THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
In the Court of Common Pleas

R. Knox McMahon, Presiding Judge

Case No. 2012-212487

Mariko Marie Clack.....Respondent,

v.

Eddie Arnold Smith, d/b/a the Lawn Doctor.....Appellant.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ABUSE HIS DISCRETION AND COMMIT AN ERROR OF LAW BY FINDING APPELLANT IN DEFAULT?

II. DID THE TRIAL COURT'S ORDER HOLDING APPELLANT IN DEFAULT IGNORE THE EVIDENCE PRESENTED TO HIM?

III. DID THE TRIAL COURT'S ORDER MISCONSTRUE AND MISPPLY SOUTH CAROLINA LAW, SPECIFICALLY SOUTH CAROLINA CODE SECTION 38-77-160, ET. SEQ."

IV. DID THE TRIAL COURT COMMITE AN ERROR OF LAW AND ABUSE HIS DISCRETION IN DENYING THE APPELLANT'S MOTION TO VACATE AND FILE A LATE ANSWER, THEREBY HOLDING APPELLANT IN DEFAULT?

STATEMENT OF THE CASE

This is an appeal from an Order of the Honorable R. Knox McMahon, Presiding Judge of the Eleventh Judicial Circuit, denying Appellant Eddie Arnold Smith, d/b/a the Lawn Doctor's Motion to Vacate and to File a Late Answer (R.pp. 54-60) (R pp. 1-5). Appellant received notice of Judge McMahon's Order on June 28, 2012 and timely filed a Notice of Intent to Appeal with the Court on July 12, 2012 (R.pp. 135-136).

STATEMENT OF FACTS

Respondent Mariko Marie Clack commenced this action by filing and serving a Summons and Complaint on or about December 3, 2010 seeking damages for injuries allegedly received in an automobile accident which occurred in Lexington County, South Carolina. (R.pp. 14-20). Ms. Clack's Complaint alleges she was a passenger in an automobile driven by a third party (not a party to this appeal) which collided with a vehicle owned and operated by Appellant Eddie Smith, d/b/a The Lawn Doctor. (R pp. 14-20). At the time of the accident, State Farm provided underinsured coverage on the vehicle in which Ms. Clack was riding at the time of the accident and liability insurance coverage for the vehicle owned by Appellant. Allstate Insurance provided Underinsured Motorist Coverage (UIM) to Respondent Clack.

On December 15, 2012 the Defendant Eddie Arnold Smith was served with a copy of Respondents Summons and Complaint. (R.pp. 21-22). Attorney Austin Hood of the Law Firm of Brown and Brehmer entered an appearance on behalf of State Farm on December 20, 2012 and subsequently filed an Answer on behalf of Appellant. (R.pp. 23-24) (R.pp. 25-28) Shortly thereafter, State Farm paid all of its liability limits to Respondent and all or part of its underinsured motorist's limits. Attorney Hood did not withdraw the Answer filed on behalf of

the Appellant nor did he or his firm withdraw as counsel for the Appellant. (R.p. 81, lines 23-25; R.p. 82, line 1).

On January 24, 2011 Respondent's Attorney forwarded a copy of the Summons and Complaint on the Honorable Scott Richardson, South Carolina Department of Insurance for service on Allstate Insurance Company as the underinsured insurance carrier for Respondent Clack. One week later, counsel for Respondent wrote Deborah Lynn Boggs a claims adjuster for Allstate and informed her that State Farm had paid policy limits and that the pleadings had been forwarded to the South Carolina Department of Insurance for service upon Allstate as the UIM carrier. (R.p. 74). A proof of service, showing service on of the Summons and Complaint on Allstate by delivery of the same with the South Carolina Department of Insurance was filed with the Court on April 12, 2011. (R.pp. 31-36). However, Allstate has no record that the Department of Insurance ever sent the Summons and Complaint to Allstate. (Affidavit of Bryan Thompson dated February 1, 2012; R pp. 98-99). Bryan Thompson, the front line process expert for Allstate in Columbia who's responsibility is to process casualty claims as they come into the office conducted a diligent search of Allstate's records and found no evidence to indicate that Allstate ever received any papers from the Department of Insurance. (R. pp. 98-99).

