THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2011-CP-10-8831

Kerry and George Hernandez, ... Respondents,

v.

Watertoys, LLC, ... Appellant.

WATERTOYS, LLC'S RETURN IN OPPOSITION TO THE MOTION TO DISMISS

Introduction

This Court should not dismiss this appeal. Watertoys, Inc. ("Watertoys") has properly filed this appeal and the Orders in question are not only immediately appealable but actually ***must*** be appealed immediately to preserve Watertoys' rights because the Orders affect a mode of trial. For this Court to rule on Respondent's (hereinafter "Plaintiffs") motion to dismiss, it will have to reject Watertoys' arguments regarding mode of trial ***on the merits***. One of the issues Watertoys raises in this appeal relates to the trial court's error in ruling that the damages hearing in this matter would be heard non-jury before the Master-in-Equity. Through this Return and in this appeal, Watertoys will explain why, on the merits, the trial court's ruling was incorrect. Such a ruling without question involves a mode of trial and the trial court has improperly removed the case from the jury trial docket for the purpose of determining damages. Plaintiffs

contend that Watertoys' arguments on the jury trial issue should be rejected on the merits. The Court should address such issues after full briefing and oral argument on all issues presented by this appeal. *See Willis v. Wukela*, 379 S.C. 126, 665 S.E.2d 171 (2008) (ruling by the South Carolina Supreme Court delaying any decision on a motion to dismiss until briefing and argument were complete in order to fully address the merits of the issues presented by the appeal).

Watertoys has filed, contemporaneously with this Return, its initial appeal brief and designation of matter to be included in the Record on Appeal. Watertoys understands that Plaintiffs' motion to dismiss this appeal stays briefing deadlines. However, Watertoys wants to demonstrate that its positions on the merits are viable and should prevail. Thus, Watertoys has gone forward and filed its initial brief. In their motion to dismiss, Plaintiffs provided less than a full picture (which Plaintiffs called "context") of the facts and what is at issue in this appeal. This Court should not permit Plaintiffs' efforts to provide selected "context" affecting the merits while at the same time seek to avoid full briefing and a complete ruling on the issues presented by the appeal. This Court should instead deny Plaintiffs' motion to dismiss ***without prejudice***. The Court should permit Plaintiffs to incorporate their appealability arguments in their responsive appeal brief. Such a ruling in no way prejudices the Plaintiffs, and judicial resources are best utilized and conserved. *See Willis, supra.*

Watertoys has appealed the entirety of the Order of June 6, 2012 as well as the Order denying the Motion for Reconsideration. If Watertoys is right on its default arguments, the case will return to square one and be tried on its merits, as is favored generally by the law. *See Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290

(1981) (South Carolina Supreme Court recognizing that courts should closely scrutinize default judgments to prevent harsh results and drastic action and that it is the policy of the law to favor the trial of cases on the merits).

If Watertoys is right only on its mode of trial arguments, then the parties will have been spared an improper damages hearing before an improper fact-finder. *See McEachern v. Poston*, 273 S.C. 122, 254 S.E.2d 796 (1979) (demonstrating the necessity of a remand for further proceedings when a court undertakes improper procedural measures in a default setting with respect to damages). This case is not going to involve a simple, short damages hearing. Plaintiffs are claiming severe injuries and will be claiming many millions of dollars are owed in damages. Further, a denial of Plaintiffs' motion to dismiss this appeal without prejudice is unreviewable. Plaintiffs can then complete their brief forthwith; Watertoys can complete its Reply brief; and this appeal can be determined by this Court. This approach serves judicial economy.

In contrast, if this Court grants the motion to dismiss, Watertoys will need to seek certiorari to review the dismissal. If Watertoys prevails on that, this Court would then need to decide the appeal which may (probably will) lead to a second petition for certiorari by the losing party. This is not judicially economical and the Court should address the merits of this appeal and deny the motion to dismiss without prejudice.

Summary of Appealability Argument

In their motion to dismiss the appeal, Plaintiffs have pointed to authority for the proposition that an Order denying a Motion to Set Aside the Entry of Default is not immediately appealable, and that instead, a party in default in an unliquidated damages case must wait until there is a concluded damages hearing and a judgment to appeal.

However, and importantly, Watertoys ***also*** has appealed the rulings in the June 6, 2012 Order in which the Trial Court *sua sponte* ordered that the parties not be permitted any discovery on damages, and that the parties must try the damages proceeding non-jury, before the Master-in-Equity. This latter ruling involves a mode of trial, and Watertoys would lose its rights to complain about this aspect of the trial court's Orders if it failed to immediately appeal the trial court's order on this point. *See Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997) (holding that the party's failure to appeal from the trial court's determination that no jury trial right existed constituted a waiver of that right).

The trial court was wrong to order the damages hearing to proceed before the Master under the circumstances of this case because: 1) Rule 53(b), SCRCP provides Watertoys with the right to request a jury trial for its damages hearing in a case where it has appeared and made such request; 2) Plaintiffs' jury demand was never formally withdrawn and thus the Court could not have properly ordered the damages hearing to the Master under Rule 55(b)(2); 3) in a case, such as here, where a party has appeared, a demand for a jury may not be withdrawn without the consent of the parties under Rule 38(d); and 4) no rules or statutes may be construed to deprive Watertoys of its right to a jury trial respecting a damages hearing because the South Carolina Constitution grants Watertoys a right to a jury trial in an unliquidated damages setting.[1]

[1] The remainder of the Orders should be reviewed as a matter of judicial economy because they are part of the same Order already under review and the rulings therein are related, as both involve the same default proceedings. See Section III., infra.

