the 'good cause' standard established in Rule 55(c)." *Id.* (quoting *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888) "[R]elief from default judgment under Rule 60(b), SCRCP, 'requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party.'" *Id.* (quoting *ITC Com. Funding, LLC V. Crerar*, 393 S.C. 487, 494, 713 S.E.2d 335, 339 (Ct. App. 2011)); *see also Hill v. Dotts*, 345 S.C. 304, 309, 547 S.E.2d

894, 897 (Ct. App. 2001) ("In determining whether a default judgment should be set aside under Rule 60(b)(1), '[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant.'" (alterations by court) (quoting *N.H. Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993)). "The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default." *Graham v. Full Logistics, Inc. (In re Trustgard Ins. Co.)*, 442 S.C. 485, 510 (2023) (quoting *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888-89).

In the instant case, the circuit court correctly found, and Appellant does not contest, that Appellant was properly served with the Summons and Complaint on March 9, 2022, and that Appellant "failed to file an Answer for over seven (7) months before Default was entered against him." (*See* Order, p. 2 (Oct. 14, 2025); Certificate of Service (Mar. 29, 2022); Order for Entry of Default (Oct. 19, 2022).) The circuit court also noted that "he had retained an attorney to file an Answer but the attorney failed to do so" and acknowledged Appellant's representation agreement with his counsel. (*See* Order at pp. 2-3 (Oct. 14, 2025).) The circuit court correctly found that these circumstances "d[id] not rise to the level necessary to set aside default judgment." (*Id.* at p. 3.)

The circuit court further found that because default judgment had been entered against Appellant, it may only be set aside according to the provisions of Rule 60(b), SCRCP, not Rule 55(c), SCRCP. In applying Rule 60(b), SCRCP, the circuit court held that Appellant "failed to establish 'mistake, inadvertence, surprise or excusable neglect.'" *Id.* (quoting Rule 60(b) (1-5), SCRCP).) In so holding, the circuit court found that Appellant's argument that his incarceration, limited access to the law library, and telephone fell within the categories of Rule 60(b), and that Appellant "clearly had access to the Court system as shown by his filing numerous motions over more than a 2-year period." (*Id.*)

The circuit court did not err in upholding the order of default judgment. As explained at length *supra*, the timeline is critical to analyzing whether the circuit court abused its discretion. Namely, that Appellant was served with the Summons and Verified Complaint along with other injunctive and attachment motions on March 9, 2022. (*See* Certificate of Service (Mar. 29, 2022). Appellant failed to file a timely Answer. Moreover, despite having his wife, Tavarez, file a Motion to Stay on his behalf showing he had been served and in contact with multiple attorneys, as of June 7, 2022, neither Appellant, nor his wife or any other person requested a hearing or moved to appoint him a guardian ad litem. (*See* Motion to Stay (June 7, 2023).)

Over ten (10) months later, Appellant was served on April 24, 2023 with the Entry of Default filed on October 25, 2022 and original Motion for Default Judgment filed on February 9, 2023, which the court declined to grant until after DiscoverFresh resolved its claims with the defendant Mahon, as there were claims for joint and several liability. (*See* Certificate of Service (Apr. 24, 2023); Stipulation of Dismissal (Aug. 30, 2024).) Over five (5) months later, Appellant was indicted for federal criminal charges relating to the fraud on October 10, 2023. On October 23, 2023, Appellant filed another Motion to Stay in which he still did not request the appointment of a guardian ad litem or request a hearing. (*See* Motion to Stay (Oct. 23, 2023).)

On September 19, 2024, almost two (2) years after Appellant was served with the Entry of Default and original Motion for Default Judgment, DiscoverFresh renewed its Motion for Default Judgment. (*See* Renewed Motion for Default Jdt. (Sept. 19, 2024).) The order granting default judgment was issued without a hearing on October 2, 2024. (*See* Order (Oct. 2, 2024).)

Indeed, Appellant did not request the appointment of a guardian ad litem until April 1, 2025, three (3) years after Appellant was first served with the Summons and Verified Complaint (on March 29, 2022), and two years after Appellant was served with the Entry of Default (April 24, 2023), and one and a half years after Appellant was indicted on federal criminal charges in

South Carolina (October 10, 2023), and almost six (6) months after Appellant was transferred to prison in South Carolina and appointed counsel in his criminal matter in October 2024. (*See* Cert. of Serv. (Mar. 29, 2022); Cert. of Serv. (dated Apr. 24, 2023) (filed Apr. 23, 2025); Indictment (Oct. 10, 2023); Text Order Appointing Counsel (Oct. 15, 2024).)