On April 12, 2012 Counsel for Respondent Clack filed an Affidavit of Default attesting that Appellant had filed no Answer or Responsive Pleading to the Summons and Complaint served upon the South Carolina Department of Insurance. (R.p. 31). On June 13, 2012, Respondent and her counsel appeared at a hearing on her motion for default judgment. Neither the Appellant nor any counsel on his behalf appeared at the hearing. At the hearing Respondent's counsel represented to the Court that he filed the motion under the mistaken belief that Attorney Hood had withdrawn the Answer previously filed in this case. (R.p. 85, lines 24-

25; R.p. 86, lines 1-13). The hearing was continued. Respondent's counsel later informed the Court that after contacting Attorney Hood, he learned that the Answer filed on behalf of Appellant had not been withdrawn. Counsel for Respondent then dismissed the Motion for default judgment.

Respondent subsequently deposed the Appellant who was not represented by counsel at his deposition. (R.p. 103) Based on this deposition testimony, again taken without Appellant having counsel present, Respondent moved for an obtained an Order granting her Summary Judgment on or about October 11, 2011. (R.p. 6-11). There is nothing in the record to indicate that Allstate ever received notice of the Motion for Summary Judgment, the June 13th hearing or the deposition on which the Order was based. (R.pp. 88-89).

On or about November 9, 2011 Appellant filed its Motion to Vacate Default and File Late Answer. (R.pp. 54-56). This matter was set for argument before the Honorable R. Knox McMahon, Presiding Judge of the Eleventh Judicial Circuit on January 31, 2012. Prior to the hearing counsel for the Appellant prepared and executed a Order of Substitution, substituting the undersigned as counsel for Attorney Hood and his firm, which prior to the execution of the Order was still counsel of record for Appellant. After hearing argument of counsel, Judge McMahon issued his Order denying the relief requested by Appellant on June 20, 2012. (R. pp. 1-5). Appellant timely filed a Notice of Intent to Appeal with the Court on July 12, 2012. (R.pp. 135-136)

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely in the discretion of the trial court. *Roberson v. S. Fin. Of South Carolina, Inc.,* 365 S.C. 6, 9, 615 S.E.2d. 112, 114 (2005). The trial court's discretion will not be disturbed on appeal absent a

clear showing of an abuse of that discretion. *Id.* An Order based on exercise of discretion in ruling on motion for relief from entry of default will be set aside if it is controlled by some error of law or lacks evidentiary support. Rules of Civ. Proc. 55(c); *Wham v. Shearson Lehman Brothers, Inc.* 298 S.C.462, 381 S.E.2d. 499 (S. C. App. 1989).

ARGUMENT

South Carolina Rules of Civil Procedure provide that the standard for granting relief from an entry of default is "good cause." *Ricks v. Weinrauch,* 293 S.C. 372, 360 S.E.2d. 535 (S.C. App. 1987); *Wham v. Shearson Lehman Brothers, Inc.* 298 S.C.462, 381 S.E.2d. 499 (S. C. App. 1989). While the decision to grant relief from an entry of default rests solely within the discretion of the Trial Judge, an order based on exercise of that discretion will be set aside if it is controlled by some error of law or lacks evidentiary support. *Ricks v. Weinrauch, supra.; Wham v. Shearson Lehman Brothers, Inc. supra.* The Order of Judge McMahon denying Appellant's Motion is controlled by error of law and lacks evidentiary support and should be reversed by this Court.

THE APPELLANT IS NOT IN DEFAULT

It is fundamental that in order for a party to obtain a default judgment under the South Carolina Rules of Civil Procedure, there must first be a default. *Sijon v. Green,* 289 S.C.. 126, 345 S.E. 2d. 246 (1986). The Appellants are simply not in default in this case. The Trial Court committed an error of in denying Appellant's Motion because the Appellant was not in default in June of 2012 or at anytime in this matter.

On or about December 3, 2010 the Respondent Clack commenced this action by filing and serving a Summons and Complaint. (R. pp. 14-20). The Summons attached to her complaint specifically provided that unless an Answer or other responsive pleading was received within

thirty (30) days, the Defendant would be in default. An Answer was filed and served on Plaintiff's counsel on behalf of Appellants. Within thirty (30) days of service of this Summons and an attached Complaint an Answer was filed at the Lexington County Clerk of Court and served on Respondent's counsel. This Answer has never been withdrawn. It was still in effect in June of 2012 when Respondent, under the mistaken belief it had been withdrawn, attempted to get a default judgment against Appellant. It was not withdrawn at any time subsequent to the April 2011 hearing. It remains totally effective. Thus the terms of the Summons have been complied with.

