

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

Appeal from Richland County
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2009-CP-40-8717

QBE Insurance Corporation,

Respondent,

v.

William Fincher, Harrison, Fincher & Associates, LLC,
and Harrison, Fincher & Associates, Inc.,

Appellants.

**RESPONDENT'S MOTION TO DISMISS APPEAL
AND MEMORANDUM IN SUPPORT**

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown
Jeffrey J. Wiseman
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
Attorneys for the Respondent

RECEIVED
SEP 25 2012
SC Court of Appeals

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA
COURT OF APPEALS

COMES NOW the Respondent, QBE Insurance Corporation, by and through its undersigned counsel, and hereby moves this Honorable Court to dismiss the above-captioned appeal upon the following grounds.

1. The Appellants' Notice of Appeal appeals two orders of the Honorable Clifton Newman. Specifically, these orders are (1) the Order Denying Defendants' Motion to Set Aside Entry of Default filed June 27, 2011 and (2) the Order Denying Defendants' Motion to Reconsider, Alter or Amend Order Denying Motion to Set Aside Entry of Default filed March 28, 2012. (*See* Appellant's Notice of Appeal, a copy of which is attached hereto along with copies of the appealed orders as Exhibit A, which is incorporated herein by reference.) Hereinafter, both of the appealed orders will be referred to collectively as the "Subject Orders."

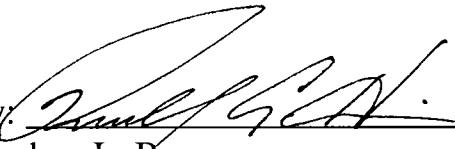
2. The Subject Orders, which, respectively, denied the Appellants' motion under Rule 55(c), SCRCP, to set aside the entry of default against them and declined to reconsider such denial, are not immediately appealable. Thynes v. Lloyd, 294 S. C. 152, 363 S. E. 2d 122 (Ct. App. 1987) (holding that an order refusing to grant relief from the entry of default is not appealable until after final judgment); *see* Jefferson v. Gene's Used Cars, Inc., 295 S. C. 317, 368 S. E. 2d 456 (1988) (approving Thynes' holding and

dismissing appeal from order denying motion for leave to file late answer); 15 S.C. Jur. Appeal and Error § 21 (West 2012) (“A direct appeal does not lie from an order refusing to set aside an entry of default or from the default judgment itself.”).¹

WHEREFORE, the Respondent moves this Honorable Court to dismiss Appellants’ appeal and for such other and further relief as it may deem to be just and proper.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 
Stephen L. Brown
Jeffrey J. Wiseman
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
Attorneys for the Respondent

Charleston, South Carolina

Dated: 9/20/12

¹ For the Court’s reference, copies of the Appellants’ Motion to Set Aside Entry of Default and Motion to Reconsider, Alter or Amend are attached hereto as Exhibits B and C, respectively, which are incorporated herein by reference.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2009-CP-40-8717

QBE Insurance Corporation,

Respondent,

v.

William Fincher, Harrison, Fincher & Associates, LLC,
and Harrison, Fincher & Associates, Inc.,

Appellants.

PROOF OF SERVICE

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown
Jeffrey J. Wiseman
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
Attorneys for the Respondent

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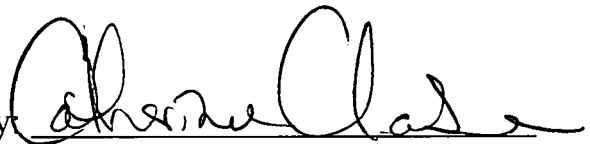
SEP 25 2012

SC Court of Appeals

I, Catherinell Chase, of Young Clement Rivers, LLP, counsel for the Respondent above named, do hereby certify that I have served the Respondent's **Motion to Dismiss Appeal and Memorandum in Support** on the above-named Appellants by depositing a copy of the same in the United States Mail, postage prepaid, on September 21, 2012, addressed as follows to their counsel of record:

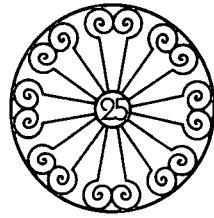
MCNAIR LAW FIRM, P.A.
Susan Taylor Wall, Esquire
Amanda C. Williams, Esquire
100 Calhoun Street, Suite 400
Charleston, SC 29401

