IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

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SC Court of Appeals

Case No. 2017-000674

Lahitsha Hampton, Respondent,

v.

George Edward Willoughby,
Richard Mann & William Sherman Defendants,

Of Whom William Sherman, is the Appellant.

FINAL REPLY BRIEF OF APPELLANT

Matthew C. LaFave
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5727
Attorney for Appellant

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TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

1. Was Appellant's appeal of the Trial Court's denial of the Motion to Set Aside the Entry of Default timely?

2. Are the interests of justice served by setting aside the entry of default against Appellant?

3. Did the Trial Court Err in finding Appellant failed to satisfy the Wham factors to support the setting aside of the entry of default?

4. Did the Trial Court abuse its discretion in failing to stay enforcement of the default judgment?

ARGUMENT

1. Respondent has clearly and correctly indicated in her brief that a Rule 55(c) motion is not immediately appealable. However, Respondent incorrectly asserts that the appeal is untimely as it was not filed within 30 days after October 17, 2016, which was the date the default judgment was entered. Respondent blindly ignores the subsequent actions undertaken by Appellant, following the damages hearing that took place on October 17, 2016, which prevented immediate appeal thereafter of the Motion to Set Aside the Entry of Default, filed a Motion to Stay Enforcement of the Default Judgment on October 18, 2016. The Court denied the Motion to Stay Enforcement of the Default Judgment in a Form 4 Order filed November 9, 2016 (R. pp. 4-6); thereafter, Appellant timely submitted a Motion for Reconsideration on November 17, 2016, (R. pp. 41-47) which was not ruled upon until February 17, 2017. Appellant submits that the default judgment entered on October 17, 2016, did not become final such that all prior rulings became appealable until February 17, 2017.

Rule 203(b)(1) of the South Carolina Rules of Appellate Procedure requires a party who intends to appeal a ruling to serve, within thirty (30) days, a written notice of appeal after notice of entry of a final judgment or order has been received. *USAA Property Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008); (*see also Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 4, 524

S.E.2d 416 (Ct. App. 1999)). The issue to be addressed here, when analyzing the timeliness of the appeal of the Trial Court's ruling on July 28, 2016, centers on a determination of when a final order was rendered. Appellant submits it is clear and unequivocal that these issues did not become ripe for appeal until the final determination by the Court that the judgment entered October 17, 2016, was to be enforced, which did not occur until February 17, 2017. Appellant filed a written notice of appeal, as required by the Rule 203 (b)(1) on March 13, 2017, which is within the requisite thirty (30) days. *Supra USAA Property and Cas. Ins. Co.*, at 651. In the case at bar Appellant, the day after the default judgment was entered, filed an appeal, which should be categorized as a post-trial motion thus staying the time for filing an appeal. Specifically, on October 18, 2016, Appellant filed a Motion to Stay Enforcement of the Default Judgment. The foregoing motion was denied and a Rule 59(e) motion was timely filed seeking reconsideration. Appellant submits that only upon the denial of the Motion for Reconsideration, which occurred on February 17, 2017, was the judgment on the Motion to Set Aside the Entry of Default final and enforceable thus rendering it and all other rulings by the Trial Court subject to appeal. Therefore, Appellant, having filed a written notice of appeal within thirty (30) days of February 17, 2017, has timely appealed the July 28, 2016, Order denying the Motion to Set-Aside the Entry of Default (R. pp. 1-3).

2. "The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009); (*see also Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.,* 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006)). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id.*; (*see also Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375

S.E.2d 321, 322-23 (Ct. App. 1988)). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Id.*; (*see also In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). Under Rule 55(c), as expounded upon in *Sundown*, a party seeking to have an entry of default set aside must satisfy the standard of mere "good cause." To show "good cause" the moving party must "provide an explanation for the default and give reasons why vacation of the default judgment would serve the interests of justice." *Id.* at S.C. 608. It is further established "[u]nder Rule 55 (c) of the South Carolina Rules of Civil Procedure, a default may be set aside 'for good cause shown.' Rule 55(c) should be 'liberally construed to promote justice and dispose of cases on the merits.'" *Melton v. Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008); (*quoting Bage v. Southeastern Roofing Co. of Spartanburg, Inc.*, 373 S.C. 457, 471, 646 S.E.2d 153, 160 (Ct. App. 2007)).