The Trial Judge Misconstrued and/or Misapplied South Carolina Law by Requiring Appellant to File an Answer to Comply with South Carolina Code Section 38-77-160

The Trial Court committed an error of law by misapplying South Carolina Code Section 38-77-160 and holding that Allstate must file a Notice of Appearance in order to avail itself of the Answer previously filed on behalf of Appellants by Attorney Austin Hood. South Carolina Code Section 38-77-160 provides, in part that:

> No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. ***The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear.*** The evidence of service upon the insurer may not be made a part of the record. ***In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit.*** (Emphasis Added)

This statute provides that in the event the automobile insurance insurer for the putative at fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense for its own benefit. Further, the clear intent of this Statute is to protect an insurance

carrier's right to contest liability for underinsured benefits. *Broome v. Watts,* 319 S.C. 337, 461 S.E.2d. 46 (1995).

The Trial Court's Order held that because Allstate did not file a Notice of Appearance within thirty (30) days, the Appellant was in default, even though a valid, uncontested Answer was timely served on Respondent's counsel and filed at the Lexington County Courthouse. There is nothing in the Code that provides that a UIM carrier who does not file a Notice of Appearance is in default, especially where there is a valid Answer served and on file at the Courthouse. The failure to file a Notice of Appearance simply was not an event of default under any definition set forth in the Code or the South Carolina Rules of Civil Procedure.

Further, the Court erred in holding that the Appellant could not avail itself of the Answer previously filed and served in this case. Judge McMahon's Order in effect provides that under this Statute, the Appellant would be required to file a separate and distinct Answer once Allstate exercised its right under South Carolina Code Section 38-77-160. South Carolina Code Section 38-77-160 does not require a UIM carrier to re-file an Answer once they exercise their rights under this Statute. In fact, all this section does is to allow a Notice of Appearance to be filed and for the UIM carrier to protect its interest. There is nothing in the code which would have required an additional Answer.

The Trial Court's Order holding Appellant in default is based on an erroneous interpretation and application of South Carolina Code 38-77-160 and should be reversed by this Court.

CASES SHOULD BE DECIDED ON THEIR MERITS AND AND NOT ON TECHNICALITIES

The South Carolina Court has long held that it is the public or judicial policy of this State to dispose of cases on their merits as opposed to a technicality of law. See, *Mictronics, Inc. v.*

South Carolina Department of Revenue, 345 S.C. 506, 548 S.E.2d. 223 (S.C.App. 2001); *Columbia Pools, Inc. v. Galvin,* 288 S.C.59, 339 S.E.2d. 524 (S.C.App. 1986). The Respondent's entire case is based upon technicalities. As set forth above, an Answer was timely served on Respondent and filed at the Lexington County Clerk of Court. This Answer has never been withdrawn. This Answer has remained in force and in effect the entire time of this lawsuit. It is in force and in effect today. Further, the Appellant has always been represented by counsel, first by Attorney Hood and then once an Order of Substitution was signed, by the undersigned. Regardless of who filed the Answer, and regardless of which insurance company (State Farm or Allstate) was paying that lawyer for his services, the Respondent's Summons and Complaint was properly responded to pursuant to the language of the Summons. Appellant was simply not in default.

Further, nothing in South Carolina Code Section 38-77-160 provides that a party who has served and filed a valid answer is in default merely because a UIM fails to timely file a Notice of Appearance after being served with notice of a Summons and Complaint. The language of the statute does not provide any support for this interpretation of the Statute. The Trial Court's interpretation that the language of the Statute provides otherwise is clearly erroneous.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO VACATE AND BE RELIEVED FROM DEFAULT

Even if the Appellant is in Default (which is expressly denied), the Trial Court erred in denying the Appellant's Motion to Vacate Judgment and be Relieved from Default. The standard for granting relief from an entry of default is "good cause" under Rule 55(c). *Richardson v. P.V., Inc.* 383 S.C.610, 682 S.E.2d. 263 (2009). The South Carolina Court has Court has enumerated a number of factors to consider in determining whether or not good cause exists. These include (1) the timing of the moving party's motion; (2) whether the moving party has a meritorious

defense; and (3) the degree of prejudice to the non-moving party if the requested relief is granted. *Wham v. Shearson Lehman Brothers, Inc. supra*

