STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity
Case No. 2015-CP-10-3392

Appeal No. 2017-001628

Ann M. Blandin,

Respondent-Appellant,

v.

City of North Charleston,

Appellant-Respondent.

INITIAL APPELLANT'S BRIEF OF APPELLANT-RESPONDENT CITY OF NORTH CHARLESTON

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STATEMENT OF THE ISSUES OF APPEAL

Did the Trial Court abuse its discretion in denying the Defendant City's Rule 55(c) motion to set aside entry of default? Or, as otherwise stated, did the Trial Court err in finding that there was no good cause shown for the failure to timely file an Answer?

STATEMENT OF THE CASE[1]

This action arises out of an automobile accident that occurred on January 3, 2015, at the intersection of E. Montague Ave. and McDowell Ave. in the City of North Charleston. The automobile driven by Plaintiff Ann M. Blandin disregarded a stop sign and was struck by a patrol car owned by the City of North Charleston.

The Plaintiff commenced this action with the filing of a summons and complaint on June 15, 2015. [ROA ___; Complaint.] The complaint was served on the City on June 30, 2015, by a process server, who personally delivered the pleading to Sandy Brown, Administrative Assistant to the Clerk of Council on behalf of the City of North Charleston. [ROA ___; Affidavit of John E. Parker with Ex. A.] As explained in more detail below, an Answer was not timely filed because of a mistake in the City Risk Department whereby the summons and complaint inadvertently were not forwarded by email to the State Insurance Reserve Fund for assignment to legal counsel.

An affidavit of default was filed on November 10, 2015, and an Entry of Default was signed by the Clerk of Court and filed that same day. [ROA ___, ___; Affidavit of John E. Parker, Entry of Default.] The affidavit of default was not served on the City. Likewise, the Entry of Default was not served on the City.

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[1] The relevant facts regarding the issue on appeal will be discussed in the Argument. *See* Rule 208(b)(1)(D), SCACR.

The Plaintiff moved that the matter be referred to the Master in Equity by way of a motion form with a proposed order filed March 29, 2016; and the matter was referred to the Master in Equity by order filed April 5, 2016. [ROA ___; Order.] Neither the motion nor the order were served on the City.

On April 25, 2016, the Master set the case for a damages hearing for July 7, 2016. [ROA __; see docket sheet.] Counsel for the Plaintiff sent a letter on May 11, 2016 to the City giving notice for the first time of the default and informing the City of the damages hearing. [ROA ___; Letter from Attorney Parker to Mayor, dated May 11, 2016.] This letter was received by Leslie Mitchum, Risk Manager for the City of North Charleston on May 17, 2016. [ROA ___; Affidavit, Exhibit A to Motion to Set Aside Entry of Default.]

The Hood Law Firm was immediately retained and promptly filed a Motion to Set Aside Entry of Default, pursuant to Rule 55(c), SCRCP, two days later on May 19, 2016, along with an Answer. [ROA ___, ___; Motion, Answer.] A motion hearing was held on June 14, 2016, and the Trial Court denied the motion by form order filed June 15, 2016. [ROA ___; Order.]

The City filed a Motion to Reconsider on June 24, 2016, which was denied by order filed July 12, 2016. [ROA ___, ____; Motion, Order.]

As a result of the default ruling the City's insurer promptly exercised a policy exclusion. Thereafter the City's taxpayer-funded treasury is solely responsible for satisfying any money judgment.

A damages hearing was held on May 2, 2017. The Trial Court found that the Plaintiff incurred damages in the amount of $5,250,000[2], but applied the monetary cap set by S.C. Code §

[2] $1,000,000 for medical expenses and $4,250,000 for past and future pain and suffering and permanent injury.

15-78-120(a), and directed entry of judgment for the Plaintiff in the amount of $300,000. [ROA ___; Order/Judgment on Damages, entered June 23, 2017.]

The City received notice of the entry of the Order on July 3, 2017, and served a notice of appeal on July 28, 2017. The Plaintiff also served a notice of appeal on August 1, 2017.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE CITY'S MOTION TO SET ASIDE ENTRY OF DEFAULT BECAUSE THE CITY MADE THE REQUISITE SHOWING OF "MERE" GOOD CAUSE UNDER RULE 55(C).

A. Rule 55(c) – The "Mere" Good Cause Standard for Setting Aside Entry of Default

Rule 55(c), SCRCP, generally provides: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Rule 60(b), SCRCP, provides for relief for a final judgment for specified reasons, including "(1) mistake, inadvertence, surprise, or excusable neglect."

