

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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Appeal from Berkeley County  
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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Case No. 2012-CP-08-03405

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Century Metal Recycling Pvt. LTD  
d/b/a CMR America,

Respondent,

v.

Don's Car Crushing, Inc. and  
Donald R. Brewer,

Defendants,

Of whom Don's Car Crushing, Inc. is,

Appellant.

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**INITIAL BRIEF OF RESPONDENT**

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**SC Court of Appeals**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
RESPONDENT’S COUNTER-STATEMENT OF THE ISSUE ON APPEAL.....	1
<b>I. Assuming, <i>arguendo</i>, that a default judgment is directly appealable (which the Respondent denies and presents as a sub-issue herein), did the circuit court err in granting a default judgment in favor of the Respondent under the circumstances of this case, wherein the Appellant was properly defaulted for failure to appear and the damages claimed by the Respondent where shown to be capable of being made certain by computation, and, likewise, under these circumstances, did the circuit court err in denying the Appellant relief from the default judgment? .....</b>	<b>1</b>
RESPONDENT’S COUNTER-STATEMENT OF THE CASE .....	1
ARGUMENT.....	9
<b>I. Assuming, <i>arguendo</i>, that a default judgment is directly appealable (which the Respondent denies), the circuit court did not err in granting a default judgment in favor of the Respondent under the circumstances of this case, wherein the Appellant was properly defaulted for failure to appear and the damages claimed by the Respondent where shown to be capable of being made certain by computation, and, likewise, under these circumstances, the circuit court did not err in denying the Appellant relief from the default judgment.....</b>	<b>9</b>
CONCLUSION .....	16

**TABLE OF AUTHORITIES**

**Page**

**Cases**

Beckman Concrete Contractors, Inc. v. United Fire and Casualty Co., 360 S.C. 127, 600 S.E.2d 76 (Ct. App. 2004),..... 15

Coleman v. Dunlap, 306 S.C. 491, 413 S.E.2d 15 (1992)..... 10

Cont'l Ins. Co. v. Shives, 328 S.C. 470, 492 S.E.2d 808, 811, n. 2 (Ct. App. 1997)..... 14

Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817, 825 (Ct. App. 2004)..... 10

Em-Co Metal Prods., Inc. v. Great Atlantic & Pacific Tea Co., Inc., 280 S.C. 107, 311 S.E.2d 83 (Ct. App. 1984)..... 10

First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct.App.1998) 14

Glasscock, Inc. v. U.S. Fidelity & Gaur. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) ..... 9, 13

Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005)..... 9, 13

Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003)..... 14

Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010)..... 14

Lewis v. Congress of Racial Equality, 275 S.C. 556, 274 S.E.2d 287 (1981)..... 15

McCall v. IKON, 380 S.C. 649, 670 S.E.2d 695 (Ct. App. 2008)..... 9, 13

Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263 (2009)..... 3

Saro v. Ocean Holiday P'ship, 314 S.C. 116, 441 S.E. 835 (Ct. App. 1994)..... 10

Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007) ..... 12

Stephens v. Ringling, 102 S.C. 333, 86 S.E. 683 (1915)..... 12

Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985)..... 10

**Statutes**

S.C. Code Ann. § 15-19-110..... 4

**Other Authorities**

4 Am. Jur. 2d *Appearance* § 1 (1995)..... 12

4 Am. Jur. 2d Appearance § 1 (West 2014)..... 12

6 C.J.S. Appearances § 1 (West 2013)..... 12

Black’s Law Dictionary 395-97 (7th ed. 1999). .... 16

Black’s Law Dictionary 94 (7th ed. 1999)..... 13

**Rules**

Rule 12(a), SCRCP..... 3

Rule 220(c), SCACR ..... 16

Rule 4(b), SCRCP ..... 12

Rule 55(a), SCRCP ..... 2

Rule 55(b)(1)..... 11, 14, 15, 16

Rule 55(c), SCRCP ..... 2, 3

Rule 6(b), SCRCP ..... 2

Rule 60(b), SCRCP ..... 10

## RESPONDENT'S COUNTER-STATEMENT OF THE ISSUE ON APPEAL

- I. **Assuming, *arguendo*, that a default judgment is directly appealable (which the Respondent denies and presents as a sub-issue herein), did the circuit court err in granting a default judgment in favor of the Respondent under the circumstances of this case, wherein the Appellant was properly defaulted for failure to appear and the damages claimed by the Respondent were shown to be capable of being made certain by computation, and, likewise, under these circumstances, did the circuit court err in denying the Appellant relief from the default judgment?**