The Trial Court erred in ruling that the Appellant failed to demonstrate good cause to set aside the entry of default. Appellant presented evidence at the hearing that for reasons not known to any of the parties to this appeal, there is no record that Allstate ever received a copy of the Summons and Complaint from the South Carolina Department of Insurance. (R. pp. 98-99). There is nothing in the record to indicate that Allstate ever received notice of the Motion for Summary Judgment filed and argued by Respondent's counsel (R. pp. 98-99). The only evidence in the record is that after Respondent obtained Summary Judgment, the undersigned counsel made an appearance, in an abundance of precaution filed a second Answer, and immediately moved to be relieved from Entry of Default. (R. pp. 54-56) (R.pp. 57-60). There is nothing in the record to indicate that there was any delay in filing for relief once Allstate received notice of the action and the Summary Judgment Order.

The Trial Judge erred in holding that the Appellant demonstrated no meritorious defense. To establish that he has a meritorious defense, the Appellant does not need to show that he would prevail on the merits, only that his defense is meritorious. A "meritorious defense" need only be one "worthy of a judicial inquiry because it raises a question of law deserving of some investigation or a real controversy as to real facts arising from conflicting or doubtful evidence." *Rodriquez v. Gutierrez,* 391 S.C.323, 705 S.E.2d. 94 (2011). Based upon the evidence in the record, there is a genuine dispute as to the facts and circumstances surrounding the accident which forms the basis of the Respondent's action. (R. pp. 25-28) (R. pp. 57-60) (R.pp. 98-99).

Finally, the Trial Court erred in ruling that the Respondent would be prejudiced by Appellant's Motion. The Trial Court's Order states (without providing any evidentiary basis)

that, "the Plaintiff would be forced to retry the entire case at a substantial defense." This conclusion is simply not supported by any evidence presented at the hearing. The additional defense costs that would be incurred by the Respondent would be an additional deposition of Appellant and an additional hearing regarding the Order for Summary Judgment. There is no evidence in the record to indicate that the Respondent would have to "retry the entire case at a substantial expense."

THE TRIAL COURT ERRED IN RULING ON ISSUES NOT BEFORE THE COURT

In his Order dated June 19, 2012, Judge McMahon not only refused to set aside the entry of default Judgment pursuant to Rule 55 (c) but also appeared to Rule on a Rule 60(b) Motion to set aside the Summary Judgment entered in this case. The Appellant is informed and believes that the Court misconstrued the Appellant's Motion because in the body of its motion, the Appellant based it, in part, on the Rule 60(b) "excusable neglect" standard as opposed to the Rule 55(c) "good cause" standard. As a result of this language, Judge McMahon construed the Appellant's Motion as one not only seeking relief from entry of default, but also relief from the summary judgment granted to Respondent after entry of the default against Appellant. This was an erroneous construction of the relief requested by the Appellant.

The relief requested by Appellant came up several times in the hearing before Judge McMahon. Attorney S. Jahue Moore, who appeared and argued on behalf of Appellant, first informed the Court that, "There are two basic reasons for our motion today, and obviously will have to address the summary judgment or the summary judgment order at some time when we get the issue of default cleared up, but we don't believe the defendant is in default." (R. p. 81, lines 5-9). Counsel for Appellant informed the Court, "It would be our intent, assuming the motion for default were denied and the affidavit or default or any default was vacated or

declaration that there was no default, it would be our intent to then come in and basically move to set aside the order in regards to summary judgment." (R. p. 83, lines 8-14). He argued that, "We may ultimately be stuck with the summary judgment motion, but I think that is another day." (R. p. 83, lines 22-25). Later he added, "We may ultimately be stuck with summary judgment – I don't know – but I simply believe that we are not in default because there was an answer." (R.p. 84, lines 4-6). Attorney Moore concluded his argument by informing the Court, "So it's a two pronged motion: Basically for a declaration that we are not actually in default. And if we are, that we be allowed to escape default by virtue of the fact that it was properly served on the department of insurance, but we just never got notice of the fact they received it." (R.p. 84, lines 19-25).

