THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2015-000701
Circuit Court Case No.: 2014-CP-42-02846

Paula Rose, ... Respondent,

v.

Charles Homer Rose, II, ... Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

STATEMENT OF THE ISSUES

1) Did the Court err in denying Defendant's motion to set aside default?

2) Does reversal and/or remand of the default issue require reversal and remand of the damages issue as well?

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF THE CASE

The parties were married at the time this action was initiated. This action was commenced by the filing of a Summons and Complaint on October 2, 2014. The Defendant was served on October 6, 2014. On December 19, 2014 the Defendant filed an Affidavit of Default and Motion for Damages Hearing. On January 20, 2014 the Plaintiff filed a Motion for Enlargement of Time and to Set Aside Any Default; a Memorandum in support of the motion; and an Answer.

T. Ryan Langley, Charles J. Hodge, N. Douglas Brannon, and Christopher D. Kennedy represented the Plaintiff/Respondent below. Kim R. Varner represented the Defendant/Appellant below. J. Falkner Wilkes and Kim R. Varner represent Appellant on appeal.

STATEMENT OF FACTS

Respondent, Paula Rose, sued her husband, Homer Rose, in a circuit court action for damages based on a claim of assault and battery. Mr. Rose was served with the summons and complaint on October 6th of 2014. Shortly after receiving the complaint Mr. Rose met with his divorce counsel who then forwarded a copy of the summons and complaint to Mr. Rose's insurance company. (T. p. 49). In late October Mr. Rose returned to his divorce counsel's office to follow up on the case and discovered that the insurance company had taken no action on the summons and complaint claiming that Mr. Rose had failed to make a "formal claim". (R. p. 20; 49). Learning this Mr. Rose immediately called his agent and made a "formal claim" with the insurance company so that it could act on the summons and complaint. (R. p. 20; 49). Mr. Rose's divorce counsel then notified Mrs. Rose's counsel of the situation with the insurance carrier and requested an extension of time in which to answer. (R. p. 20). The affidavit of Mr. Rose's counsel indicates that Plaintiff's counsel consented to the request for an extension. (R. p. 20). Plaintiff's counsel, although admitting to having a discussion about the situation with the insurance company, denied ever having granted an extension in which to answer the complaint. (R. p. 41-42).

The insurance company subsequently notified Mr. Rose that they would not provide coverage nor defend under a reservation of rights. (R. p. 20; 50). Near the end of time the complaint was due a medical condition arose and Mr. Rose was hospitalized. (R. p. 2). Mr. Rose required surgery and almost died. (R. p. 50). During the time Mr. Rose was in the hospital, Mrs. Rose came to visit him regularly. (R. p. 50). Photos show Mr. and Mrs. Rose at the hospital together. (R. 36-40; 50). In the photos of Mr. and Mrs. Rose at the hospital the

parties appear to have reconciled their differences. During this time Mrs. Rose was assuring Mr. Rose that she was dropping the lawsuit. (R. p. 20-21; 23-27; 33-34; 35; 50). Mrs. Rose's assurances that she would drop the case began even prior to Mr. Rose's admittance to the hospital. (R. p. 50-52).

In December when Mr. Rose was released from the hospital he was heavily medicated. (R. p. 51). During Mr. Rose's hospitalization through his convalescence and up to January 17th Mrs. Rose repeatedly assured Mr. Rose that the lawsuit was or would be dropped. (R. p. 21; 23-40; 50).

On January 19th, in what appears to be a "suicide note," Mrs. Rose rambles that she did not want to sue him, that she did not intend to, and that is was her fault that she didn't stand up to the lawyers. (R. p. 33-35; 51). Once it became clear from the January 19th email that Mrs. Rose might not dismiss the action as she had repeatedly promised, Mr. Rose immediately (January 20th) filed a motion to set aside the default and enlarge the time to answer the complaint. (R. p. 14). At the same time Mr. Rose also filed an answer to the complaint. (R. p. 13; Supp. App. 1). The motion to set aside the default and the damages hearing were each set to be heard on the same day. At the hearing the trial court denied Mr. Rose's motion to set aside the default, took testimony as to damages, and awarded Mrs. Rose $149,016.00, $111,762 of which were punitive damages. (R. p. 1-7; p. 42-221).

