

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

Appeal from Charleston County
Court of Common Pleas

Brian C. Duffy, Esquire, Special Referee

Appellate Case No. 2016-001308
Trial Court Case No. 2015-CP-10-02616

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SC Court of Appeals

Patricia Danyea Emory,

Respondent,

v.

Grace Hospitality, LLC, JHM Enterprises, Inc.,
and JHM Hotels, LLC d/b/a Charleston Marriott,

Appellants.

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES..... ii

INTRODUCTION..... 1

STATEMENT OF ISSUES ON APPEAL..... 4

STATEMENT OF THE CASE 4

ARGUMENT

I. The special referee erred in denying the Motion for Relief..... 8

A. Where default was entered based on service purportedly accomplished by certified mail, the special referee erred in denying relief because the mail was not accepted by a person authorized to accept service of process and, therefore, personal jurisdiction had not attached. 8

B. The special referee erred in denying the Motion for Relief as contrary to the “good cause” standard of Rule 55(c)..... 17

II. The judgment against the Hotel Defendants should be reversed because the special referee’s award unduly relies on speculation and is excessive, unreasonable, and unjust under the circumstances..... 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s):

Cases

<u>Columbia Pools, Inc. v. Galvin</u> 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1986)	18, 19
<u>Graham Law Firm v. Makawi,</u> 396 S.C. 290, 721 S.E.2d 430 (2012)	9, 11, 12, 14
<u>Graham v. Town of Loris,</u> 272 S.C. 442, 248 S.E.2d 594 (1978)	21
<u>In re Estate of Weeks,</u> 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997)	17
<u>Mitchell v. Fortis Ins. Co.,</u> 385 S.C. 570, 686 S.E.2d 176 (2009)	19
<u>Micronics, Inc. v. S.C. Dep't of Revenue,</u> 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001)	20
<u>Moore v. Simpson,</u> 322 S.C. 518, 473 S.E.2d 64 (Ct. App. 1996)	9
<u>R&G Constr., Inc. v. Lowcountry Reg'l Trans. Auth.,</u> 343 S.C. 242, 540 S.E.2d 113 (Ct. App. 2001)	14
<u>Richardson v. P.V., Inc.,</u> 383 S.C. 610, 682 S.E.2d 263 (2009)	14, 15
<u>Roberson v. S. Fin. of S.C., Inc.,</u> 365 S.C. 6, 615 S.E.2d 112 (2005)	9, 10, 14
<u>Small v. Pioneer Mach.,</u> 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997)	25
<u>Sundown Operating Co., Inc. v. Intedge Industries, Inc.,</u> 383 S.C. 601, 681 S.E.2d 885 (2009)	17
<u>Wintersteen v. Food Lion, Inc.,</u> 344 S.C. 32, 542 S.E.2d 728 (2001)	20

Rules

Rule 1, SCRPC	18
Rule 4(d)(8), SCRPC	8, 11
Rule 55(c), SCRPC	17, 18, 19

Rule 60(b)(1), SCRCF 18, 19
Rule 803(4), SCRE 22

INTRODUCTION

Underlying this personal-injury lawsuit is an alleged slip-and-fall accident (the “Subject Accident”) at the Charleston Marriott in the wee hours¹ of May 6, 2013. In town for a work-related conference at the hotel, Ms. Emory² had arrived on May 5th. According to her, this is how the Subject Accident happened: she had left her 11th-floor room and was taking the “painted, concrete stairs” down to the 10th floor when she was caused to slip and fall by “an accumulation of standing water/liquid.”

What was Ms. Emory doing? Was she herself at fault for the Subject Accident, and if so, to what degree? What about the alleged foreign substance on the steps? Did the Hotel Defendants³ create the condition, or did they have actual or constructive notice of it? Did Ms. Emory promptly report the Subject Accident or notify anyone at the hotel of a need to address the alleged hazard for the protection of others? Or did she wait more than 15 hours before telling the hotel

¹ Practically speaking, the time of the Subject Accident is better described as late night than early morning, albeit technically *ante meridiem*. (See Damages Hr’g Tr. p. 8:9-10.)

² “Ms. Emory” is Plaintiff-Respondent Patricia Danyea Emory.

³ “Hotel Defendants” collectively refers to Defendants-Appellants Grace Hospitality, LLC, JHM Enterprises, Inc., and JHM Hotels, LLC d/b/a Charleston Marriott. Respectively they are “Grace Hospitality,” “JHM Enterprises,” and “JHM Hotels.”

about while seeking reduction of her bill? And finally, when she did report it, did she decline offers of medical care and assistance?