YOUNG CLEMENT RIVERS, LLP

By 

Charleston, South Carolina

Dated: September 21, 2012



YCR LAW
 Young Clement Rivers, LLP

656666

Russell G. Hines
 Associate

Direct Dial: (843) 720-5488
 Direct Fax: (843) 579-1327
 E-mail: rhines@ycrlaw.com

September 21, 2012

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
 Clerk of Court
 South Carolina Court of Appeals
 P.O. Box 11629
 Columbia, SC 29211

Re: *QBE Insurance Corporation v. William Fincher, et al*
 Appellate Case No.: 2012-211863
 Circuit Case No.: 2009-CP-40-8717
 YCR File No.: 14272-20091361

RECEIVED

SEP 25 2012

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing in the above matter please find the original and seven (7) copies of **Respondent's Motion to Dismiss Appeal and Memorandum in Support** along with the original and two (2) copies of a **Proof of Service** for the same and our firm's check in the amount of \$25.00 to cover the motion filing fee. Kindly return one (1) stamped copy of each filed document to me in the envelope provided.

As I understand it, pursuant to Rule 240(b), SCACR, the filing of this motion to dismiss stays the time for perfecting the appeal until the motion is decided, to include the time for serving and filing the Respondent's initial brief and designation of matters to be included in the record on appeal. If I am incorrect in this understanding, I would greatly appreciate you advising me of the same.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Catherine Chade for
 Russell G. Hines

RGH/jla
 Enclosure

cc: Susan Taylor Wall, Esquire
 Amanda C. Williams, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Case No. 2009-CP-40-8717

QBE Insurance Corporation,Respondent,

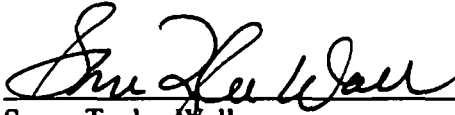
v.

William Fincher, Harrison, Fincher &
Associates, LLC, and Harrison, Fincher &
Associates, Inc.,Appellants,

NOTICE OF APPEAL

William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc. ("Appellants"), appeal the Orders of the Honorable Clifton Newman, specifically the Order Denying Defendants' Motion to Reconsider, Alter or Amend Order Denying Motion to Set Aside Entry of Default filed on March 28, 2012, and the Order Denying Defendants' Motion to Set Aside Entry of Default filed on June 27, 2011. Appellants received notice of the entry of the Order Denying Defendants' Motion to Reconsider, Alter or Amend on April 3, 2012. The Orders appealed from are attached hereto.





Susan Taylor Wall
swall@mcnair.net

Amanda C. Williams
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Phone: 843-723-7831
Fax: 843-722-3227

ATTORNEYS FOR APPELLANTS.

April 25, 2012

Other Counsel of Record:

Stephen L. Brown, Esq.
Jeffrey Wiseman, Esq.
Young Clement Rivers, LLP
25 Calhoun Street, Suite 400
Charleston, SC 29401
Telephone: (843) 577-4000
Attorneys for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2009CP4008717

QBE Insurance Corporation

William Fincher

Harrison Fincher & Associates Inc

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Settle/No admit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 28 March 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Stephen Lynwood Brown

Jeffrey J. Wiseman

Susan Taylor Wall

Jennifer Kirk Dunlap

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeanette W. McBride

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 QBE Insurance Corporation.)
)
 Plaintiff,)
)
 v.)
)
 William Fincher, Harrison, Fincher &)
 Associates, LLC., and Harrison Fincher &)
 Associates, Inc.,)
 Defendants.)
 _____)

THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2009-CP-40-8717

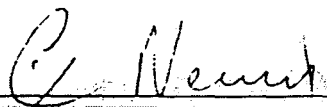
**ORDER DENYING DEFENDANTS'
 MOTION TO RECONSIDER, ALTER
 OR AMEND ORDER DENYING
 MOTION TO SET ASIDE ENTRY OF
 DEFAULT**

FILED
 CLIFTON W. McBRIDE
 C.P. & G.S.
 MAR 27 PM 2:49
 CLERK OF COURT

The Court issued an Order Denying Defendants' Motion to Set Aside Entry of Default on June 23, 2011. The Defendants subsequently filed a Motion to Reconsider, Alter or Amend Order Denying Defendants' Motion to Set Aside Entry of Default. After fully considering the motion, applicable law and submissions by the parties, the Motion to Reconsider, Alter or Amend Order Denying Defendants' Motion to Set Aside Entry of Default is DENIED.

