THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002481

AEP2, LLC f/k/a 2AM Group, LLC ..... Respondent

v.

BMW of North America, LLC ..... Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. Respondent mischaracterizes both the record and the law in arguing that BMW NA has failed to establish good cause to set aside the default 1

A. The evidence of record compels a finding that the explanation for BMW NA's default was a mistake of fact, and the lower court's refusal to set aside the entry was an abuse of discretion. 2

1. BMW NA's mistake of fact as to date of service is well-established in the record as the cause or explanation for its default 2

2. A mistake of fact is sufficient good cause for relief from an entry of default under Rule 55(c), SCRCP 5

a. Respondent reads any causation requirement out of the statute... 6

b. BMW NA's mistake of fact is sufficient grounds to set aside the entry of default 7

B. The remaining factors weigh in favor of relief 9

II. Respondent's argument in favor of affirming the lower court's prejudgment interest award materially misstates the language and effect of the contract and misapplies New Jersey law 11

A. The "Notice of Claim" provision applies, and is not negated or limited by the later-executed Assignment Agreement 11

B. Respondent omits significant language from the contract and misconstrues its legal effect 14

1. Standard of Review 14

2. Respondent omits crucial language from the Notice of Claim provision and then applies a meaning inconsistent with the plain language of that provision and the controlling law 16

III. Respondent is not entitled to the benefit of an adverse inference because the documents referenced would not have helped to resolve a material or disputed issue..17

CONCLUSION.....21

TABLE OF AUTHORITIES

CASES

Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc., 616 F.3d 413, 419 (4th Cir. 2010) 11

Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1985).....8, 9

Conway v. 287 Corporate Center Assocs., 187 N.J. 359, 901 A.2d 341 (2006) 14

Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 463 S.E.2d 636, 638 (Ct. App. 1995) 8

Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super 415, 707 A.2d 209 (N.J. App. Div. 1998) 15

GMAC Mortgage, LLC v. Willoughby, 230 N.J. 172, 165 A.3d 787 (2017) 14

Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99 , 892 A.2d 646 (2006)..16

Hillman v. Pinion, 347 S.C. 253, 554 S.E.2d 427 (Ct. App. 2001) 8

In re Estate of Balk, 445 N.J. Super. 395, 138 A.3d 572 (App. Div. 2016) 15

Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990).. .....18, 19

Kieffer v. Best Buy, 205 N.J. 213, 14 A.3d 737 (2011) 15

Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 85 A.3d 947 (2014).....14

McMahon v. City of Newark, 195 N.J. 526, 951 A.2d 185 (2008) 14, 16

Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001).....8, 9

Morgan v. Sanford Brown Institute, 225 N.J. 289, 137 A.3d 1168 (2016) 14

Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 675 S.E.2d 783 (Ct. App. 2009).....18, 19

Selective Ins. Co. of America v. Hudson E. Pain Management Osteopathic Medicine, 210 N.J. 597, 46 A.3d 1272 (2012) 15

Spring Creek Holding Co., Inc. v. Shinnihon U.S.A. Co., Ltd., 399 N.J. Super. 158, 943 A.2d 881 (App. Div. 2008) 15

Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009).....

.....2, 6, 7, 9

Vosough v. Kierce, 437 N.S. Super. 218, 97 A.3d 1150 (App. Div. 2014).....15

White Oak Manor, Inc., v. Lexington Insurance Company, 407 S.C. 1, 753 S.E.2d 537 (2014)...5, 9

Wis. Motor Corp. v. Green, 224 S.C. 460, 79 S.E.2d 718, (1954).....17, 19

STATUTES

28 U.S.C. § 1446.....10

Rule 55, SCRCP.....1, 2, 4, 5, 6, 7, 9

Rule 60, SCRCP.....1, 7, 8, 9

Rule 220, SCACR.....19

OTHER AUTHORITIES

Kevin Eberle, Spoliation in South Carolina, 19-SEP. S.C. Law., Sept. 2007, 26, 32 19

ARGUMENT

The court below was tasked with determining the reason for Appellant BMW of North America, LLC's ("BMW NA") default and applying the lenient standard of Rule 55(c) of the South Carolina Rules of Civil Procedure to determine whether Appellant had established "good cause" for filing its removal just days out of time. Respondent AEP2, LLC, f/k/a 2AM Group, LLC ("AEP2") continues to direct the bulk of its efforts to condemning Appellant's in-house counsel for inadvertently misfiling a single email on or around February 13, 2017. Irrespective of how reprehensible Respondent may feel this simple error was, the record is clear that the default was in fact caused by counsel for BMW NA's good faith mistake of fact as to the date of service and resulting miscalculation of the due date. Mistakes of fact are plainly within the purview of Rule 55(c), notwithstanding Respondent's efforts to redirect the Court's attention and confuse the issue. Further, even assuming that the lower court had correctly denied relief from the default entry, Respondent's claim for indemnification and any prejudgment interest thereon is premised on the Services Agreement attached to and referenced by the Complaint, and Respondent cannot now shift its theory of liability in order to lend support to the lower court's piecemeal enforcement.