## RESPONDENT'S COUNTER-STATEMENT OF THE CASE

The Respondent, Century Metal Recycling Pvt. LTD d/b/a CMR America ("CMR America"), commenced this lawsuit against the Appellant, Don's Car Crushing, Inc., and also against the Appellant's co-Defendant, Donald R. Brewer ("Mr. Brewer")<sup>1</sup> (hereinafter, the Appellant and Mr. Brewer will be collectively referred to as the "Defendants"), on November 29, 2012 with the filing of a summons and verified complaint in Berkeley County Circuit Court seeking recovery under causes of action pleaded for breach of contract, breach of contract accompanied by a fraudulent act, conversion, and also in quantum meruit. (Summons and Complaint (with all Exhibits as well as Verification, Affidavit, and Bond).)

Generally, CMR America's complaint alleged that, on or about August 25, 2012, Mr. Brewer signed a written sales order contract on behalf of the Defendants agreeing to supply and deliver via shipment to India 275,000 pounds of aluminum scrap for CMR America for a purchase price of \$204,875.00. (Complaint ¶¶ 7 & 14 and Exhibit A.) CMR America paid (and the Defendants accepted) the full purchase price of \$204,875.00, and CMR America otherwise

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<sup>1</sup> As reflected in the Court's caption for this appeal, and also in the Appellant's Notice of Appeal, Mr. Brewer has not taken an appeal in this matter. (Appellant's Notice of Appeal (dated November 4, 2013).) To the extent, however, that Mr. Brewer may also be deemed to be an appellant (i.e., along with the Appellant, Don's Car Crushing, Inc.), the argument/analysis set forth herein addresses and rebuts the entirety of the argument/analysis presented in the Initial Brief of Appellant, which would include any argument/analysis in support of an appeal by Mr. Brewer.

satisfied any/all conditions precedent to the Defendants' performance under the contract. (Complaint ¶¶ 8 & 15-18 and Exhibits B, C, & D.) The Defendants wrongfully failed to supply and deliver any of the aluminum scrap for shipping to India, causing damages to CMR America. (Complaint ¶¶ 9 & 18-19.) Despite repeated demands from CMR America prior to filing suit, the Defendants did not supply and deliver the material, nor did the Defendants return CMR America's \$204,875.00 payment. (Complaint ¶ 10.) Indeed, in its brief, the Appellant concedes that the Defendants do not "oppos[e] the fact that they were liable initially," which, the Appellant appears to mean, liable as CMR America duly alleged in its complaint, for their wholesale failure to perform under the contract. (App's Br. p. 6.)

CMR America served the Defendants on December 14, 2012. (*See* App's Br. p. 1.)<sup>2</sup> Thereafter, counsel for CMR America learned from John M. Prosser, Jr., Esquire, that he had been retained as counsel for the Defendants in this matter. Counsel for CMR America consented to Mr. Prosser's request for an extension of time for the Defendants to answer or otherwise plead in response to CMR America's complaint.

In this regard, CMR America notes that a thirty (30) day extension is the standard; indeed, by rule, specifically, Rule 6(b), SCRPC, "the time [(for time for performing an act required by the South Carolina Rules of Civil Procedure)] may [(only)] be extended by written agreement of counsel for an additional period not exceeding the original time provided in these

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<sup>2</sup> In this regard, CMR America notes also that the Defendants have not substantively pursued relief from the default that was entered against them (pursuant to Rule 55(a), SCRPC) on July 30, 2013. (Motion for Entry of Default and Entry of Default.) CMR America acknowledges that the Defendants' motion for relief from the default judgment does make passing reference to "set[ting] aside the Entry of Default issued by the Clerk of Court on July 30, 2013," but the Defendants' motion, like the Appellant's brief (which contains no allegation of error regarding entry of default), contains no substantive argument/analysis regarding the applicable standard for setting aside the entry of default under Rule 55(c), SCRPC. *See Richardson v. P.V., Inc.*, 383

rules.” And, as the Appellant’s brief acknowledges,<sup>3</sup> the original time period in this instance was thirty (30) days. *See* Rule 12(a), SCRCF.