But, alas, this is a default case, so for Ms. Emory, any troublesome answers to these questions are neatly avoided. And with the special referee to whom she had this matter referred having already denied the Hotel Defendants relief from entry of default, her opponents thus left hamstrung by their procedural predicament, Ms. Emory made short work of the damages hearing. Her injuries were generally described in reference to her right shoulder and lumbar spine. She claimed \$107,435.44 in past medical specials and \$56,023.17 in lost wages; with the help of another expert's present-value calculations, her medical expert—a doctor local to her suit's venue, not to Ms. Emory herself, and to whom she was referred by counsel, her lone visit to him for an "independent medical evaluation" only about a month before the already-scheduled damages hearing—added \$664,671 in future medicals; her nonpecuniary damages were valued at \$750,000. All told, it took about an hour and a half and resulted in a \$1,578,129.61 judgment in her favor.

So as it stands, held in default and thereafter denied relief therefrom below, the Hotel Defendants have about a \$1.6 Million judgment against them, and most respectfully, this appeal is about why they should not. First and foremost, they should have been granted relief from entry of default—indeed, Ms. Emory's

attempt at service by certified mail was ineffective, personal jurisdiction did not attach, and default was wrongfully entered to begin with. But alternatively, at a minimum, the judgment should be reversed because the special referee's award unduly relies on speculation and is excessive, unreasonable, and unjust under the circumstances.

STATEMENT OF ISSUES ON APPEAL

- I. **Did the special referee err in denying the Hotel Defendants relief from entry of default?**
 - A. **Where default was entered based on service purportedly accomplished by certified mail, did the special referee err in denying relief because the mail was not accepted by a person authorized to accept service of process and, therefore, personal jurisdiction had not attached?**
 - B. **Did the special referee err in denying relief under the “good cause” standard of Rule 55(c), SCRCP?**
- II. **Should the judgment against the Hotel Defendants be reversed because the special referee’s award unduly relies on speculation and is excessive, unreasonable, and unjust under the circumstances?**

STATEMENT OF THE CASE

Ms. Emory filed a summons and complaint in the Charleston County Court of Common Pleas on May 7, 2015. (*See generally* Summons filed May 7, 2015; Compl.) She named only one defendant, Grace Hospitality “d/b/a Charleston Marriott.” (*Id.*) No attempt was—or has ever been—made to serve this summons and complaint.

On May 29, 2015, Ms. Emory filed another summons and an amended complaint. (*See generally* Summons filed May 29, 2015; Am. Compl.) Though no longer said to be “d/b/a Charleston Marriott,” Grace Hospitality was again named a defendant, this time along with JHM Enterprises and JHM Hotels, with “d/b/a Charleston Marriott” attributed to the latter entity. (*Id.*) It is on the basis of Ms.

Emory's supposed service of this summons and amended complaint filed May 29th—the validity of which is denied, of course—that the Hotel Defendants would later come to be held in default.⁴

On August 5, 2015, Ms. Emory's counsel filed affidavits of service stating each Hotel Defendants' registered agent had been served by certified mail on June 17, 2015, all as evidenced, said the affidavits, by the respective return receipts and USPS.com tracking information attached to them. (Affs. of Service for each Hotel Defendant.) Hereinafter, these mailings—three of them in total, i.e., one for each of the Hotel Defendants, simultaneously sent and substantially identical—are referred to as the "Certified Mailings."

The Certified Mailings were sent via the same kind of envelop that Ms. Emory's counsel's office uses for all outgoing mail—plain white but for the upper-left corner, on which the firm's logo and name are pre-printed above "ATTORNEYS AT LAW" and a return address in smaller type. (Dep. of D. Pickelsimer Tr. pp. 18:21-19:9; Dep. Ex. 1 (Envelope).) As shown by the corresponding return receipts, not one of the Certified Mailings was actually delivered to its addressee; all of them were signed for by administrative assistant

⁴ To be clear, the Hotel Defendants maintain that Ms. Emory has never validly served them with process, and nothing herein is intended to waive or in any way otherwise compromise their continuing jurisdictional challenge—both as set forth in this brief and in their separate motion for relief from judgment under Rule 60(b), SCRCF, which, at present, remains pending below.

Dianne Pickelsimer (“Ms. Pickelsimer”). (Affs. of Service for each Hotel Defendant; Aff. of D. Pickelsimer; Dep. of D. Pickelsimer Tr. p. 3:21-23, p. 17:8-13.)