I. Respondent mischaracterizes both the record and the law in arguing that BMW NA has failed to establish good cause to set aside the default

In arguing in favor of affirming the lower court's finding that no good cause existed to set aside default, AEP2 first takes the position that there is no evidence in the record to support what it characterizes as a "new" explanation for BMW NA's default: namely, counsel for BMW NA's good faith mistake as to the date of service. Resp't's Br. 16, 29. AEP2 then argues, contrary to the plain language of the Rules of Civil Procedure and South Carolina jurisprudence, that such a mistake would not be encompassed by the more rigorous standard for relief articulated under

Rule 60(b), or in any event that under the circumstances presently before the court it does not meet even the minimal justification of "good cause." Id. at 29–30. Finally, Respondent argues that even if BMW NA had put forward a satisfactory explanation for the default under Rule 55(c) and the standard articulated in Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), the remaining factors (timing, the existence of a meritorious defense, and prejudice) all weigh in favor of affirming the entry of default. Id. at 30–31. Because AEP2's arguments mischaracterize both the content of the existing record and the substance of review for relief, the lower court order affirming entry of default should be set aside as an abuse of discretion.

A. The evidence of record compels a finding that the explanation for BMW NA's default was a mistake of fact, and the lower court's refusal to set aside the entry was an abuse of discretion.

Despite Respondent's arguments to the contrary, BMW NA's proffered explanation for the default has been its good faith mistake of fact as to the date of service since the outset of this litigation, and the record is well-established on this point. Respondent, however, asks this Court to affirm the lower court's holding based on facts and circumstances that are not attributable to BMW NA's tardy removal. Moreover, while Respondent has acknowledged that relief under Rules 55(c) and 60(b) call for different standards of proof, its analysis of South Carolina case law render the two usually-distinct standards almost indistinguishable.

1. BMW NA's mistake of fact as to date of service is well-established in the record as the cause or explanation for its default.

AEP2 attempts to characterize BMW NA's mistake of fact as to the date of service as a "new" position, with no history in the record. Resp't's Br. 16, 29. This is patently untrue; BMW NA's mistake of fact as to the date of service has been its explanation for the default since before

Defendant's Motion to Set Aside Entry of Default was filed on May 1, 2017; Respondent and the lower court have simply disregarded it.

Despite AEP2's insistence that BMW NA's good faith mistake is new to the record and only its "latest reason" for default, Resp't's Br. 15, AEP2 was well aware of Appellant's explanation over a year ago, when counsel for Respondent received an email from Attorney Ashley Abel explaining that "[t]he basis for lifting the default is that we removed the case to federal court based on what we were told was the service date . . . ." Ex. 3 to Pope Aff., June 6, 2015. The existence and content of this email directly contradicts Attorney Pope's claim that the "only reason" he was offered for the default was a clerical error. Id. at 3.

BMW NA explained its default the result of a mistake as to the date of service again in affidavits filed with this court on May 1, 2017. By his first affidavit, Mr. Spitaleri explains that he received a copy of the filed Complaint from Attorney Bruce Wallace and, "[b]elieving that BMW had not yet been officially served" and in an abundance of caution, retained outside litigation counsel that day rather than waiting for formal service. Spitaleri Aff. 3, April 25, 2017; Spitaleri 3d Aff. 6–7, Oct. 5, 2017. Only later, after BMW NA had removed the matter to federal court and AEP2 had moved to remand, did BMW NA and its counsel learn of the mistake. Spitaleri Aff. 2. This same rationale was offered in the affidavit of Attorney Ashley Abel, who explained that he noticed the removal on March 23, 2017, "based on" a mistake as to the date of service. Abel Aff. 1–2, April 25, 2017.

This same explanation is consistently reasserted in BMW NA's subsequent pleadings. The Notice of Removal gives a service date of February 21, 2017. Ex. 1 to Def.'s Mot. to Set Aside Entry of Default, May 1, 2017. Despite its current insistence that this argument is somehow novel or new, AEP2 acknowledged that the delayed filing resulted from a mistake as to

the date of service in its own Memorandum in Support of Motion to Remand. Pl.'s Mem. In Supp. Of Mot. to Remand 2, Mar. 28, 2017 ("The Notice of Removal erroneously states that BMW was serviced with the Summons and Complaint on February 21, 2017. Apparently, BMW failed to inform its counsel of the correct date of service . . . ."). The rationale is offered yet again in BMW NA's Motion to Set Aside Entry of Default. Def's Mot. Set aside Entry of Default, May 1, 2017. In setting out the events leading up to the default, BMW NA immediately explains that it filed its notice of removal in the district court out of time "[b]ased on the identified date of service as being February 21, 2017." Id. at 1, 2 . While the Motion goes on to provide additional details setting forth how counsel came to be mistaken as to the correct date, the default was "based on," or caused by, the same good faith mistake of fact BMW NA continues to offer as explanation now.