These rules provide relief in different circumstances under different standards, but there is some overlap. As the Supreme Court addressed in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), there are clear distinctions between the "mere" good cause standard for setting entry of default and the more rigorous standard for relief from judgment under Rule 60(b):

> 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. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct.App.1989). ****
>
> Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default

> judgment under Rule 60(b) is ***more rigorous*** than the "good cause" standard established in Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App.1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRCP. ***The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default.***
>
> It is often observed, as the court of appeals held in the present case, that the criteria for obtaining relief from judgment under Rule 60(b)—mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation—are relevant in determining whether good cause has been shown under Rule 55(c), SCRCP. *See New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 378–79 (Ct.App.1993) (holding that, "as a practical matter," the 60(b) factors are relevant under both rules). However, we caution that this language invites trial courts to apply a heightened standard to Rule 55(c) motions. ***The Rule 60(b) factors are indeed relevant to a Rule 55(c) analysis, but only insomuch as proof of any one of these factors is sufficient to show "good cause."*** No trial court should ever find good cause lacking based solely on the absence of a Rule 60(b) factor.

Id. at 888-89 (emphasis added).

Here, the Trial Court failed to appreciate and apply the more lenient ***mere*** good cause standard of Rule 55(c) where the City made the threshold showings for a Rule 55(c) motion as delineated in Sundown Operating, namely (1) an explanation for the default, and (2) reasons why vacation of the default entry would serve the interests of justice. The Trial Court erred in denying the motion to set aside entry of default inasmuch as the City explained that the failure to timely answer was a mistake from inadvertence, and presented reasons that the interests of justice would be served by setting aside the entry of default against a governmental entity and allowing the case to proceed on the merits.

1. The Explanation - The failure to forward an email was a mistake from inadvertence.

As noted above, the complaint was served on the City on June 30, 2015, by personal delivery to Sandy Brown, Administrative Assistant to the Clerk of Counsel. [ROA ___; Affidavit

of Service.] On that same day, Beth Woodall, a legal assistant for the City of North Charleston, emailed copy of the summons and complaint to Leslie Mitchum, the Risk Manager for the City of North Charleston. [ROA ___; Affidavit of Leslie Mitchum ¶¶ 3-4, dated May 19, 2016.] The City's typical protocol is for Ms. Mitchum to forward any summons and complaints received to the City's liability claims handler for assignment to legal counsel to defend the City. [ROA ___; Mitchum Affidavit ¶ 5.] However, in this case, Ms. Mitchum sent an email from her mobile phone to Karen Helms, who worked in the City Risk Department as Claims and Insurance Coordinator. [ROA ___; Mitchum Affidavit ¶ 6.] In that email – sent the same day of service, Ms. Mitchum forwarded the email from Ms. Woodall and requested that Ms. Helms send the summons and complaint to the liability claims handler for the City. [ROA ___; Mitchum Affidavit ¶ 6.] Ms. Mitchum does not specifically recall why she sent this email to Ms. Helms, but she believes that she must have been away from her office and unable to send emails with large attachments from her mobile phone. [ROA ___; Mitchum Affidavit ¶ 7.] Having forwarded the summons and complaint with such instructions, Ms. Mitchum was under the belief that Ms. Helms had forwarded a copy of the Summons and Complaint to the City's liability claims handler. Unfortunately, due to a gap in communication, Ms. Helms did not forward the summons and complaint to the City's liability claims handler. [ROA ___; Affidavit of Karen Helms, dated May 19, 2016.] This is far from a case where a municipality ignored legal process or tried to flout the authority of the court. This is, instead, a case where the City acted immediately to process the Complaint, took step after step correctly, and suffered an unexpected human error at the last step of the process.

The Trial Court ruled that the failure to forward an e-mail does not amount to good cause shown for failure to timely file an answer. However, in so holding, the Trial Court failed to recognize or acknowledge that the failure the forward the email was an administrative mistake – a

mere inadvertence – proof of which satisfies the mere good cause standard articulated in Sundown Operating. The Trial Court also failed to appreciate and apply the Rule 55(c) ***mere*** good cause standard with the appropriate lenience as expressed by the Supreme Court.