In its order the trial court recognized the complicated relationship between Mr. and Mrs. Rose, as well as problematical nature of the text messages from Mrs. Rose to Mr. Rose. (R. p. 3). While the court appears to have recognized Mr. Rose's reliance on Mrs. Rose's

assurances that she was not pursuing the case, it nevertheless failed to grant relief from the default. (R. p. 3).

ARGUMENT

I. THE COURT ERRED IN REFUSING TO GRANT RELIEF FROM DEFAULT WHERE GOOD CAUSE WAS SHOWN.

The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

"Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 607-08, 681 S.E.2d at 888. The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court. Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 322 (Ct.App.1988). An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997). In this case record shows that the trial court's

ruling was both, controlled by an error of law and is without evidentiary support.

The *good cause* standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Here, the record shows a number of factors that, in combination, sufficiently explain why Mr. Rose failed to file a timely answer. Initially, Mr. Rose acted timely in taking the summons and complaint to his divorce lawyer who immediately forwarded the complaint to Rose's insurance company. Again, Rose acted timely by returning to his divorce attorney's office within a few weeks to follow up on the complaint. When it was discovered that the insurance company had taken no action on the complaint due to some technicality, Rose again acted immediately to cure the problem so as to allow the insurance company to act on the complaint. When the insurance company denied coverage and defense, Rose's divorce counsel acted immediately to request an extension from the Plaintiff's counsel. Mr. Rose was told that he had an extension to answer the complaint. Then, near the end of the time the answer was due, Mr. Rose nearly died and was hospitalized for emergency surgery. While Mrs. Rose was visiting him in the hospital she assured Mr. Rose that she would be dropping the case. She continued to assure Mr. Rose that the case was, or would be dropped, up to January 19, 2015, when she wrote the rambling suicide note stating that she didn't have the strength to "stand up" to her attorneys. After the January 19th email raised suspicion as to Mrs. Rose's true intent, Mr. Rose immediately filed a motion for relief along with an answer to the complaint.

As found by the trial judge, Mr. Rose entered the hospital near the end of the time the answer was due. Possibly before, but no later than the time of Mr. Rose's

hospitalization, Ms. Rose began a pattern of repeatedly assuring Mr. Rose that the case would be dismissed. These repeated assurances by Mrs. Rose that she would not proceed with the case, whether fraud or misrepresentation, are each a specifically identified basis for relief of default under Rule 60. Any ground for relief under Rule 60 is also a ground for relief under Rule 55:

> It is often observed, as the court of appeals held in the present case, that the criteria for obtaining relief from judgment under Rule 60(b) — mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation — are relevant in determining whether good cause has been shown under Rule 55(c), SCRCP. *See* New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 378-79 (Ct.App. 1993) (holding that, "as a practical matter," the 60(b) factors are relevant under both rules). However, we caution that this language invites trial courts to apply a heightened standard to Rule 55(c) motions. The Rule 60(b) factors are indeed relevant to a Rule 55(c) analysis, but only insomuch as proof of any one of these factors is sufficient to show "good cause." No trial court should ever find good cause lacking based solely on the absence of a Rule 60(b) factor.

Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

Because the showing required under Rule 55 is less than that required in Rule 60, the misleading assurances by Mrs. Rose, even if not rising to the level of relief individually, require relief when taken in combination with all other factors. In addition to the misrepresentations by Mrs. Rose that she would drop the case, Mr. Rose had been told that he had an extension of time in which to answer. He then suffered severe medical problems requiring surgery and hospitalization prior to the end of the time he reasonably believed the complaint was due. Mrs. Rose made repeated assurances during Mr. Rose's convalescence, while he was heavily medicated. The assurances continued through January

17th, when she again indicated that she could "call this off". On January 19th, realizing from the "suicide note" that Mrs. Rose may not be abandoning the case, Mr. Rose immediately filed an answer to the complaint and motion for Rule 55 relief.