By motion filed September 24, 2015, Ms. Emory sought entry of default against the Hotel Defendants and referral of the case to Brian C. Duffy, Esquire, as special referee. (Aff. of David B. Lail, Esquire and Mot. for Entry of Default and Referral.) Coupled with the motion was Ms. Emory’s counsel’s affidavit, which advised that he had personally “called and spoke[n] with [Ms. Pickelsimer] at her place of employment . . . on August 24, 2015 and [he] underst[ood] from their conversation that [Ms. Pickelsimer] had authorization to sign” (Id.) According to Ms. Emory’s counsel, the Hotel Defendants had been duly served on June 17, 2015, via the Certified Mailings and were in default. (Id.) The clerk of court immediately entered default against the Hotel Defendants and referred the case to the special referee. (Entry of Default and Order of Reference.)

On October 19, 2015, the Hotel Defendants filed a motion to set aside entry of default and vacate the order of reference (the “Motion for Relief”). (Mot. for Relief (with Supporting Affs. of D. Hart, L. Finlay, and D. Pickelsimer).) They contended that Ms. Emory had not accomplished valid service of process—and, therefore, personal jurisdiction had not attached to any of them—because Ms. Pickelsimer did not have authority to accept service of process; thus, default had

been wrongfully entered against them and should be set aside and the order of reference vacated. (Id.)

The special referee heard the Motion for Relief some four months later on February 24, 2016. (Mot. for Relief Hr'g Tr.) He denied it by order filed March 22, 2016. (Order Den. Mot. for Relief.)

The damages hearing took place on April 28, 2016, and thereafter, on May 3, 2016, the special referee filed judgment in favor of Ms. Emory: \$1,578,129.61 against all Hotel Defendants, jointly and severally. (Mot. for Default J. and Notice of Damages Hr'g; Notice of Damages Hr'g; Tr. of Hr'g held April 28, 2016; Form 4 J. and attached Order of Default J. Against Defs.) By order filed May 18, 2016, the special referee denied the Hotel Defendants' timely motion for reconsideration without a hearing. (Mot. to Recons.; Order Den. Defs.' Mot. to Recons.)

By notice served June 17, 2016, this appeal timely follows. (Notice of Appeal.)

ARGUMENT

I. The special referee erred in denying the Motion for Relief.

- A. **Where default was entered based on service purportedly accomplished by certified mail, the special referee erred in denying the Motion for Relief because the mail was not accepted by a person authorized to accept service of process and, therefore, personal jurisdiction had not attached.**

Rule 4(d)(8), SCRCP, addresses service of process via certified mail. In pertinent part, it provides:

Service pursuant to this paragraph shall not be the basis for the entry of a default . . . unless the record contains a return receipt showing the acceptance by the defendant. Any such default . . . *shall* be set aside pursuant to Rule 55(c) . . . if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person.

(emphasis added).

Here, Ms. Emory's attempt at service by certified mail was ineffective, personal jurisdiction did not attach, and default was wrongfully entered against the Hotel Defendants to begin with—and, accordingly, the special referee erred in denying the Motion for Relief. Although delivery of the Certified Mailings was supposed to have been restricted to their respective addressees, quite simply, it was not; Ms. Pickelsimer signed for them, and quite simply, she was an “unauthorized person,” i.e., she was not a person *authorized to receive service of process* on behalf of any of the Hotel Defendants.

“The class of persons authorized to sign on behalf of defendants is *narrow*: ‘Actual appointment *for the specific purpose of receiving process* normally is expected and *the mere fact a person may be considered to act as defendant’s agent for some purpose does not necessarily mean that the person has authority to receive process.*’” Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 295, 721 S.E.2d 430, 433 (2012) (quoting Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (Ct. App. 1996)). The instant record contains no evidence that Ms. Pickelsimer was “[a]ctual[ly] appoint[ed] for the specific purpose of receiving process,” nor does it allow for her authority to receive process to be reasonably inferred without resort to speculation and specious reasoning. (*See generally* Affs. of D. Hart, L. Finlay, and D. Pickelsimer.)

“An agent’s authority is composed of his or her actual authority, whether express or implied, together with the apparent authority which the principal by his or her conduct is precluded from denying. Thus, an agent’s authority must be either expressed, implied, or apparent. While actual authority is expressly conferred upon the agent by the principal, apparent authority is when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority.” Roberson v. S. Fin. of S.C., Inc., 365 S.C. 6, 10-11, 615 S.E.2d 112, 115 (2005) (citations omitted). Apparent authority may be established only “upon manifestations by the principal, not the agent.” Id.

Likewise, “apparent agency may not be established solely by the declarations and conduct of an alleged agent.” Id. And an agent has no implied authority unless he or she personally believed they had such authority.” Id. (citation omitted).