Background[2]

The above issues in this appeal arise out of a lawsuit against Watertoys, LLC for damages by Respondents Kerry Hernandez ("Ms. Hernandez") and George Hernandez ("Mr. Hernandez") (collectively referred to as "Plaintiffs") allegedly resulting from Mrs. Hernandez's participation in a "banana boat" ride operated by Watertoys at the Isle of Palms Marina on July 6, 2011. Plaintiffs' Complaint was filed on December 1, 2011, and was served on Watertoys on December 29, 2011. (Compl. and Certificate of Service; R. ___).[3] Watertoys was the sole defendant named in the Complaint, which asserted a claim for negligence on behalf of Mrs. Hernandez, and a claim for loss of consortium on behalf of Mr. Hernandez. (Compl.; R. ___). Plaintiffs' Complaint also included a demand for a jury trial. (*Id.*)

On March 1, 2012, Plaintiffs filed an affidavit of default and a motion for default judgment. (Aff. of Default and Mot. for Default Judgment; R. ___). On that same day the Charleston County Clerk of Court filed an entry of default and an Order of Default Judgment was also executed by Judge Jefferson. (Entry of Default filed 3/1/12, Order of

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[2] For a complete recitation of the facts, Watertoys refers to and fully incorporates the Statement of Facts contained in its initial Watertoys' brief filed contemporaneously herewith. (*See* excerpted pages from Initial Appellant's Br., attached as Exhibit A.)

[3] Various filings are referenced herein. These voluminous filings are not attached. They would be part of the Record on Appeal in this matter. Should the Court desire all of these filings to be filed in an Appendix of some sort, Watertoys will be happy to provide them.

Default Judgment filed 3/6/12; R. ___). However, the Order of Default Judgment was not filed with the Clerk of Court until five days later on March 6, 2012.[4]

On March 5, 2012, Watertoys filed an answer which included a demand for a jury trial. At the time that this answer was filed, Watertoys was not aware that an entry of default had occurred or that Plaintiffs had moved for default judgment and that a default judgment order had been executed and was in the process of being filed.

On March 6, 2012, at 10:35 a.m., Plaintiffs filed a motion seeking to have Jon L. Austen appointed as a special referee "to take testimony and direct entry of final judgment in this action." (Mot. for Reference filed 3/6/12; R. ___). One minute later the Charleston County Clerk of Court entered an Order of Reference to this effect. (Order of Reference filed 3/6/12; R. ___). On the very next day, March 7, 2012, Watertoys filed a motion to set aside the entry of default and the default judgment. (Mot. to Set Aside Entry of Default and Default Judgment filed 3/7/12; R. ___). Subsequently, on March 12, 2012, the Charleston County Clerk of Court filed an Order vacating the Order of Reference due to the fact that, prior to the order of reference being entered, Watertoys had "filed an Answer and requested a trial by jury." (Form 4 Order filed 3/12/12; R. ___).

A hearing on Watertoys' motion to set aside the entry of default was held before Judge Michael G. Nettles on May 29, 2012. Prior to that hearing, both Watertoys and Plaintiffs filed affidavits and memoranda relating to that motion. (Aff. of Nigro filed 3/12/12, Aff. of Fiem filed 3/12/12, Aff. of Yarborough filed 5/24/12, Memo. in Supp.

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[4] While this Order purported to grant a default judgment in favor of Plaintiffs, it noted that "a trial on unliquidated damages will be held at a later date." (Order of Default Judgment at p. 2; R. ___). Thus, this was not an actual default judgment because "a default judgment does not occur and cannot be entered until ... damages are determined." *Beckham v. Durant*, 300 S.C. 329, 331 n.2, 387 S.E.2d 701, 703 n.2 (Ct. App. 1989). In any event, this Order was later vacated. See infra.

filed 5/29/12, and Plaintiff's Memo. in Opp. Filed 5/29/12; R. ___). At this hearing, it was agreed by the parties that the March 6, 2012 Order of default judgment should be vacated, and it was. (Transcript of 5/29/12 Hearing at pp. 3-4, Order filed 6/5/12 at p. 3; R. ___). Thus, at the time of the hearing, the only issue before the court was Watertoys' motion for relief from the mere entry of default.

On June 5, 2012, an Order by Judge Nettles was filed denying Watertoys' motion for relief from the entry of default. (Order filed 6/5/12; R. ___). ***In addition to*** denying this motion, the June 5th Order also referred this matter "without discovery to the master-in-equity of Charleston County for a hearing on [Plaintiffs'] damages and default judgment...." (Order filed 6/5/12 at p. 8; R. ___).

On June 15, 2012, Watertoys filed a motion for reconsideration pursuant to Rule 59(e), SCRCP. (Mot. for Recon. filed 6/15/12; R. ___). Three days later, on June 18, 2012, Watertoys' insurer, Federal Insurance Company ("Federal"), filed a motion to intervene in this action which also requested that the Court stay any further rulings until the issue of its intervention was resolved. (Mot. to Intervene and Stay filed 6/18/12; R. ___). Simultaneous with such filing, Federal also filed a motion to set aside the entry of default as to Watertoys. (Mot. to Set Aside Default filed 6/18/12; R. ___).

On June 27, 2012, Watertoys filed a motion requesting that the Trial Court stay any ruling on its motion for reconsideration until the issue of Federal's intervention motion was resolved. (Motion to Stay filed 6/27/12; R. ___). On that same day, Watertoys also filed a supplemental memorandum in support of its motion for

reconsideration.[5] (Reply & Supp. Memo in Supp. of Mot. to Recon. filed 6/27/12; R. ___). In addition to addressing issues relating to the Trial Court's denial of the motion to set aside the entry of default, Watertoys' motion for reconsideration and related filings specifically raised issues regarding: (1) the improper reference of this matter to the master-in-equity despite Watertoys' demand for a jury trial; (2) the improper denial of any discovery on the issue of damages; and (3) the improper consideration of Plaintiffs' counsel's statements as testimony at the May 29th hearing. (Mot. for Recon. Filed 6/15/12 and Reply & Supp. Memo in Supp. of Mot. to Recon. filed 6/27/12; R. ___).