But for the delays caused by outside influences, Mr. Rose took timely and appropriate action at every juncture. He was reasonable in his reliance on the insurance company and his divorce attorney. He acted promptly when he discovered a problem and was told that he had an extension just prior to his hospitalization. There was clearly confusion amongst his divorce attorney and the insurance company. Although that alone would not require relief, it is relevant when combined with all other factors. "Although the presence of other factors, in the totality of the circumstances, may amount to a showing of "good cause," a defendant may not be relieved from the entry of default solely because it relied to its detriment on a negligent insurance agent. *See* Ricks, 293 S.C. 372, 360 S.E.2d 535 (holding that good cause was shown in the totality of circumstances involving misplaced reliance on insurance agent)." Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). Given the totality of the circumstances, Mr. Rose clearly met the satisfactory explanation requirement of Wham and Rule 55 SCRCP. The trial court's ruling to the contrary is unsupported by the record.

Under Rule 55(c) of the South Carolina Rules of Civil Procedure, a default may be set aside "for good cause shown." Rule 55(c) should be "liberally construed to promote justice and dispose of cases on the merits." Bage v. Southeastern Roofing Co. of Spartanburg, Inc., 373 S.C. 457, 471, 646 S.E.2d 153, 160 (Ct.App. 2007), *cert. granted* (Mar. 20, 2008). Public policy favors the disposition of cases "on their merits rather than on

technicalities." Mictronics, Inc. v. South Carolina Department of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct.App. 2001) *citing* Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct.App. 1986). Rule 55(c) should be "liberally construed to promote justice and dispose of cases on the merits." Dixon v. Besco Eng'g, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct.App. 1995); Ricks, 293 S.C. at 374-75, 360 S.E.2d at 536; *see also* Mann v. Walker, 285 S.C. 194, 328 S.E.2d 659 (Ct.App. 1985) (holding under the earlier statutory provisions for default judgment pursuant to section 15-27-130 of the 1976 Code of Laws of South Carolina, the rules dealing with default are liberally construed to see that justice is promoted and to strive for the disposition of cases on their merits). The trial court in this case failed to properly construe Rule 55. Its ruling is therefore controlled by an error of law as well as lacking in evidentiary support.

An abuse of discretion in setting aside an entry of default arises when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App. 1997); Boland v. S.C. Public Service Authority, 281 S.C. 293, 315 S.E.2d 143 (Ct.App. 1984). The trial court's ruling in this case, being supported by neither law nor fact, therefore constitutes an abuse of discretion.

Additional Factors for Relief

Due to the erroneous ruling that Mr. Rose had failed to provide a satisfactory explanation for his default the trial court failed to conduct an analysis of additional factors required for relief. Under a Rule 55 analysis, once a satisfactory explanation for the default

has been shown, the court must consider the factors as set forth in Wham. *See* Sundown, 383 S.C. at 607-08, 681 S.E.2d at 888.

The factors as set forth in Wham:

(1) The timing of motion for relief;

Considering Mr. Rose's belief that he had been given a period of extension, the motion for relief was filed only six weeks after the answer would have been due. (R. p. 53, l. 14). During this time Mr. Rose was convalescing from his surgery and while being told repeatedly by Mrs. Rose that she was dropping the case. In light of the totality of the circumstances, Mr. Rose's delay was based on Mrs. Rose's actions and therefore, should not be considered against him, especially where he filed immediately after there was an indication by her that she might not "stand up to her lawyers" and dismiss the case as repeatedly promised.