At the hearing on BMW NA's Motion to Set Aside Entry of Default, held June 13, 2017, when asked to identify its "good cause" for relief, counsel for BMW NA once again offered the same explanation:

> THE COURT: What rule are you moving under?
>
> MR. ABEL: Rule 55, Your Honor.
>
> THE COURT: All right. Rule 55. What is your good cause?
>
> MR. ABEL: The good cause is there was only a short time period between when we thought it was served on February 21st and it was actually served on February 11th. [sic].
>
> Your Honor, we removed – I removed the case to federal court based on the incorrect service date.

Hr'g Tr. 5:5-5:12, June 13, 2017. Later in this same proceeding, counsel for BMW NA continued to reiterate that the default was the result of a "common mistake" based on a factual error and misunderstanding as to the date of service. Id. at 6:5-6:6, 7:14-7:17.

Contrary to Respondent's assertions, the record illustrates that the actual explanation or reason for BMW NA's default is, and always has been, Appellant's good faith mistake as to the date of service and the resulting inadvertent miscalculation of the due date for a responsive motion. Appellant has provided this explanation to Respondent and the lower court since as early as April of 2017. It is no less the factual explanation because Appellant has used the phrases "neglect" or "human error" in describing the events leading up to BMW NA's inadvertent misidentification of the Complaint when it was first received on or around February 13, 2017. BMW NA had acknowledged the Summons and Complaint and assigned the matter to outside litigation counsel no later than February 21, 2017. As set forward by email, affidavits, motion, argument, and briefs, BMW NA filed its notice of removal shortly after the responsive deadline based on and due to a mistake of fact as to the date of service. The lower court erred in issuing its decision based on facts that, ultimately, were neither the cause of nor the explanation for BMA NA's default.

2. A mistake of fact is sufficient good cause for relief from an entry of default under Rule 55(c), SCRCP.

Despite the ample evidence of Appellant's mistake as to the date of service, Respondent urges the court to affirm the lower court's ruling on the grounds that lost suit papers are not a satisfactory explanation for default under White Oak Manor, Inc., v. Lexington Insurance Company, 407 S.C. 1, 753 S.E.2d 537 (2014). Resp't's Br. 21–22. Appellant doesn't dispute Respondent's synopsis of the White Oak holding, but rather its applicability to this particular matter.[1] Respondent's position, as stated, chips away at both the Rules of Civil Procedure and

[1] The White Oak court did not hold that misplacement of suit papers could never be good cause for default, but only that on the record before it, the lower court's refusal to lift the entry of default was not an abuse of discretion. White Oak Manor, Inc., 407 S.C. at 11–12, 753 S.E.2d at 542–43.

decades of case law by abrogating the requirement for a causal relationship between a defaulting party's cited behavior and the default, and by reading an exceptionally stringent standard for relief into Rule 55(c), SCRCP.

a. Respondent reads any causation requirement out of the statute.

Respondent asks the Court to hold BMW NA in default because, on or around February 13, 2017, Respondent's in-house counsel received a copy of the suit papers but misidentified and misfiled them. Resp't's Br. 23–25. BMW NA does not deny that its in-house counsel initially lost the pleadings that were electronically forwarded to him. He did. But the first task of the lower court in applying Rule 55(c), SCRCP's "good cause" standard is to examine the circumstances that explain or actually caused the default. See Sundown, 383 S.C. at 681 S.E.2d at 885 (setting out "good cause" standard for relief from entry of default, including defaulting party's "explanation for the default"). The analysis presumes a causal nexus between the defendant's explanation and the

BMW NA's initial inadvertent misplacement of the suit papers was not the cause of Appellant's default, Respondent's vigorous condemnation of same notwithstanding. Appellant is not asking this Court to condone or approve its in-house counsel's error in misfiling the suit papers when they were initially received. Nor is Appellant asking this Court to hold that an overlooked email is, standing alone, a satisfactory explanation or "good cause" for default. Appellant is simply asking this Court to apply the existing law and render a determination of good cause in light of the reason for the failure to respond in time. As set forth above, the uncontroverted evidence establishes that the Summons and Complaint were received by Appellant and forwarded to outside counsel for removal and defense well in advance of any

default. BMW NA's failure to timely remove is not attributable to "lost" or "disregarded" suit papers alone, but counsel's mistake of fact as to the correct date of service.

b. BMW NA's mistake of fact is sufficient grounds to set aside the entry of default

Under South Carolina law, mistakes of fact are grounds for relief from an entry of default, as expressed in both the plain language of the South Carolina Rules of Civil Procedure and the case law. Respondent correctly points out that the standards for relief under Rule 55(c), SCRCP, governing relief from an entry of default, and Rule 60(b), SCRCP, governing relief from a default judgment, are distinct. Resp't's Br. 28. The standard for relief from an entry of default is mere "good cause," which as a threshold matter requires the defaulting party to set out an explanation for its failure to answer or otherwise defend in time. Rule 55(c), SCRCP; Sundown, 383 S.C. at 607–08, 681 S.E.2d at 888–89. By contrast, as Respondent correctly points out, relief from a default judgment involves a more limited, stringent standard and requires the defaulting party to make a particularized showing of certain enumerated circumstances, including "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1), SCRCP.