IT IS SO ORDERED.

March 27, 2012
 Columbia, South Carolina


 Clifton Newman
 Presiding Judge
 Fifth Judicial Circuit

SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP4008717

QBE Insurance Corporation
Plaintiff

vs.

RICHLAND COUNTY
FILED
2011 JUN 27 PM 2:08
JEANNETTE W. McBRIDE
C.C.P. & G.S.
William Fischer
Defendant

CHECK ONE:

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other:

ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other:

DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; Statement of Judgment by the Court:

Defendant's motion to set aside ~~Default~~ entry of Default is Denied. ~~Forced entry of default~~
Dated at Columbia, South Carolina, this 23 day of June, 2011.

[Signature]
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this _____ day of _____, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Stephen Lynwood Brown

Susan Taylor Wall

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

[Signature]
Clerk of Court

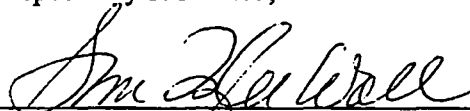
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
QBE INSURANCE CORPORATION,)	
Plaintiff,	)	C/A No.: 2009-CP-40-8717
)	
vs.)	
)	
WILLIAM FINCHER, HARRISON,	)	MOTION TO SET ASIDE ENTRY OF
FINCHER & ASSOCIATES, LLC, AND	)	DEFAULT
HARRISON, FINCHER &)	
ASSOCIATES, INC.,)	
)	
Defendants.)	

Defendants, William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc. (referred to herein as "Defendants"), by and through their undersigned counsel, respectfully request that the Court issue an Order Setting Aside Entry of Default in this case, pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure. The grounds for this Motion include that good cause exists for setting aside the entry of default because litigation on the merits is preferable to litigation by default and the default was not caused by Defendants' purposeful delay, but rather by Defendants' confusion and misunderstanding. Further, Defendants have meritorious defenses to the allegations contained in the Complaint, including, but not limited to, a statute of limitations defense. This Motion is supported by the pleadings, the Affidavit of William Fincher, the applicable law, a Memorandum of Law to be filed, and such other materials as may be presented to the Court.

WHEREFORE, Defendants respectfully request that the Court enter an Order Setting Aside Entry of Default, grant leave to Defendants to file a response to the Complaint, and grant such other and further relief as the Court deems just and proper.



Respectfully submitted,



Susan Taylor Wall
susanwall@parkerpoe.com

Amanda C. Williams
amandawilliams@parkerpoe.com

PARKER POE ADAMS & BERNSTEIN LLP

200 Meeting Street, Suite 301

Charleston, SC 29401

Phone: 843-727-2650

Fax: 843-727-2680

*ATTORNEYS FOR DEFENDANTS
WILLIAM FINCHER, HARRISON, FINCHER &
ASSOCIATES, LLC, AND HARRISON,
FINCHER & ASSOCIATES, INC.*

February 18, 2011

Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
QBE INSURANCE CORPORATION,)	
Plaintiff,	)	C/A No.: 2009-CP-40-8717
)	
vs.)	
)	
WILLIAM FINCHER, HARRISON,	)	AFFIDAVIT OF WILLIAM FINCHER
FINCHER & ASSOCIATES, LLC, AND)	
HARRISON, FINCHER &)	
ASSOCIATES, INC.,)	
)	
Defendants.)	

PERSONALLY appeared before me, William Fincher, who first being duly sworn, deposes and states as follows:

1. I am over the age of eighteen (18) and make this Affidavit based on my personal knowledge.
2. I am an independent insurance agent employed with Harrison, Fincher, & Associates, LLC.
3. In December 2009, I was served with a copy of a Summons and Complaint in the above-captioned matter. I was subsequently served with a copy of a Summons and Amended Complaint on January 13, 2010.
4. At the time I received the Summons and Complaint and up until the present time, I have been consumed and at times overwhelmed by my struggle to keep my family business from failing in this difficult economy and I have been faced with health related issues of loved ones, including caring for a close-family friend who has many health issues.
5. I have never before been a named party in a lawsuit and am unfamiliar with the legal process.

