

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 20100179486
C.A. No. 2009-CP-04-2130

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S.C. Supreme Court

Jay and Meri Guerry, and Silo Oaks, LLC,.....Plaintiffs,

v.

James Agnew and Virginia Agnew d/b/a Agnew Arabians,.....Petitioners,

v.

Guerry and Guerry, LLC, Marsha Wright, The Marsha Wright Group, LLC d/b/a Wright
Group Realty, Century 21 Bob Capes Realtors, and Century 21, ...Third-Party Defendants,

Of Whom, Century 21 Real Estate, LLC is,.....Respondent.

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STATEMENT OF ISSUES

Appellants moved pursuant to Rule 55 for entry of default; Appellants' motion did not address Rule 6. Respondent opposed entry of default, filed its Answer, and also moved to dismiss the case on the merits. The Circuit Court denied Appellants' motion for entry of default; the Circuit Court's Order did not address Rule 6. The Circuit Court later dismissed the case on the merits. Appellants then filed their notice of appeal, which addresses only the denial of the motion to enter default. Appellants did not appeal the Circuit Court's dismissal on the merits.

1. Is this relatively routine case – in which the Court of Appeals found multiple grounds upon which to affirm the Circuit Court, and in which Respondent has been separately dismissed on the merits – one of the rare cases where there are special and important reasons when the Supreme Court should grant review?
2. Because the unappealed Order of the Circuit Court dismissing this case as to Respondent is now the law of the case, should certiorari be denied because any further appeal is moot?
3. Where Respondent demonstrated “good cause,” did the Court of Appeals correctly affirm the Circuit Court in finding no abuse of its discretion in the denial of Appellants' motion to enter default against Respondent?
4. Where neither Appellants' motion nor the Circuit Court's Order addressed Rule 6(b), and Appellants did not seek rehearing, did Appellants preserve any issue concerning Rule 6(b) for appeal?

5. Given that the standard for “good cause” under Rule 6(b) is identical to the standard under Rule 55, to the extent the Circuit Court may have erred in failing to conduct a good cause analysis under Rule 6(b), was that error harmless?

STATEMENT OF THE CASE

On or about September 14, 2009, Appellants James Agnew and Virginia Agnew d/b/a Agnew Arabians (“Appellants”) filed a Summons and Amended Third-Party Complaint (“Third-Party Complaint”; R. pp. 24-67) in Circuit Court in Anderson County, South Carolina. The Third-Party Complaint did not correctly identify Respondent (Century 21 Real Estate, LLC), but instead listed “Century 21” in the caption. The Third-Party Complaint was served on the registered agent for Respondent on or about October 2, 2009. (Affidavit of Service; R. pp. 199-200)

After reviewing the Third-Party Complaint, Respondent saw no allegations of wrongdoing set forth against it and confirmed it had no relationship with any of the parties to the lawsuit except its franchisee, Bob Capes Realty, Inc. (Affidavit of Iuliano ¶ 10; R. p. 133; Affidavit of Gladdis ¶ 6; R. p. 184) Additionally, Respondent confirmed internally that it had no knowledge of or involvement in any of the facts alleged in the Third-Party Complaint. (Affidavit of Iuliano ¶ 10; R. p. 133; Affidavit of Gladdis ¶ 6; R. p. 184) Believing it had been served in error, Respondent sent a letter to counsel for the Appellants, requesting that it be dismissed from the lawsuit. (Nov. 19, 2009 Letter; R. p. 131) Without responding to the letter, Appellants filed a motion to enter default on December 9, 2009. (Motion to Enter Default; R. pp. 68-70) Respondent did not receive this motion until approximately December 16, 2009. (Affidavit of Iuliano ¶ 17; R. p. 134)

On December 29, 2009, Respondent filed its Memorandum in Opposition to the Motion to Enter Default (which fully briefed the issue of “good cause”) (R. pp. 79-84); its Answer to the Third-Party Complaint (R. pp. 71-78); a Motion to Dismiss the Third-

Party Complaint on the merits (R. pp. 85-86); and a Memorandum in Support of its Motion to Dismiss (R. pp. 87-105).

Appellants did not move to strike the Answer filed by Respondent, which has remained on file with the Anderson County Clerk.

A hearing on Appellants' motion to enter default was held on May 12, 2010. At the hearing, the Circuit Court denied Appellants' motion and, therefore, treated Respondent's Answer to the Third-Party Complaint as timely. The Circuit Court entered an Order on May 24, 2010, indicating only that Appellants' motion for entry of default was denied. (May 24, 2010 Order; R. p. 6) The Circuit Court's Order made no reference to Rule 6 or to the timeliness of Respondent's Answer. Appellants did not move to alter or amend this Order to seek any formal ruling under Rule 6. Appellants never moved to strike Respondent's Answer.