Ms. Pickelsimer did not have express actual authority to accept or receive service of process on behalf of any of the Hotel Defendants. The evidence is uncontroverted that none of them expressly authorized Ms. Pickelsimer to accept or receive service of process for them. In fact, all of the sworn testimony in the record is that they expressly did not so authorize Ms. Pickelsimer. The Hotel Defendants had a procedure in place that whenever Ms. Pickelsimer was made aware that someone was trying to serve process, she was not to personally accept or receive the process, but to direct the matter elsewhere, up the corporate ladder. (Aff. of L. Finlay ¶¶ 6-11; Dep. of L. Finlay Tr. p.15:17-24; Aff. of D. Hart ¶¶ 6-11; Aff. of D. Pickelsimer ¶¶ 7-14; Dep. of D. Pickelsimer Tr. pp. 23:13-24:10; Dep. of J.P. Rama Tr. p. 16:8-14.)

Ms. Pickelsimer did not have implied actual authority to accept or receive service of process on behalf of any of the Hotel Defendants. In Roberson, our Supreme Court specifically held that an employee “has no implied authority unless she herself believed that she had such authority.” 365 S.C. at 11, 615 S.E.2d at 115. Here, Ms. Pickelsimer testified unequivocally that she herself did not believe she had authority to accept or receive service of process on behalf of the Hotel

Defendants. (Aff. of D. Pickelsimer ¶¶ 7-14; Dep. of D. Pickelsimer Tr. pp. 23:13-24:10.) In fact, she understood that she was expressly not authorized to do so. And, of course, it would be patently absurd to conclude that Ms. Pickelsimer had implied actual authority to accept service of process in the face of the express policy that she did not have actual authority to do so.

Just because Ms. Pickelsimer received and signed for certified mail as part of her job duties does not make her impliedly authorized to act as any of the Hotel Defendants' agent for service of process. See Roberson, 365 S.C. at 11-12, 615 S.E.2d at 115 (where the employee who had signed for the process at issue had signed for service by certified mail on multiple occasions in the past, but the Court held that "the circumstances [did not] support the conclusion that [the employee] had implied authority to accept service for [the principal]."); Graham, 396 S.C. at 295, 721 S.E.2d at 433 ("the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process.") (internal quotation marks omitted). Such a rule would mean that a broad array of clerical staff in our state are impliedly authorized to serve as agents for service of process simply because their job duties include receiving company mail—a notion that cannot logically be squared with the policy reflected by Rule 4(d)(8)'s requirement that service by certified mail must be by

“restricted delivery” and it proviso that an unauthorized person’s signature will not support entry of default.

Respectfully, too much was been made below of Ms. Pickelsimer’s other, non-mail-related responsibilities. For instance, in addition to receiving the mail, Ms. Pickelsimer also booked travel for her superiors and “filed” claims with the insurance carrier *under the supervision of in-house counsel*. (See Pltf.’s Mem. in Opp. to Mot. for Relief p. 4 (“[I]n addition to Ms. Pickelsimer’s duties with regard to handling all certified mail . . . she has the responsibility of filing general liability claims with insurance companies for premises liability injuries *after she receives approval* from Daniel Hart, Esquire, . . . Director of Legal Services.”) (emphasis added). Again, “the mere fact a person may be considered to act as defendant’s agent for some purpose does not necessarily mean that the person has authority to receive process.” Graham, 396 S.C. at 295, 721 S.E.2d at 433. Highlighting the admirable traits and skills Ms. Pickelsimer has displayed in her job performance is beside the point; that she is a responsible and talented person good at her job does not transmute that job into something else.

And too much was also made of Ms. Pickelsimer’s signing for other mail that happened to contain legal process. The question is not whether she signs for the mail, or even whether she may be considered to act as the Hotel Defendants’ agent for *some* purpose, but whether she may be considered to have acted for the

specific purpose of accepting service of process on their behalf. And, after all, it is not as if all certified mail contains legal process; nor is it as if any particular attention is necessarily drawn to the certified mail that does contain legal process—a point rather well illustrated by Ms. Emory’s counsel’s own envelope, austere and nondescript as it was. (Dep. Ex. 1.)

The fact that, through her general process of receiving and routing mail of all kinds, Ms. Pickelsimer may have signed for a certified mailing that contained legal process says nothing of whether she even knew that what she had signed for was such process, much less whether she was indeed authorized to do so. Indeed, while Ms. Pickelsimer understood she was authorized to sign for certified mail, she did not even know that service of process could be accomplished via certified mail. She knew that she was specifically not authorized to receive service of process from a process server or the sheriff, and there is no evidence that she would have thought that there was an exception for service of process by certified mail. (Aff. of D. Pickelsimer ¶ 8.) When she had been made aware that someone was attempting to serve process in the past, she recognized that she was not authorized to receive it and called an executive-level officer who was. (Aff. of D. Pickelsimer ¶ 10.) And, again, the Hotel Defendants cannot be said to have “knowingly” permitted Ms. Pickelsimer to their agent for service of process merely because they

allowed her to sign for certified mail. *See* Roberson, 365 S.C. at 11-12, 615 S.E.2d at 115; Graham, 396 S.C. at 295, 721 S.E.2d at 433.