CMR America must also disagree with the assertion in the Appellant’s brief that “an appearance was made [(by Mr. Prosser)] on behalf of the Defendants within the thirty (30) day response time.” (App’s Br. p. 1.) While CMR America’s counsel acknowledges that it knew of Mr. Prosser’s representation of the Defendants—and, indeed, attempted many times, often without success or with substantial delay in response, to communicate with Mr. Prosser for the purpose of achieving an out-of-court resolution of this matter—the Defendants (neither directly, nor through Mr. Prosser on their behalf) made no appearance of record in this matter until September 9, 2013, when the Defendants filed a motion to set aside the default judgment (i.e., the default judgment that had already, on August 15, 2013, been entered against the Defendants in favor of CMR America). (Defendants’ Motion for Relief to Set Aside Default Judgment.)

In this regard, CMR America notes that the August 15, 2013 default judgment against the Defendants expressly provides “that default has been duly entered against Don’s Car Crushing and Brewer, and that Don’s Car Crushing and Brewer have not answered, otherwise pled, or appeared in this action . . . .” (Judgment by Default Against Defendants p. 1) (emphasis added.) CMR America also notes that the Appellant’s Designation of Matter to be Included in the Record on Appeal does not include any court filing by or on behalf of the Defendants in this matter other than the motion for relief from default judgment filed September 9, 2013. (*See* App’s Designation of Matter.)

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S.C. 610, 682 S.E.2d 263, 266 (2009) (setting forth the standard for granting relief from an entry of default under Rule 55(c)).

<sup>3</sup> (*See* App’s Br. p. 1.)

By way of background, on December 28, 2012, CMR America moved, pursuant to S.C. Code Ann. § 15-19-110, for a warrant of attachment against the Defendants on the grounds that the Defendants had received full payment from CMR America in the amount of \$204,875.00, which the Defendants retained without making their contracted-for performance, and which (identified) funds CMR America believed that the Defendants were about to remove from the State, or had assigned, disposed of or secreted or were about to assign, dispose of or secret with intent to defraud CMR America. (Motion for Warrant of Attachment (with all Exhibits) and Notice of Filing Affidavit of Rajiv Kaushal (filed February 5, 2013) with attached Supplemental Affidavit of Rajiv Kaushal.)

On February 5, 2012, a warrant of attachment was issued by the circuit court, the Honorable Stephanie P. McDonald presiding. (Warrant of Attachment.) The warrant of attachment commanded “the sheriffs and constables of such state and Berkeley County, Horry County, Williamsburg County, Orangeburg County, and Calhoun County . . . to attach and seize Two-Hundred Four-Thousand Eight-Hundred Seventy-Five Dollars (\$204,875.00), or so much of the funds and property of Don’s Car Crushing and Donald R. Brewer as will make the sum of \$204,875.00 and all costs, to serve such summons as may be placed in your hands and to make return of this attachment, with your actions entered on the attachment, to this court.” (Warrant of Attachment.)

Nonetheless, following issuance of the warrant of attachment, CMR America attempted to resolve this matter with the Defendants (in a manner that would have obviated the need for seizure of funds and/or property from the Defendants pursuant to the warrant of attachment) by simply having the Defendants comply with the contract terms (i.e., by supplying and delivering

the material for which CMR America had already paid), but was unable to receive from the Defendants/counsel cooperation needed to consummate such a resolution.