A hearing on Respondent's motion to dismiss was held on July 13, 2010. By Order dated September 30, 2010, the Court granted the motion to dismiss, finding that the Third-Party Complaint failed to state facts sufficient to constitute a cause of action against Respondent. (Sept. 30, 2010 Order; R. pp. 7-21) On October 14, 2010, Appellants filed a Motion for Reconsideration of the Order granting Respondent's motion to dismiss. (Motion for Reconsideration; R. pp. 112-15) By Order dated November 22, 2010, that motion was denied. (Nov. 22, 2010 Order; R. pp. 22-23)

Appellants served their notice of appeal on December 3, 2010. The notice was specifically limited to the Circuit Court's May 24, 2010 Order denying Appellants' motion to enter default. Appellants did not appeal the Circuit Court's dismissal of the case on the merits.

The Court of Appeals affirmed the Circuit Court by Unpublished Opinion No. 2012-UP-182. Appellants filed Petition for Rehearing on March 22, 2012. The Petition for Rehearing was denied by Order dated May 4, 2012. Appellants now seek a writ of certiorari to review the final decision of the Court of Appeals.

STATEMENT OF FACTS

I. Respondent Was Not Properly Identified in the Third-Party Complaint, and Had No Involvement in Any of the Matters Alleged in the Third-Party Complaint.

The dispute at the core of this lawsuit relates to claims that certain parties conspired to ensure that two parcels of real estate would be foreclosed upon so that Third-Party Defendant Guerry and Guerry, LLC could purchase those parcels at foreclosure sales. As the Circuit Court held in its unappealed Order dismissing the claim against Respondent, the Third-Party Complaint fails to set forth any allegations of misconduct against Respondent, and fails to set forth any allegations that Respondent had knowledge of, or involvement in, any alleged misconduct on the part of any other party.

(Sept. 30, 2010 Order; R. pp. 7-21)

Respondent is a Delaware limited liability company with its principal place of business in Parsippany, New Jersey. (Affidavit of Iuliano ¶ 3; R. p. 132; Affidavit of Gladdis ¶ 3; R. p. 183) The legal name of the Respondent is Century 21 Real Estate, LLC. (Affidavit of Iuliano ¶¶ 2-3; R. p. 132; Affidavit of Gladdis ¶¶ 2-3; R. p. 183) Respondent is in the business of franchising residential and commercial real estate brokerages. Its franchisees establish independently owned and operated businesses throughout the United States. (Affidavit of Iuliano ¶ 4; R. p. 132) Respondent does not itself own, manage, or operate these franchised businesses. Instead, its franchisees

operate as independent contractors and do not serve as agents or employees of Respondent. (Affidavit of Iuliano ¶ 5; R. p. 132)

Notably, the Third-Party Complaint does not identify “Century 21 Real Estate, LLC” as a party in its caption, nor does it make any mention of or allegations regarding “Century 21 Real Estate, LLC.” Of the Third-Party Complaint’s 207 paragraphs, only two contain the words “Century 21” (Third-Party Complaint ¶¶ 110, 111; R. p. 39), and neither of them identifies Respondent by name. Notably, paragraph 110 of the Third-Party Complaint alleges that “Century 21” is organized in South Carolina; as stated above, Respondent is a Delaware entity. (Affidavit of Iuliano ¶ 3; R. p. 132; Affidavit of Gladdis ¶ 3; R. p. 183) In short, the Third-Party Complaint never specifically identifies or makes allegations of wrongdoing against “Century 21 Real Estate, LLC.” Appellants’ contention that Respondent was included within the Third-Party Complaint’s catch-all designation of all third-party defendants as “Wright” does nothing to lessen this confusion. Indeed, the attempt to adopt a completely unrelated name to refer to an entity never identified in the Complaint only added to the confusion and unfairness of the Third Party Complaint. (Third-Party Complaint ¶ 111; R. p. 39).

After the Third- Party Complaint was served on the registered agent for Respondent on or about October 2, 2009, it was referred to Respondent’s legal department for review. (Affidavit of Iuliano ¶¶ 7-8; R. p. 133; Affidavit of Gladdis ¶¶ 6-7; R. p. 184) As noted above, this review revealed no mention of Respondent, and no allegations of wrongdoing against it. The Third-Party Complaint appears to refer to a *South Carolina* entity as “Century 21,” and Respondent is a Delaware entity. Respondent confirmed that it had no relationship with – or knowledge of – any of the

parties to the lawsuit except its franchisee Third-Party Defendant Bob Capes Realty, Inc. a/k/a Century 21 Bob Capes Realtors (“Bob Capes Realtors”). (Affidavit of Iuliano ¶ 10; R. p. 133; Affidavit of Gladdis ¶ 6; R. p. 184) Respondent further confirmed it had no knowledge of or involvement in any of the facts alleged in the Third-Party Complaint. (Affidavit of Iuliano ¶ 10; R. p. 133; Affidavit of Gladdis ¶ 6; R. p. 184)