6. When I received the Summons, I read that I only had thirty days to respond, and thus, contacted Plaintiff's counsel to request an extension until I had time to contact my insurance carrier and/or otherwise respond to the Complaint.

7. Plaintiff's counsel's office left a message on my voicemail granting me an extension. They did not, however, state the length of the extension they were granting.

8. I thought Plaintiff's counsel would send me something in writing letting me know when I needed to provide them with a response to the Amended Complaint. Time elapsed and the next document I received from Plaintiff's counsel was a Motion for Entry of Default.

9. I then contacted Plaintiff's counsel because I understood that they had granted me an extension and I was not aware that my time and the agency's time to respond to the Amended Complaint had expired.

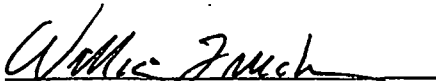
10. After speaking with Plaintiff's counsel several times over the next several months, I understood that they were going to hold off on proceeding with a default judgment while I sorted through issues with my errors and omissions insurance carriers and obtained an attorney to defend the agency and me.

11. I proceeded to try and resolve the issues with my insurance carriers because I was confused about which carrier might be able to provide me with a defense.


12. I have reviewed the Complaint and Amended Complaint. QBE has no basis for the claims asserted against the agency and me because we put the broker in the underlying wrongful death matter on timely notice. The various reports we received regarding the accident at issue were forwarded by mail to Johnson & Johnson, Inc., the broker on the QBE policy at issue, on November 3, 2004. A copy of the notice and documents sent are attached hereto. Thus, we did provide timely notice of the lawsuit to QBE via the correspondence sent to their broker, Johnson & Johnson, Inc.

13. In light of my inexperience with the legal process, my confusion with regard to the extension, my confusion with regard to my insurance coverage, my struggling business, and other personal issues, I respectfully request that the Court set aside the Entry of Default and permit me to assert my legal rights and defenses in this case, which would serve the ends of justice.

FURTHER AFFIANT SAYETH NOT.


William Fincher

SWORN to before me this
17 day of February, 2011.

 (Seal)

Notary Public for South Carolina

My Commission Expires: _____ My Commission Expires July 10, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
QBE INSURANCE CORPORATION,)	
Plaintiff,	)	C/A No.: 2009-CP-40-8717
)	
vs.)	
)	
WILLIAM FINCHER, HARRISON,	)	DEFENDANTS' MOTION TO
FINCHER & ASSOCIATES, LLC, AND	)	RECONSIDER, ALTER OR AMEND
HARRISON, FINCHER &)	
ASSOCIATES, INC.,)	
)	
Defendants.)	

Pursuant to Rule 59(e), SCRCP, Defendants William Fincher, Harrison, Fincher & Associates, LLC, and Harrison, Fincher & Associates, Inc. (“Defendants”), by and through their undersigned counsel respectfully move the Court to alter or amend¹ its Order Denying Defendants’ Motion to Set Aside Entry of Default which was filed on June 27, 2011 (“Order”). In support of this motion, Defendants provide the following:

1. Plaintiff’s counsel failed to advise Fincher regarding the length of his extension to answer or otherwise respond to the Amended Complaint.

It is undisputed that Mr. Fincher timely sought an extension to respond to the Amended Complaint from Plaintiff’s counsel. However, Plaintiff incorrectly contends that Mr. Fincher sought a “30-day” extension to answer or otherwise respond to the Amended Complaint. (See Plaintiff’s Memorandum in Opposition to Defendants’ Motion to Set Aside Entry of Default

¹ “A motion under Rule 59(e) long has been viewed as a ‘motion for reconsideration’ despite the absence of those words from the rule. Consequently, a party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.” *Elam v. S.C. Dep’t of Transp.*, 36 S.C. 9, 22, 6021 S.E.2d 772, 779 (2004) (citations omitted). Furthermore, this Court has the authority and discretion to reconsider an interlocutory order at any time. See *Blyth v. Morris*, 335 S.C. 363, 366, 517 S.E.2d 433, 435 (1999).