Ms. Pickelsimer did not have apparent authority to accept or receive service of process on behalf of any of the Hotel Defendants. Again, “[w]hile actual authority is expressly conferred upon the agent by the principal, apparent authority is when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority.” Roberson, 365 S.C. at 10-11, 615 S.E.2d at 115 (emphasis added); Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263, 265 (2009) (citing Roberson). In order to determine whether apparent authority exists, the representations of the principal are to be examined, not those of the purported agent. *Id.* “The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party. An agency may not be established solely by the declarations and conduct of an alleged agent.” R&G Constr., Inc. v. Lowcountry Reg’l Trans. Auth., 343 S.C. 424, 432-33, 540 S.E.2d 113, 118 (Ct. App. 2001) (citations omitted).

Here, there is no evidence in the record that any of the Hotel Defendants made any representations of any kind to Ms. Emory/her counsel as Ms. Pickelsimer’s status—nor, for that matter, is there any evidence such representations the mailcarrier. This case is not like Richardson, *supra*, where our

Supreme Court did find that a hotel employee had apparent authority to accept or receive service of process on behalf of an employer. That case dealt with in-person service by process server, *not* by certified mail. Also, unlike Ms. Pickelsimer—who was in the reception area at the entrance of an office building and quite obviously not the only one around—the employee found to have apparent authority in Richardson was the only employee on duty when the process server arrived, which the Court found “represented to third parties that she was in charge.” 682 S.E.2d at 265. Further unlike the instant case, in Richardson, the process server testified that he spoke with the principal himself and the principal suggested he could leave the process with the employee. Id. at 265-66. And, of course, unlike a process server, a mail carrier has no idea that the mail being delivered contains legal process. It defies credulity to think that the mail carrier would have perceived that Ms. Pickelsimer had apparent authority to accept service of process without even knowing that the mail he or she was delivering contained process—and, of course, there is no evidence in the record to the contrary. And, further still, with respect to Ms. Pickelsimer’s other, non-mail related job duties and the question of her apparent authority, the inquiry is not simply about what her job responsibilities were, but rather about whether and to what extent her job responsibilities may have translated into a representation to Ms. Emory/her counsel that she had authority to act as the Hotel Defendants’ agent for service of process.

Lastly, there is Ms. Emory's counsel's telephone call to Ms. Pickelsimer on August 24, 2015, which is also noteworthy. (See Aff. of David B. Lail, Esquire and Mot. for Entry of Default and Referral.) First off, it is conspicuously worded, attesting only to his understanding of Ms. Pickelsimer's "authorization to sign," not specifying *what* it was exactly that she had authorization to sign, stopping clear short of attesting to her authorization to *accept service of process*. Indeed, in this way, counsel's affidavit is consistent with Ms. Pickelsimer's own account in regard to the salient point that she did *not* convey to Ms. Emory's counsel that she was authorized to accept or receive *service of process*. (Compare Aff. of David B. Lail, Esquire and Mot. for Entry of Default and Referral and Aff. of D. Pickelsimer ¶¶ 13-14 ("I did receive a phone call a couple of weeks ago from someone asking if I was the person who signed for mail, and I probably did say that I am. I did not intend to communicate, and I did not communicate, that I was the person authorized to receive or accept service of process, because I am not.").)

Also absent from counsel's affidavit is any indication that Ms. Pickelsimer was ever advised that she was speaking to a lawyer for a party adverse to the Hotel Defendants in a particular lawsuit with which she had supposedly been served on their behalf via the Certified Mailings. Counsel's affidavit did not provide any support for the proposition that Ms. Pickelsimer was authorized to accept service of process on the Hotel Defendants' behalf; however, in conjunction with Ms.

Pickelsimer's affidavit, and in view of both what it says and what it left unsaid, counsel's affidavit actually supports the Hotel Defendants' position that, while she was authorized to sign for mail, Ms. Pickelsimer was not authorized to accept service of process—as she told Ms. Emory's counsel back on August 24, 2015, *before any issue of default was ever raised*. And, of course, the very fact of counsel's call to Ms. Pickelsimer betrays his own uneasiness about her receipt of process and cuts against the notion that she had the requisite authority, actual or apparent, to do so on the Hotel Defendants' behalf.