Moreover, Appellant pled guilty to the federal criminal on June 9, 2025, four (4) months prior to Judge Gravely holding a hearing on October 6, 2025 on the motions presently on appeal where Appellant appeared in person. (*See* Guilty Plea (June 9, 2025); Order (Oct. 14, 2025).) Appellant was represented by counsel in his criminal case in the Southern District of New York, as well as in his federal criminal case in South Carolina.

The circuit court did not err in holding that Appellant had failed to establish "mistake, inadvertence, surprise, or excusable neglect" as required under Rule 60(b), SCRCP, as Appellant did not demand a hearing on any of his pending motions, nor did he, his family members, or third-parties request the appointment of a guardian ad litem until April 1, 2025, three (3) years after Appellant was first served with the Complaint and almost two (2) years after he was served with the Entry of Default and original motion for default judgment. For those same reasons, the circuit court did not err in holding that Appellant failed to establish "good cause" to set aside entry of default, as required under Rule 55(c), even though the more stringent standard applied. Therefore, the circuit court's order affirming the order of default judgment and denying Appellant's motion to set aside default judgment should be affirmed.

Furthermore, DiscoverFresh disagrees that the fact that the circuit court issued its initial order granting default judgment without a hearing or Appellant present constitutes reversible error. In the instant matter, Appellant was properly served with the Complaint, Entry of Default, and Motion for Default Judgment. DiscoverFresh's Motion for Default Judgment was based upon a liquidated amount and sum certain and supported by an affidavit. (*See* Cert. of Service (Mar. 29,

2022); Cert. of Service (April 24, 2023) (filed April 23, 2025); Motion for Default Judgment (Sept. 19, 2024).)

Pursuant to Rule 55(b)(1), SCRCP, "the judge, upon motion of application of the party seeking default, and upon affidavit of the amount due, shall enter judgment for that amount and costs." Rule 4, SCRCP only requires service of the summons and complaint.

To the extent a hearing was required for the final order of default judgment against Appellant, the circuit court remedied any potential omission of the original order by holding a hearing with Appellant present in which the circuit court found that "good cause" did not exist to set aside entry of default, and Appellant had failed to establish the factors necessary to set aside default judgment under Rule 55(c), SCRCP and Rule 60(b)(1-5), SCRCP respectively.

Appellant cannot argue his lack of familiarity with legal proceedings, lack of legal counsel, or that he had insufficient time to retain legal counsel or appoint a guardian ad litem as a defense. *See Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001). Moreover, for those same reasons, Appellant failed to establish "a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party.'" *Id.* (quoting *ITC Com. Funding, LLC V. Crerar*, 393 S.C. 487, 494, 713 S.E.2d 335, 339 (Ct. App. 2011)); *see also Hill*, 345 S.C. at 309, 547 S.E.2d at 897 ("In determining whether a default judgment should be set aside under Rule 60(b)(1), '[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant.'" (alterations by court) (quoting *N.H. Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993)).

Indeed, Appellant failed to act promptly and, given the fact that he already plead guilty to the federal criminal charge arising from the fraud, he did not have a meritorious defense. DiscoverFresh would further submit that it would suffer tremendous prejudice at having to litigate

this case against Appellant, given that the Verified Complaint was filed in January 18, 2022, DiscoverFresh has incurred significant expenses to date in litigating this case over the past four and a half years, and because of the millions in fraud that were embezzled by Appellant and others and other factors, DiscoverFresh is no longer in operation, so future litigation expenses would be borne by its owner individually. Appellant's effort to set aside default judgment and further litigate this case flies in the face of his guilty plea admitting to the fraud.

For these reasons, the circuit court's order denying Appellant's Motion to Set Aside Default Judgment and the Entry of Default and affirming the Entry of Default and Order of Default Judgment should be upheld.

III. The Circuit Court Did Not Err in Denying Appellant's Motion to Dismiss.

Ordinarily, denials of a motion to dismiss are interlocutory and not subject to appeal. However, to the extent the Court finds this issue is preserved on appeal, which DiscoverFresh denies, the circuit court correctly denied Appellant's motion to dismiss. The circuit court noted that Appellant's motion to dismiss was based on alleged fraud committed by DiscoverFresh in its deposition on July 9, 2024 and his incarceration in New York and South Carolina. The circuit court correctly noted that Appellant's motion to dismiss was untimely, as he was already held in default, and further noted that the deposition in question occurred after Appellant was held in default. (*See* Order, p. 3 (Oct. 14, 2025).) The circuit court correctly held that Appellant "fails to establish a basis for dismissing the action, especially in light of the Court's ruling validating the Default Judgment against him." (*See id.*) DiscoverFresh agrees and respectfully requests the circuit court's order be affirmed.

