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

RECEIVED
JAN 22 2018
SC Court of Appeals

Ann M. Blandin,

Respondent-Appellant,

v.

City of North Charleston,

Appellant-Respondent.

RETURN TO MOTION TO DISMISS

This action arises out of an automobile accident that occurred on January 3, 2015, involving the Plaintiff and a City of North Charleston patrol car. The Plaintiff commenced this action with the filing of a summons and complaint on June 15, 2015. The City was duly served, but 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. When the City received notice of a damages hearing was to be held by the Master in Equity and for the first time realized that no answer had been filed, the City 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. The Trial Court denied the motion by form order filed June 15, 2016; a Motion to Reconsider was timely filed, which was denied by order filed July 12, 2016. (Hereafter referred to as "the Rule 55(c) orders"). Thereafter, a damages hearing was held, and the Trial Court found that the Plaintiff incurred damages in the amount of $5,250,000[1], but applied the monetary cap set by S.C. Code § 15-78-120(a), and directed entry of judgment for the Plaintiff in the amount of $300,000. The Order/Judgment was entered on June 23, 2017. The City received notice of the entry of the Order/Judgment 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.

The City has served an initial appellant's brief with a Statement of the Issue on 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?" The City argues that 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).

The Plaintiff has moved to dismiss the City's appeal as unappealable on the grounds that the City did not make a Rule 60(b) motion for relief from a default judgment, and that the City did not specify its appeal from the Rule 55(c) orders in its notice of appeal. The City respectfully submits that the motion to dismiss should be denied because (1) appellate preservation rules did not require the City to make an unnecessary Rule 60(b) motion after the judgment was entered after damages hearing, and (2) the intermediate orders on the Rule 55(c) motion are reviewable on appeal from the final judgment pursuant to S.C. Code Ann. § 14-3-330(1) and applicable case law.

---

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

1. The intermediate orders on the Rule 55(c) motion are reviewable on appeal from the final judgment on damages.

The City could not file an immediate appeal from the Rule 55(c) order because the law is well settled that an order on a Rule 55(c) motion is not appealable prior to final judgment. Ateyeh v. United of Omaha Life Ins. Co., 293 S.C. 436, 361 S.E.2d 340 (Ct. App. 1987). However, the law is equally clear that an intermediate order is reviewable on appeal from final judgment:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, ***that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;...*** (emphasis added).

S.C. Code Ann. § 14-3-330; 15 S.C. Jur. *Appeal and Error* § 15 ("After final judgment has been entered, however, a party may seek review of all decisions by the trial court that are material to the judgment.") Accordingly, the City properly waited and timely served/filed its notice of appeal timely after the entry of the final judgment entered June 23, 2017.

The Plaintiff seeks to avoid review of the Trial Court's Rule 55(c) decision refusing to set aside the entry of the default for good cause shown on the grounds that the City did not specifically identify the Rule 55(c) orders filed June 15, 2016 and/or July 12, 2016 in the Notice of Appeal or send copies of those orders to the Court of Appeals with the Notice of Appeal, citing to Appellate Rule 203(d)(1)(B)(ii), SCACR. The City maintains that the interlocutory orders merged into the final judgment and an appeal from the final judgment is sufficient to provide review of the intermediate orders. In support of such reasoning, the City relies upon Morgan v. Smith, 37 S.E. 43, 44 (S.C. 1900), wherein the Court held that an intermediate order of one judge could be reviewed on appeal from a final decree of another judgment even where

not appeal from taken from the intermediate order. *See also* Hyatt v. McBurney, 17 S.C. 143, 150, 1882 WL 6870, at *5 (S.C. 1882), where the Court held that it had power to review an unappealed intermediate decree that affected the final judgment from which an appeal was taken; and Brown v Pechman, 55 SC 555, 33 SE 732 (1899) (recognizing that upon appeal from a final judgment the court may review any interlocutory order affecting the merits, even though no formal appeal was taken from such order). Further support can be found in decisions from other jurisdictions such as Illinois and Texas with similar appellate rules on specifying the order from which the appeal is taken in the notice. 231 W. Scott, LLC v. Lakeside Bank, 2017 IL App (1st) 161131, ¶ 29, 80 N.E.3d 753, 759 (2017) ("a notice of appeal will be deemed to include an unspecified interlocutory order where that order was a step in the procedural progression leading to the judgment specified in the notice of appeal."); Human Biostar, Inc. v. Celltex Therapeutics Corp., 514 S.W.3d 844, 846 (Tex. App. 2017) ("Rule 25.1 provides that a notice of appeal must state the date of the judgment or order appealed from. Tex. R. App. P 25.1(d)(2). However, the rules do not require an appellant to list in the notice of appeal every interlocutory ruling that he desires to challenge on appeal."); Texas Sting, Ltd. v. R.B. Foods, Inc., 82 S.W.3d 644, 647–48 (Tex. App. 2002) (intermediate order of dismissal was reviewable even where the notice of appeal referred only to the date of the default judgment).