As the Circuit Court held in its unappealed Order dismissing Respondent, the Third-Party Complaint fails to set forth any allegations of misconduct against Respondent, fails to allege facts supporting the claim that Marsha Wright was Respondent’s “agent,” and generally fails to set forth any factual allegations that Appellants are entitled to any relief against Respondent. (Sept. 30, 2010 Order, p. 4; R. p. 10) Bob Capes Realtors is an independent contractor, and its only relationship with Respondent is an arm’s length contractual relationship set forth in the franchise agreement between the two entities. (Affidavit of Iuliano ¶ 13; R. p. 133; Franchise Agreement – Exhibit A to Affidavit of Iuliano; R. pp.135-80; Affidavit of Derrick ¶ 8; R. p. 208) Bob Capes Realtors is not and has never been an agent or affiliate of Respondent. (Affidavit of Iuliano ¶ 12; R. p. 133; Affidavit of Derrick ¶ 6; R. p. 207) Respondent has never had any relationship of any nature with Third-Party Defendants Marsha Wright, The Marsha Wright Realty Group, LLC d/b/a Wright Group Realty, or Guerry and Guerry, LLC. (Affidavit of Iuliano ¶ 14; R. p. 133) Respondent has never had any relationship with Plaintiffs Jay and Meri Guerry or Silo Oaks, LLC. (Affidavit of Iuliano ¶ 15; R. p. 133)

Because Respondent was not named in the Complaint and had no involvement with or knowledge of the matters alleged in the Complaint, Respondent believed the

Complaint had been directed to it in error. Respondent sent a letter to counsel for Appellants to explain this. (Affidavit of Iuliano ¶ 16; R. p. 133) Rather than clarify their confusing pleading, Appellants filed a motion to enter default against Respondent; Respondent received this motion on or about December 16, 2009. (Affidavit of Iuliano ¶ 17; R. p. 134; Affidavit of Gladdis ¶ 9; R. p. 184) Immediately upon receipt of a copy of the motion to enter default, Respondent took prompt steps to retain counsel in South Carolina to answer the Third-Party Complaint, to address the motion to enter default, and to move to dismiss. (Affidavit of Iuliano ¶ 18; R. p. 134; Affidavit of Gladdis ¶ 10; R. p. 184)

In its ruling on Respondent's motion to dismiss, the Circuit Court agreed with Respondent that the Complaint did not state any claims against Respondent. (Sept. 30, 2010 Order, p. 4; R. p. 10)

ARGUMENT

I. Summary of Argument

Appellants apparently concede that they have no valid claim against Respondent. The Circuit Court dismissed the Third-Party Complaint against Respondent for failure to state a claim, and Appellants never appealed that ruling. Despite this concession, Appellants still asked the Court of Appeals to reverse the Circuit Court's decision not to enter default against Respondent. Appellants' position was and is both unjust and illogical, and properly rejected by the Court of Appeals. For the reasons set forth below, there are no "special or important reasons" to justify the grant of a writ of certiorari in this case.

First and most simply, the unappealed Order dismissing the action as to Respondent is the law of the case. An order remanding this matter for further

consideration of the motion to enter default, or directing an entry of default, simply cannot coexist with that unappealed Order. Respondent has been dismissed from the case, and that fact renders this appeal moot.

That dismissal also underscores the injustice that would be entailed in an entry of default. Appellants' decision to appeal the denial of the motion to enter default, but not to appeal dismissal on the merits, is a clear acknowledgement that their only goal is to recover something by exploiting a technicality; they have no claim on the merits.

Second, the Court of Appeal's decision to affirm the Circuit Court's decision not to enter default was correct. The only relief sought by Appellants in the motion that was appealed was an entry of default. As the Court of Appeals indicated in its affirmance, the Circuit Court did not abuse its discretion in denying that motion. The Circuit Court applied the "good cause" standard to this motion, and Respondent's memorandum in the record before the Circuit Court contained clear evidence on each of the three factors that are included in that good cause analysis. The Circuit Court exercised sound discretion, based on evidence before it in the record, in finding good cause to refuse to enter default against Respondent and in treating Respondent's answer as timely.

Third, Appellants argued on appeal that, in addition to finding good cause under Rule 55(c), the Circuit Court should have conducted a separate analysis under Rule 6(b) before allowing Respondent's Answer as timely. However, Appellants failed to preserve any issue concerning Rule 6(b) for appeal. Their motion did not mention Rule 6(b), it was not addressed in the Circuit Court's Order, and Appellants did not move for reconsideration to ask the Court to address Rule 6(b). In addition, because Respondent

had actually filed an Answer and Appellants did not move to strike that filing, Rule 6(b) did not apply here.