2. The Interests of Justice

a. *Burden on City taxpayers*

Forcing innocent taxpayers to pay a default from the public treasury here would subvert justice, not further it. The Plaintiff is pursuing over $5 million dollars of taxpayer money in a case in which there is evidence to suggest the Plaintiff herself was the primary cause of the accident when she ran a stop sign. Allowing the Plaintiff to enjoy a multi-million-dollar default here, erasing her role in the accident, is not a "just" sanction for a single misplaced government email. The injustice is magnified a thousand-fold when one considers that it is the innocent taxpayers who will be paying, not even the person who misplaced the email.

b. *Trial on the merits*

Additionally, setting aside the entry of default would serve the interest of justice in resolving this case by trial on the merits. "It is the policy of the law to favor the trial of cases on the merits." Petty v. Weyerhaeuser Co., 272 S.C. 282, 251 S.E.2d 735 (1979); Trial Handbook for South Carolina Lawyers § 4:8. "Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits." Melton v. Olenik, 379 S.C. 45, 664 S.E.2d 487, 492 (Ct. App. 2008). The denial of the motion to set aside entry of default does not evidence liberal construction of the ***mere*** good cause standard of Rule 55(c), nor does it serve the interest of justice in resolving this case on the merits.

The interest of justice in the resolving the case on the merits is important particularly in this case because the defendant in default in a governmental entity. The non-profit, governmental

status of the Defendant City is the linchpin of the other point, namely the financial burden on the City taxpayers. If a private litigant makes a mistake in answering, mistake and consequence are unified because it is the private litigant who suffers the resulting loss. Here, however, the mistake was made by a public, governmental employee for which the city taxpayers will bear the ultimate burden of paying the judgment because, as shown to the Trial Court, there is no insurance coverage for the City's liability.[3] This unfair and costly financial burden on the public taxpayers is contrary to the interest of justice and the public policy of South Carolina.

B. The Wham Factors

In addition to having explained the default and shown the interest of justice, the City has also made a proper showing on the three Wham factors.

ONE: As to the timing of the motion for relief, the record shows that the City filed the motion within two days of being made aware of the default. The City received notice of the default damages hearing on May 17, 2016 and promptly retained counsel and filed the Rule 55(c) motion on May 19, 2016.

TWO: The Defendant City has shown a meritorious defense through the accident report that indicates the Plaintiff was at fault in disregarding the stop sign. Notably, the Traffic Collision Report listed Plaintiff's failure to yield right of way when she disregarded a stop sign as the primary contributing factor in the accident, even though the City vehicle was also speeding. [ROA ___; Ex. A to Motion to Set Aside Entry of Default.] Evidence of such a traffic violation by the Plaintiff could establish a comparative negligence defense that could bar recovery or apportion damages. Nelson v. Concrete Supply Co., 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991) ("a

[3]The IRF has denied coverage under the automobile liability policy and there is no Errors and Omission policy to provide coverage for the public employees' mistake. [ROA ___; Email of June 14, 2016 from City Attorney Brady Hair to Judge Nicholson with attachments.]

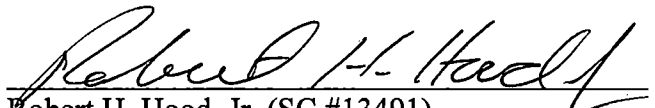
plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence.")

THREE: No prejudice will result to the Plaintiff as a result of the Court set aside the entry of default other than having to prove their case. Allowing the City to answer will not impede the ability of the Plaintiff to present her claim and delay alone for the process of litigation and trial is not sufficient to establish prejudice. *See* Shannon v. McGee, No. 2007-UP-543, 2007 WL 7273650, at *3 (S.C. Ct. App. Nov. 30, 2007); *see also* Potomac Leasing Co. v. Bone, 294 S.C. 494, 497, 366 S.E.2d 26, 28 (Ct. App. 1988) (delay alone, without prejudice, not sufficient to bar amendment of pleading under Rule 15); Sanders v. Weaver, 583 So. 2d 1326, 1329 (Ala. 1991) (delay alone is not sufficient prejudice to justify denial of Rule 55(c) motion, "the delay must result in loss of evidence, create increased difficulties in discovery, or provide greater opportunity for fraud.")

CONCLUSION

WHEREFORE, based on the foregoing, the Defendant City of North Charleston requests that the Court reverse the judgment, set aside the entry of default, and remand to allow the City to responsively plead to Plaintiffs Complaint.

HOOD LAW FIRM, LLC



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December 4, 2017

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Ann M. Blandin,

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Certificate of Service

The undersigned certifies that on this 4th day of December, 2017, a copy of the Initial Appellants Brief and Designations of Matters to be Included in the Record on Appeal on behalf of Appellant-Respondent City of North Charleston was served on Counsel for all the parties by depositing a copy in the U.S. Mail, with sufficient first class postage, addressed to the following counsel at the addresses listed below:

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December 4, 2017

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Re: Ann M. Blandin v. City of North Charleston
C/A No. 2015-CP-10-3392, Charleston CP
Appellate Case No. 2017-001628
HLF File No. 236.136

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief and Designations of Matters to be Included in the Record on Appeal for Appellant/Respondent City of North Charleston, along with our Certificate of Service. We are also enclosing our Motion to Remove Counsel of Record, with the appropriate filing fee as Will DesChamps is no longer working in our office nor involved with this appeal. By copy of this letter we are serving all Counsel of Record. Please return a clocked-in copy of each in the attached envelope.