On July 6, 2012, an Order by Judge Nettles denying Watertoys' motion for reconsideration was filed. (Order filed 7/6/12; R. ___). While the July 6, 2012 Order states that the Trial Court "carefully considered the briefs by both parties on the issue of reconsideration," it failed to address the issue of Federal's motion to intervene or Watertoys' motion to stay this ruling pending resolution of the intervention motion. (*Id.*) Instead, the Trial Court communicated to the parties its view that Watertoys' motion to stay was rendered moot by its Order denying the motion for reconsideration. On July 6, 2012, Watertoys timely filed its notice of appeal as to both the June 6th Order and the July 6th Order. The Plaintiffs' motion to dismiss the appeal followed.

[5] Watertoys incorporated all of the arguments asserted by Federal into its filing supporting its motion for reconsideration.

Argument[6]

I. The Trial Court improperly referred this matter to the Master-in-Equity for a damages hearing in contravention of the provisions of the South Carolina Rules of Civil Procedure and both parties' demands for a jury trial.

The Trial Court's June 6th Order referred this matter to the Charleston County master-in-equity for a hearing on damages. (Order filed June 6, 2012 at p. 8; R. ___). In doing so, the Trial Court erred and violated the South Carolina Rules of Civil Procedure under the circumstances. This requires reversal of the portion of the lower court's Orders depriving Appellant of a jury trial on the issue of Respondents' damages.

A. Appellant demanded a jury trial once it appeared in this action and Rule 53(b) expressly provides Appellant with a right to a jury trial on damages.

"In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). In applying the rules of construction, our courts have held that "[i]f a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." Id.; see also Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004) (stating where the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning without resort to forced construction to limit or expand the rule).

Rule 53(b) of the South Carolina Rules of Civil Procedure provides in pertinent part:

> In an action where the parties consent, ***in a default case***, or an action for foreclosure, some or all of the causes of action in a case

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[6] These arguments are the same as in Watertoys' initial appeal brief—they are merits arguments.

> may be referred to a master or special referee by order of a circuit judge or the clerk of court.
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> . . .
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> Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.

Rule 53(b), SCRCP (emphasis added).

The first sentence of the above, inset portion of Rule 53(b), makes it clear that the Rule applies "in a default case" by permitting the trial court to refer the case to a Master. However, the next relevant part of the Rule then states that "*any party may request a jury . . . on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court.* Rule 53(b), SCRCP (emphasis added). This italicized language includes a party in default under the broad language of the Rule. The Rule applies to "any party." The Rule notes that the matter ***shall*** be returned to the circuit court upon a request for a jury—indicating that a jury trial right can be asserted after the reference. Necessarily, Rule 53(b) thus recognizes that a party that has appeared, even in default, and demanded a jury trial, shall have a right to a jury as to damages and the case returned to the circuit court for that purpose. In fact, based on this very construction of the rules, the original order of reference to a special referee was vacated, and such vacation was not contested or appealed.

Appellant demanded a jury trial upon its initial appearance in this case. (Answer filed 3/5/12 at pp. 1, 3, & 4; R. ___). Further, in seeking reconsideration of the Trial Court's denial of its motion to set aside the entry of default, Appellant again asserted its right to a jury trial as to damages. (Reply and Supp. memo in Supp. of Mot. to Recon. Filed 6/27/12 at p. 2; R. ___). See, e.g., Sunamerica Financial Corp. v. Equi-Data, Inc., 299 S.C. 175, 383 S.E.2d 8 (Ct. App. 1989) (recognizing that the renewed demand for a

jury trial made by appellant *after* the master filed his report served to remind the trial court of its outstanding demand for a jury trial and indicated appellant did not waive its right to a jury trial).

Accordingly, under a proper reading of Rule 53(b), Appellant has demanded its right to a jury as to damages as permitted by the broad language of the Rule applying to any party, including a party in default. Appellant has not waived this right. To conclude otherwise improperly limits the language of Rule 53(b).

B. Respondent's jury demand was never formally withdrawn and the Court improperly ordered the damages hearing to the Master under Rule 55(b)(3).

Plaintiffs also demanded a jury trial in their Complaint. (Compl. at pp. 1, 2, & 6). In the circumstances here, Plaintiffs have not withdrawn their demand for a jury trial.[7] In order for Respondents to withdraw a jury demand, they would need to do so by written stipulation filed with the court or by oral stipulation made in open court and entered in the record. Sunamerica Financial Corp. v. Equi-Data, Inc., 299 S.C. at 177, 383 S.E.2d at 9 (citing Rule 39 of the South Carolina Rules of Civil Procedure). The Plaintiffs did not withdraw their jury demand, yet the Trial Court ordered the matter to the Master regardless.

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[7] Previously Plaintiffs moved for an order of reference and the Trial Court granted the request. (Order of Reference filed 3/6/12; R. ___). Consent to an order of reference does not constitute a waiver or withdrawal of a jury trial demand. See Sunamerica Fin. Corp. v. Equi-Data, Inc., 299 S.C. 175, 383 S.E.2d 8 (Ct. App. 1989) (holding the parties' subsequent consent to referral to a master does not properly withdraw the demand). Moreover, the motion for reference was withdrawn and the Trial Court vacated the order of reference to a Special Referee. Plaintiffs did not move again for an order of reference or properly withdraw their jury demand. Instead, in his Order denying Appellant's motion to set aside the entry of default, the Trial Court *sua sponte* referred the case to the Master-in-Equity. The Trial Court subsequently denied Appellant's motion for reconsideration and Appellant's second assertion of its right to a jury trial as to damages following the reference to the Master.