Finally, even if Appellants' Rule 6(b) argument were preserved for appeal, the argument elevates form over substance. The "good cause" standard is identical, whether it is applied under the rubric of Rule 6(b) or Rule 55(c). Accordingly, any "error" in failing to conduct two identical analyses was harmless and the decision of the Circuit Court was correctly affirmed.

II. Appellants Did Not Appeal the Circuit Court's Dismissal of Respondent. That Dismissal Renders This Appeal Moot

On September 30, 2010, the Circuit Court entered an Order dismissing the Third-Party Complaint as to Respondent. (Sept. 30, 2010 Order; R. pp. 7-21) Appellants did not appeal this Order; their Notice of Appeal is expressly limited to the May 24, 2010 Order denying their motion for entry of default (May 24, 2010 Order; R. p. 6), and Appellants made no argument on appeal regarding the dismissal of their claims against Respondent.

The existence of this unappealed dismissal both renders any continued appeal futile as a matter of law, and demonstrates the fundamental injustice that would result from ruling for Appellants.

Legally, that unappealed Order of dismissal is the law of the case in this matter. It precludes entry of any sort of judgment against Respondent. It would be nonsensical to grant certiorari or remand this matter for further consideration of Appellants' motion to enter default against Respondent, when Respondent has already been dismissed. An entry of default against a party, and a dismissal in favor of that same party, could not logically coexist.

The following excerpt from APPELLATE PROCEDURE IN SOUTH CAROLINA leaves no doubt that the Order dismissing Respondent is the law of the case in this matter:

It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997). Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. *Id.* An unappealed order, right or wrong, is ordinarily the law of the case. *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000); *Resolution Trust Corp. v. Eagle Lake & Golf Condominiums*, 310 S.C. 473, 427 S.E.2d 646 (1993) (the trial judge's ruling is the law of the case since it has not been appealed); *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case).

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In the light of this clear precedent, Appellants' request that this Court grant certiorari to review the decision not to enter a default simply makes no sense. Any further appeal is moot, and certiorari should be denied. *See Daniels v. City of Goose Creek*, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993) (unappealed ruling that city lacked standing to enforce deed restriction rendered moot question of whether laches barred application of restriction, since appellate ruling on laches could not change lack of standing).

Denial of a writ of certiorari is also the just result. As the Circuit Court found in some detail in granting Respondent's motion to dismiss, Appellants utterly failed to identify any wrongdoing – or even any legal connection with any alleged wrongdoer – on the part of Respondent. Appellants' failure to appeal that Order effectively concedes this point. This means that reversal of the denial of the motion for entry of default would raise the specter of entry of judgment against an entity *that has been adjudged to have*

no liability. Such an inconsistent and fundamentally unfair result should not occur. See SCRCP 1 (the Rules “shall be construed to secure the just . . . determination of every action”).

III. The Evidence Fully Supports the Circuit Court’s Exercise of Discretion in Denying the Motion to Enter Default

A. The Circuit Court’s Order May Be Reversed Only for Abuse of Discretion.

“The decision whether to set aside an entry of default . . . lies solely within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear showing of an abuse of that discretion.” *Richardson v. P.V., Inc.*, 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009); *see also Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995) (court’s discretion in ruling on motion to set aside default will not be disturbed unless there is no evidence in the record to support that exercise).

B. Rule 55(c) Is Liberally Construed to Dispose of Cases on the Merits.

The only motion before the Circuit Court in the case below that was the subject of appeal was a motion to enter default filed by Appellants. In their briefs concerning this motion, both Appellants and Respondent agreed that the correct standard for review of this motion was the “good cause” standard set forth in Rule 55(c). (Respondent’s Memorandum in Opposition to Motion to Enter Default, p. 3; R. p. 81; Appellants’ Memorandum in Support of Default, p. 3; R. p. 108)

Importantly, it has been held that “Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits.” *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). The “good cause” standard to be applied

under Rule 55(c) is recognized to be a *less rigorous* standard than that to be applied for granting relief from a previously entered default judgment under Rule 60(b), SCRC. *Id.*

The South Carolina Supreme Court recently articulated the proper application of the Rule 55(c) good cause standard: “In deciding whether good cause exists, the trial court should consider the following factors: (1) the timing of the defendant’s motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted.” *Richardson v. P.V., Inc.*, 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009).

C. The Evidence Presented to the Circuit Court Fully Supports the Circuit Court’s Exercise of Discretion in Finding Good Cause to Deny the Motion to Enter Default.

