THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2019-000759
Civil Action No. 2018-CP-33-00534

James Washington, Jr., Appellant,

v.

Crystal Denise Dudley, Respondent.

MEMORANDUM IN SUPPORT OF DISMISSAL OF APPEAL

Respondent Crystal Denise Dudley ("Respondent"), by and through the undersigned, hereby submits this memorandum in support of a dismissal of the instant appeal. For the reasons stated in greater detail below, Respondent submits Appellant James Washington Jr.'s ("Appellant") appeal arises from a non-final, interlocutory order that is not subject to immediate appellate review. Accordingly, Respondent is entitled to an order dismissing this appeal in its entirety pending a final judgment in the matter.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant initiated the underlying negligence claim alleging injuries in an automobile accident by filing a Summons and Complaint on July 26, 2018. Appellant served Respondent on July 31, 2018. On September 18, 2018, the court declared defendant in default for failure to answer or otherwise appear. (Ex. A) Respondent filed an Answer to the Complaint on September

19, 2018, and an Amended Answer on September 24, 2018. Respondent moved to set aside the entry of default on December 11, 2018. Appellant never moved for a hearing on his alleged, unliquidated damages and the court's Order did not enter a final judgment against Respondent.

The Honorable Michael G. Nettles held a hearing on Respondent's Motion to set aside default on April 15, 2019. Prior to the hearing, Appellant filed a memorandum in opposition to Respondent's motion. (Ex. B) Appellant argued that the court should apply the Rule 60(b), SCRCP, standard of review rather than Rule 55(c), SCRCP. *Id.* The court disagreed. (Ex. C) The court held that Respondent satisfied her burden pursuant to Rule 55(c), SCRCP, and the factors outlined in *Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct. App. 1989). *Id.* Notably, the court also recognized that finding a party in default is an "official recognition of the failure to appear or otherwise respond, but is not a judgment by default. Judgment by default is not properly entered until damages are determined." *Id.* (citing *Beckham v. Durant*, 300 S.C. 329, 331, 387 S.E.2d 701, 703) (Ct. App. 1989)).

Appellant filed a motion for reconsideration on April 23, 2019; however, the court denied Appellant's motion on April 30, 2019. (Ex. D) Appellant filed a notice of appeal from the court's order setting aside default and order denying his motion for reconsideration on May 7, 2019.

STANDARD OF REVIEW AND ARGUMENT

South Carolina courts generally adhere to the final judgment rule. "An appeal ordinarily may be pursued only after a party has obtained a final judgment." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citation omitted); S.C. Code Ann. § 14–3–330(1) (1976); *see* Rule 201(a), SCACR. "An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory

order from which no immediate appeal is allowed." *Hagood*, 362 S.C. at 195, 607 S.E.2d at 709 (citing *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002)). The right of appeal prior to a final judgment is controlled by statute, S.C. Code Ann. §14–3–330.

A "final judgment" is an order that must dispose of the whole subject matter of the action or terminate the action, leaving nothing to be done but to enforce what already has been determined. *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942); *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't. of Health and Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010).

In a default case, the defaulting party conceded liability but has not conceded the amount of liability. *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90, 757 S.E.2d 557, 558 (Ct. App. 2014). The finding that a party is in default is not a final judgment, as the court would still need to determine an award of damages. *See Ateyah v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 361 S.E.2d 340 (Ct. App. 1987); *see also* Rule 55(c), SCRCP. As such, because a final judgment has not been entered and law does not recognize this intermediate order as an exception to the "final judgment rule", a "grant or denial of a Rule 55(c) motion is not directly appealable . . . ." *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 317–18, 368, S.E.2d 456 (1998) (citing *Ateyeh*, 293 S.C. 436, 361 S.E.2d 340).

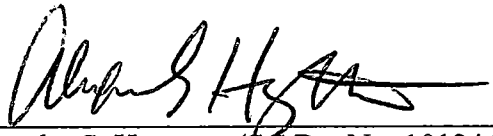
Appellant's negligence claim against Respondent remains pending before the Marion County Court of Common Pleas. The court's order setting aside default only addressed the following: (1) the applicable standard of review for Respondent's motion to set aside default; and, (2) whether Respondent satisfied her burden under Rule 55(c). (Ex. C) Appellant's damages from this automobile accident have not been set, approved or determined by the court, nor has the Appellant claimed liquidated damages. Indeed, even if the court denied

Respondent's motion to set aside entry of default, the Appellant still needed to prove the amount of his unliquidated damages at a damages hearing. *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. at 90, 757 S.E.2d at 558. Because Appellant's damages are unliquidated and have not been set, approved, or determined, an order setting aside default or denying a motion for reconsideration therefrom is interlocutory and does not constitute a final adjudication. Therefore, the Court should dismiss an appeal from either.

CONCLUSION

For the reasons stated herein, Appellant's appeal is interlocutory and not subject to immediate appellate review by this Court. Accordingly, Respondent is entitled to an order dismissing this appeal in its entirety pending a final judgment in the matter.

June 21, 2019

By 

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MARION COUNTY SC
CHRISTY TISDALE
CLERK OF COURT

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF MARION) TWELFTH JUDICIAL CIRCUIT
) C/A NO. 2018-CP-33-00534
James Washington, Jr.,)
)
Plaintiff,)
)
vs.) ORDER OF DEFAULT
)
Crystal Denise Dudley,)
)
Defendant.)

