

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2017-000674

RECEIVED

NOV 06 2017

SC Court of Appeals

Lahitsha Hampton,

Respondent,

v.

George Edward Willoughby,
Richard Mann & William Sherman,

Defendants,

OF WHOM:

William Sherman is the

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Appellant's Notice of Appeal was untimely, as it was filed more than thirty (30) days after final entry of the judgment against him.

- II. The Court properly denied Appellant's Motion to Prevent Entry of Default or in the Alternative, for Relief from entry of default as Appellant failed to meet the "good cause" standard of SCRCP Rule 55.

- III. The Court properly denied Appellant's Motion to Stay enforcement of a Judgment.

STATEMENT OF THE CASE

The facts underlying the case at bar involve a complex collision that took place on March 30, 2015. Respondent has alleged in her well plead Complaint that she was traveling northbound on East Stone Avenue near Spartanburg Street when George Edward Willoughby, in Appellant's vehicle, after a separate impact with Richard Mann, collided with her vehicle. Respondent filed said Complaint on December 11, 2015. Brian Garrett, of SC Process Service, served Appellant personally with the Summons and Complaint on December 15, 2015. Later that same afternoon, Appellant contacted The Law Office of Brian T. Smith and asked what he needed to do with the papers he received. An attorney at the office, Christina Bradford, returned his phone call the next day and told him to contact his insurance company regarding the papers. After the requisite days elapsed with no response from Appellant, Respondent filed an affidavit seeking an order of default as to Appellant and Richard Mann. The affidavit was filed on February 26, 2016, with an Order of Default signed on March 22, 2016, and filed March 24, 2016. Appellant then filed a Motion for Relief from Default on June 1, 2016, with a hearing set before Judge Verdin on July 28, 2016. During the hearing, Judge Verdin denied Appellant's motion. At Appellant's request, and with Respondent's consent, Judge Verdin continued the damages hearing set for July 28, 2016, in order to provide Appellant with time to discuss settlement of the matter. Instead of contacting Respondent with regards to settlement, Appellant filed a motion to stay default proceedings before the court on September 15, 2016, seeking to further delay his responsibility for Respondent's damages. On October 3, 2016, Judge Stillwell denied Appellant's motion, noting that Appellant was presenting defenses that were foreclosed to him due to his default and allowed Respondent to proceed to assess damages as to Appellant. Additionally, Judge Stillwell's Order granting damages specifically designates the judgment as applying to only Appellant and his

culpability for the collision giving rise to Respondent's Complaint. The Order provided for a Judgment as to Appellant for actual damages in the amount of \$30,000.00. A subsequently filed Motion for Reconsideration with regards to said order was denied by Judge Stillwell on October 19, 2016. On October 8, 2016, Appellant filed another Motion, this time seeking to stay enforcement of the judgment. His motion was denied on November 9, 2016. Appellant filed a Motion for Reconsideration on November 17, 2016, which was denied February 17, 2017.

ARGUMENT

This Court should affirm the Trial Court because Appellant has failed to show that the Trial Court abused its discretion in finding that he failed to demonstrate “good cause” for failing to timely respond to Plaintiff’s Complaint. The decision to set aside default “is within the discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion.” *N.H. Ins. Co. v. The Bey Corp.*, 312 S.C. 47, 435 S.E.2d 377, 379 (Ct. App. 1993); see *Dixon v. Besco Eng’g, Inc.*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995). An abuse of discretion occurs when a trial court ruling is based on an error of law or is without evidentiary support. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (S.C. 2000). In the case at bar, however, Appellant has failed to show an abuse of discretion and the Trial Court should be affirmed.

I. Appellant’s Notice of Appeal was untimely, as it was filed more than thirty (30) days after entry of the judgment against him.

Respondent, as an initial matter, would assert that Appellant’s appeal should be dismissed as he failed to file his Notice of Appeal within thirty days of receipt of notice of entry of the judgment/order. South Carolina Rule of Appellate Procedure 203(b)(1) requires that a notice of appeal be served within thirty days after receiving written notice of entry of a final judgment or order and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal.” *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct.App.1999). “The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004); USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008).