Respondent’s Memorandum in Opposition to Motion to Enter Default discussed the three factors of the “good cause” standard in detail, and presented evidence to address each of these factors. Respondent demonstrated that the Circuit Court had good cause to exercise its discretion and deny the motion to enter default. (Respondent’s Memorandum in Opposition to Motion to Enter Default, pp. 3-5; R. pp. 81-83)

Timing. The first factor is typically stated as the timing of the motion for relief. In this case, Respondent never needed to move for relief because default was never entered. Instead, the evidence presented to the Circuit Court demonstrated that the Respondent took action to address the motion to enter default immediately after it received that motion. Although Appellants’ motion to enter default was filed on December 9, 2009, Respondent did not receive that motion until approximately December 16, 2009. (Affidavit of Iuliano ¶ 17; R. p. 134) Respondent promptly responded to that motion, and also filed its Answer, less than two weeks later, on December 29, 2009. (Affidavit of Iuliano ¶ 18; R. p. 134; Affidavit of Gladdis ¶ 10; R. p.

184; *see also* Respondent's Memorandum in Opposition to Motion to Enter Default (R. pp. 79-84); Respondent's Answer to Third-Party Complaint (R. pp. 71-78), both filed December 29, 2009). There is no evidence of any delay by the Respondent in seeking relief, and in fact Respondent filed its Answer with the Circuit Court before any default was ever entered, as Appellants concede: "In the current matter, no default entry was ever made." Initial Brief of Appellants p. 5. Respondent's promptness supports the Circuit Court's decision.

Meritorious Defense. The second factor in determining good cause under Rule 55(c) is whether or not the party has a meritorious defense. The evidence before the Circuit Court with respect to this factor is overwhelming. To begin with, the Third-Party Complaint itself is misleading and confusing. *It never provides the correct identity of the Respondent, referring only to "Century 21."*¹ *The Complaint then alleges "Century 21" is a South Carolina entity; Respondent is not. Then, the Third-Party Complaint mentions "Century 21" in only two of 207 paragraphs of the document.* (Third-Party Complaint; R. pp. 24-67) This failure to identify or make specific allegations regarding Respondent demonstrates that Respondent was likely to have a meritorious defense. *See Central Laborers' Pension, Welfare & Annuity Funds v. W.C. Beiser Concrete Co*, 2011 WL 1549226 (S.D. Ill. 2011) (finding good cause where defendant "did not know that he had been sued as a defendant in his individual capacity. This is perhaps best evidenced by the 16 page, operative **Complaint**, which only refers to

¹ A search of the online database maintained by the South Carolina Secretary of State (which is a generally available public record and thus subject to judicial notice) reveals no fewer than **108** entities that use "Century 21" in their names.

Beemer ‘individually’ three times and does so in an unnecessarily **confusing** manner.” (Emphasis in original; docket reference omitted)).

Appellants rely on an inconspicuous “definition” of the name of an unrelated party, “Wright,” to refer to all parties to claim an expanded set of allegations against Respondent. This purported definition of “Wright” to mean “Century 21 Real Estate, LLC” does not affect Respondent’s likelihood of success on the merits. First and foremost, the Third-Party Complaint *never mentions* “Century 21 Real Estate, LLC”; it refers only to “Century 21,” which it alleges to be a South Carolina entity. (Third-Party Complaint ¶ 110; R. p. 39) Second, many of the allegations regarding “Wright” plainly did not and could not apply to Respondent. For example, the Third-Party Complaint alleges that “Wright had previously been involved in business transactions with the Guerrys” (Third-Party Complaint, ¶ 114; R. p. 40), but Respondent had not been in any such transactions. The Third-Party Complaint alleges that “Wright knew or should have known of Plaintiffs’ Guerry’s intent not to contribute to Silo Oaks, LLC...” (Third-Party Complaint, ¶ 130; R. p. 44), but Respondent never had any relationship or contact with Wright, the Guerrys, or Silo Oaks, LLC. If anything, this blanket “lumping together” of parties, in passing, only served to make the Third-Party Complaint more confusing. It certainly violated the requirement of SCRCP 8(e) that each averment of a pleading be “simple, concise, and direct.” Under these circumstances, it is not difficult to see how Respondent could review the Third-Party Complaint and find no allegations of wrongdoing against it. The evidence before the Circuit Court included evidence that the Respondent made a careful review of the Third-Party Complaint and saw no allegations of wrongdoing as to Respondent.