While Respondent correctly notes that these two standards from relief are not interchangeable, and that "proof of any one of the factors of Rule 60 is sufficient to show 'good cause,' it's reasoning extends the holding of Sundown so far as to nearly invert these standards Resp't's Br. 29. A party seeking relief from entry of default is not required to make a showing of any of the particular grounds enumerated under Rule 60(b). Sundown, 383 S.C. at 607–08, 681 S.E.2d at 888–89 ("No trial court should ever find good cause lacking based solely on the absence of a Rule 60(b) factor."). However, South Carolina courts have long confirmed that relief from an entry of default is to be "freely given," and that Rule 55(c)'s "good cause" standard is far less rigorous than the particularized showings required for relief from a judgment

in default. See Id. at 607, 681 S.E.2d at 888 ("[T]he basic legal premise [is] that the standard for granting relief under Rule 60(b) is more rigorous than under Rule 55(c), and that an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment."); Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 463 S.E.2d 636, 638 (Ct. App. 1995) ("This section is liberally construed to promote justice and dispose of cases on the merits."); Equally well-established is the principle that a good faith mistake of fact (but not a mistake of law), including a mistake as to the date of service or due date for a responsive pleading, is sufficient grounds from relief even under Rule 60(b)'s more demanding baseline. See Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) (granting relief from judgment under Rule 60(b) for movant's mistake of fact as to hearing date); Hillman v. Pinion, 347 S.C. 253, 554 S.E.2d 427 (Ct. App. 2001) (confirming that good faith mistakes of fact are sufficient grounds for a relief from judgment provided all other factors are met, but denying relief because mistake was one of law); Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1985) ("[W]e hold that where there is a good faith mistake of fact, and no attempt to thwart the justice system, there is basis for relief").

Respondent attempts to undermine the sufficiency of BMW NA's explanation by declaring at various times that "no logical, clear-thinking BMW in-house lawyer can confuse receipt of a courtesy copy of a complaint with actual service of process," and that Appellant "made up a service date out of thin air." Resp't's Br. 21, 26. Clearly, the February 21, 2017 date was not fabricated by Appellant; this is clearly the date that BMW NA is documented as having received the Complaint from Mr. Wallace, and the evidence is uncontroverted that the involved counsel for BMW NA genuinely believed in good faith that it was the appropriate date for calculating the deadline for a responsive filing. Additionally, Mr. Spitaleri acted reasonably and

diligently in using this date as the date of service for the purpose of "starting the clock" on the due date for a response, rather than sitting on his hands and awaiting formal service of process. Our courts do not require "exacting compliance" with the rules for formal service of process, and it was sensible for Mr. Spitaleri to avoid any potential subsequent dispute as to the sufficiency of service or the court's personal jurisdiction over BMW NA by assuming that his receipt and actual notice of the suit papers might be adequate to trigger BMW NA's response. See White Oak, 407 S.C. at 10. 753 S.E.2d at 542 (noting that the court does not require strict adherence to the rules to effect service, provided that the court has personal jurisdiction over the defendant and the defendant has notice of the proceedings.").

The evidence supports no other finding but that BMW NA filed out of time based on a genuine, good faith mistake of fact as to the date that a responsive filing was required. Neither the Rules of Civil Procedure or South Carolina case law require that a mistake be unavoidable or immune from correction, or that the party holding the mistaken belief be utterly blameless in arriving at the mistake. Respondent's effort to distinguish the present matter from those before this Court in Columbia Pools and Mictronics, even if persuasive, could only serve to demonstrate that Appellant falls just short of the more exacting standard for relief from a default judgment. This court should not give White Oak and Sundown a reading that raises the standard for "good cause" under Rule 55(c) so high that it is nearly indistinguishable from the elevated showing required by Rule 60(b), such that even these negligible distinctions simultaneously wipe out a defaulting party's claim for relief under either statute.

B. The remaining factors weigh in favor of relief.

Respondent continues to assert that, even if BMW NA's explanation for the default were sufficient, the lower court was nevertheless within its discretion to deny relief because the

remaining factors—the timing of the motion for relief, existence of a meritorious defense, and prejudice to the plaintiff—weigh in Respondent's favor. Resp't's Br. 30–31. None are persuasive.

In attempting to show that BMW NA did not promptly seek relief from default, Respondent continues to rely on a 43-day lapse between the entry of the default and Appellant's motion. Resp't's Br. 31. Here, Respondent entirely disregards the salient fact that the matter had been removed to the district court by the time the default was entered, and that notice of the removal was filed with the lower court that same day, completely divesting it of jurisdiction to entertain any motion for relief until remand could be effectuated. See 28 U.S.C. § 1446(d) (filing notice of removal with the state court "shall effect the removal and the State court shall proceed no further unless and until the case is remanded"). Appellant could not have sought relief any earlier.

Respondent likewise apparently continues to rely on the expressed legal opinions of adverse counsel as evidence that BMW NA does not have a meritorious defense. Resp't's Br. 31. In attempting to invalidate BMW NA's defense, AEP2 apparently relies on Attorney Bruce Wallace's stated position that BMW NA, rather than his own client, is responsible for reimbursing Respondent. Resp't's Br. 31. It should be clear to both Respondent and this Court that a contrary position taken by an adverse attorney in the course of representing his own client does not negate the existence of a meritorious defense. BMW NA's meritorious defense is made clear by the very contract AEP2 relies on to establish liability; the documents speak for themselves.