However, in the current action, Appellant failed to file his notice of appeal until thirty days after receiving a final order denying his motion for reconsideration as to his Motion to Stay Enforcement of the Default Judgment under Rule 54(b)/62(h). That motion does not address any of the materials or assertions in Judge Verdin's July 28th order; thus, it does not extend his time for filing of a notice of appeal. It is well established that a Rule 55(c) motion is not immediately appealable; however, it is appealable after entry of a damages award, which happened in the above case on October 17, 2016. Furthermore, Appellant filed the Motion to Stay Enforcement on October 8, 2016, prior to written entry of the Order Granting Damages. To now submit to the Court that this motion related back to the damages award and prior Order keeping him in default is thus inconsistent with the record. As such, in the case at bar, the notice of appeal should have been filed within thirty days of receiving the Order Granting Damages as to Defendant Sherman, filed October 17, 2016. In evaluating a motion, it is important to review its substance and effect rather than its caption. *See Mickle v. Blackmon*, 255 S.C. 136, 177 S.E.2d 548 (S.C. 1970); *see also Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 747 S.E.2d 461 (S.C. 2013). Appellant's motion not only fails to mention "reconsideration" of the entry of the judgment, it also fails to substantive request reconsideration or alteration by the court of its decision regarding Appellant's liability for Respondent's damages. Instead, it focuses on assertions regarding derivative liability. These assertions do not affect the lack of "good cause" determination by the Court and is not something that was specifically brought up or ruled upon in front of the Court, both of which are required to bring the matter properly before this Court. In light of Appellant's failure to file his Notice of Appeal within thirty days of entry of the damages award against him, Respondent would request that Appellant's appeal be dismissed as untimely or clarified to only

include the denial of his Motion to Stay Enforcement of a Judgment. Respondent will address the substantive matters of the appeal in the interest of judicial economy.

II. The Court properly denied Appellant's Motion to Prevent Entry of Default or in the Alternative, for Relief from entry of default as Appellant failed to meet the "good cause" standard of SCRCP Rule 55.

The Trial Court did not abuse its discretion in finding that Appellant failed to meet the "good cause" standard for relief required by SCRCP Rule 55. A motion for relief under SOUTH CAROLINA RULES OF CIVIL Procedure Rule 55(c) requires the party presenting the motion, in this case, Appellant, to present to the court "good cause" for vacating his entry of default. Once "good cause" is established, a Defendant still must meet the *Wham* factors in order to justify setting aside an entry of default. See *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885, (S.C. 2009); *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 719 S.E.2d 703 (S.C. Ct. App. 2011); see also *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 12, 753 S.E.2d 537, 543 (S.C. 2014) (describing the standard as two pronged: first requiring an explanation for the default and why setting aside the default would serve the interests of justice, and second present evidence with regards to the factors set forth in *Wham*). Further a finding of fact as to each factor is not necessary on the record so long as there is sufficient evidentiary support on the record for finding the Defendant lacked good cause. *Dixon v. Besco Eng'g Inc.*, 463 S.E.2d 636 (S.C. Ct. App. 1995). Judge Verdin ruled that Respondent failed to meet the "good cause" standard, indicating that:

This is a situation where Mr. Sherman was personally served and they've got a witness who is here live to testify, if necessary. And I certainly believe that he would testify that he personally served [Sherman]. They have a call log that they have kept timely with phone calls, which is an excellent thing to do, in which Mr. Sherman, at least, knew enough of the seriousness of [being served with papers] to call the attorney on the other side. There's a witness here who evidently would say

that she told him he should call his insurance company. All that being said, I do not find that Mr. Sherman has provided good cause for his failing to forward this on to you.

Transcript of Proceedings from July 28, 2016, at 20–21 (alterations added).

A. *Appellant has failed to show that the Court abused its discretion in finding that he failed to show “good cause” to set aside entry of default pursuant to Rule 55(c)*

The record reveals the necessary evidence showing that Appellant failed to meet his initial burden for relief under Rule 55(c), a showing of “good cause.” The “good cause” standard requires that a party seeking relief from an entry of default must “provide an explanation for the default and give reasons why vacation of the default would serve the interest of justice.” *Sundown*, 681 S.E.2d at 888. In the case at bar, Appellant failed to do so. His only explanation regarding his default was first that he was never served and later that he was so unfamiliar with matters that he did not know what to do when served with papers. Appellant no longer denies that he was personally served; instead, he cites to unfamiliarity with the process as his “good cause” for failing to respond. South Carolina case law, however, specifically rejects unfamiliarity as grounds for “good cause.” *See Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894 (Ct. App. 2001) (finding lack of familiarity with legal proceedings no a proper excuse; laymen are held to the same standard as that of an attorney); *see also McCall v. Ikon*, 611 S.E.2d 315, 317–18 (S.C. 2 005) (holding that a suit at law is not a children’s game, “but a serious effort on the part of adult human beings to administer justice”). Additionally, evidence was presented to the trial court that Appellant contacted Plaintiff’s counsel on the date of service inquiring into what he should do with the papers. The evidence and testimony presented to the Court established that Appellant was instructed to contact his insurance company. Thus, the Trial Court properly found that Appellant

failed to provide “good cause” for his failure to respond to Respondent’s Summons and Complaint, (Transcript of Proceedings from July 28, 2016, at 17 through 18).