The Third-Party Complaint was deceptive and deficient. It did not state a claim against Respondent, and this alone supports Respondent's argument that it has a meritorious defense and that there was good cause sufficient to justify the Circuit Court's refusal to enter default. Indeed, the Third-Party Complaint was ultimately dismissed by the Circuit Court precisely because it failed to state a claim. To reward the Appellants' use of such deceptive and defective pleadings by allowing entry of default against an innocent party certainly does not comply with the guidance that Rule 55(c) in particular and the Rules in general should be construed so as to promote justice. *See* SCRCP 1. As the Circuit Court aptly indicated at the hearing below, "...and even just the entry of default, it has to have good cause. This isn't a game of ambush and siege. I'm sorry. The old days are gone." (Transcript, p. 9, lines 4-7; R. p. 126, lines 4-7).

No Prejudice. The third factor to be considered in determining whether good cause has been shown under Rule 55(c) is the degree of prejudice, if any, to the party seeking to enter the default. *Appellants stipulated to the Circuit Court that there was no prejudice to them:*

Court: All right, so I'm going to ask you: What would be the prejudice to the [Appellants], except getting a free shot?

Counsel [for Appellants]: *Your Honor, I would concur. I cannot show prejudice.*

Court: Well, then, . . . I'm going to deny your motion for entry of [default] judgment and permit [Respondent] to answer."

(Transcript p. 9, lines 14-21 (emphasis added); R. p. 126, lines 14-21).

In this case, Respondent presented evidence in the record before the Circuit Court to support each of the factors bearing on good cause under Rule 55(c). The Circuit Court made clear on the record that it was analyzing the issue under the good cause standard:

“[E]ven just the entry of default, it has to have good cause.” (Transcript p. 9 lines 4-5; R. p. 126, lines 4-5) Indeed, Appellants present as their first issue on appeal whether the Circuit Court “err[ed] in it application of Rule 55(c) ... to the Motion to Enter Default?”

Appellants suggest that the Court failed to conduct a “good cause” analysis, seizing on part of the Court’s exchange regarding whether default had been entered. *See* Appellants’ Brief p.10; Transcript p. 7, lines 12-21 (R. p. 124, lines 12-21). It is plain from reading the entire exchange that the point of the Court’s comment is that no default had been entered and accordingly that there was no default to lift, *not* that the Court was not considering whether good cause existed.

In any event, the record clearly establishes that good cause existed, for the reasons just set forth. Accordingly, even if the Court did not expressly parse those factors, its decision can be affirmed on the basis of this additional sustaining ground. *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000) (“[A] respondent – the ‘winner’ in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review.”); *Dixon v. Besco Engineering*, 320 S.C. at 179, 463 S.E.2d at 639 (ruling on motion to lift default will not be disturbed on appeal if evidence in record is sufficient to support ruling).

There can be no dispute, based on the record evidence, that the Circuit Court had ample evidence before it to support its exercise of discretion in finding good cause (*i.e.*, virtually no delay by Respondent in seeking relief, a meritorious defense for Respondent,

and a stipulation by Appellants that they suffered no prejudice) to refuse to enter default under Rule 55(c). Under the totality of the circumstances, the Circuit Court properly exercised its discretion and found good cause to refuse to enter default against Respondent. In its opinion, the Court of Appeals correctly affirmed this decision, and expressly noted that “the evidence presented by [Respondent] supported the circuit court’s ruling.” Opinion No. 2012-UP-182, at 2-3.

IV. Appellants Failed to Preserve Any Issue Under Rule 6(b) for Appeal

It is well established that the lower court must rule upon an issue for it to be preserved for review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 732 (1998); see *Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000). Where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved. *South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 347 S.C. 333, 554 S.E.2d 870 (Ct. App. 2001), *rev’d on other grounds*, 353 S.C. 249, 578 S.E.2d 8 (2003).

The record demonstrates that Appellants raised no argument under Rule 6(b) in their motion to the Circuit Court. In fact, Appellants’ initial brief to the Court of Appeals and its petition for writ of certiorari to this Court both include this concession: “Appellants admit that they initially mistakenly discussed Respondent’s Rule 55(c) argument ... in formulating Appellants’ own argument,” and later “recognized their error and, as evidenced by the hearing transcript, argued appropriately before the trial court ... that the proper rule to apply to the issue was, in fact, Rule 6(b), SCRPC.” Appellants’ Brief p. 6; Petition for Writ of Certiorari, p. 6.

First of all, the contention that the matter before the Circuit Court was governed by Rule 6(b) is absolutely incorrect. The only motion before the Court at the hearing in question was Appellants' own motion to enter default. In their memorandum in support of that motion, Appellants briefed only Rule 55(c). *There was no motion pending before the Circuit Court that cited Rule 6(b) as the grounds for any relief. See* SCRPC 7(b)(1) (requiring that a motion "shall state with particularity the grounds therefor, and shall set forth the relief or order sought"); *Summer Place of Myrtle Beach Homeowner's Ass'n v. Knight*, 298 S.C. 241, 379 S.E.2d 724 (Ct. App. 1989) (relying on Rule 7(b)(1) to reverse grant of summary judgment where no proper motion was pending). Moreover, because Respondent's Answer was accepted for filing and Appellants never moved to strike, the practical fact was that the question of leave to file under Rule 6(b) was never expressly presented.