Here, CMR America expressly notes its disagreement and denial of the Appellant's characterization that "[t]his matter initially involved a contractual dispute . . . ," as if the character of the matter thereafter changed to become something other than a contractual dispute. (App's Br. p. 1.) CMR America's effort to resolve this matter with the Defendants was simply to have the Defendants comply with the original contract terms—again, CMR America had already paid, and the Defendants had accepted, \$204,875.00, as called for under the contract, and the Defendants were obligated to perform under the contract.

In this regard, CMR America also notes the following from the Appellant's brief:

[T]he parties negotiated a settlement, whereby and wherein the Defendants would provide [CMR America] materials which would compensate [CMR America] for any losses claimed. [CMR America's] counsel prepared a settlement document, and sent the same to the Defendant' counsel. However, prior to execution thereof, a representative of [CMR America], Rajiv Kaushal, and the Defendant, Donald R. Brewer, negotiated and consummated a settlement between themselves, and as a result thereof, the Defendants shipped a pre-inspected quantity of materials to [CMR America], and [the Defendants] were under the belief that the matter was concluded. It was not until after the shipment(s) of materials arrived overseas that the Defendants discovered that [CMR America] now was not satisfied with the materials which given to settle this matter.

(App's Br. pp. 1-2.)

Respectfully, CMR America disagrees with and denies the Appellant's assertion that any settlement was "consummated" between CMR America and the Defendants. Likewise, CMR America would make clear that the "pre-inspect[ion]" of material, to which the Appellant refers, did not establish that the material met the specification that the Defendants agreed to supply and deliver to India (for which, of course, CMR America had long before paid the Defendants the

\$204,875.00 purchase price without any return performance from the Defendants), nor did CMR America's right to inspect the material before it shipped to India in any way waive or otherwise compromise CMR America's right to assert that the material shipped did not meet the required specification, nor did CMR America ever indicate to the Defendants that it was "satisfied" that the material met contractual specifications on the basis of any pre-delivery-inspection (as the Appellant seems to imply)—nor, of course, has the Appellant actually pointed to any evidence of record to the contrary. To be clear, it was not until the material actually reached its final destination overseas that it would be determined if its composition was actually consistent with that agreed upon by the parties, and it was not until such time (and until the material's composition was determined to be consistent) that the settlement would be consummated via the dismissal of this case and the warrant of attachment and by CMR America's execution of an appropriate release in favor of the Defendants. This did not happen—and, respectfully, in its absence, it is hard to understand how the Appellant could have reasonably "belie[ved] that the matter was concluded," as it asserts—because the Defendants did not supply and deliver to India material with a composition that was actually consistent with that agreed upon by the parties.

Rather, the Defendants shipped 262,000 pounds of aluminum scrap to India—again, as set forth in CMR America's complaint, CMR America notes that it paid \$204,875.00 to the Defendants with the understanding that the Defendants would supply and deliver 275,000 pounds of aluminum scrap. (Notice of Filing of Affidavit of Rajiv Kaushal (filed August 7, 2013) with attached Affidavit Rajiv Kaushal ¶¶ 1-2 and Complaint ¶¶ 7, 9, & 14 and Exhibit A.) The Defendants' shipment was received in India on or about April 24, 2013. (Notice of Filing of Affidavit of Rajiv Kaushal (filed August 7, 2013) with attached Affidavit Rajiv Kaushal ¶ 3.) The material received did not comply with the agreed-upon percentage of red metals, and also

contained high levels of impurities. (Notice of Filing of Affidavit of Rajiv Kaushal (filed August 7, 2013) with attached Affidavit Rajiv Kaushal ¶¶ 3-6.)

Without cooperation from the Defendants/counsel needed to resolve the matter, i.e., to have the Defendants comply with the contract, CMR America filed a motion for entry of default against the Defendants on July 30, 2013, and default was duly entered against the Defendants the same day. (Motion for Entry of Default; Affidavit of Default; and Entry of Default.)