IV. The Circuit Court Did Not Err in Denying Appellant's Motion for Appointment of Guardian Ad Litem.

Finally, the circuit court did not err in denying Appellant's motion for appointment of a guardian ad litem. The denial of a motion to appoint a guardian ad litem for an incarcerated person

is within the sound discretion of the trial judge under Rule 17, SCRCP and is reviewed for an abuse of discretion. *Gossett v. Gilliam*, 317 S.C. 82, 84, 452 S.E.2d 6 (Ct. App. 1995).

Rule 17(c) provides in relevant part that if a party is imprisoned outside the State, he shall appear by guardian ad litem, but if he is imprisoned in this State, 'the court may, in its discretion appoint a guardian ad litem or order [the party] to be brought personally to the trial to testify in accordance with Rule 43(a).'" *Id.* (quoting Rule 17(c), SCRCP). Rule 17(d)(4) outlines the mechanism through which an incarcerated person may be appointed a guardian ad litem and states, 'The guardian ad litem for an imprisoned person shall be appointed upon application of such person or of a relative or friend.'" *Id.* (quoting Rule 17(d)(4), SCRCP). "Also Rule 17(d)(6) states that if 'no application for appointment of a guardian ad litem be made by or on behalf of minor, imprisoned or incompetent party within thirty (30) days after service of the summons upon such party, then the guardian ad litem may be appointed upon application of any party to the action....'" *Id.* (quoting Rule 17(d)(6), SCRCP) (holding because the defendant was represented by counsel, there was no need to appoint a guardian ad litem).

As the circuit court correctly noted, "Rule 17, SCRCP does not impose a mandatory requirement for the appointment of a GAL" for imprisoned persons. (*See* Order, p. 4 (Oct. 14, 2025).) "While the language of Rule 17(c) does not expressly so provide, it is clear from applicable case law that the right to appearance by guardian ad litem is not absolute." (*Id.* (quoting *McCuen v. McCuen*, 348 S.C. 179, 182 (2002)).) In so holding, the circuit court correctly noted the "distinction between a party that is limited by infancy or mental deficiency and the 'physical restraint of imprisonment,' which allows for an imprisoned party to 'waive the appointment of a guardian ad litem.'" (*Id.* (quoting *McCuen*, 348 S.C. at 182; *In the Matter of Bishop*, 272 S.C. 307, 309 (1979)).)

"The possibility of a waiver by an imprisoned party is not limited by the use of the word 'shall' in SCRCP 17." (*Id.* (quoting *McCuen*, 348 S.C. at 184) (citing *Green v. Boney* (noting the Supreme Court's holding that "a defendant in a civil suit waived his right to appointment of a GAL by filing pleadings with the Court and failing to raise the appointment of GAL until the case was called to trial").)

In the instant case, the circuit court correctly found that Appellant "was not restrained from availing himself of the Court system as evidenced by his filing of a Motion to Stay prior to Default Judgment, and two additional Motions before filing his Motion for Appointment of GAL thirty-seven months after he had been served with the Summons and Complaint and six months after final judgment had been entered against him." (*Id.* at p. 5.) The circuit court did not err in holding Appellant waived his right to the appointment of a GAL during his incarceration in New York and subsequently in South Carolina. (*Id.*) The circuit court noted that no motion was filed by Appellant or anyone else until after default judgment was entered. (*Id.*) Moreover, Appellant's request for a guardian ad litem was after he was incarcerated in the State of South Carolina and had plead guilty on June 9, 2025 to the related federal criminal charges brought against him.

Therefore, the circuit court's order denying Appellant's motion to appoint a guardian ad litem should be affirmed, and the circuit court did not abuse its discretion in denying same.

CONCLUSION

The circuit court did not abuse its discretion and correctly denied Appellant's motions to stay and vacate default judgment, motion for appointment of guardian ad litem, and motion to set aside default judgment. The circuit court further did not abuse its discretion and correctly affirmed the entry of default and order of default judgment against Appellant. Further, the circuit court did not err in denying Appellant's motion to reconsider.

Appellant's claims that somehow he was denied his day in court or entitled to relief are

demonstrably false given the extensive periods of time that lapsed in the instant case without Appellant requesting a hearing or timely moving for the appointment of a guardian ad litem through himself, a family member or any other person. Appellant's access to the court and others is demonstrable from the record.

Therefore, DiscoverFresh respectfully requests the Court affirm the circuit court's orders for the reasons stated herein and any ground(s) appearing in the Record on Appeal, pursuant to SCAR 220(c).

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Respectfully submitted,

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