Appellant is permitted to rely upon Plaintiffs' jury demand because it has not been withdrawn. See Baughman v. Am. Tel. & Tel. Co., 298 S.C. 127, 378 S.E.2d 599 (1989) (noting that under Rule 38, a defendant may rely on a plaintiff's demand for a jury trial) (citing Cram v. Sun Insurance Office, Ltd., 375 F. (2d) 670 (4th Cir. 1967)). In Baughman, the South Carolina Supreme Court reversed the circuit court's order consolidating several claims for a non-jury trial on the basis that while the defendant had not made a jury demand, the plaintiff had demanded a jury trial. Id. The Court held that the defendant was entitled to rely upon the plaintiff's demand and remanded the case for a jury trial. Id.

Moreover, Rule 55(b)(2) states that a trial court "shall accord a right to a trial by jury to the parties if a proper demand therefor has been made pursuant to Rule 38 and not withdrawn...." Such are the circumstances here. The Trial Court's *sua sponte* order referring the damages hearing to the Master when a jury had been demanded in the Complaint and not withdrawn was error. Hence, should this Court construe Appellant's multiple efforts at asserting its rights to a jury trial as invalid, the continued existence of the Plaintiffs' jury demand in their Complaint entitles Appellant to a jury trial. The Trial Court's order must be reversed on this point because the Plaintiffs' jury demand remains operative.

C. Plaintiffs' cannot withdraw their jury demand without Appellant's consent because Appellant has appeared in this case.

Rule 38(d), SCRCP, is intended to allow withdrawal of a jury demand and reference for a non-jury proceeding without consent of both parties only in default cases where the defaulting party has not made an appearance. Appellant has made an

appearance and does not fall within such circumstances. Thus, Rule 38(d) does not apply in this case because of Appellant's appearance.

Rule 38(d) operates to alleviate the requirement of the plaintiff having to gain the consent of an absent party prior to withdrawing a jury demand. This exception to the consent requirement is well reasoned because it would create a burden on the plaintiff to be required to obtain the consent of a party who has made no appearance in the action. However, the rationale of the default exception contained in Rule 38(d) does not apply where the defaulting party has made an appearance. If there is no "adverse party" that has appeared, consent is not required. Here, however, Appellant appeared and the Plaintiffs must obtain its consent, given its status as an adverse party. Thus, when there is a defaulting party who has made an appearance before the court, an agreement between the parties must be reached before the case can be referred for a non-jury proceeding or the jury demand withdrawn.

Plaintiffs contend that Roche v. Young Brothers, Inc., 332 S.C. 75, 504 S.E.2d 311 (1998) demonstrates that party does not have to obtain the consent of a defaulting party who has made an appearance before referring the case for non-jury proceedings on damages. However, Roche is not applicable. Roche addresses the issue of obtaining consent as to the identity of a special referee; not whether a party consents to a non-jury proceeding. The current appeal involves, among other things, the demand for a trial by jury—a fundamental and important right provided by the South Carolina Constitution. Thus, unlike Roche, Appellant is not arguing about consenting to a certain special

referee. Rather, Appellant is objecting to the Trial Court's Orders infringing on its protected right to a jury trial.[8]

The construction Appellant offers as to the effect of Rule 38(d) is the only logical conclusion that can be reached in light of Baughman. Other courts have held that a plaintiff may not withdraw a jury demand made in a pleading without the defendant's consent, even where the defendant is in default. Jayre, Inc. v. Wachovia Bank & Trust Co., N.A., 420 So.2d 937, 938 (Fla. Ct. App. 1982) ("A plaintiff, after demanding a jury trial in its complaint cannot withdraw the demand, absent consent of the defendant, even when a default judgment has been entered against the defendant.") (citations omitted). The Florida Supreme Court has similarly determined that "[w]hen a jury trial has been requested by the plaintiff, the defendant is still entitled to a jury trial on the issue of damages even though a default has been entered against the defendant for failure to answer or otherwise plead." Curbelo v. Ullman, 571 So. 2d 443 (Fla. 1990) (citation omitted). Likewise, the Michigan Supreme Court has held that a defendant's default does not "cancel" a prior jury trial demand or constitute the functional equivalent of waiver. Wood v. Detroit Automobile Inter-Insurance Exchange, 321 N.W.2d 653, 658-59 (Mich. 1982); see also Zaiter v. Riverfront Complex, Ltd., 620 N.W.2d 646, 651-53

[8] If this Court finds Roche to be applicable to the circumstances of this case, Roche was, respectfully, wrongly decided. A consent requirement in a rule should apply where parties have appeared in an action. It is contrary to our adversarial system and to due process generally to permit one party, in an action where an opposing party has made an appearance, to unilaterally decide the identity of the fact-finder and judge for the parties' dispute. No party is unfairly prejudiced by requiring consent in such a circumstance. Respectfully, the Court of Appeals was correct on this point in Roche, yet was reversed by the Supreme Court. In any event, Roche does not cite or acknowledge the prior holding in Baughman, supra, which entitles a defendant to rely upon a plaintiff's jury demand when that jury demand has not been properly withdrawn.

(Mich. 2001) (holding that defaulting defendant was entitled to a jury trial on damages based on plaintiff's demand for jury trial).