Finally, in establishing its own prejudice had default been lifted, AEP2 points to the burden it will supposedly endure if it is forced to litigate its own claim. Resp't's Br. 31.

Respondent also points to the delay it has allegedly suffered and will continue to suffer in the time elapsed between the events giving rise to AEP2's alleged right to indemnification in 2014 and a final judgment. BMW NA is still not to blame for AEP2's years-long delay in seeking redress for its alleged injuries, and the time, cost, and expense associated with litigating a case on the merits is not cognizable "prejudice." See Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc., 616 F.3d 413, 419 (4th Cir. 2010).

II. Respondent's argument in favor of affirming the lower court's prejudgment interest award materially misstates the language and effect of the contract and misapplies New Jersey law.

Respondent admits that the lower court correctly held that New Jersey law should govern the award and calculation of prejudgment interest, pursuant to the choice of law provision contained in the Services Agreement. Resp't's Br. 32. But now, Respondent argues that other provisions in the same document and relevant to the same issue were properly disregarded, or would've had no effect. This position disregards the plain language of the contract, the law, and Respondent's own allegations.

AEP2 argues first that Section 18, requiring written notice of claims or claims for damages (the "Notice of Claim" provision), should not apply at all because it is part of the Services Agreement, rather than the Assignment Agreement, and second, that even if it applicable, it is narrowly tailored to only claims for personal injury or property damage. Resp't's Br. 32–33. Both positions are belied by the clear language of the documents themselves.

A. The "Notice of Claim" provision applies, and is not negated or limited by the later-executed Assignment Agreement.

Respondent appears to argue that, because the "Notice of Claim" provision is included in the Services Agreement, and not the later-executed Assignment Agreement, it has no effect and

should not be applicable to the present claim for damages. This position overlooks four important issues, each of which is independently dispositive.

First, AEP2's entire indemnification claim is premised on the Services Agreement referenced in and attached to the Complaint. See Compl. In its own brief, Respondent avows that "BMW [NA] is in default and all allegations in the complaint are deemed to be true." Resp't's Br. 32. AEP2's Complaint alleges that it is entitled to indemnification "[u]nder section 16(c) of the Services Agreement." Compl. at 1. It does not mention the Assignment Agreement. See Compl. The Assignment Agreement appears in the record only months later, after BMW NA's motion to lift the default entry, as an attachment to the Affidavit of Attorney Bruce Wallace. Ex. A to Wallace Aff., May 24, 2017. Respondent is now attempting, on appeal, to change its theory and claim that BMW NA's liability is now premised instead on the Assignment Agreement.[2] Resp't's Br. 31, n.25. Appellant is not aware of any authority holding that a party in default is deemed to have admitted not only the allegations of the Complaint, but also any additional allegations a plaintiff wishes to add later on. Respondent cannot now, well over a year after initiating its suit, retroactively shoehorn new allegations into its Complaint as though they have been there all along.

Second, the Respondent's obligations under the "Notice of Claim" provision (Section 18 of the Services Agreement) were clearly intended to survive the termination of the agreement. Section 21(c) of the Services Agreement reads as follows:

> The obligations of the SUPPLIER [AEP2] under section 4, 9, 13, 14, 15, 17, 18, 19, 22, 24, 28, and 29 in the Agreement shall survive the completion of all activities to be performed by SUPPLIER and the termination or expiration of the Agreement.

[2] As previously noted, by conceding that the lower court was correct to apply the Choice of Law provision, AEP2 has already admitted that the award and calculation of any prejudgment interest owed is controlled by the terms of the Services Agreement. Resp't's Br. 32.

Ex. 1 to Compl. at ¶ 21. Whether or not the later-executed Assignment Agreement contains an express damages clause, it does not relieve AEP2 of its continuing obligation to provide BMW NA with written notice of claims for damages under Section 18.

Third, even to the extent that the Assignment Agreement might have modified or limited AEP2's obligations under the Services Agreement, it can have no effect because it is not executed. The Assignment Agreement attached to Attorney Wallace's Affidavit and referenced by Respondent is not signed by either party. To Appellant's knowledge, no signed copy of this Assignment Agreement has ever been located or produced by either party.[3]

Fourth, even if the Assignment Agreement could be held to alter AEP2's notice obligations under the Services Agreement (despite its omission from the Complaint, the absence of either party's signature, and the express reservation of AEP2's duty to give notice) by its own terms it clearly intended to preserve all rights and obligations under the original Services Agreement. Ex. A to Wallace Aff. Paragraph D in particular expressly clarifies that the Assignment Agreement was not intended to modify or alter the original terms of the Services Agreement:

> D. Purchaser [Sustained Quality, LLC] and Assignor [AEP2] desire to assign Assignor's rights under the Agreement to Assignee, and Assignee desires to assume the obligations of the Assignor under the Agreement, from and after the closing of the sale of Assignor's business pursuant to the Asset Purchase agreement.