In the alternative, the City submits that any perceived deficiency in the notice of appeal from not listing the specific orders or/and not forwarding a copy of said orders is not jurisdictional and does not warrant dismissal of the City's appeal. At worst, they amount to technical, clerical errors which have not prejudiced the Plaintiff who has herself appealed from the final judgment. The appellate courts of this State generally refuse to elevate form over substance and where a notice of appeal is timely served to convey jurisdiction upon the appellate

court, and clerical errors in the notice have been found not to destroy the appeal. Charleston Lumber Co. v. Miller Hous. Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 435 (Ct.App.1995); Weatherford v. Price, 340 S.C. 572, 578, 532 S.E.2d 310, 313 (Ct.App.2000); Mason v. Mason, 412 S.C. 28, 59–60, 770 S.E.2d 405, 421 (Ct. App. 2015); Moody v. Dickinson, 54 S.C. 526, 32 S.E. 563 (1899) (the court may properly allow an appellant to correct a mere clerical error in the title to his notice of intention to appeal where there is no prejudice to the appellee). To the extent that the asserted deficiency is considered a clerical error in need of correction even at this stage in the appeal, the City is separately submitting a motion to amend the notice of appeal separately listing the orders and submitting copies thereof.

2. Appellate preservation rules did not require the City to make an unnecessary Rule 60(b) motion after the final judgment was entered following the damages hearing.

As a second ground for dismissal, the Plaintiff cites to a decision in Winesett v. Winesett, 287 S.C. 332, 333, 338 S.E.2d 340, 341 (1985), which holds that a direct appeal does not lie from a default judgment and that the proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP. The Plaintiff also relies upon language in the Court's opinion in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) that "Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. An appeal may then be taken from the denial of this motion." The City maintains that these citations are inapposite because of the distinction in this case where the City already had made a Rule 55(c) motion to set aside entry of default.

Sundown Operating Co. v. Intedge Indus., Inc. is currently one of the seminal cases on defaults. In that opinion, the Supreme Court purposefully sought to clarify confusion in the case law regarding the application of the standards for relief set forth in Rule 55(c) and Rule 60(b).

While the Court did state that a party must seek relief from a default judgment by a Rule 60(b) motion, that statement does not support dismissal of this appeal.

In Sundown, the defendant made a Rule 55(c) motion to set aside entry of default which was denied, and then after a damages hearing was held and judgment entered, both parties appealed. As the Court explained the distinction between Rule 55(c) and Rule 60(b), Rule 55(c) permits a party to move to set aside the entry of default made by the Court, but once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The Court did not state that the defaulting party must make a Rule 60(b) after a Rule 55(c) is denied, and the Court ruled on the appeal of the order denying the Rule 55(c) motion even though it does not appear that any Rule 60(b) motion was made after the Master in Equity entered judgment on the amount of damages and interest. The relevant choice is when the defaulting party realizes the default and makes a motion for relief. Nothing in the Rules or legal logic require that a Rule 60(b) motion be made in circumstances such as here where a Rule 55(c) motion has been made and ruled upon.

The appropriate limitation/qualification on the holding quoted from Winesett is explained in context of basic appellate principles by the Court in Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 157–58, 399 S.E.2d 439, 442 (Ct. App. 1990):

> In support of its argument, The Balloon Plantation relies on Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985). There, the Supreme Court held that "a default judgment may not be appealed to this Court. The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP." Id. at 334, 338 S.E.2d at 341. The Court gave three reasons for requiring this procedure: (1) "a defendant who does not appear and answer 'has no status in court which will enable him to appeal from the judgment rendered'"; (2) "a party appealing a default judgment will ordinarily be precluded from raising any issues on appeal because they were not first presented below"; and (3) "the appellant will often not be able to meet his burden of providing this Court with a record sufficient to permit an adequate review." Id. at 333, 338 S.E.2d at 341.

> The procedure required by the Court in Winesett is not required in the instant case. Here, unlike there, the defendants did appear and answer. They are not in default because of their failure to do so. Rather, they are in default because the circuit judge decided they should be in default. Here, unlike there, the trial court explicitly ruled on the question of whether the defendants should be in default. This Court is not being asked to rule on an issue not first presented below. There is no point in requiring the defendants to ask the circuit judge to rule on the same question twice. Here, unlike there, the appellants are able to provide this Court with a sufficient record on appeal. Rule 60(b) provides that a court may relieve a party from a final judgment, order or proceeding for "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc." The defendants do not seek relief based on any of these grounds. Therefore, a motion pursuant to Rule 60(b) would not make any sense. *Nam ratio legis est anima legis; cessante ratione legis cessat et ipsa lex* (or, so they say). (Footnote omitted)