While a defaulting defendant has effectively admitted his liability for the allegations in the Complaint, a Plaintiff may not subsequently alter or expand the allegations to take advantage of the default and thereby prejudice the defendant. See Harbor Island Owners' Ass'n v. Preferred Island Properties, Inc., 369 S.C. 540, 546, 633 S.E.2d 497, 500 (2006) ("By defaulting, Appellant admitted the allegations in the complaint concerning liability, not damages."); Dynasteel Corp. v. Aztec Indus., Inc., 611 So. 2d 977, 982 (Miss. 1992) ("[A] default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded."); 46 Am. Jur. 2d Judgments § 296 ("A default judgment must conform to the pleadings.") (citations omitted). Here, a jury trial demand was also asserted by Plaintiff. Consistency favors permitting reliance by the defendant on that demand, and not allowing, after a default, for the unilateral change to a non-jury damages proceeding absent consent. A defaulting party that appears can thus know that a damages proceeding will be before a jury if such was demanded in the Complaint, absent consent by all to proceed otherwise. This reasoning is consistent with the Supreme Court's holding in Baughman and further supports reversal of the Trial Court's Orders denying Appellant its desired mode of trial.

II. Appellant has a Constitutional right to a jury for the damages hearing.

This Court should find that a proper reading of the South Carolina Rules of Civil Procedure recognize the right to a jury trial as to damages for a party in default when that party has appeared in the case following the entry of default but before the determination

of damages and entry of judgment. To conclude otherwise would render the Rules of Civil Procedure, Rules 38, 53, and 55, unconstitutional.

Our Courts construe statutes and court rules in such a way as to uphold their constitutionality. South Carolina Nat'l Bank v. Central Carolina Livestock Market, Inc., 289 S.C. 309, 345 S.E.2d 485 (1986) (recognizing that statute will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond reasonable doubt and a court must uphold the constitutionality of legislation if possible). Thus, the Court should adopt Appellant's reading of these Rules as set forth herein to avoid the conclusion that these rules are unconstitutional.

The South Carolina Constitution provides "the right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868. Medlock v. 1985 Ford F-150 Pickup, 308 S.C. 68, 70-71, 417 S. E. 2d 85, 86 (1992). The right to a jury trial encompasses forms of action that have arisen since the adoption of the Constitution in those cases where the later actions are of like nature to actions which were triable at common law at the time of the adoption of the Constitution. Id.

The question then is whether, at the time of the adoption of the South Carolina Constitution, a party in default had a right to a jury in an unliquidated damages hearing. Such a right existed. Prior to the adoption of the South Carolina Constitution in 1868, default damages were determined by a master or referee only when they were liquidated or mechanically calculable (a liquidated amount):

> In England, whence we have adopted this practice, after interlocutory judgment by default, it seems that the Judges will

> refer to both master or prothonotary, on an affidavit of the nature of the action, actions upon bills of exchange and promissory notes, and covenants for the payment of a sum certain, as upon a mortgage, or for rent, or arrears of an annuity, or an award, in order to compute the principal sum due, and the interest. [] ***They have refused, in every case, however, to make such reference, where there was the slightest uncertainty as to the obligation of the debt, or the interest due.***

Wilkie v. Walton, 29 S.C.L. 473, 1844 WL 2604 (S.C. App. Law 1844) (citing 1 Tidd's Prac. 571-2) (emphasis added); see also Reigne v. Dewees, 2 Bay (S. Car.) 405 (1802).

This right has been borne out in other cases prior to the adoption of the Constitution. "[The trial judge] *charged the jury*, that in consequence of the default of the defendant in not pleading to the action, the title and conversion were admitted, and that the only question left for them was what amount of damages the plaintiff ought to recover." See Connor v. Hillier, 11 Rich. 193, 1858 WL 3771 (S.C. App. Law 1858) (emphasis added). On appeal, however, the Connor court reversed, noting that because the action was one of "trover," the plaintiff was entitled to recover the face value amount of the stock certificate at issue and because the amount was a sum certain, a jury was not needed. Id. Despite that, Connor recognizes the right available in South Carolina as noted in Wilkie as early as 1844.

Similarly, cases after the adoption of the 1868 Constitution, demonstrate that the right to a jury trial for a defaulting party continued. See Wolf v. Hamberg, 8 S.C. 82, 1876 WL 5991 (1876) (noting that when a defendant defaults in an action where damages are not liquidated, the clerk may not simply enter judgment without an order or further involvement of the court); Wolf, Mayer & Co. v. Hamberg, 6 S.C. 448, 1876 WL 5930

(1876) (same).[9] Scholarly work on the law in South Carolina from the relevant time period further supports the existence of this jury trial right. See **"History of a Suit at Law According to the Practice of this State,"** James Conner, of the Charleston Bar (1860 2d ed.) (at pp. 16-17) (stating that "[w]here, however, the demand is unliquidated, it is then necessary for the plaintiff to execute a writ of inquiry . . . The defendant is restricted to evidence in mitigation of damages . . . . In other words, he can contest the *amount* of the debt, but not the debt itself, and ***the jury are bound to find some damages for the plaintiff***—they can never find for the defendant."). This treatise also notes that South Carolina law as of 1860 required a plaintiff, in a default setting, to execute a writ on inquiry and that such plaintiff could only obtain damages when the case "is upon the call of the Docket, executed by the jury in attendance." Id. at p. 17.

In light of the historical backdrop as to jury trial rights for a defaulting party in an unliquidated damages setting, Appellant is entitled to a jury trial on damages in this case.