After the hearing, the Circuit Court entered an Order denying the motion to enter default that was before it. That Order makes no reference to Rule 6(b) or to Appellants' contention that – despite the fact their own briefs did not mention Rule 6(b) – the Court should have analyzed the motion under that rule.

In order to preserve for appeal this issue of whether or not the Circuit Court should have considered Rule 6(b), Appellants had an obligation to file a motion to alter or amend the Order to address that question. *Vespazianni v. McAlister*, 307 S.C. 411, 415 S.E.2d 427 (Ct. App. 1992) (even if matters appear in the record, they are not preserved for appeal if not ruled on by circuit court);² *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d

² *Vespazianni* applies here rather than *Bailey v. Segars*, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001) because there is nothing in the record – either in the Circuit Court's written Order or elsewhere – that constitutes a clear ruling on Appellants' Rule 6

122 (1991) (issue not preserved for appellate review where trial court did not explicitly rule on appellant's argument and appellant made no Rule 59(e) motion to alter or amend judgment); *see also Halbersberg v. Berry*, 302 S.C. 97, 104, 394 S.E.2d 7, 12 (Ct. App. 1990) (although issue was presented to master-in-equity, master did not explicitly rule on issue and failure of appellant to bring this omission to master's attention by way of Rule 52(b) or 59(e) motion effectively waived issue on appeal).

Appellants did not ask the Court to alter or amend the Order denying their motion to enter default by addressing their contention that Rule 6(b) governed that question. Accordingly, Appellants' argument that the Court erred in failing to apply Rule 6(b) was not preserved for appeal.

V. Though Appellants Failed to Preserve This Issue, Any Error in Failing to Perform a Good Cause Analysis Under Rule 6(b) Was Harmless Because the Standard for Good Cause is Identical Under Rules 6(b) and 55(c)

Appellants' primary complaint about the Circuit Court's exercise of discretion in this case appears to be Appellants' contention that the Circuit Court should have applied a "good cause" standard under Rule 6(b) and not a "good cause" standard under Rule 55(c). Because the two rules do not involve two separate standards, Appellants are arguing about a distinction without a difference.

Essentially, Appellants are complaining that, in addition to finding good cause under Rule 55(c), the Circuit Court should also have conducted a *second* analysis of good cause under Rule 6(b) before allowing Respondent's answer as timely. This would have been pointless, and any error in failing to conduct such an analysis was a mere formality and harmless because, as the official notes to Rule 6(b) make clear, *the standard for good cause is identical under both Rule 6(b) and Rule 55(c)*:

argument.

This amendment [to Rule 6(b)] authorizes the court to permit an act to be done after the expiration of time upon a showing of good cause. *This is the standard applied by courts in practice and is found in Rule 55(c) for relief from entry of default.* The change distinguishes the test under Rule 6(b) which is applicable when filings are untimely, from that used when a party has obtained a judgment. Post-judgment relief under Rule 60(b) remains governed by the stricter standard of excusable neglect which has a precise meaning under state precedents. See also Rule 55(c).

Rule 6(b), SCRCF, Notes from 1986 Amendment (emphasis added).

The Rules also provide that “no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for ... vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” SCRCF 61.

Even apart from the legal standard, it is obvious as a practical matter in this case that the questions of “whether to enter default” and “whether to allow Respondent’s Answer” are two sides of the same coin. The Circuit Court could not sensibly have entered default *and* allowed Respondent to answer, or vice versa. The Circuit Court recognized that it was not truly facing two separate questions: “I have . . . denied his motion for entry of default, which means now your Answer is timely.” (Transcript p. 11 lines 22-23; R. p. 128, lines 22-23) The Circuit Court found good cause not to enter default, which necessarily meant good cause existed to treat Respondent’s Answer as timely.

The only motion before the Circuit Court below was Appellants’ own motion to enter default, which Appellants’ own memorandum to the Circuit Court acknowledged should be analyzed under Rule 55(c). Respondent’s memorandum on this issue, which

was part of the record evidence before the Circuit Court below, cites the precise good cause standard applicable under Rule 55(c) and walks through the evidence on each of the factors the Circuit Court was to consider in the exercise of its discretion under Rule 55(c). “Good cause” was briefed and argued to the Circuit Court, and Appellants’ suggestion that the Circuit Court should have applied “Rule 6 good cause” instead of “Rule 55 good cause” is nonsensical. The two are the same,³ and there would be no point in remanding this matter to have the same standard applied a second time.