On August 6, 2013, CMR America served (copying the Defendants' counsel) a motion for default judgment against the Defendants. (Motion for Default Judgment (with all Exhibits and transmittal letter to the Court).)<sup>4</sup> In addition to the matter contained within and/or attached to CMR America's verified complaint, CMR America's motion for default judgment set forth, via affidavit, the inspection (and result thereof) of the material the Defendants shipped to India, that the material failed to meet the contracted-for specifications, and, how, on account of that failure (which was calculated in percentage form), CMR America was entitled to be reimbursed by the Defendants in the amount of \$39,017.82 (based upon the price it paid for the material for as contracted and the value of the material that the Defendants actually supplied and delivered to India, which was not in conformity with the contract) and also in the amount of \$3,901.78 (for freight and processing costs), for a total judgment against the Defendants in the amount of \$42,919.60. (Motion for Default Judgment (with all Exhibits) and Notice of Filing of Affidavit of Rajiv Kaushal (filed August 7, 2013) with attached Affidavit Rajiv Kaushal.)

CMR America's motion for default judgment was decided by the Honorable Robert E. Watson, Presiding Circuit Judge. As noted above, the circuit court found "that the default has been duly entered against Don's Car Crushing and Brewer, and that Don's Car Crushing and

Brewer have not answered, otherwise pled, or appeared in this action.” (Judgment By Default Against Defendants p. 1.) The court therefore held “that CMR America is . . . entitled to Judgment against Don’s Car Crushing and Brewer by default.” (Judgment By Default Against Defendants p. 1.) And, the court continued, “[b]ased on CMR America’s verified Complaint, and the affidavit of Rajiv Kaushal dated July 29, 2013, its claim against Don’s Car Crushing and Brewer is capable of being made certain by computation; specifically, by calculating the percentage of impurities found to be in the product shipped by Don’s Car Crushing and Brewer, multiplying that percentage by the total weight of product shipped, and multiplying that by the unit price which equals \$39,017.82, together with the industry average 10% markup for freight and processing costs \$3,901.78, which total amount is \$42,919.60.” (Judgment By Default Against Defendants p. 1.) Accordingly, on August 15, 2013, the court entered judgment against the Defendants “in the amount of \$42,919.60 together with all interest thereon allowed by law.” (Judgment By Default Against Defendants p. 2.)

On September 9, 2013, the Defendants filed a motion for relief from the default judgment. (Defendants’ Motion for Relief to Set Aside Default Judgment.) Although the Appellant asserts in its brief that this motion was “summarily denied,” CMR America notes that the Defendants’ motion was heard in the circuit court on October 22, 2013, with the Honorable R. Markley Dennis, Jr. presiding. The circuit court filed its order denying the Defendants’ motion on October 23, 2013. (Form 4 Order Denying Defendants’ Motion for Relief from Default Judgment.) The Defendants did not thereafter seek alteration, amendment, or reconsideration of the order.

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<sup>4</sup> CMR America notes that this motion was served nine (9) days before it was actually file-stamped by the circuit court.

On November 4, 2013, the Appellant noticed an appeal of both the default judgment and of the order denying relief from the default judgment. (Appellant's Notice of Appeal (dated November 4, 2013).)

### ARGUMENT

- I. **Assuming, *arguendo*, that a default judgment is directly appealable (which the Respondent denies), the circuit court did not err in granting a default judgment in favor of the Respondent under the circumstances of this case, wherein the Appellant was properly defaulted for failure to appear and the damages claimed by the Respondent were shown to be capable of being made certain by computation, and, likewise, under these circumstances, the circuit court did not err in denying the Appellant relief from the default judgment.**

As an initial matter, in evaluating this appellate challenge to the circuit court's grant of a default judgment in favor of CMR America and later denial of relief therefrom, it is important to note that, to upset the presumptive validity of the circuit court's action, the Appellant has the affirmative obligation to present substantive, non-conclusory argument/analysis and also to provide this Court with a record sufficient to show reversible error as to all independent grounds supporting the circuit court's action. See Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334,339, 611 S.E.2d 485, 487-88 (2005) (the appellant has the burden of providing a sufficient record for appellate review); McCall v. IKON, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error); Glasscock, Inc. v. U.S. Fidelity & Gaur. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Respectfully, the Appellant has not met this burden, and has not presented argument/analysis in its brief (nor pointed to evidence of record) sufficient to upset the circuit court's action.