("Pl. Mem. in Opp." or "Plaintiff's Memorandum in Opposition") at p. 6.) Exhibit B to Plaintiff's Memorandum in Opposition demonstrates that Mr. Fincher asked for "an extension." Although Plaintiff's counsel advised his assistant to grant Mr. Fincher a "30-day" extension, his assistant failed to communicate this to Mr. Fincher. (Fincher Aff. at ¶ 7).² Rather, Plaintiff's counsel's assistant left a voice message for Mr. Fincher granting the extension, but she did not state the length of the extension that she was granting. (*Id.*) As a non-attorney, it was reasonable for Mr. Fincher to assume that Plaintiff's counsel would follow-up with him by letter or other correspondence confirming the length of the extension. The failure of Plaintiff's counsel in communicating the length of the extension to Mr. Fincher, misled Mr. Fincher into believing he had longer than 30-days to respond and renders his neglect to respond within that timeframe excusable. *See Strickland v. Consolidated Energy Products Company*, 274 S.C. 554, 557-58, 265 S.E.2d 682, 684 (1980) (finding that Plaintiff's counsel's failure to respond to Defendant's counsel's request for an extension was sufficient to mislead defense counsel and render his neglect to answer the complaint excusable).

2. Any delay by Defendants in filing their Motion to Set Aside Entry of Default was reasonable based on representations by Plaintiff's counsel that the Plaintiff might be willing open the Default so that Defendants could obtain errors & omissions insurance coverage.

During the period of time between the Entry of Default on March 30, 2010 and the Defendants' Motion to Set Aside the Entry of Default filed on February 22, 2011, Mr. Fincher and Stanley Freeman, Mr. Fincher's on-again/off-again attorney, were under the impression that Plaintiff might be willing to open the default so that Mr. Fincher and his company could obtain

² Defendants' Motion to Reconsider, Alter or Amend is further supported by the Affidavit of William Fincher (cited herein as "Fincher Aff."), filed simultaneously with Defendants' Motion to Set Aside Entry of Default. It is worth noting that there is no affidavit from Plaintiff's counsel's assistant confirming that she communicated the length of the extension to Mr. Fincher.

coverage for defense and potential liability under one of his Errors & Omissions (“E & O”) policies. Mr. Fincher contacted Plaintiff’s counsel within two days after the Entry of Default. (Ex. C. to Pl. Mem. in Opp.) Although Mr. Fincher explained his confusion about the extension, Plaintiff’s counsel was unwilling to grant any relief to Mr. Fincher who was not represented by counsel at that time. (*Id.*) On April 7, 2010, just six days after the Entry of Default, Mr. Fincher wrote Plaintiff’s counsel an e-mail stating that his “nightmare of all nightmares is that a default judgment will enable the E & O carrier to deny coverage.” (Ex. D to Pl. Mem. in Opp.) Following his April 7, 2010 e-mail, Mr. Fincher and Mr. Freeman maintained contact with Plaintiff’s counsel regarding the issues concerning Mr. Fincher’s E&O carriers. On July 14, 2010, Stanley Freeman wrote to Plaintiff’s counsel stating that Plaintiff’s counsel had indicated that “[h]e was going to talk to [Plaintiff] to determine whether or not this matter could be reopened so that we could obtain malpractice coverage.” (Ex. G to Pl. Mem. in Opp.) Plaintiff’s counsel has not disputed that this conversation took place. Under these circumstances, Defendants’ delay in filing the Motion to Set Aside Entry of default was reasonable.

Lowe’s of Georgia v. Constantino, a case decided under S.C. Code §15-27-130, the precursor to Rule 60(b), SCRPC, is an analogous case and therefore, instructive. 288 S.C. 106, 110, 341 S.E.2d 382, 384 (1986). In *Lowe’s*, the defendants, who failed to respond to an action to foreclose on a mechanic’s lien, did not move to set aside the default judgment until 10 months after default had been entered and the property attached to the lien had been sold. 288 S.C. at 108, 341 S.E.2d at 383. During the time after the entry of default and before the defendants’ request for relief, defendants communicated with Plaintiff’s counsel regarding potential settlement and believed that nothing further was required of them until issues they were having with materials supplied by Lowe’s were resolved. 288 S.C. at 110, 341 S.E.2d at 384. The Court of Appeals found no abuse of discretion by the circuit court in holding that the defendants’

neglect, under the circumstances, was excusable. *Id.* The court reasoned that the defendants' neglect "could scarcely be described as either forgetfulness, carelessness, indifference, or inattention . . . [the defendants] neither idly ignored the summons to defend the action nor willfully disregarded it." *Id.*