B. The special referee erred in denying the Motion for Relief as contrary to the “good cause” standard of Rule 55(c).

Citing Sundown Operating Company, Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), the special referee concluded the Hotel Defendants were not entitled to relief from entry of default because they “cannot provide the satisfactory explanation of their failure to file a timely Answer required to meet minimal good cause standard under Rule 55(c).” (Order Den. Mot. for Relief p. 8.) Respectfully, the special referee's view of the applicable standard is misguided.

Rule 55(c), of course, allows entry of default to be set aside for “good cause.” “Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits.” In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). Indeed, even when discussing former Code § 15-

27-130—predecessor to our current Rule 60(b)(1), SCRCP, which, though *more* strict than the Rule 55(c) standard for relief from *entry* of default, allows relief from a default *judgment* for “mistake, inadvertence, surprise, or excusable neglect[]”⁵—our Court of Appeals found,

[T]he plain language . . . clearly expresses an intent by the legislature that mistake constitutes a basis for a trial court, exercising its sound discretion, to vacate a default judgment under the proper circumstances. *Therefore, we hold that where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief. We favor trial of issues on merit over securing judgment by slight technicalities.* The default judgment is vacated.

Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 60, 339 S.E.2d 524, 525 (Ct. App. 1986) (emphasis added); *see also* Rule 1 (“These rules . . . shall be construed to secure the *just*, speedy, and inexpensive determination of every action.”). Assuming, *arguendo*, the Hotel Defendants had been validly served, there was certainly good cause to grant them relief from entry of default and allow them to fully defend themselves on the merits.

There is no evidence in the record that default was occasioned by any intent or effort to disregard or avoid the judicial process; it was no more than “mistake, inadvertence, surprise, or excusable neglect”—of a forgivable sort that will, so long as humans remain imperfect, from time to time happen despite reasonable and

⁵ Rule 60(b), Note.

diligent efforts to prevent it. Any notion that the reason for the default must be something more or different in character than this to obtain relief under Rule 55(c) is nonsensical. Were this so, the law would be, in effect, that a party could not obtain relief from a mistake unless the party did not make a mistake to begin with. Indeed, the very inclusion within Rule 60(b)(1)—which, again, is more strict standard than the “mere ‘good cause’” standard that is applicable presently—of the words “mistake,” “inadvertence,” and “excusable neglect” would be ridiculous and futile, because a party committing one of those sins would be barred from relief thereunder, while a party who had not would not need it. This, of course, cannot be so—there can be no “excusable neglect” without “neglect,” and the rule cannot be construed to be ignorant of this truth. *See Columbia Pools*, 288 S.C. at 61, 339 S.E.2d at 524. To do so would not only violate established canons of construction, but also—if relief were denied on this basis, in the absence of prejudice to the adverse party and in spite of the existence of meritorious defenses—so arbitrary as to violate due process. *Cf. Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009) (explaining, in the context of punitive damages awards, at the point where no legitimate state interest is furthered there becomes a an arbitrary deprivation of property in violation of due process).

The Hotel Defendants submit that they acted with sufficient promptness in seeking relief and, in turn, Ms. Emory would suffer no undue prejudice if relief

were granted. The Hotel Defendants originally moved for relief from entry of default back in October of 2015. Were it not for Ms. Emory's insistence on keeping them in default—an effort which included her counsel traversing the state to take three depositions in February of 2016, not in pursuit of evidence in support of the merits of her claims, but in an effort to prevent her from actually having to prove them and, in turn, to see that Hotel Defendants would have the courtroom equivalent of both arms tied behind their backs in trying to defend against Ms. Emory's damages presentation, thereby preserving the windfall that is a default entered against a defendant who, like the Hotel Defendants, appears late enough to be in default but still plenty early enough that, truth be told, the case would have proceeded through the litigation process in due course and called to trial just as it would have been otherwise—this case could have already been discovered and made ready for trial, with no undue prejudice whatsoever to Ms. Emory in terms of the availability of evidence or in any way otherwise justly bearing upon her ability to have her day in court. *Cf. Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 512, 548 S.E.2d 223, 226 (Ct. App. 2001) (“It appears from the record that DOR will suffer no prejudice should this case proceed for a determination on the merits. Here, DOR has no substantial stake in this windfall, and the resolution of the case on its merits has not been substantially delayed by the parties' actions.”).