Appellant presented the Trial Court, in his showing of good cause, an explanation for his failure to timely file an answer as required by *Sundown.* At the original hearing on his Motion to Set Aside the Entry of Default it was explained to the Court that Appellant was confused and uncertain as to why he was being served with legal papers, as he was not a party to the motor vehicle accident giving rise to Respondent's alleged injuries. Respondent directs the Court to *Hill v. Dotts* to support the premise that Appellant's lack of familiarity is not a "proper excuse" it is easily distinguishable in that Dotts was seeking relief from a default judgment pursuant to Rule 60(b), SC Rules of Civ. P. 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001). In the case at bar Appellant is seeking relief from the less stringent rule, Rule 55(c). Moreover, Appellant submits the rule established in *Sundown* requires presentation of an explanation for the default. Respondent would seek to have this Court supplant the requirement of a mere explanation with

the requirement that a moving party submit "good cause for failing to respond." In *Sundown* the Court clearly establishes the requirements of the "good cause standard" and consistent therewith Appellant has provided an explanation for why a timely answer was not filed. In fact, as supported by the Court in *Sundown* the totality of the circumstances may "amount to a showing of good cause" despite the absence of some factors. *Id.* at S.C. 609.

Secondarily, Appellant submitted ample evidence and support to the Trial Court to satisfy the remaining prong of the "good cause standard." It was further established in *Sundown* that to satisfy the "good cause standard" the moving party must show how the interests of justice would be served if the entry of default is vacated. Respondents mistakenly contend that the analysis as to the interest of justice wrongly center on the Appellant being held accountable for his decision to ignore the Summons and Complaint. Appellant submits that the interests of justice analysis center on those interests served by setting the entry of default aside. It is clear, as evidenced by the Summons and Complaint, that Appellant has been named as a defendant in this motor vehicle accident solely as a result of his vehicle being involved. Respondent makes no assertion therein or through any evidence presented otherwise that Appellant contributed to this accident in some other manner. Moreover, it is equally clear that the only sustainable premise under which Respondent could seek recovery against requires that she establish negligence on the party operating Appellant's vehicle. As evidenced by the record, Mr. George Willoughby was the operator of Appellant's vehicle. Furthermore, Mr. Willoughby, after having been served by publication, timely answered Plaintiff's Complaint denying liability. The suit against Mr. Willoughby remains unresolved. Absent a setting aside of the entry of default and thereby permitting the judgment to stand against Appellant runs afoul to our system of justice. In refusing to set aside the entry of default a default judgment has directly led to a judgment against

a party despite the pendency of the case against Mr. Willoughby which could establish a complete lack of merit in the case against Appellant. The interests of justice are clearly served by preventing such an inconsistent outcome and as such Appellant has clearly satisfied the "good cause standard" justifying the vacation of the entry of default.

3. It is well settled that a party seeking to have an entry of default set aside must, once a satisfactory explanation has been made as to the default, satisfy the *Wham* factors. The *Wham* factors include (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).

Appellant contends, firstly, that Respondent moved to have Appellant and Defendant Mann held in default on March 10, 2016, with a subsequent filing for same culminating in the filing of an Order of Default on March 24, 2016. It was established in the Motion to Set Aside the Entry of Default that Appellant's insurance carrier was never provided a copy of the Summons and Complaint as to the cause of action against him thus no Answer was filed. Appellant filed his Motion to Set Aside the Entry of Default on June 1, 2016, which was within mere days of counsel being retained. While Respondent directs the Court to the timeliness of the motion in relation to the service of the Summons and Complaint the standard is not as precise. Appellant directs this Court to the July 28, 2016, (R. pp. 1-3) Order to refute Respondent's contention as it was even noted therein that action was undertaken timely by counsel to have the entry of default set aside.

Second, Appellant submits there was ample evidence as to the existence of a meritorious defense. Indeed Respondent even notes that the Court on the record acknowledged the potential presence of a meritorious defense. Appellant, at the hearing on this motion, argued that the

Complaint, as drafted, presented no factual allegations to support a claim for damages as to Appellant. It is well settled that:

> [A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worth of a hearing or judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

McClug v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 93 (Ct. App. 2008); (*see also Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989)); (quoting *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)). While Respondent points to one meritorious defense that is available in the form of an absence of evidence of alcohol use or abuse by Defendant Willoughby it wholly ignores another. First and foremost it is without dispute that the elements of negligent entrustment have been extended to include:

> (1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking, (2) that the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver."