Here, as in *Lowe's*, the circumstances make any delay by Defendants in moving for relief excusable. As demonstrated by the exhibits attached to Plaintiff's Memorandum in Opposition, Mr. Fincher was in contact with Plaintiff's counsel throughout this process. Mr. Fincher was under the impression that Plaintiff would be willing to lift the default entry so that he could obtain E & O coverage. Like the defendants in *Lowe's*, Defendants in this case did not idly ignore or willfully disregard the Amended Complaint. Rather, Defendants were working with Plaintiff's counsel in an effort to have the default lifted. Given the Court of Appeals' ruling in *Lowe's*, a case finding excusable neglect under the much stricter standard applicable to setting aside default *judgments*, it is respectfully suggested that this Court should find that any delay by the Defendants in moving for relief in this case is excusable under the more lenient standard set forth in Rule 55(c).

3. Defendants have established that they have meritorious defenses to the Complaint.

The law in South Carolina is clear that, as to the second consideration of the good cause inquiry, a party is not required to show an absolute defense. *Micronics, Inc. v. South Carolina Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 233, 226 (Ct. App. 2001). In fact, in order to be considered meritorious for purposes of good cause, a defense "only need be one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." *Id.* Defendants have set forth several defenses that easily meet this

standard. (See Memorandum of Law in Support of Defendants' Motion to Set Aside Entry of Default ("Def. Mem." or "Defendants' Memorandum") at pp. 8-11).

Plaintiff's argument in its Memorandum of Law in Opposition and at the hearing focused solely on Defendants' argument that Plaintiff's claim for negligence is time-barred. By failing to address any of Defendants' other meritorious defenses as set forth in Defendants' Memorandum, Plaintiff effectively concedes that such defenses are meritorious. For this reason alone, Defendants have satisfied the second consideration of good cause under Rule 55(c).

Plaintiff's position that it could not have known about a potential cause of action for negligence against Defendants until a default judgment was entered is incorrect under South Carolina law.³ In South Carolina, the statute of limitations for a cause of action begins to run when the plaintiff has acquired "such facts as would have led to knowledge thereof, if pursued with reasonable diligence." *Grayson v. Fidelity Life Ins. Co. of Philadelphia*, 114 S.C. 130, 103 S.E. 477, 478 (S.C. 1920). The South Carolina Supreme Court has explained that the exercise of reasonable diligence means:

that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party **might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed.**

Epstein v. Brown, 363 S.C. 372, 376, 610 S.E.2d at 818 (emphasis in the original) (citing *Berry v. McLeod*, 328 S.C. 435, 445, 492 S.E.2d 794, 799 (S.C. Ct. App. 1997)). This is an objective,

³ Neither of the two cases cited by Plaintiff in its Memorandum in Opposition in support of Plaintiff's position that it could not have discovered its claim until it accrued damages were decided under South Carolina law. (See Pl. Mem. in Opp. at p. 10.) *Snider v. Lee*, 584 F.3d 193, 199 (4th Cir. 2009) was decided under West Virginia law. *B & B Enterprises of Wilson County, LLC v. City of Lebanon*, 318 S.W.3d 839 (Tenn. 2010) was decided under Tennessee law.

not a subjective, standard. Thus, the statute of limitations in this case began to run when Plaintiff knew it *might* have a claim against Defendants, not when damages were awarded in the underlying lawsuit. Plaintiff became aware of a potential claim against Defendants when it was notified of the Entry of Default in the underlying lawsuit in November 2004, *more than five years before filing this lawsuit* on December 14, 2009.