Kind regards,

Yours truly,

Robert H. Hood, Jr.

RHHjr/spc
Enclosure(s)
cc: J. Brady Hair, Esquire/Derk Van Raalte IV, Esquire
John E. Parker, Esquire/William F. Barnes, III, Esquire
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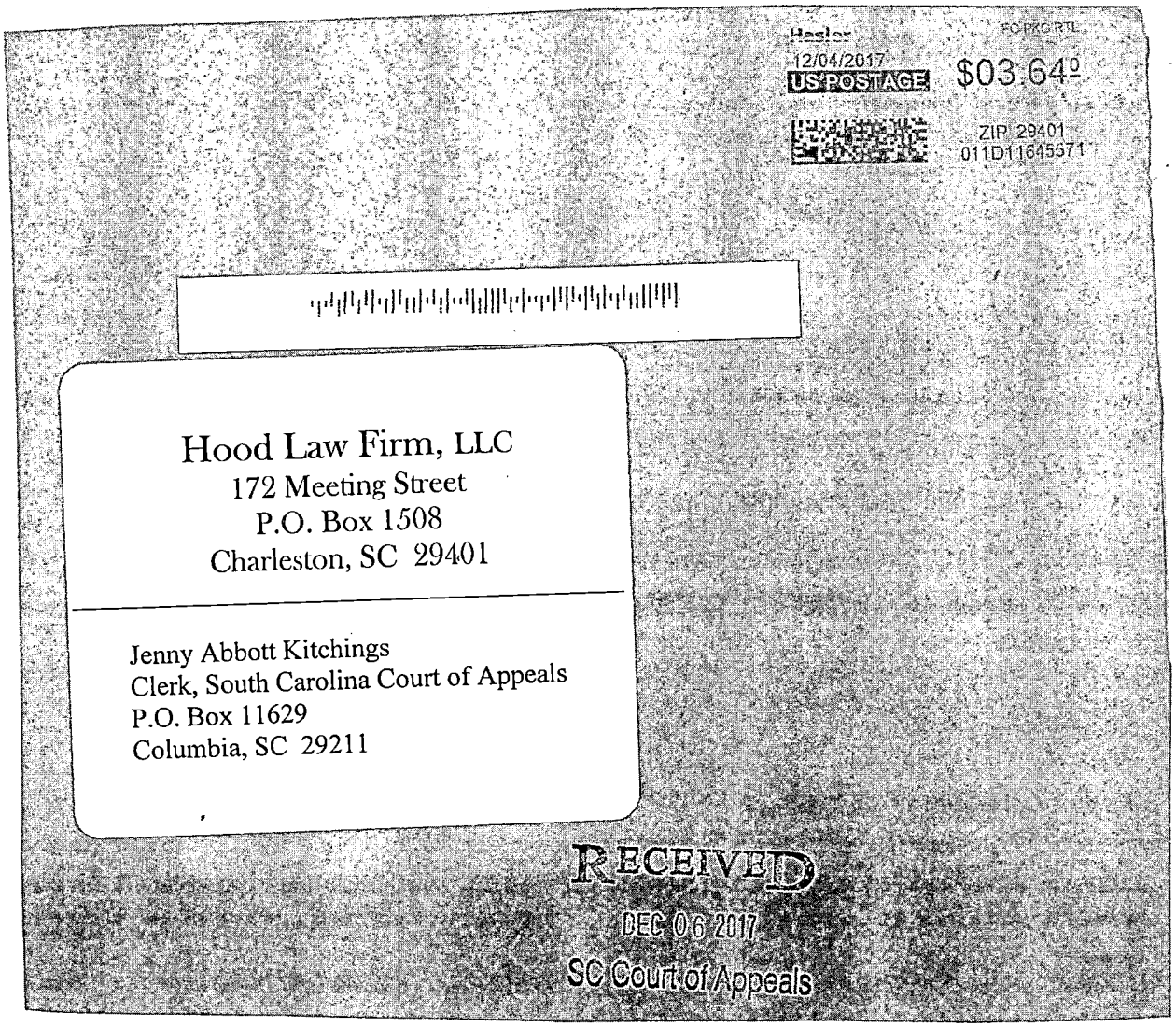
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