Jones ex rel. Jones v. Enterprise Leasing Company-Southeast, 383 S.C. 259, 264, 678 S.E.2d 819, 822 (Ct. App. 2009); (*see also Am. Mut. Fire Ins. Co. v. Passmore*, 275 S.C. 618, 621, 274 S.E.2d 416, 418 (1981); (*see also McAllister v. Graham*, 287 S.C. 455, 458, 339 S.E.2d 154, 156 (Ct. App. 1986) (inserting an element of knowledge of alcohol consumption into the test for negligent entrustment). Unfortunately, despite Respondent's contention that there exists an entire line of case law addressing negligent entrustment *without* alcohol, the Supreme Court has directly and repeatedly refused to adopt any such standard. Therefore, to maintain a negligent entrustment claim it remains the law of this State that one is yet still required to show knowledge of alcohol consumption. Therefore, the absence of alcohol here presents a clear and

uncontroverted meritorious defense. Alternatively, Appellant submits a meritorious defense exists within the defense of Defendant Willoughby. Appellant would argue that his liability directly correlates to the purported negligence of Defendant Willoughby such that if Defendant Willoughby is found to not be negligent there can be no liability on Appellant.

Finally, Appellant is required, as the moving party, to show that there is no prejudice to the Respondent. Respondent, in her Complaint brought suit against Appellant as well as defendants George Edward Willoughby and Richard Mann. At the time relief was sought by Appellant, Respondent had not yet even perfected service on Defendant Willoughby as it was accomplished later through service by publication. Respondent was only given an Order permitting service by publication on May 26, 2016. Furthermore, at the time Appellant sought relief from the entry of default there had been no discovery undertaken by the parties such that there would be no delay or interruption in the timely flow of litigation. Respondent merely points to the length of time from the lawsuit having been filed as to the prejudice sustained by contending that she will likely not be able to obtain the same discovery she would have a year prior. There was nothing in this case preventing Respondent from commencing discovery and/or deposing parties prior to the taking of this appeal. In fact, Respondent has possessed the Answer of Defendant Willoughby since July 13, 2016, and the Answer of Defendant Mann since August 24, 2016. Respondent has had more than ample opportunity to undertake reasonable and available actions to continue the prosecution of her case as to the co-defendants, which would have furthered her case against Appellant. Respondent has merely taken no actions to obtain discovery and now wishes to use that as a basis to argue prejudice. The record is clear that discovery could have been conducted timely and without interruption given the pendency of

litigation against the other defendants at the time relief was sought such that there would have been no prejudice to Respondent.

4. Appellant, as indicated hereinabove, also submitted a Motion to Stay Enforcement of a Judgment in accordance with Rule 54(b) and 62(b), S.C. Rules of Civ. P. Under Rule 62(b) a court may, when fewer than all claims are adjudicated "the court may stay the enforcement of that judgment until the entering of a subsequent judgment or judgments." To permit a stay of the enforcement one must establish, under Rule 54(b), more than one claim for relief is sought such that there may be entry of a judgment against "one but fewer than all of the claims or parties." It is undisputed that the judgment entered against Appellant was against one but fewer than all parties as Defendants Mann and Willoughby continue to defend claims against them by Respondent.

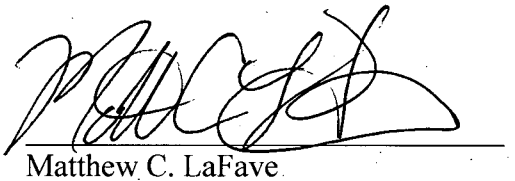
Appellant submits that there is minimal case law on point with regards to the type of motion filed in this case. Respondent herein submits a blanket statement that a trial court ruling from Greenville County reviewed Federal Law and "specifically found that public policy favored Respondent." However, this is an overstatement and overreaction to the Court's ruling. The Order relied upon by Respondent discussed factors espoused by the Supreme Court of the United States in *Hilton v. Braunskill* to address a stay pending an appeal under Rule 62(c), Fed. Rules of Civ. P. 481 U.S. 770, 107 S. Ct. 2113, 95 L.Ed.2d 724 (1987). The stay sought by Appellant herein does not pertain to an injunction while an appeal is pending rather it was to permit final adjudication of remaining claims against the remaining parties under Rule 54(b), S.C. Rules of Civ. P. Appellant submits that the interests of justice are best served by permitting the stay of the enforcement of this judgment so as to avoid Appellant being held responsible for a judgment that the law might otherwise conclude he is not liable for. Therefore, Appellant submits that the

Court abused its discretion as it incorrectly relied on law and factors relating to a motion other than the motion it was asked to adjudicate.

CONCLUSION

For the reasons stated, this Court should reverse the Trial Court's denial of the Motion to Set Aside the Entry of Default or alternatively reverse the Trial Court's denial of the Motion to Stay Enforcement of the Judgment.

Respectfully submitted,



January 2, 2018

Matthew C. LaFave
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5727
Attorney for Appellant

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b) SCACR.

January 2, 2018

Matthew C. LaFave
CROWE LAFAVE, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5727
ATTORNEY FOR APPELLANT