As another preliminary matter, although the Appellant purported to notice an appeal from the circuit court's grant of default judgment, as a matter of law, a direct appeal does not lie from a default judgment. Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985). The proper procedure for challenging a default judgment is to move the circuit court to set aside the judgment pursuant to Rule 60(b), SCRPC. An appeal may then be taken from the denial of this motion. Id. Accordingly, the Appellant's direct appeal of the default judgment should be dismissed. Id. Of course, even assuming, *arguendo*, that the Appellant's direct appeal of the default judgment is permissible, under the circumstances of this case, the default judgment in favor of CMR America is rightfully upheld for the same reasons that the circuit court's denial of relief from the judgment should be affirmed.

With regard to the Appellant's appeal of the circuit court's denial of relief from the default judgment, at the outset, CMR America notes the highly discretionary (in favor of the circuit court) standard of review that is applicable. As noted above, the proper procedure for challenging a default judgment is to move the circuit court to set aside the judgment pursuant to Rule 60(b). Id. Whether to grant or deny a motion under Rule 60(b) is within the sound discretion of the circuit court. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). On review, the appellate court is limited to determining whether the circuit court abused its discretion in granting or denying such a motion. Saro v. Ocean Holiday P'ship, 314 S.C. 116, 124, 441 S.E. 835, 840 (Ct. App. 1994). "An abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support." Ellis v. Davidson, 358 S.C. 509, 524, 595 S.E.2d 817, 825 (Ct. App. 2004). And, of course, "[t]he burden always rests upon the appellant to show an abuse of discretion . . . ." Em-Co Metal Prods., Inc. v. Great Atlantic & Pacific Tea Co., Inc., 280 S.C. 107, 110, 311 S.E.2d 83, 85 (Ct. App. 1984).

Though not cited or otherwise accounted for in the Appellant's brief, Rule 55(b)(1), SCRCPC, addresses judgment by default in the specific context of cases involving liquidated damages or sum certain amounts:

**(b) Judgment.** Judgment by default may be entered as follows:

*(1) Cases Involving Liquidated Damages or Sum Certain Amounts.* When the claim of a party seeking judgment by default is for a liquidated amount, a sum certain or a sum which can by computation be made certain, the judge, upon motion or application of the party seeking default, and upon affidavit of the amount due, shall enter judgment for that amount and costs against the party against whom judgment by default is sought, if that party has been defaulted for failure to appear and if such party is not a minor or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

(emphasis added via underline).

At the time of entry of the default judgment, the Appellant had been defaulted for failure to appear, as was expressly reflected in the default judgment, which provided “that the default has been duly entered against Don’s Car Crushing and Brewer, and that Don’s Car Crushing and Brewer have not answered, otherwise pled, or appeared in this action.” (Judgment By Default Against Defendants p. 1.) While the Appellant’s brief—like the motion for relief from default judgment before it—contains the conclusory assertion that the Appellant had appeared in the action, the court record in this case reflects no appearance by or on behalf of the Defendants at any time prior to the filing of the motion for relief from the default judgment on September 9, 2013. Indeed, as noted above, the Appellant’s Designation of Matter to be Included in the Record on Appeal does not include any court filing by or on behalf of the Defendants in this matter other than the motion for relief from default judgment filed September 9, 2013. (*See App’s Designation of Matter.*)