Plaintiff also incorrectly states that the statute of limitations would be tolled by Mr. Fincher's alleged misrepresentations. Specifically, Plaintiff alleges that there is no evidence that Mr. Fincher forwarded the claim information in the underlying case to Johnson & Johnson, Inc. for presentation to Plaintiff. However, Mr. Fincher has provided evidence that such information was forwarded to Johnson and Johnson by facsimile on November 3, 2004, nearly five months before the complaint in the underlying action was filed on April 1, 2005. (*See* Fincher Aff. ¶12, Exh. 1). Thus, Defendants did not actively mislead Plaintiff from discovering facts essential to the timely filing of this lawsuit.

4. Plaintiff will suffer no prejudice if relief is granted to Defendants.

The only basis asserted by Plaintiff in support of its argument that it will be prejudiced if Defendants' requested relief is granted is the delay between the Entry of Default and Defendants' motion for relief. However, "[p]rejudice is not mere delay, but rather its accompanying dangers: loss of evidence, increased difficulties of discovery, or an enhanced opportunity for fraud or collusion."⁴ *See FDIC v. Francisco Inv. Corp.*, 873 F.2d 474, 479 (1st Cir. 1989) (applying identical Rule 55(c), FRCP).

⁴ As mentioned previously, Defendants are not aware of any South Carolina appellate opinion defining "prejudice" in the context of a motion to set aside entry of default under Rule 55(c), SCRCF. In analogous context, however, the South Carolina Court of Appeals discussed "prejudice" in terms of unavailability or impairment of evidence as the result of delay. *See Maxwell v. Genez*, 350 S.C. 563, 570, 567 S.E.2d 496, 500 (S.C. Ct. App. 2002), *rev'd on other*
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Indeed, neither of the cases cited by Plaintiff in its Memorandum in Opposition hold that mere delay constitutes prejudice. (See Pl. Mem. in Opp. at pp. 11-12 citing *Central Operating Co. v. Utility Workers of America*, 491 F.2d 245, 252-53 (4th Cir. 1974) and *Consolidated Masonry & Fireproof, Inc. v. Wagman Constr. Co.*, 383 F.2d 249 (4th Cir. 1967)). Also, both cases are easily distinguishable from the circumstances in this case. In each case cited by Plaintiff, the court was evaluating whether to set aside a default *judgment* under the much stricter Rule 60(b) standard. Here, where there has been no default *judgment*—only an *entry* of default, the much less stringent standard under Rule 55(c) applies. See *Sundown Operating Co. v. Intedge Indus. Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Additionally, the court in *Central Operating Co.* found that the Defendants provided no satisfactory reason for their delay. In this case, Defendants have set forth an acceptable reason for the timing of their Motion to Set Aside Entry of Default—their belief that Plaintiff would reopen the default so that they could obtain E&O coverage. Furthermore, in *Consolidated Masonry & Fireproof, Inc.*, the court found that the defendant had no meritorious defenses. As set forth above and in their Memorandum in Support of Defendants’ Motion to Set Aside Entry of Default, Defendants have several meritorious defenses as to Plaintiff’s allegations this case.

Here, there has been no loss of evidence or any other impairment in Plaintiff’s ability to proceed with discovery. Plaintiff will not have to incur any discovery-related expenses that otherwise would not have been incurred in proving its case. Additionally, Plaintiff has not alleged and there is no indication that the passage of time has resulted in the “enhanced opportunity for fraud or collusion” contemplated by the *FDIC* Court. Thus, Plaintiff will not be

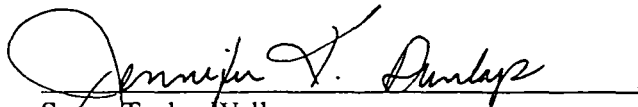
grounds, 56 S.C. 617, 591 S.E.2d 26 (2003). This is consistent with the federal case law cited above.

prejudiced by setting aside any entry of default, and for reasons stated herein, "good cause" exists for this Court to do so.

CONCLUSION

For all of the foregoing reasons as well as those set forth in Defendants' Memorandum of Law in Support of their Motion to Set Aside Entry of Default, the Affidavit of William Fincher, and any others that the Court may consider, Defendants respectfully request that the Court RECONSIDER, ALTER, or AMEND its Order denying Defendants' Motion to Set Aside Entry of Default, and enter an Order Setting Aside Entry of Default, accept Defendants' Amended Answer as timely filed, and grant such other relief as the Court deems just and proper.

Respectfully submitted,



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July 5th, 2011

Charleston, South Carolina