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[9] During various periods of time, the General Assembly has adopted statutes that purportedly addressed jury trial rights or lack thereof in a default setting:

1870 – 1882: § 269 (of the 1870 Code)
1882 – 1922: § 267 (of 1882 and 1902 Code)
1922 – 1930: § 526 (of 1922 Code)
1930 – 1942: § 577 (of 1930 Code)
1942 – 1953: § 586 (of 1942 Code)
1953 – 1976: §§ 10-1531 and -1532
1976 – 1985: § 15-35-310

However, it appears that none of these statutes purporting to pertain to jury trial rights were challenged on a constitutional basis. Regardless, all of the statutes no longer exist.

Moreover, the General Assembly can only modify rights embedded in our State Constitution by constitutional amendment. Medlock v. 1985 Ford F-150 Pickup, 308 S.C. 68, 73, fn. 3, 417 S. E. 2d 85, 87 (1992). The Legislature may not abrogate the right to a jury trial simply by designating a proceeding as a civil action without a jury. See Mims Amusement Co. v. S.C. Law Enforcement Div., 366 S.C. 141, 621 S.E.2d 344 (2005). Therefore, the jury trial right in this regard exists today as it did in 1868.

Hence, to the extent the South Carolina Rules of Civil Procedure could be interpreted to deprive Appellant of its claimed right to a jury trial, such rules would be unconstitutional. The rules should not be so interpreted. This Court should thus reverse the Trial Court's *sua sponte* decision to refer the damages hearing to the Master.

III. Because one of the rulings in the Trial Court's Orders is appealable, the remainder of the rulings are appealable.

As demonstrated above, an immediately appealable issue exists as to mode of trial respecting the damages hearing in this matter, thereby necessitating resolution of those issues by this Court on the merits. Because this Court is already reviewing the Orders of the Trial Court for that reason, it should consider the remainder of the Order for reasons of judicial economy.

An order that is not directly appealable may be considered if there is an appealable issue before the Court. Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 623 S.E.2d 387 (2005); Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001). When an immediately appealable order is before the Court, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy), an appellate court will consider issues that are intertwined with the immediately appealable issue. *See* Edge, supra. Our appellate courts aim to avoid unnecessary litigation. Consideration of unappealable issues at the same time the court undertakes adjudication of an appealable issue best serves this aim. See Hite v. Thomas & Howard Co. of Florence, Inc., 305 S.C. 358, 409 S.E.2d 340 (1991); Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994) (addressing each issue presented by the appeal and reversing the trial court on all).

Should this Court decline to entertain all the issues in this case, multiple subsequent appeals and/or petitions for certiorari will be necessary. Thus, the Court should address each issue on the merits and reverse the trial court on all points raised.

Conclusion

Based on the above, this Court should deny the Plaintiffs' motion to dismiss the appeal without prejudice. Watertoys has properly appealed from the trial court's Orders. This Court should address the issues on the merits and order Plaintiffs' to file their Respondents' brief in this matter.

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August 17th, 2012

Exhibit A

Statement of the Facts

On July 6, 2011, Mrs. Hernandez was a passenger on a "banana boat" ride[1] operated by Appellant at the Isle of Palms Marina. (Compl. at ¶ 10, R. ___). Prior to participating in the "banana boat ride," Mrs. Hernandez executed an "Assumption of Risk, Release of Liability & Indemnification Agreement" ("the Release") (Release executed on 7/6/11; R. ___). In this Release, Mrs. Hernandez specifically acknowledged that this activity could be hazardous and involved the risk of physical injury, and, in consideration of her being allowed to participate, she assumed all risks and dangers of participating in the activity, granted a release to Appellant for any claims arising from her participation in the activity, and agreed to indemnify Appellant and others from any suits, claims or demands arising out of her participation in the activity. (Id.).

The Complaint in this matter alleges that during the course of the "banana boat" ride Mrs. Hernandez was thrown from the water sled and sustained a closed head injury. (Compl. at ¶¶ 14-15; R. ___). No report of injury was made by Mrs. Hernandez at the conclusion of the ride. (Aff. of Fiem filed 3/9/12 at ¶16; R. ___). Rather, the first time Appellant was aware that Mrs. Hernandez had allegedly suffered any form of injury during the ride was almost six months later when it was served with the Complaint on December 29, 2011. (Aff. of Fiem filed 3/9/12 at ¶ 17; R. ___).

Appellant's insurer, Federal, was not notified of Mrs. Hernandez's claim until the service of the Complaint. (Aff. of Nigro filed 6/15/12 at ¶ 6; R. ___). Typically, in a serious casualty claim such as this, the claims examiner receives notice of the claim many months prior to the initiation of litigation. (Id.; R. ___). This prior notice allows for time to investigate, evaluate, and possibly settle the claim prior to litigation commencing. (Id.; R. ___). Thus, in this matter,

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[1] A "banana boat" ride consists of an inflatable water sled that is shaped like a banana upon which riders sit while it is towed behind a boat or a jet ski. (Compl. at ¶ 7; R. ___).

Federal had no opportunity to conduct any investigation, evaluation, or settlement negotiations, and instead it was immediately thrust into an existing lawsuit.

On January 5, 2012, Federal assigned this claim to its claim examiner Maria Nigro ("Ms. Nigro"). (Id. at ¶¶ 2, 8; R. ___). Appellant's policy has a limit of $1,000,000. (Id. at ¶ 5; R. ___). However, the costs of defending any claims eroded the policy's coverage limit. (Id. at ¶ 8; R. ___). Because she did not have the usual prior notice of the claim, and had, therefore, no opportunity to investigate, evaluate and possibly settle the claim prior to litigation, Ms. Nigro's primary focus upon receiving the claim was to obtain extensions to respond to the Complaint and postpone retaining defense counsel in order to preserve the full policy limits for settlement, rather than having those limits depleted by litigation defense costs. (Id. at ¶ 5; R. ___). To this end, immediately upon being assigned to this matter, Ms. Nigro attempted to speak with Respondents' counsel. (Id. at ¶ 9; R. ___).