Counsel for Respondent did not address any Rule 60 motion in his argument. In his reply argument, counsel for Appellant again set forth the arguments/matters before the Court. "There was obviously a mix-up somewhere between Allstate and the Department of Insurance. I respectfully submit that Mr. Jonas may have a summary judgment and we will deal with that, but I don't think he has a default." (R. p. 95 Lines 16-17). Counsel for Respondent then informed the Court, "I would just say briefly, Judge, the ***concept of whether this defendant is in default or whether Allstate has waived its right to appear is the issue before the Court."*** (Emphasis Added) (R. p. 96, Lines 24-25; R.p. 97,, Lines 1-2).

Despite the clear indication of counsel as to the issues before the Court, the Trial Court's Order dealt with both a Rule 55(c) Motion to be relieved from default and also a Rule 60 Motion regarding Summary Judgment. On page two of his Order, Judge McMahon stated, "As to the second argument, Allstate fails to present a sufficient argument in favor of setting aside the entry of default, ***or the order of summary judgment."*** (Emphasis Added) (Order of the Honorable

Knox McMahon dated June 19, 2012; R.pp. 1-5). Further, Judge McMahon's order provides that "Allstate's motion implicates both the entry of default governed by Rule 55(c) and this Court's summary judgment on issues of liability, governed by Rule 60(b). (R.pp. 1-5). On the final page the June 19th Order states, "There is no 'good cause' to vacate default or judgment." (R.pp. 1-5). Judge McMahon's Order concludes, "All these factors considered, the Court must conclude that there is no 'good cause' under Rule 55(c***), let alone grounds to set aside the summary judgment under the more stringent analysis of Rule 60(b).***" (Emphasis Added) (R.pp. 1-5)

The Trial Court's Order appears to not only hold that Appellant was not entitled to relief from the entry of default, but also appears to hold that the Appellant was not entitled to have the summary judgment set aside. This matter was not before the Court. Neither counsel addressed Rule 60 issues in their arguments to the Court. Numerous times during his argument to the Court counsel for the Appellant informed the Court that the matters in issue and raised by his motion were clearly limited to issues pertaining to the existence of default, more specifically, whether there was a default and if so, whether Appellant was entitled to a relief from it. At no time did the Respondent challenge these assertions. In fact, counsel for Respondent specifically agreed that these were the only issues or matters before the Court. The Trial Court's Order going beyond the requested relief (issues pertaining to default) and addressing the summary judgment was clearly erroneous, and constitute an abuse of discretion and should be reversed by this Court.

To the extent that this Court finds a Rule 60(b) Motion for Relief from Summary Judgment was properly before the Court, which the undersigned denies, then the undersigned would respectfully incorporate its arguments set forth above to assert that excusable neglect exists under Rule 60(b) of the SCAR to relive Appellant from any Judgment entered in this case. There is no evidence in the record to indicate that Appellant was every served with any Notice of

the Summary Judgment Motion or any argument on the Summary Judgment Motion. There has been no evidence presented that Allstate as the UIM carrier was ever sent notice of either the Summary Judgment Motion or any argument on the Summary Judgment Motion.

Although most often used when relief is sought from a judgment by default, the rule governing a motion to set aside judgment for excusable neglect applies to any final judgment *RRR Inc. v. Tigas,* 378 S.C. 174, 662 S.E.2d. 438, rehearing denied, certiorari granted, affirmed, 381 S.C.490, 674 S.E.2d. 170. As set forth above, there has been no showing of any delay on the part of the Appellant to be relieved from Summary Judgment. There is ample evidence in the record that Appellant has a meritorious defense. Finally, there is nothing in the record to indicate that the Respondent would be prejudiced in the event that relief under Rule 60(b) was granted with respect to the Summary Judgment Order. Even if relief from the Summary Judgment Order was properly before the Court, the Trial Judge erred as a matter of law in denying any motion on the part of Appellant to be relieved from it.

CONCLUSION

For the reasons set forth above, the Order of the Trial Court denying the Appellant the relief requested in his Motion should be reversed by this Court.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief contains all material proposed to be included by any of the parties and not other material.

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PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief by mail, to Donald E. Jonas, Esquire, Post Office Box 99, Lexington, South Carolina 29071, on April 2, 2013.

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