

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson Jr., Circuit Court Judge
Deadra L. Jefferson, Circuit Court Judge

Case No. 2018-000460

RECEIVED
DEC 20 2018
SC Court of Appeals

Assistive Technology Medical
Equipment Services, LLC, Respondent,

v.

Hood & Selander, CPAS, LLC; Donna Cash, as
Representative of the Estate of Dorothy Connelly;
W. Applegate, III, as Personal Representative of the
Estate of James B. Connelly; Kimberly Cuce; and Phillip DeClemente. Defendants,

Of whom, Phillip DeClemente is the Appellant.

FINAL REPLY BRIEF OF APPELLANT

Cameron L. Marshall
7 Gamecock Avenue, Ste. 707
Charleston, South Carolina 29407
S.C. Bar #64192
Telephone: (843) 795- 2298
cameron@attorneymarshall.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
ARGUMENT	1
CONCLUSION	5
CERTIFICATE OF COMPLIANCE	7

TABLE OF AUTHORITIES

CASES

BB&T v. Taylor,

369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006)..... 1

Church v. McGee,

391 S.C. 334, 345-346, 705 S.E.2d 481 (Ct. App. 2011)..... 3

Gainey v. Gainey,

382 S.C. 414, 423, 675 S.E.2d 792, 797 (Ct. App. 2009)..... 1

Maybank v. BB&T Corp.,

416 S.C. 541, 576, 787 S.E.2d 498 (2016)..... 3

Wham v. Shearson Lehman Bros.,

298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989)..... 1

William v. Watkins,

384 S.C. 319, 684 S.E.2d 914 (S.C. App. 2009)..... 2

RULES OF PROCEDURE

SCRCP Rule 52(a)..... 3

SCRCP Rule 55(c)..... 1-3

SCRCP Rule 59..... 4

SCRCP Rule 60(b) 4-5

Though not the only issue on appeal, Mr. DeClemente agrees with ATMES' assertion that the central issue in this case is whether the circuit court abused its discretion by holding him in default and entering default judgment in the amount of \$875,144.00. Abuse of discretion occurs "when the court issuing the order was controlled by an error of law or the order is based on conclusions that are without evidentiary support." *Gainey v. Gainey*, 382 S.C. 414, 423, 675 S.E.2d 792, 797 (Ct. App. 2009); *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006).

Judge Nicholson's default order and Judge Jefferson's default judgment constitute abuse of discretion. Though Mr. DeClemente is required to establish only one prong of the abuse of discretion standard (either legal or factual) in order to meet his burden, each order not only fails to correctly apply the law, but also lacks evidentiary support.

Erroneous Order of Default

In his default order against Mr. DeClemente, Judge Nicholson failed to apply SCRPC Rule 55(c)'s three-prong "good cause" standard for relief. When considering relief from default, the court must 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.*, 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989).

The fact that the court was controlled by errors of law is plainly evident when reviewing the errors in three parts. First, the court's default order addresses only "unreasonable delay," the first of Rule 55's three necessary inquiries. The court held Appellant in default solely because approximately nine weeks passed before Mr. DeClemente's counsel filed a formal motion for relief from default. Though not a formal motion, immediately upon being retained Appellant's counsel filed with the clerk of court a letter of representation and notice of intent to defend any

potential future entry of default, since no entry of default had been made (R. p. 708).

Importantly, courts have held that delay in requesting relief from default, alone, is not grounds for order of default. *William v. Watkins*, 384 S.C. 319, 684 S.E.2d 914 (S.C. App. 2009) (where defendant's meritorious defense and argument against prejudice were substantial in outweighing untimeliness, relief from default was proper). Judicial imposition of default upon a party who in no way sought to avoid the court's authority is draconian and disfavored by American courts.

Second, the court committed legal error by failing to rule upon Mr. DeClemente's repeated assertions of his meritorious defenses. (R. pp. 68-70; R. pp. 226-230). At least one of these defenses, the Full and Final Release specifically barring this frivolous lawsuit, is not only meritorious, but is an absolute defense. (R. pp. 96-98). The Release requires dismissal of Respondent's illegal lawsuit. Judge Nicholson and Respondent both acknowledge that Mr. DeClemente's Full and Final Release defense is, at a minimum, meritorious. (R. pp. 239-240). Yet the default order nowhere recognizes even the existence of the binding contractual Release. (R. pp. 6-10). The court's refusal to acknowledge the Release in its default order is an abuse of discretion, exercised in an apparent effort to render the Release unenforceable and justify the court's determination to rule in Respondent's favor.

Third, the court committed additional legal error by failing to rule upon the third prong of Rule 55(c)'s required analysis, whether or not ATMES was prejudiced by Appellant's delay in filing a formal motion for default relief. Neither Respondent nor the court is able to identify any prejudice, because the delay caused no prejudice. (R. pp. 240-244). Yet the court's default order nowhere addresses Rule 55(c)'s prejudice element. (R. pp. 6-10).

Failure to correct the circuit court's abusive rulings would be contrary to hundreds of years of contract jurisprudence. *Maybank v. BB&T Corp.*, 416 S.C. 541, 576, 787 S.E.2d 498 (2016). If the court's order were upheld, then citizens would become free to file actions in violation of their contractual obligation to refrain from initiating litigation against released parties. Settlement agreements would become unenforceable, and there could be no voluntary final termination of disputes between citizens.