(2) Whether the defendant has a meritorious defense;

Through his Answer, Motion, and Affidavits, as well as the audio recording of the alleged incident, the defense offered his version of the events denying the assault. (R. p. 49). The audio recording would establish a defense to the allegations and thus is necessary to consider in the *Wham* factors. Despite having been presented the tape, and it having been played in open court, it appears the tape may not have been properly recorded or preserved for this Court's review. To the extent that the record does not allow this Court to fully evaluate the issue of a meritorious defense, a remand is necessary for further consideration by the trial court. Nevertheless, the Appellant submits there is a sufficient factual basis for this Court to determine that he has a meritorious defense.

To establish that he has a meritorious defense, a complainant need not show that he would prevail on the merits, only that his defense is meritorious. Thompson, 299 S.C. at 120, 382 S.E.2d at 903. A meritorious defense need only be one "worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation or a real controversy as to real facts arising from conflicting or doubtful evidence." *Id.* (*quoting* Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978)). Here, the record shows sufficient evidence to establish a genuine question as to the allegations of assault and battery.

The record before the trial court was sufficient to establish a question of fact and thus meet the meritorious defense requirement.

> In yet another case, the court of appeals found a meritorious defense in a party's prehearing statement. Mictronics, Inc. v. S.C. Dep't Rev., 345 S.C 506, 511, 548 S.E.2d 223, 226 (Ct.App. 2001). In so finding, the court reiterated that the standard for finding a party raised a meritorious defense is a low one. Id. ("To establish a meritorious defense, a party is not required to show an absolute defense."). Further research would likely reveal a multitude of similar cases. In my view, the key inquiry is merely whether the materials submitted to the trial court reflect, in any way, that a contest on the merits might render different results than the result reached by the default judgment.

McClurg v. Deaton, 395 S.C. 85 (2011), *Chief Justice Toal dissenting.*

Here, given Mr. Rose's version of the facts, as set forth in his affidavit, as well as audio tape of the proceedings, and other matter before the trial court, the record is sufficient to show that a contest on the merits might render different results.

(3) The degree of prejudice to the Plaintiff if relief is granted.

Here the delay was not significant. Even had an answer been filed, the Plaintiff's

case would not have been able to proceed as Mr. Rose was in the hospital or recovering from surgery for a significant amount of the time at issue. Setting aside the default would not in any way prejudice the Plaintiff's ability to proceed with the case, present any evidence, or avail herself of any procedure.

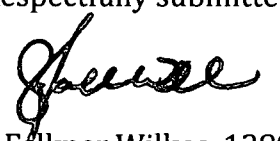
The record is sufficient for this Court to find the existence of additional factors set fort as set forth in Wham. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App. 1989). The trial court's ruling as to a sufficient reason for the delay was unsupported by facts and based on an error of law. The record therefore establishes a basis for a granting of relief by this Court. Policy favors a decision on the merits of a case rather than by default or technicalities. The decision of the trial court should therefore be reversed and the matter remanded for a trial on the merits.

The reversal of the lower court's ruling on default requires a reversal and remand of the damages award as well. Due to the finding of default in this case, defense counsel's participation limited to cross-examination and objection to plaintiff's evidence. Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978). Howard still governs post-default proceedings. Limehouse v. Hulsey, 404 S.C. 93 (2013). Consequently, the erroneous ruling on default prejudiced Mr. Rose's ability to defend on the issue of damages. A reversal and remand on the default ruling therefore requires a reversal and remand of the damages award as well.

CONCLUSION

The trial court's denial of relief pursuant to Rule 55 should be reversed. The findings and award of punitive damages should also be reversed and remanded.

Respectfully submitted,



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January 6, 2016.

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CERTIFICATE OF COUNSEL

I certify that the Appellant's Brief and Reply Brief comply with Rule 211(B), SCACR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 6th day of January 2016, I served the Appellant's Brief, Appellant's Reply Brief and Certificates on the Respondent by placing a copy of same in the U. S. Mail, first class postage prepaid, addressed to counsel of record as indicated below:

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