Specifically, on January 5, 2012, Ms. Nigro called Respondents' counsel and left a message seeking information about the claim. (Id.; R. ___). On January 13, 2012, Ms. Nigro left a detailed message which requested an extension to respond to the Complaint as well as factual information and medical records. (Id. at ¶ 11; R. ___). On January 19, 2012, Ms. Nigro again called Respondents' counsel's office and left a message with an employee requesting an extension as well as additional information about the claim. (Id. at ¶ 12; R. ___). That evening, Respondents' counsel (Mr. Yarborough) returned her call, and Ms. Nigro explained that Federal was completely unaware of this claim prior to the filing of the Complaint and that she would need some time to investigate and evaluate the claim, especially considering the serious nature of the injuries involved. (Id. at ¶ 13; R. ___). Ms. Nigro informed Mr. Yarborough of the policy limit amount and its provision that defense costs would erode that limit. (Id.; R. ___). Mr.

Yarborough indicated that he would not settle for less than the policy's maximum limit. (Id., Aff. of Yarborough filed 5/24/12 at ¶ 2; R. ___). Ms. Nigro then requested a ninety-day extension to allow her to investigate and evaluate the claim, obtain and review the medical records, and avoid retaining counsel and depleting the policy limits before the completion of that process. (Id.; R. ___).

Mr. Yarborough granted an extension of thirty-days.[2] (Id.; R. ___). However, it was Ms. Nigro's understanding that Mr. Yarborough agreed to consider granting further extensions so as to allow her to review the medical records, investigate and evaluate the claim and avoid depleting the policy limits during their settlement discussions. (Id.; R. ___). This view was reflected in her claim note following their conversation that evening wherein she noted her request for a ninety-day extension, and that Mr. Yarborough indicated he would grant an "initial" extension of thirty-days and would review her request for a larger extension upon his receipt of policy information. (Id. at ¶ 14; R. ___). Thus, Ms. Nigro was operating under the belief that the parties would exchange information to allow them to mutually evaluate the claim and possibly settle this matter before defense counsel had to be retained, which retention would deplete available insurance proceeds. (Id. at ¶ 13; R. ___) (noting Ms. Nigro's belief that "[w]e agreed to exchange documentation and get back together later to discuss settlement").

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[2] There is a dispute as to what Mr. Yarborough said with regard to the extension of thirty-days. Specifically, Mr. Yarborough contends that he informed Ms. Nigro that he could not agree to any extension beyond thirty-days under the South Carolina Rules of Civil Procedure. (Aff. of Yarborough filed 5/24/12 at ¶¶ 3, 6). At the May 29, 2012 hearing, Mr. Yarborough was permitted, over Appellant's objection, to essentially testify on this issue without being subject to cross-examination. (May 29, 2012 Hearing Trans. at pp. 14-15; R. ___). Ms. Nigro, however, explicitly contends that "[a]t no time in my conversation with Mr. Yarborough did he advise me that he was not allowed by the civil procedure rules to grant more than a 30 day extension of the time to answer." (Aff. of Nigro filed 6/15/12 at ¶ 17; R. ___).

On January 30, 2012, Ms. Nigro sent Mr. Yarborough an e-mail confirming their January 19, 2012 telephone conversation. (1/30/12 e-mail from Nigro to Yarborough; R. ___). In this e-mail she reiterated that she had requested a ninety-day extension to allow adequate time for her to receive and review the medical records as well as to otherwise "investigate this claim and attempt a compromised resolution," and that he had agreed to a thirty-day extension. (Id.; R. ___). Significantly, her e-mail stated her understanding that Mr. Yarborough had "advised that further extensions will be taken under consideration." (Id.; R. ___). Mr. Yarborough did not respond to or otherwise attempt to correct the understanding expressed by Ms. Nigro in this e-mail. (Aff. of Nigro filed 6/15/12 at ¶ 17; R. ___).

Additionally, the January 30, 2012 e-mail shows that Ms. Nigro was using the extension period to both provide Mr. Yarborough with information as well as to request information for her evaluation of the claim. Specifically, Ms. Nigro provided Mr. Yarborough with a copy of the Release executed by Mrs. Hernandez as well as information confirming the insurance policy's limits and that defense costs would erode those limits. (1/30/12 e-mail from Nigro to Yarborough; R. ___). Ms. Nigro had previously requested Mrs. Hernandez's medical records in order to evaluate the severity of the injury, and she reiterated that request in the e-mail. (Id., Aff. of Nigro filed 6/15/12 at ¶ 15; R. ___). In the January 30, 2012 e-mail, Ms. Nigro also requested contact information for the Gambinos, who were Hernandez family friends that were also on the "banana boat" on the day of the injury. (1/30/12 e-mail from Nigro to Yarborough; R. ___). The investigation and evaluation of eye witnesses such as the Gambinos is extremely important in the claim evaluation process. (Aff. of Nigro filed 6/15/12 at ¶ 15; R. ___). Mr. Yarborough never provided Ms. Nigro with the Gambino's contact information. (Id.; R. ___). On February 9, 2012, Ms. Nigro received a computer disc from Mr. Yarborough containing over 1200 pages of

medical records and bills. (Id. at ¶ 18; R. ___). This voluminous data had to be uploaded into Federal's computer system for review, a process which was not completed until March 8, 2012. (Id.; R. ___).