Moreover, even assuming, *arguendo*, that the Appellant has properly preserved and presented to this Court any issue on appeal as to whether it had made an appearance at the time of the default judgment, the record here (or, rather, absence of any record here of an appearance by the Defendants before September 9, 2013) is dispositive of this issue against the Appellant. The Appellant can point to no act constituting an appearance by the Defendants in this case as that term of art is known. *Cf. Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007) (“The term ‘appearance’ is used particularly to signify or designate the overt act by which one against whom suit has been commenced submits himself to the court’s jurisdiction.” 4 Am. Jur. 2d *Appearance* § 1 (1995). ‘An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied from some act done with the intention of appearing and submitting to the court’s jurisdiction.’ *Id.* No specific act constitutes an appearance, as ‘a defendant may choose to come into court with trumpets, or quietly by the back door.’ *Stephens v. Ringling*, 102 S.C. 333, 342, 86 S.E. 683, 685 (1915).”); Rule 4(b), SCRCP (“The summons shall . . . state . . . the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.”); 4 Am. Jur. 2d *Appearance* § 1 (West 2014) (“An ‘appearance’ in an action involves some submission or presentation to the court by which a party shows his intention to submit himself or herself to the jurisdiction of the court. A party ‘appears’ in an action either formally, by serving and filing a notice of appearance or an answer or by making a motion that serves to extend the time to answer, or informally, by actively litigating the merits of an issue without raising any jurisdictional objection.”); 6 C.J.S. *Appearances* § 1 (West 2013) (“An appearance is ordinarily an overt act by which a party comes into court and submits himself or herself to its

jurisdiction. An appearance in its common and particular use signifies an overt act by which a person against whom suit has been commenced submits to the jurisdiction of the court. Used broadly, the term ‘appearance’ means the coming into court by either party to an action.”); Black’s Law Dictionary 94 (7th ed. 1999) (defining “appearance” as “[a] coming into court as a party or interested person, or as a lawyer on behalf a party or interested person.”).

The Appellant’s position is that a hearing was required to determine the amount of damages in this case, and that the Appellant was wrongfully denied a right to notice of and participation in such a hearing, because the amount of damages was “in dispute and is thereby unliquidated in nature.” (App’s Br. p. 4.)

In this regard, CMR America notes the following passage from the Appellant’s brief, which appears to summarize the factual basis for the Appellant’s position:

While [CMR America’s] original claim was contractual in nature and was a sum certain liquidated amount, the fact that the parties attempted to settle the matter by “bartering” or trading goods to satisfy the amount created a situation which transformed their dispute into one involving the sufficiency of a settlement. Therefore, since [CMR America] and the Defendant were disputing whether the claim was fully and properly settled, the amount of damages is in dispute and is thereby unliquidated in nature.

(App’s Br. p. 4.) Similarly, elsewhere in the Appellant’s brief, the Appellant asserts that, “since the parties attempted to settle their matter between themselves,” a situation was created “which obviously involved unliquidated damages.” (App’s Br. p. 6.)

Respectfully, a review of the Appellant’s brief shows that the Appellant has not met its burden to upset the presumptive validity of the circuit court’s action. See Helms Realty, 363 S.C. at 339, 611 S.E.2d at 487-88; McCall, 380 S.C. at 659-60, 670 S.E.2d at 701; Glasscock, 348 S.C. at 81, 557 S.E.2d at 691. The Appellant’s position is patently conclusory, simply

asserting that the damages sought by CMR America were disputed and unliquidated, without setting forth any substantive analysis of (or, indeed, making any reference at all to) Rule 55(b)(1), which plainly provides that, “[w]hen the claim of a party seeking judgment by default is for . . . a sum which can by computation be made certain, the judge, upon motion or application of the party seeking default, and upon affidavit of the amount due, shall enter judgment for that amount and costs against the party against whom judgment by default is sought, if that party has been defaulted for failure to appear . . .” (emphasis added).

Indeed, by failing to make any argument, or otherwise raise any challenge, that the default judgment was not for a sum capable of being made certain by computation, the Appellant has necessarily failed to present an appellate challenge sufficient to upset the circuit court’s action, requiring affirmance of the circuit court. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (“Under the two issue rule, 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.”); *Jinks v. Richland County*, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); *First Union Nat’l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct.App.1998) (holding an “unchallenged ruling, right or wrong, is the law of the case and requires affirmance”); *Cont’l Ins. Co. v. Shives*, 328 S.C. 470, 474, 492 S.E.2d 808, 811, n. 2 (Ct. App. 1997) (an issue not raised in the appellant’s principal brief may not be raised via a reply brief).