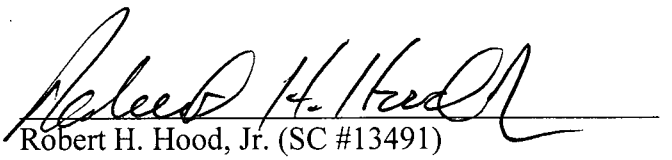
Under a comparable analysis, the Defendant City did appear by making a Rule 55(c) motion to set aside entry of default in which the issue of default was raised and ruled upon. After the damages hearing, the trial court entered a final judgment setting the damages from which an appeal was timely taken. As the City maintains in this appeal, the applicable standard is "good cause" under Rule 55(c), and a Rule 60(b) motion after judgment was entered would not have made sense and only further prolonged the case unnecessarily.

CONCLUSION

WHEREFORE, based on the foregoing, the Defendant City of North Charleston respectfully submits that the Motion to Dismiss its appeal should be denied. The City was not required to make Rule 60(b) motion after having already made a Rule 55(c) motion. In addition, the order denying the Rule 55(c) motion [as well as the related order denying the motion for reconsideration] merged into the judgment awarding damages and those intermediate orders are reviewable on appeal pursuant to the notice of appeal taken from that final judgment.

Respectfully submitted,

HOOD LAW FIRM, LLC



Robert H. Hood, Jr. (SC #13491)
Deborah H. Sheffield, *Of Counsel* (SC #2757)
172 Meeting Street ~ P.O. Box 1508
Charleston, South Carolina 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630

LAW OFFICES OF J. BRADY HAIR
J. Brady Hair (SC# 9040)
Derk Van Raalte IV (SC # 9286)
2500 City Hall Lane North
P.O. Box 61896
Charleston, South Carolina 29419
Phone: (843) 843-572-8700
Facsimile: (843) 843-745-1082

Attorneys for the Appellant/Respondent
City of North Charleston

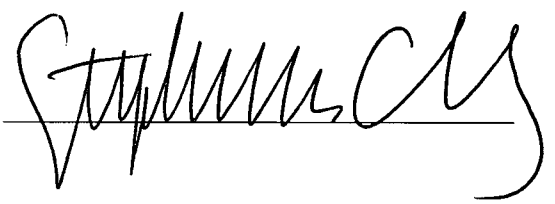
January 19, 2018

Certificate of Service

I, secretary to Robert H. Hood, Jr., attorney for the Appellant/Respondent do hereby certify that on January 19, 2018, I served a copy of the Return to the Motion to Dismiss Appeal on Counsel for Respondent/Appellant, via U.S. Mail, first class, postage prepaid to the following address:

Lawrence C. Kobrovsky, Esquire
123 Meeting Street
Post Office Box 1726
Charleston, SC 29402-1726

John E. Parker, Esquire
Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
101 Mulberry Street East
P.O. Box 457
Hampton, SC 29924



RECEIVED
JAN 22 2018
SC Court of Appeals

HOOD
LAW FIRM
LLC

ROBERT H. HOOD, JR.
Managing Partner
(SC & NC)
DIRECT DIAL: (843) 577-1219
EMAIL: bobbyjr.hood@hoodlaw.com

January 19, 2018

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

RECEIVED
JAN 22 2018
SC Court of Appeals

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 for filing in the above matter are the original and seven copies of 1) Appellant/Respondent's Return to Motion to Dismiss; 2) Motion to Amend Notice of Appeal and 3) Amended Notice of Appeal with Orders. Please return a clocked-in copy of each in the attached envelope. We are also enclosing a check for the $25.00 motion fee for the Motion to Amend. Please be advised that we do not oppose the Respondent/Appellant's Motion to Stay. By copy of this letter we are serving all counsel of record.

Kind regards,

Yours truly,

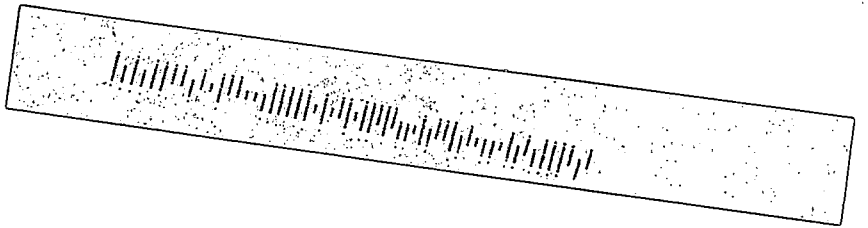
Robert H. Hood, Jr.

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

HOOD
LAW FIRM
LLC

172 MEETING STREET
CHARLESTON, SC
29401

Hasler
01/19/2018
US POSTAGE
PRIORITY MAIL
$07.20⁰
ZIP 29401
011D11645571



RECEIVED
JAN 22 2018
SC Court of Appeals

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