Finally, in this slip-and-fall case like this, the plaintiff must “show either (1) that the injury was caused by a specific act of the defendant which created the dangerous condition; or (2) that the defendant had actual or constructive knowledge of the dangerous condition and failed to remedy it.” Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001). Surely, in the interests of justice, and in light of the substantial stakes involved here, and in view of the Wintersteen standard, questions worthy of hearing or judicial inquiry are fairly raised with respect to the circumstances of the incident, including Ms. Emory’s conduct. *See* Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978).

II. The judgment against the Hotel Defendants should be reversed because the special referee’s award unduly relies on speculation and is excessive, unreasonable, and unjust under the circumstances.

Dr. Marshall Allyn White (“Dr. White”), a neurologist, based in Mt. Pleasant, South Carolina, offered the only medical expert testimony on Ms. Emory’s behalf at the damages hearing. (Damages Hr’g Tr. p. 4:1-14; *see also* Damages Hr’g Ex. 1, p. 1.) Ms. Emory herself lives in Gaston County, North Carolina,⁶ and Dr. White was not one of her treating physicians; rather, Ms. Emory was sent to him by her legal counsel for an “independent medical evaluation.” (Damages Hr’g Tr. p. 10:2-3; *see also* Damages Hr’g Ex. 2.)

⁶ (Am. Comp. ¶ 1; Damages Hr’g Tr. p. 62:8-9.)

Dr. White saw Ms. Emory but once, on March 24, 2016, nearly three years after the Subject Accident, a mere 35 days before to the damages hearing—which had already been scheduled for at least a couple weeks then. (*See* Damages Hr’g Tr. p. 10:2-3, p. 15:3-5, p. 25:10-12; Damages Hr’g Ex. 2; Mot. for Default J. and Notice of Damages Hr’g; Notice of Damages Hr’g.) In this regard, the Hotel Defendants would note, the South Carolina Rules of Evidence plainly reflect that there is reason to be wary of the potential for self-serving statements made to healthcare providers after the commencement of litigation. *See* Rule 803(4), SCRE (“[T]he admissibility of statements made after commencement of litigation is left to the court’s discretion.”)

Before seeing Dr. White, the last time Ms. Emory recalled seeing one of her treating physicians was “several months prior” when she saw Dr. Hunter Dyer of “Carolina Neurosurgical (sic) and Spine in Charlotte,” whom she said she had seen then “[j]ust to let him know how I was doing, follow-up visit.” (Damages Hr’g Tr. pp. 58:11-59:6.) Ms. Emory relates two surgeries to the Subject Accident, one on her rotator cuff, the other on her bicep tendon, the most recent of these being done on March 31, 2014, about two years before she saw Dr. White. (Damages Hr’g Tr. p. 59:7-14.) Ms. Emory has not had physical therapy since 2014. (Damages Hr’g Tr. pp. 60:4-61:2.) She could not remember the last time she had a cortisone shot in her shoulder, but knew it was before she went back to work in September of

2014. (Damages Hr’g Tr. p. 60:12-13, p. 61:7-21.) During the course of the nearly three years between Subject Accident and Dr. White’s examination of Ms. Emory, none of her actual treating physicians had set timetables for any future treatment she would need. (Damages Hr’g Tr. p. 62:10-19.) While acknowledging that she could “follow up [with her treating physicians] at any time basically[,]” Ms. Emory explained her reasoning for not doing so like this: “I mean, I know that like I can go back. But everything has just seemed like I just haven’t had the right doctor, does that make sense? I haven’t been receiving the appropriate treatment, I guess.” (Damages Hr’g Tr. p. 62:12-16.) Indeed, Ms. Emory’s criticism of her treatment, however, stands in notable contrast to Dr. White’s view that “all of the medical treatment [she received [as a result of the underlying incident] was reasonable and necessary” (Damages Hr’g Tr. p. 12:10-16; *see also* p. 12:16 (wherein Dr. White describes Ms. Emory’s treatment as “reasonable and customary”).)

Dr. White was not provided with—and, accordingly, did not review—any of Ms. Emory’s medical records from before the Subject Accident, and he admitted that he was “essentially . . . just relying on the history that [she herself] provide[d] to [him] and . . . maybe [the history] she provided to the doctors in the records that [he] ha[s].” (Damages Hr’g Tr. pp. 22:20-23:2, p. 24:18-21.) Dr. White did not actually see any of Ms. Emory’s radiology images. (Damages Hr’g Tr. p. 26:9-13.) He testified that, including the time he spent seeing Ms. Emory in person, he

spent “at least three hours” evaluating this matter. (Damages Hr’g Tr. pp. 25:24-26:4.) Dr. White testified that the medical records he reviewed—again, none of them pre-dating the Subject Accident—spanned approximately 800 pages, though he noted, “There’s a lot of fluff in the medical records.” (Damage Hr’g Tr. p. 26:2-7.)