The court abused its discretion by considering only the first factor of Rule 55(c)'s three-prong analysis for judging relief from default status. SCRCP 52(a); *Church v. McGee*, 391 S.C. 334, 345-346, 705 S.E.2d 481 (Ct. App. 2011). Rule 55(c)'s first factor is arguably somewhat favorable to ATMES. But consideration of factors 2 and 3 would necessitate the court relieving Appellant from default status. The court therefore omitted consideration of those two crucial dispositive elements of Rule 55(c) because such analysis would have required a proper order relieving Mr. DeClemente from default.

Though these legal errors alone require reversal of the default order, the court further abused its discretion by holding Mr. DeClemente in default without evidentiary support for its order. This litigation was complex, involving multiple parties, each with counter-claims and cross-claims, and was additionally complicated by Mr. DeClemente's serious mental illness. Appellant's counsel was mindful of the ethical obligations of due diligence and proper investigation prior to filing formal pleadings. Mr. DeClemente acknowledges the nine-week delay in filing a formal motion for default relief. But there is no evidence that Appellant lacks meritorious, in fact dispositive, defenses to ATMES' frivolous lawsuit. Nor is there evidence that ATMES was prejudiced by the filing delay. (R. pp. 240-244).

Erroneous Default Judgment

Mr. DeClemente made timely motion for relief from Judge Jefferson's erroneous default judgment pursuant to SCRCR Rules 59 and 60. (R. p. 160). Rule 60 relief from default judgment requires a showing of: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. SCRCR 60(b). The presence of any one of these factors requires that default judgment be set aside. *Id.*

The record contains voluminous evidence that not just one, but rather three, of these five independent criteria requiring default judgment to be set aside are present in this case. (R. pp. 96-98; R. pp. 702-703). Those criteria are contained in Rule 60(b)'s subsections 1, 3 and 5. The only Rule 60(b) consideration clearly not present is "newly discovered evidence." Rule 60(b)(4), whether or not the default judgment is void, presents a more complex issue, which Mr. DeClemente has preserved. (R. pp. 160-161). Yet Judge Jefferson's default judgment order addresses not a single one of the factors of which Rule 60 mandates analysis when considering Mr. DeClemente's motion to set aside default judgment. (R. pp. 18-30).

On multiple occasions during this improper, prolonged and wasteful litigation Judge Jefferson said she believed that Judge Nicholson's default order prevented her from considering any of Mr. DeClemente's motions regarding default. She mistakenly believed that Judge Nicholson's erroneous default order prevented her from performing her compulsory judicial duties, and ruled that she was permitted to do nothing other than set the amount of damages and

enter default judgment. (R. pp. 368-370). Judge Jefferson was unaware of her duty to consider Mr. DeClemente's Rule 59 and Rule 60 motions and apply Rule 60's five mandatory considerations to the facts of this case. (R. pp. 301-303; R. p. 368-370; R. p. 22).

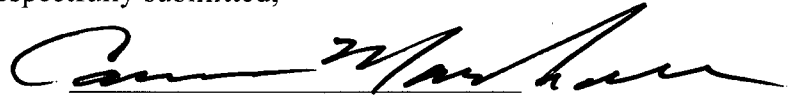
While Rules 55 and 60 are related, the law requires the court to consider different factors when ruling upon a Rule 60 motion for relief from default judgment. All evidence supports Mr. DeClemente's motion to have default judgment set aside. There is no evidence supporting the court's denial of Appellant's Rule 60 motion. The court abused its discretion by refusing to conduct the required legal analysis, which would have resulted in the default judgment being set aside. The court further abused its discretion by refusing to either set aside the default judgment against Appellant or, in the alternative, order that the judgment be marked "satisfied" pursuant to Rule 60(b)(5).

Conclusion

Assisting a party in its effort to secure financial gain over another party is abuse of discretion. Assisting a party in its effort to illegally secure financial gain over another party is gross abuse of discretion. The circuit court's legal and factual errors require reversal of its default order and reversal of its default judgment.

The circuit court's uncontrolled desire to have Respondent prevail in its illegal lawsuit against Mr. DeClemente is an affront to the rule of law. But Lady Justice remains blind to the litigants' identity and steadfast in her determination that these proceedings, after eight years and enormous public and private cost, will ultimately produce justice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Cameron L. Marshall", written over a horizontal line.

Cameron L. Marshall
7 Gamecock Avenue, Suite 707
Charleston, SC, 29407
S.C. Bar #64192
Telephone: (843) 795-2298
cameron@attorneymarshall.com
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I, Cameron Marshall, counsel for the Appellant, hereby certify that Appellant's Final Reply Brief complies with the provisions of Rule 208 and Rule 267 of the South Carolina Appellate Court Rules.



December 18, 2018
Charleston, SC

Cameron Marshall
7 Gamecock Avenue, Suite 707
Charleston, SC, 29407
S.C. Bar #64192
Telephone: (843) 795-2298
cameron@attorneymarshall.com
Attorney for Appellant

cc:
James E. Smith Jr. Esq.
1422 Laurel Street
Columbia, SC 29201
Fax: (803) 933- 9801
James@jamesmith.pa.com
Attorney for Respondent

Blake Hewitt, Esq.
P.O. Box 7965
Columbia SC 29202
Fax: (803) 771-8097
Blake@bluesteinattorneys.com
Attorney for Respondent

RECEIVED

DEC 20 2018

SC Court of Appeals