

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

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

FEB 28 2017
SC Court of Appeals

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

Paula Rose, Respondent,

v.

Charles Homer Rose, II, Petitioner.

PETITION FOR WRIT OF CERTIORARI

Kim R. Varner
Varner & Segura
304 Pettigru Street
Greenville, SC 29601
(864) 271-2232

J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

COUNSEL FOR APPELLANT

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 Plaintiff wife sued the Defendant Husband in circuit court seeking damages for assault and battery. The Plaintiff filed an affidavit of default and sought a damages hearing. The Defendant sought to set aside the default. The circuit court denied relief from the default and held a damages hearing. The Defendant appealed and the court of appeals affirmed. Plaintiff seeks a review of the decision of the court of appeals.

T. Ryan Langley, Charles J. Hodge, N. Douglas Brannon, and Christopher D. Kennedy represented the Respondent at trial and on appeal. Kim R. Varner represented the Petitioner at trial. J. Falkner Wilkes and Kim R. Varner represent Petitioner on appeal.

QUESTIONS PRESENTED FOR REVIEW

Now into Court comes the Petitioner, Homer Rose, who respectfully submits that the decisions of the lower courts are without factual support and contrary to prior decisions of this Court.

ARGUMENT

The decision of the court of appeals fails to consider the parties' spousal relationship as a major factor underlying the Appellant's default. The nature of the parties' special relationship as spouses is essential to the analysis of this case. The present case involves extrinsic fraud which caused the Respondent's default.

Extrinsic fraud "induces a person not to present a case or deprives a person of the opportunity to be heard." Chewning v. Ford Motor Company, 354 S.C. 72, 579 S.E.2d 605 (2003) (citing Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). The court of appeals failed to consider the issue of extrinsic fraud, the parties' relationship, and its impact on the Applicant's actions in failing to timely file a timely answer in the civil suit.

The record shows that the Petitioner was hospitalized near the end of his time for filing an answer. (A. 55; A. 103). During the period of time that Mr. Rose was in the hospital, Mrs. Rose came to visit him regularly. (A. 103). Photographs taken of the parties together at the hospital show the parties appearing to have reconciled their differences. (A. 89-93; 103). In light of clear evidence of what appears to be their reconciliation prior to the default, the parties' special relationship as spouses explains Mr. Rose's subsequent delay in filing an answer, and establishes good cause under Rule 55. The court of appeals did not address the

relationship of the parties or the extrinsic fraud issue.

Although perhaps novel, the existence of the spousal relationship is a necessary consideration in the analysis of the facts. Here, the lower court failed to address clear evidence that shortly before Mr. Rose's default, the parties appear to have reconciled their differences. The photographs in evidence are consistent with Mr. Rose's testimony that throughout his hospitalization and convalescence, Mrs. Rose was repeatedly assuring him that she was dropping the lawsuit. (A. 73-74; 76-80; 86-87; 88; 103). These photographs indisputably support Mr. Rose's belief that the parties' had resolved their differences and establishes an elevated basis for Mr. Rose's reliance on Mrs. Rose's assurances that she would not pursue the claim. Due to the parties' spousal relationship, Mr. Rose's reliance on Mrs. Rose's assurances, and his delay in filing an answer were entirely reasonable and thus constitute good cause.

The standard for granting relief from an entry of default under Rule 55 is "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). Here Mr. Rose, as a husband, relied on the representations

of Mrs. Rose, as his wife, in delaying the filing of his answer. Mrs. Rose's actual intent in leading Mr. Rose to believe they were reconciling their differences and that she would not pursue the civil case is not important. The issue is whether Mr. Rose's belief and reliance were reasonable so as to establish good cause is the issue. Here, due to the marital relationship, Mr. Rose's interpretation and reliance on Mrs. Rose's actions were entirely reasonable.

If Mrs. Rose never intended a reconciliation the result is the same as misrepresentations and fraud are each 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). The end result, which has been overlooked, is that Mr. Rose was not afforded an opportunity to litigate the merits of the case based on his reliance of his wife's assurances. A result that would not have happened but for the marital relationship.

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). 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 inasmuch 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.

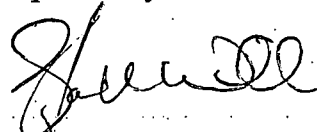
But for the delays caused by outside influences, Mr. Rose took timely and appropriate action at every juncture. He was reasonable in his reliance on the insurance company and his divorce attorney. He acted promptly when he discovered a problem and was told that he had an extension just prior to his hospitalization. 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 SCRPC. The lower courts' rulings are unsupported by the record.

CONCLUSION

Petitioner moves this Court to grant the petition and issue a writ of certiorari in this case.

Respectfully submitted,



J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
Counsel for Appellant

February 16, 2017.

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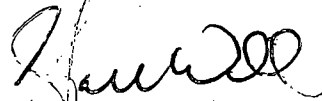
v.

Charles Homer Rose, II, Petitioner.

CERTIFICATE OF COUNSEL

I certify that a timely petition for rehearing was filed with the Court of Appeals and that the Court of Appeals has issued a final ruling on that petition.

Respectfully submitted,



J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
COUNSEL FOR APPELLANT

February 16, 2017.

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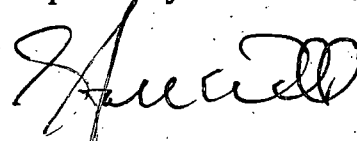
CERTIFICATE OF SERVICE

I certify that on the 20th day of February 2017, I served the Petition for Writ of Certiorari and Appendix, along with 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:

Charles J. Hodge
T. Ryan Langley
Hodge & Lanley Law Firm, P.C.
229 Magnolia Street
Spartanburg, SC 29306

Christopher David Kennedy
Douglas Brannon
Kennedy & Brannon, P.A.
P.O. Box 3254
Spartanburg, SC 29304

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Falkner Wilkes". The signature is written in a cursive style with a large initial "J" and "W".

J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
COUNSEL FOR APPELLANT

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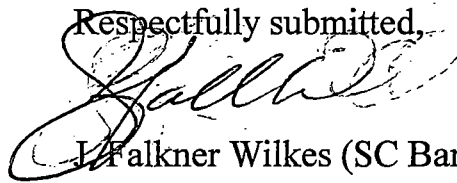
v.

Charles Homer Rose, III, Petitioner.

CERTIFICATE

I certify that the Appendix has been redacted in accordance with the Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 2014-04-15-02.

Respectfully submitted,



J. Falkner Wilkes (SC Bar #12893)
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 (facsimile)
Counsel for Petitioner

February 20, 2017.

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J. Falkner Wilkes
Attorney-at-Law
114 Whitsett Street
Greenville, SC 29601-3139

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



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