[3] BMW NA does not deny that operations at its Ontario, California facility have been assumed by Sustained Quality, LLC, a wholly owned subsidiary of Respondent. However, Respondent cannot rely on this unexecuted Assignment Agreement to control the application of its earlier-ratified contracts.

Id. Respondent cannot simultaneously claim that it retains the right to exercise rights to indemnification that it has expressly signed away, but absolved itself from any obligations or duties under the same document.

B. Respondent omits significant language from the contract and misconstrues its legal effect.

Respondent claims a right to indemnification under the Services Agreement and admits that the court correctly applied New Jersey law to its calculation of prejudgment interest, presumably under the Services Agreement's choice of law provision. At the same time, Respondent argues that other provisions of the Services Agreement, including the Notice of Claim clause included at Section 18, were properly disregarded. This piecemeal enforcement of individual sections and clauses of the underlying agreement contradicts the applicable New Jersey law governing interpretation and construction of contracts. As an alternative, AEP2 argues that even if the Notice of Claim provision were to be given effect, it would be inapplicable here because it was intended to apply only to physical damages or personal injury, rather than monetary loss. Because this position is based on a selective reconstruction of the Notice of Claim provision's actual language, it is likewise without merit.

1. Standard of Review

As an initial matter, Respondent contends that BMWNA made an "incorrect statement of New Jersey law" in noting that the construction and interpretation of contracts is subject to *de novo* review. Resp't's Br. 35. Instead, Respondent directs the Court to two New Jersey cases for the proposition that a court charged with interpreting a contract "may consider any relevant evidence."[4] Id. Appellant does not deny that New Jersey courts may consider any relevant

[4] Both of these cases, Conway v. 287 Corporate Center Associates, 187 N.J. 359, 901 A.2d 341 (2006), and McMahon v. City of Newark, 195 N.J. 526, 951 A.2d 185 (2008), were cited in

evidence in determining the meaning of a contract. Id. Be that as it may, that determination is indeed reviewed *de novo*. GMAC Mortgage, LLC v. Willoughby, 230 N.J. 172, 183, 165 A.3d 787, 793 (2017) ("In determining the meaning or validity of a contract, our review is *de novo*."); Morgan v. Sanford Brown Institute, 225 N.J. 289, 301, 137 A.3d 1168, 1176 (2016) ("Our standard of review of the validity of an arbitration agreement, like any contract, is de novo."); Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115, 85 A.3d 947, 957 (2014) ("When a trial court's decision turns on its construction of a contract, appellate review of that determination is de novo."); Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med., 210 N.J. 597, 605, 46 A.3d 1272, 1276 (2012) ("[T]he interpretation of contract language is a question of law."); Kieffer v. Best Buy, 205 N.J. 213, 222, 14 A.3d 737, 742 (2011) ("The interpretation of a contract is subject to de novo review by an appellate court. Accordingly, we pay no special deference to the trial court's interpretation and look at the contract with fresh eyes."); In re Estate of Balk, 445 N.J. Super. 395, 400, 138 A.3d 572, 575 (App. Div. 2016) ("Interpretation and construction of a contract is a matter of law for the court subject to de novo review."); Vosough v. Kierce, 437 N.S. Super. 218, 241, 97 A.3d 1150, 1163 (App. Div. 2014) ("Initially, we note that we may conduct plenary review on appeal regarding matters of contract interpretation."); Spring Creek Holding Co., Inc. v. Shinnihon U.S.A. Co., Ltd., 399 N.J. Super. 158, 190, 943 A.2d 881, 900 (App. Div. 2008) ("Interpretation and construction of a contract is a matter of law for the court subject to *de novo* review."); Fastenberg v. Prudential Ins. Co. of Am., 309 N.J.

Appellant's own Initial Brief, in connection with the same proposition. Appellant's Br at 20. Undoubtedly, to the extent that the court's interpretation of a contract turns on its determination of a factual dispute, that finding of fact would be entitled to deference on review. But that is not the case here.

Super 415, 420, 707 A.2d 209, 211 (N.J. App. Div. 1998) ("Interpretation and construction of a contract is a matter of law for the court subject to *de novo* review.").

2. Respondent omits crucial language from the Notice of Claim provision and then applies a meaning inconsistent with the plain language of that provision and the controlling law.

AEP2 argues that even if the Notice of Claim provision is properly considered by this Court as part of the of the Services Agreement, it nevertheless should have no effect on this case because by its terms, its application is limited to "physical" or personal injury damages. Resp't's Br. 34. This interpretation of the clause is premised on selective omission of certain language and a presumption or speculation as to the parties' intent drawn from well beyond the document's plain language.

As in South Carolina, New Jersey courts charged with interpreting contracts "must discern and implement the common intention of the parties." McMahon, 195 N.J. at 545–46, 951 A.2d at 196–97 (2008). "[F]undamental canons of contract construction require that [the court] examine the plain language of the contract and the parties' intent, as evidenced by the contract's purpose and surrounding circumstances." Highland Lakes Country Club & Cmty. Ass'n v. Franzino, 186 N.J. 99, 115, 892 A.2d 646, 656 (2006).