CONCLUSION

The Circuit Court dismissed the Third-Party Complaint against Respondent for failure to state a claim. That decision was not appealed and is the law of the case. It would be nonsensical to enter default against a dismissed party; any continued appeal is therefore moot. There are no “special or important reasons” to justify the grant of a writ of certiorari in this case.

This is the just outcome. Appellants are seeking an entry of default against a party with no connection to this dispute. Respondent had no involvement in, or knowledge of, any of the acts alleged. The Third-Party Complaint was misleading and fatally defective, in that it never identified Respondent by name, misstated Respondent’s state of incorporation, and buried its attempted allegations against Respondent in confusing nomenclature. Despite their tacit confession that they never stated a claim against Respondent, Appellants seek to capitalize on the confusion created by their

³ Respondent submits that the identity of the standards under Rule 6(b) and Rule 55(c) does not excuse Appellants’ failure to preserve their Rule 6 argument for appeal. If Appellants contend Rule 6 provides a second ground, they were obliged to ask the Circuit Court to address that Rule expressly in its Order. Having said that, the practical effect of the identity of the standards is that there is no point in revisiting the Rule 6 standard, as the Rule 55 analysis already conducted answers the question.

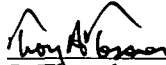
pleading and to obtain a default judgment where no judgment on the merits is possible. The Circuit Court correctly prevented such an injustice, and the Court of Appeals recognized that the Circuit Court's exercise of discretion was appropriate.

The Circuit Court's ruling – which is subject to an abuse of discretion standard on review – was correct in determining there was good cause not to enter a default. The record below plainly demonstrated Respondent's promptness in seeking relief, the Appellants' failure to plead claims against Respondent, Respondent's completely meritorious defense, and the admitted lack of any prejudice to Appellants.

Appellants did not properly preserve for appeal any issue with respect to Rule 6(b). Even if they had, "good cause" means the same thing under Rule 6(b), as under Rule 55(c), and the questions of whether to enter default and whether to allow an answer are two sides of the same coin. Appellants were in effect asking the Circuit Court to perform the same analysis twice; that plainly would be pointless. The Court of Appeals correctly affirmed the Circuit Court's decision not to enter default and correctly noted that the record provided sufficient evidence to support that ruling.

For the foregoing reasons, the Appellants' Petition for Writ of Certiorari should be denied.

Respectfully submitted,



J. Theodore Gentry (S.C. Bar No. 64038)

Troy A. Tessier (S.C. Bar No. 13354)

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**Attorneys for Respondent
Century 21 Real Estate, LLC**

Date: July 3, 2012
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JUL 6 2012

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. Supreme Court

Alexander S. Macaulay, Circuit Court Judge

Case No. 20100179486
Case No. 2009-CP-04-2130

Jay and Meri Guerry, and Silo Oaks, LLC,.....Plaintiffs,

v.

James Agnew and Virginia Agnew d/b/a Agnew Arabians,.....Petitioners

v.

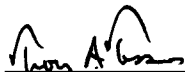
Guerry and Guerry, LLC, Marsha Wright, The Marsha Wright Group, LLC d/b/a Wright Group Realty, Century 21 Bob Capes Realtors, and Century 21,....Third-Party Defendants,

Of Whom, Century 21 Real Estate, LLC is,.....Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that this 3rd day of July 2012, he caused copies of Respondent's **Return to Petition for Writ of Certiorari** to be served on counsel for **Petitioners** by United States Mail, postage prepaid, addressed as follows:

Matthew W. Christian, Esq.
W. Harold Christian, Jr., Esq.
Christian & Davis, LLP
P.O. Box 332
Greenville, SC 29602



Troy A. Tessier

July 3, 2012

W Y C H E

Attorneys at Law

pm 7-3-12
RECEIVED

JUL 6 2012

S.C. Supreme Court

July 3, 2012

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: *Jay and Meri Guerry and Silo Oaks, LLC v. James Agnew and Virginia Agnew d/b/a Agnew Arabians*
Trial Court Case No. 2009-CP-04-2130
(*James Agnew and Virginia Agnew, d/b/a Agnew Arabians vs. Century 21*)
Case Tracking No.: 2010179486

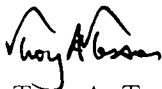
Dear Mr. Shearouse:

Enclosed please find the original and six copies of Respondent's Return to Petition for Writ of Certiorari and our Proof of Service for the return.

By copy of this letter, we are serving the return to petition on counsel for Appellants.

We have also enclosed a seventh copy of the return. We would appreciate your returning a file-stamped copy of it to us in the enclosed self addressed stamped envelope, for our file.

Very truly yours,



Troy A. Tessier
(864) 242-8219
ttessier@wyche.com

Enclosures

cc: Matthew W. Christian, Esq.
W. Harold Christian, Jr., Esq.

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