Additionally, the Trial Court did not abuse its discretion in ruling that Appellant failed to present that his request for relief was in the interest of justice. Respondent would allege that there is support in the record that it is in the interest of justice to hold Appellant accountable for his decision to ignore the Summons and Complaint after they were personally served upon him in December of 2015. Even more egregious about Appellant’s failure to respond to the Summons and Complaint in question is that he was informed by counsel for Respondent to contact his insurance company about the paperwork he received. Thus, the Trial Court properly found that Appellant failed to meet his initial burden of showing “good cause” for setting aside his entry of default.

B. Appellant has failed to show that the Trial Court abused its discretion with regards to his failure to meet the Wham factors.

The record reveals that the Trial Court did not abuse its discretion in finding that Appellant failed to show how the *Wham* factors entitled him to relief under Rule 55(c). In fact, The Court ruled that Appellant’s failure to meet the “good cause” standard acted as a bar to evaluating his motion under the *Wham* factors. Thus, Respondent would assert that they should not be evaluated in determining if she abused her discretion in denying Appellant’s Motion. However, to ensure completeness of the record and of the evidence presented at the Trial Court level, Respondent will address how the *Wham* factors weigh in favor of Respondent, not Appellant. The factors include the timeliness of the motion for relief, the existence of a meritorious defense, and the prejudice to the parties.

In the case at bar, Appellant's motion was filed one hundred and sixty-nine days (169) after he was personally served with the Summons and Complaint. He did not comply with the SCRCR Rule 12(A) deadline to answer Respondent's Summons and Complaint by almost a month at the time default was sought by Respondent. In *Sundown*, the South Carolina Supreme Court affirmed a denial of a defendant's request for relief where it moved to set aside the default less than a month after the deadline to answer passed, unlike the five months that lapsed in the case at bar. See *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, 681 S.E.2d 885, 889 (2009). Thus, the untimely nature of Appellant's Motion weighed in favor of denying his motion.

As to the existence of a meritorious defense, The Court specifically found on the record that "there may or may not" be a meritorious defense. Appellant's allegations of a meritorious defense seem to be that Appellant's negligent entrustment of his vehicle did not include the abuse of alcohol by George Willoughby. Additionally, it appears that Appellant is now asserting in his initial brief that he did not permit Willoughby to drive his vehicle even though this assertion is contrary to the record in this matter and the joint representation of the parties to date. Nevertheless, Appellant has not met his burden of showing a clear error of law as to the Court's holding regarding meritorious defense. Specifically, his assertion ignores an entire line of South Carolina cases addressing negligent entrustment *without* the existence of alcohol. See *Jones ex rel. Jones v. Enterprise Leasing Co.-Se.*, 383 S.C. 259, 266, 678 S.E.2d 819, 823 (Ct. App. 2009). Therefore,

the Court should not be persuaded by Appellant's misappropriated argument attempting to apply alcohol related requirements to non-alcohol related accidents as grounds for his meritorious defense.¹

As to the third *Wham* factor, there is evidence in the record to support that Respondent would be prejudiced if Appellant's motion was granted. As is established in the record, Respondent filed suit on December 11, 2015, after experiencing her injuries and after attempts to resolve the matter otherwise stalled. She would certainly be prejudiced to now have to begin the process again, if Appellant were let out of default. It has been almost two years since suit was filed. To date, no discovery as to Appellant has been conducted and no further investigation of the claim has happened. Thus, to set aside entry of default at this juncture would add significant time to what has already amounted to a very long wait for Appellant. She presented on the record before the trial court that due to a concussion that she suffered as a result of the collision, that she continues to have memory issues, which brings into question her ability to participate in continued discovery and depositions on the matter. It is undisputed that the longer a case is delayed the more difficult it becomes to find documents, secure witnesses with a clear memory of the event, and properly litigate a case through discovery. As such, the undue delay caused completely by