In arguing that the Notice of Claims provision applies only to personal injury or property damage, AEP2 quotes what it has identified as the "pertinent" language of the "Notice of Claims for Damages" provision, Section 18 of the Services agreement, as follows:

> "a. Should either party to this Agreement suffer injury to person or property . . . claim should be made in writing to such other party within a reasonable time after the first observation of such injury or damage."

Resp't's Br. 33 (emphasis added by Respondent). The actual language of the provision, set out in its entirety, includes additional language and clauses fundamental to the matter now before this Court:

> a. Should either party to this Agreement suffer injury to person or property (including delay or disruption to the BMW NA operative process), or failure to comply with this Agreement because of any act or omission of the other party or any of the other party's employees, agents or others for whose acts such party is legally liable, claim shall be made in writing to such other party within a reasonable time after the first observation of such injury or damage.

Ex. A to Compl. The language deliberately omitted by Respondent clearly contemplates a far broader scope of applicability than strictly personal injury or property damages, to the exclusion of "monies owed," as argued. Resp't's Br. 34. AEP2's claimed indemnification rights fall squarely within the clause addressing BMW NA's alleged "failure to comply with this Agreement."

As set forth in Appellant's initial brief, the lower court failed to apply or even address this provision or its effect on Respondent's claim or the award and calculation of prejudgment interest. This disregard for pertinent contractual language and piecemeal enforcement represents reversible legal error.

III. Respondent is not entitled to the benefit of an adverse inference because the documents referenced would not have resolved a disputed issue.

As its final issue on appeal and as an "additional sustaining ground," AEP2 argues that BMW NA's failure to produce either its written policies and procedures regarding service of suit papers or the February 13th email that Mr. Spitaleri inadvertently overlooked should be ascribed an adverse inference. More particularly, Respondent argues that the "internal requirements and protocols" were "withheld from view," and that the February 13th email "at the heart of BMW's

case" was never produced, from which this Court should draw an inference that the contents of these documents would be adverse to BMW NA's position. Resp't's Br. 39.

In some circumstances, where a party fails to produce available records, it is appropriate to infer that "the contents of the records, if presented, would be adverse to the party who fails . . . to present the records." Wis. Motor Corp. v. Green, 224 S.C. 460, 464, 79 S.E.2d 718, 720 (1954). To support this new contention that the "withheld" documents establish the absence of good cause, Respondent cites three cases. In Green, the central dispute revolved around the invoicing and payment for thirteen gasoline engines received by the respondent, who claimed that he'd paid for the shipment in cash upon delivery but failed to produce any bookkeeping records or related testimony. Id. at 463–64, 79 S.E.2d at 719–20. In weighing the totality of the evidence and testimony produced, the court noted that the absence of any records in support of the alleged cash payment raised an inference adverse to respondent's position. Id. at 464–65, 79 S.E.2d at 720.

In Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990), the Kershaw County School District initiated a suit to recover costs and expenses related to the inspection and removal of asbestos-containing ceiling tiles manufactured by the defendant. Id. at 392, 396 S.E.2d at 370. However, the school district had removed the tiles from one of the schools without notice to the defendant, in violation of a pre-existing order requiring that asbestos defendants be given notice and an opportunity to inspect prior to removal. Id. at 394, 396 S.E.2d at 371. In lieu of granting the defendant's motion for judgment in its favor as to that school, the trial court allowed the school district to explain the circumstances surrounding the tile removal and instructed the jury that it could draw an adverse inference from the destruction of evidence despite a standing court order. Id. at 394, 396 S.E.2d at 371–72. The

South Carolina Supreme Court agreed that the adverse inference instruction was an appropriate sanction for failure to comply with the order, and held that the trial court did not abuse its discretion in declining to dismiss that portion of the district's claims. Id. at 395, 396 S.E.2d at 372.

In the third case cited by Respondent, the trial court granted summary judgment for the defendant after the plaintiff's chair collapsed while dining in the defendant's hotel restaurant. Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 399–400, 675 S.E.2d 783, 784–85 (Ct. App. 2009). The trial court found that the plaintiffs had put forward no evidence that defendant had any reason to know of any allegedly defective condition, notwithstanding the plaintiffs' argument that they were entitled to an adverse inference because the chair was not available for inspection. Id. at 403, 675 S.E.2d at 786. This Court agreed, holding that the plaintiffs were not entitled to any adverse inference arising from the defendants' failure to produce the chair. Id. at 405, 675 S.E.2d at 787. In so holding, this Court explained that "the party seeking the inference 'must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder.'" Id. (quoting Kevin Eberle, Spoliation in South Carolina, 19-SEP. S.C. Law., Sept. 2007, 26, 32). Both plaintiffs denied that the chair in question was unstable or that there was any indication of a problem prior to it collapsing, and their proffered expert admitted that most purchasers would've been unable to distinguish between a "commercial" chair and a "residential" chair unsuited for the heavy use of a restaurant. Id. at 400, 401, 675 S.E.2d at 785. Affirming summary judgment in favor of the defendant, the Pringle court found that the plaintiffs were not entitled to an adverse inference because the chair at issue would not have provided any additional information relevant in establishing negligence, notwithstanding plaintiffs' speculation. Id.