While Ms. Emory testified about certain problems (pain, limitations, etc.) she attributes to the Subject Accident, her testimony reveals that she is able to work the job that she loves, to drive, to exercise (albeit in limited manner in comparison to before), and to live by herself, carrying out the necessary activities of day-to-day life. (Damage Hr’g Tr. pp. 53:9-57:5.) Even as she explained the negative impact of the underlying incident, Ms. Emory candidly acknowledged, “I know things happen much worse to people” (Damages Hr’g Tr. p. 56:24-25.)

The special referee’s award of future medicals was impermissibly speculative. *Cf. Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). The future medical care/treatment to which Dr. White opined is inconsistent with the care/treatment that Ms. Emory actually sought and received during the nearly three-year interval between the Subject Accident and Dr. White’s involvement—and, of course, his involvement was not organic, but at the direction of Ms. Emory’s legal counsel, at a time not merely

after litigation had been commenced, but on the eve of the already-scheduled damages hearing. Most respectfully, under the circumstances, with its dubious inclusion of such tremendous future medicals as well as even greater nonpecuniary damages—approximately seven times the claimed past medicals—the special referee’s damages award is excessive and unreasonable, and the judgment against the Hotel Defendants cannot justly stand.

CONCLUSION

For the reasons set forth herein, the Hotel Defendants ask this Honorable Court to reverse the special referee and to grant them relief in accordance with each of the respective grounds for reversal—first and foremost, by ruling that entry of default and the reference to the special referee should have been set aside/vacated because the Hotel Defendants were not validly served with process and personal jurisdiction had not attached; but if not that, by ruling that the special referee erred in finding the Hotel Defendants not entitled to relief under the Rule 55(c) standard and allowing them to fully defend Ms. Emory’s claims on the merits; but if not that, by ruling that the special referee erred with respect to his award of future medicals and nonpecuniary damages and reducing the judgment against the Hotel Defendants, or directing that it be reduced, to the extent of that error.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Enterprises, Inc., and JHM Hotels,

LLC d/b/a Charleston Marriott

Charleston, South Carolina

Dated: 9/16/16

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

Appeal from Charleston County
Court of Common Pleas

Brian C. Duffy, Special Referee

Appellate Case No. 2016-001308
Trial Court Case No. 2015-CP-10-2616

RECEIVED
SEP 19 2016
SC Court of Appeals

Patricia Danyeal Emory,

Respondent,

v.

Grace Hospitality, LLC, JHM Enterprises, Inc.,
and JHM Hotels, LLC d/b/a Charleston Marriott,

Appellants.

PROOF OF SERVICE

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellants, do hereby certify that I have served the **INITIAL BRIEF OF APPELLANTS** and the **APPELLANTS' DESIGNATION OF MATTER** on the above-named Respondent by depositing a copy of the same in the U.S. Mail, postage prepaid, on September 16, 2016, addressed as follows to counsel of record:

David B. Yarborough, Jr., Esquire
David Lail, Esquire
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Counsel for Respondent

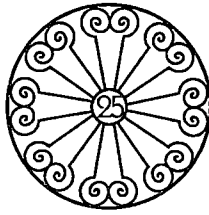
Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: 

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Dated: 9/16/16



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September 16, 2016

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

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SC Court of Appeals

Re: Patricia Emory v. Grace Hospitality, LLC
Appellate Case No.: 2016-001308
Trial Court Case No.: 2015-CP-10-02616
Claim No.: 9620198087-001
Date of Loss: 5/6/2013
YCR File: 3646-20160398

Dear Ms. Kitchings:

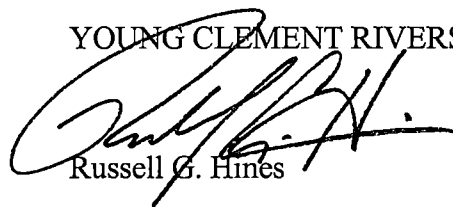
Enclosed for filing in the above-referenced matter, please find the original and one (1) copy of the **Initial Brief of Appellants**, the original and one (1) copy of the **Appellants' Designation of Matter**, and the original and one (1) copy of the **Proof of Service** regarding the same.

Kindly file the originals and return one (1) court-stamped copy of each document to me in the envelope provided.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP



Russell G. Hines

RGH/amj
Enclosures

cc: David B. Yarborough, Jr., Esquire, Yarborough Applegate, LLC
David Lail, Esquire, Yarborough Applegate, LLC
Reynolds H. Blankenship, Jr., Esquire, Walker Reibold

Hasler

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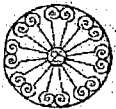
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