¹ See *Jones ex rel. Jones v. Enterprise Leasing Co. – Se.*, 383 S.C. 259, 266, 678 S.E.2d 819, 823 (Ct. App. 2009); see also *Am. Mut. Fire Ins. Co. v. Passmore*, 275 S.C. 618, 621, 274 S.E.2d 416, 418 (S.C. 1981) (finding the elements to prove negligent entrustment different in cases where alcohol is not the “responsibility” factor, instead adopting the factors of (1) ownership of the vehicle; (2) control of the vehicle; (3) responsibility for the vehicle’s use). There is no indication in *Gadson* that the Court intended to disregard and replace the elements set forth in *Passmore*. Indeed, *Passmore* is still good law in this state and is not limited by the cases involving alcohol and bound to the *Gadson* elements. See *Becker v. Estes Express Lines*, 2008 U.S. Dist. LEXIS 20400 (“the court agrees with the Plaintiff, that the South Carolina Supreme Court did not overrule the definition of negligent entrustment found in *Passmore* in its entirety” because *Gadson* alleged intoxication as the basis for the negligent entrustment claim).

Appellant has the significant threat of prejudicing the Respondent, who will likely not be able to obtain the same discovery she would have a year ago.

Additionally, Respondent's credit has been affected by the medical bills and other expenses she incurred as a result of the collision in question. Therefore, any further delay in this case simply puts her further away from the financial resources she is entitled to, as a result of her injuries from a collision that occurred through no fault of her own. Appellant also presented evidence that she would be prejudiced as she spent six months and not insubstantial funds to serve Appellant and move the case as allowed under the rules.

In light of the above, Respondent would assert that the Court did not abuse its discretion in ruling that Appellant failed to meet his burden under Rule 55(c) to show "good cause" and that even if the *Wham* factors were evaluated, they would weigh in favor of Respondent.

III. The Court properly denied Appellant's Motion to Stay enforcement of a Judgment

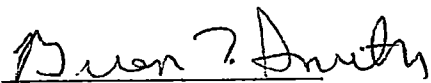
Appellant has failed to identify a clear error of law to support his assertion that the Trial Court abused its discretion in denying his motion to stay enforcement. The Trial Court denied Appellant's Motion as it failed to fulfill the necessary elements of SCRCP 54(b). Rule 54(b) provides that a Court "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment." SCRCP 54(b). The Trial Court order fulfills the Rule in denying Appellant's motion after hearing oral arguments as to Appellant's failure to present a just reason for delay. Additionally, The Court reviewed Federal Law and public policy in denying Appellant's request. The ruling specifically found that public policy favored Respondent. Appellant has not presented grounds before this Honorable Court as to why that

determination was an abuse of discretion or based upon a clear error of law. As such, he has failed to meet his burden and the judgment of the Trial Court should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment of the lower court be affirmed.

Respectfully Submitted,



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November 3, 2017
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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Letitia H. Verdin, Circuit Court Judge SC Court of Appeals

Case No. 2017-000674

Lahitsha Hampton,

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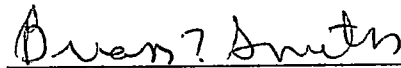
OF WHOM:

William Sherman is the

Appellant.

Proof of Service

I certify that I have served Respondent's Initial Brief on Appellant, William Sherman, by depositing a copy of it in the United States Mail, postage prepaid, on November 3, 2017, addressed to his attorney, Matthew C. LaFave at his office at: Post Office Box 1149, Columbia, South Carolina 29202.



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SC Court of Appeals

November 3, 2017

Ms. Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
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Re: Lahitsha Hampton v. George Edward Willoughby, Richard Mann,
and William Sherman
Civil Action No. 2015-CP-23-07297
Court of Appeals Case No. 2017-000674

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the Initial Brief of Respondent, Designation of Matter to be included in the Record on Appeal, and the Proof of Service in the above-captioned matter. Once filing is complete, please return the clocked copy in the enclosed, self-addressed stamped envelope.

By copy of this correspondence to the attorneys for the Appellant, I am hereby serving a copy of the Initial Brief of Respondent and the Designation of Matter to be included in the Record on Appeal upon Mr. Matthew C. LaFave, Esq.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Brian T. Smith".

Brian T. Smith
Attorney at Law

Enc.

Cc: Matthew C. LaFave, Esq.
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