Respondent acknowledges that this argument was not raised below, and that its introduction now is under Rule 220(c), SCACR, which expressly permits this Court to affirm a judgment for any reason appearing—or, in this case, not appearing—in the record. Resp't's Br. 38. Nevertheless, it argues that BMW NA's "striking" failure to produce these documents gives rise to an inference that "these documents would not have supported 'good cause' for BMW to have relief from default." Id. at 39, 40. The circumstances before the court below are plainly distinguishable from those at hand in the cases referenced by Respondent, such that no adverse inference can reasonably be drawn from the absence of these documents in the record.

First, the "missing" or "withheld" evidence in each of these matters goes directly to the primary issue at the center of a dispute of material fact. In Green, the unproduced bookkeeping records and canceled checks related directly to the central issue—whether or not Green had already paid for the shipment he received. Likewise, in Kershaw County, the presence and identity of the removed tiles was both hotly contested and central to establishing the defendant's liability. The same is true for Pringle, in that the missing and unproduced chair was the sole source of the defendant's alleged liability. By way of contrast, the precise contours of BMW NA's policy on distribution and assignment legal process (even assuming, absent any evidence, that BMW NA has such a policy in writing), or the contents of the overlooked February 13, 2017 email, are collateral issues at best. Undoubtedly, Appellant and Respondent disagree whether BMW NA has established good cause for relief from default. However, nothing in the record below illustrates any serious dispute over the existence of a BMW NA internal policy addressing the receipt and distribution of legal suit, or the precise directives contained in an email that in any event was misfiled. These documents are not "at the heart of BMW's case." Resp't's Br. 39.

Neither issue is material to the court's determination, and it is not unnatural that they would not have been produced.

Second, unlike the cases cited, the present matter does not relate to a full trial on the merits, the violation of a standing court order, or allegations of spoliation. The early procedural posture of the current matter—a default relief proceeding, rather than a disposition on the merits—demands a different analysis. BMW NA's nonproduction of the documents cited does not arise out of incomplete discovery responses, violation of a discovery order, or its claimed misplacement, destruction, or suppression of evidence.

Third, as the party requesting the inference, Respondent must be prepared to make some showing that BMW NA's failure to produce these documents supports a presumption that their contents would be adverse to BMW NA's position or somehow contribute to the lower court's determination as to good cause. It is not clear how the details and contours of a legal service policy—which were not the subject of any dispute below and were admittedly deviated from in this instance—and the email of February 13, 2017—which admittedly was not recognized for what it was by BMW NA's in-house counsel until after the default had already occurred—would have provided any additional information useful to the court's analysis. It's unclear what, if anything, Respondent is asking this court to infer.

CONCLUSION

For the reasons set forth in this brief and Appellant's Initial Brief on Appeal, Appellant BMW of North America respectfully requests that this Court vacate the lower court's Order Denying Motion to Set Aside Entry of Default and remand for adjudication on the merits or, in the alternative, modify the default judgment to eliminate prejudgment interest from the total

value, or recalculate prejudgment interest with the date of accrual as BMW NA's first notice of AEP2's claim to damages.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2017-002481

AEP2, LLC f/k/a 2AM Group, LLC.....Respondent

v.

BMW of North America, LLC.....Appellant

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Reply Brief in the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on June 4, 2018, addressed to its attorneys of record:

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June 4, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Re: AEP2, LLC f/k/a 2AM Group, LLC v. BMW of North America, LLC
Appellate Case No.: 2017-002481
Our File No.: 5330.001

Dear Madame Clerk:

Enclosed for filing please find the original and one (1) copy of Appellant BMW of North America's Initial Reply Brief and Proof of Service in the above matter. We would appreciate it if you would file the originals and return the filed, stamped copies to us in the self-addressed, stamped envelope provided.

By copy of this letter, we are serving copies of the enclosures upon counsel of record.

Sincerely,

M. Dawes Cooke, Jr.
Anna L. Strandberg

MDCjr/ALS/klj
Enclosures
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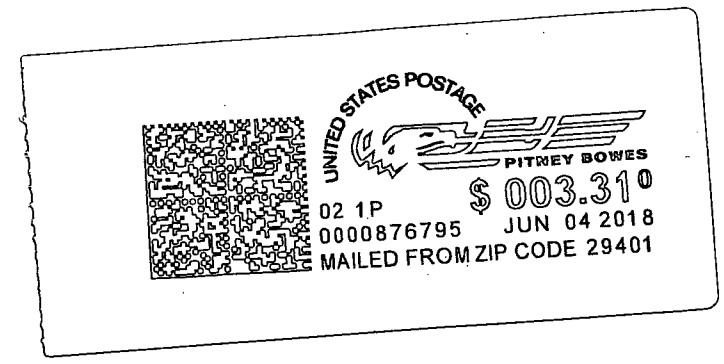

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