Further still, the Appellant points to no evidence of record that actually supports its premise that, “[w]hile [CMR America’s] original claim was contractual in nature and was a sum certain liquidated amount, the fact that the parties attempted to settle the matter by ‘bartering’ or

trading goods to satisfy the amount created a situation which transformed their dispute into one involving the sufficiency of a settlement.” (App’s Br. p. 4.) In fact, the only evidence in the record is that CMR America’s dispute with the Defendants was always contractual in nature, with CMR America unquestionably having paid the Defendants \$204,875.00 under the contract, and its effort to resolve this matter with the Defendants not involving any bartering or trading or otherwise compromising with the Defendants, but involving an attempt to have the Defendants perform as they were required under the contract, which the Defendants did not do. (Complaint (with all Exhibits as well as Verification, Affidavit, and Bond); Motion for Default Judgment (with all Exhibits) and Notice of Filing of Affidavit of Rajiv Kaushal (filed August 7, 2013) with attached Affidavit Rajiv Kaushal; and Judgment By Default Against Defendants.)

To the extent that it may be necessary nonetheless for CMR America to address the merits more substantively, CMR America, of course, would make clear that the circuit court is properly affirmed thereon, and has not committed any abuse of discretion.

The Appellant’s reliance upon Beckman Concrete Contractors, Inc. v. United Fire and Casualty Co., 360 S.C. 127, 600 S.E.2d 76 (Ct. App. 2004), is unavailing. Indeed, the Appellant’s citation to that authority does not include the Beckman Court’s explanation—which is consistent with Rule 55(b)(1)—that, “[i]n liquidated-damages cases, the amount is usually a sum certain, or at least the amount is capable of ascertainment by computation.” Id. at 131, 600 S.E.2d at 78 (quoting Lewis v. Congress of Racial Equality, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981) (emphasis added)). Likewise, the Appellant’s citation to this authority does not include the Court’s reference to the definition of “‘liquidated damages’ as ‘[a]n amount contractually stipulated’ in contrast to unliquidated damages which are ‘[d]amages that . . .

cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury.”  
Id. (quoting Black’s Law Dictionary 395-97 (7th ed. 1999).

As the circuit court rightly found, CMR America’s motion for a default judgment did not present an unliquidated claim (it was in reference to contract requirements and a formula, not the court’s own discretion):

Based on CMR America’s verified Complaint, and the affidavit of Rajiv Kaushal dated July 29, 2013, its claim against Don’s Car Crushing and Brewer is capable of being made certain by computation; specifically, by calculating the percentage of impurities found to be in the product shipped by Don’s Car Crushing and Brewer, multiplying that percentage by the total weight of product shipped, and multiplying that by the unit price which equals \$39,017.82, together with the industry average 10% markup for freight and processing costs \$3,901.78, which total amount is \$42,919.60.

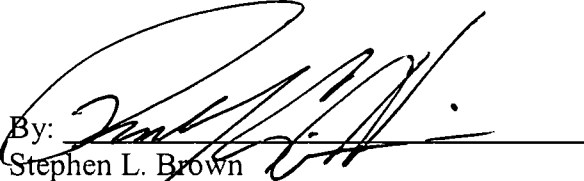
(Judgment By Default Against Defendants p. 1.) With the Defendants being duly defaulted for failing to appear, and the default judgment sought by CMR America being for a sum which could by computation be made certain, the circuit court correctly did, as Rule 55(b)(1) indeed mandates (*see* the Rule’s use of the word “shall”), and entered judgment for that amount and costs in favor of CMR America against the Defendants. And, most respectfully, the Appellant has not presented any argument thereafter, whether to the circuit court, or to this Court on appeal, sufficient to undermine either the judgment entered in favor of CMR America or the circuit court’s denial of relief therefrom.

### **CONCLUSION**

For the reasons set forth herein, as well as (in accordance with Rule 220(c), SCACR) for any other ground that may appear in the record, CMR America asks that this Honorable Court uphold the default judgment entered in favor of CMR America and affirm the circuit court’s denial of relief from said judgment.

Respectfully submitted,

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