With the thirty-day extension, Appellant's deadline to answer the Complaint was February 27, 2012. However, due to the fact that Mr. Yarborough had not provided the contact information for the Gambinos, and the time that it took to upload the voluminous medial records, Ms. Nigro's investigation and evaluation was not yet completed. (Id. at ¶¶ 15, 18; R. ___). Additionally, since their January 19, 2012 telephone conversation and Ms. Nigro's January 30, 2012 e-mail, Ms. Nigro had not received any response from Mr. Yarborough to the policy information or the Release and Indemnification Agreement she had provided him. (Id. at ¶ 17; R. ___). As it was Ms. Nigro's understanding that the parties "would talk again and both attempt in good faith to settle the case before eroding the policy limits with defense costs," and because Mr. Yarborough had expressed specifically that he would not settle for less than the full $1 million policy limits, she reasonably believed that an additional extension would be granted. (Id. at ¶ 13; R. ___).

Appellant acknowledges that Ms. Nigro did not address the need for an additional extension until March 1, 2012 – three days after the existing extension expired. On March 1, 2012, Ms. Nigro called Mr. Yarborough's office to request additional time to evaluate the claim, but was told that Mr. Yarborough was out of the office. (Id. at ¶ 20; R. ___). That same day she sent Mr. Yarborough an e-mail requesting that he confirm they were operating under an additional extension, and reiterating her need for him to provide contact information for the Gambinos in order for her to complete her investigation and evaluation of the claim. (3/1/12 e-mail from Nigro to Yarborough; R. ___). Ms. Nigro's understanding that an additional extension

was possible and would be forthcoming is expressed by her statement in the e-mail that "[i]f additional time cannot be granted I will need to know as well as I must refer this suit to defense counsel to answer for the insured." (Id.; R. ___). Mr. Yarborough did not respond to this email. Rather, on that same day, Mr. Yarborough filed an Affidavit of Default, obtained an Entry of Default from the Clerk of Court, and was able to get Judge Jefferson to execute an Order of Default Judgment. (Aff. of Default filed 3/1/12, Entry of Default filed 3/1/12; and Order of Default Judgment filed 3/6/12; R. ___).

On March 2, 2012, having received no response to her March 1, 2012 e-mail to Mr. Yarborough or her phone message left earlier that day with his office, Ms. Nigro retained Mr. Kurt Rozelsky to represent Appellant and file an answer on its behalf. (Aff. of Nigro filed 6/15/12 at ¶ 21; R. ___). On the next business day, March 5, 2012, Appellant's answer was filed – only 7 days after the deadline. (Answer filed 3/5/12; R. ___). The Order of Default Judgment executed by Judge Jefferson on March 1, 2012 was not filed until March 6, 2012. On the very next day, Appellant filed its Motion to Set Aside the Entry of Default and Default Judgment. (Mot. to Set Aside Default and Default Judgment filed 3/7/12; R. ___).

Ms. Nigro is a seasoned casualty claim examiner who has *never* before missed a deadline to timely answer on behalf of an insured. (Aff. of Nigro filed 6/15/12 at ¶ 5; R. ___). She has *never* before had a problem obtaining extensions of time from attorneys in order to conduct a claim investigation and open settlement negotiations. (Id.; R. ___) Ms. Nigro's failure to take action prior to the expiration of the deadline is explained by her reasonable belief that that parties were in the process of exchanging information in good faith in order to evaluate the claim and explore settlement possibilities. (Id. at ¶¶ 5, 13; R. ___). Additionally, her purpose in delaying the retention of counsel was to avoid the depletion of the policy limits and, thus, keep as much of

the $1,000,000 policy limits available for settlement as possible. (Id.; R. ___). The failure to act before the deadline is also explained by personal issues she was dealing with at that time. Specifically, during the month of January – the time period when she would have docketed the extension's deadline – Ms. Nigro was understandably distracted by a mammogram which resulted in a potential positive breast cancer finding and the need to under-go a biopsy on January 19, 2012 (the same day as her telephone conversation with Mr. Yarborough regarding the extension). (Id. at ¶ 22; R. ___). Additionally, during the months of January and February 2012, Ms. Nigro was the sole caregiver for her 79 year old disabled mother and her 60 year old mentally disabled sister. (Id. at ¶¶ 23-25; R. ___).

Despite these reasons for the default, and despite Ms. Nigro's course of dealing with Mr. Yarborough, the Trial Court held that Appellant had failed to provide a "satisfactory explanation" for the default, and, therefore denied Appellant's motion to set aside the entry of default. (Order filed 6/6/12 at pp. 5-7; R. ___). In addition to refusing the set aside the default, the Trial Court's June 6th Order also unilaterally referred this matter to the Charleston County Master-In-Equity for a hearing of damages and a default judgment and directed that such proceedings be conducted without discovery. (Id. at p. 8). As set forth above, on July 6, 2012, the Trial Court also denied Appellant's Motion for Reconsideration. This appeal followed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2011-CP-10-8831

Kerry and George Hernandez, ... Respondent,

v.

Watertoys LLC,..... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Watertoys LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Watertoys LLC's Return in Opposition to the Motion to Dismiss

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August 17, 2012

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

RE: Kerry and George Hernandez v. Watertoys LLC
Civil Action No. 2011-CP-10-8831
SC Court of Appeals No. 2012-212458
Our File No. 40130/01500

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Watertoys LLC's Return in Opposition to the Motion to Dismiss in the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

By copy of this letter to counsel of record, we are serving them with a copy of this Return.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

CMB:lpw
Enclosures
cc: David B. Yarborough, Esquire
Kurt Rozelsky, Esquire
Neil D. Thomson, Esquire
John S. Nichols, Esquire