This matter comes before the Court based on Plaintiff's Affidavit of Default submitted by Attorney Gene M. Connell, Jr. It being made to appear that Plaintiff's Summons and Complaint were filed on or about July 26, 2018 and were duly served on Defendant, Crystal Denise Dudley, by personal service at 3407 Hayes Street, Mullins, SC 29575, on the 31st of July, 2018; that more than thirty (30) days have elapsed since the service of said pleadings; that no Answer, Motion or Notice of Appearance has been made therein; and that said Defendant is now in default.

Accordingly,

IT IS ORDERED that Defendant Crystal Denise Dudley is hereby declared to be in default.

AND IT IS SO ORDERED.

Circuit Court Judge
Twelfth Judicial Circuit

September 13, 2018
Marion, South Carolina.

EXHIBIT
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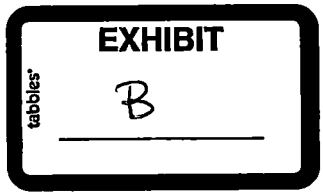
A

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
	TWELFTH JUDICIAL CIRCUIT
COUNTY OF MARION	**C/A NO. 2018-CP-33-00534**
James Washington, Jr., Plaintiff(s), vs. Crystal Denise Dudley, Defendant(s).	PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT

This matter is before the Court based on Defendant's motion to set aside an Order of Default pursuant to Rule 55 of the South Carolina Rules of Civil Procedure. Plaintiff believes that because this is not an entry of default signed by the clerk that the Court should consider Defendant's motion under SCRCP 60(b) in light of the fact that the Order of Default is signed by a circuit judge and not the clerk.

South Carolina Rule of Civil Procedure 55 makes a distinction between an entry of default and an order of default. An entry of default is merely an entry by a clerk upon the calendar or file book. In this case, the clerk did not enter a default. A circuit judge has specifically reviewed the matter and issued an Order of Default.

The case centers around a traffic accident in which the Defendant contests liability. The Defendant was served by Steve Parker, a retired deputy from Horry County, on or about July 31, 2018. The affidavit of Parker indicates that the Defendant Crystal Denise Dudley was personally served at her home on July 31, 2018 at 4:22 p.m. Judge Seals signed the Order of Default on September 13, 2018. The Defendant has filed a motion to set aside default but has provided no affidavits nor given a reason why the Defendant should be relieved from default. The Defendant's motion is a single paragraph and alleges good cause but has provided no additional information as to any reason or excuse for not answering in a timely fashion.



As stated above, SCRCP 60(b) requires excusable neglect, surprise and/or inadvertence. Plaintiff asserts that this is the rule which the Court should apply to Defendant's motion to set aside default.

In *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978), the plaintiff obtained an order of default from the circuit court. The court further ordered a hearing to be schedule for determination of damages. The Supreme Court in citing the case on appeal found the defendant was required to show excusable neglect. In this case, no excusable neglect has been offered nor have any affidavits in support been presented. Further, because this is a case of contested liability it would be prejudicial to the Plaintiff to relieve the Defendant of default.

There are numerous cases in South Carolina which require excusable neglect to be relieved of default. See *Howard v. Holiday Inns, Inc.*, 246 S.C. 2d 880 (1978) (defense counsel's failure to give prompt attention to the matter because of extensive traveling is not excusable neglect). See also *Roche v. Young Bros., Inc.*, 318 S.C. 207, 456 S.E. 2d 897 (1995) (losing summons and complaint within a corporation is not grounds to set aside default judgment). See also *Ledford v. Pennsylvania Life Insurance Co.*, 267 S.C. 671, 230 S.E. 2d 900 (1976) (insurance company's attorney failed to answer complaint where attorney erroneously relied on letter from insurance company officials was not grounds for not answering the complaint).

In sum, Defendant has offered no reason why the complaint was not answered within thirty days and has offered no reason why she failed to act promptly. Further, there is prejudice to the Plaintiff as Defendant will contest the cause of the accident; and, accordingly, Plaintiff will suffer prejudice. See *Hill v. Dotts*, 345 S.C. 304, 309-10, 547 S.E .2d 894, 897 (Ct. App. 2001).

Accordingly, Plaintiff requests the Court deny Defendant's motion to set aside the Order of Default as no reason has been advanced by the Defendant.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.

s/Gene M. Connell, Jr.
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Attorney for Plaintiff

April 12, 2019
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF MARION

James Washington, Jr.,
Plaintiff,

v.

Crystal Denise Dudley,
Defendant.

IN THE COURT OF COMMON PLEAS

TWELFTH JUDICIAL CIRCUIT

C/A No.: 2018-CP-33-00534

ORDER SETTING ASIDE DEFAULT

This matter comes before the Court by way of Defendant's Motion to Set Aside Default. The Court finds that for good cause shown the default entered in this case should be set aside and Defendant allowed to answer.

FACTUAL BACKGROUND

The present case was filed by the Plaintiff on July 26, 2018. This case arose from an automobile accident which occurred in Mullins, South Carolina on January 30, 2018. Plaintiff's affidavit of service shows that the Defendant received service of process on July 31, 2018 at her home and that she was personally served. Defendant failed to answer the complaint within the thirty (30) day time period allowed by Rule 12(a), SCRCP. Plaintiff moved for entry of default on September 4, 2018. The entry of default was signed on September 13, 2018 by the Honorable William H. Seals, Jr., Circuit Judge. The entry of default was filed with the Marion County Clerk of Court's Office on September 18, 2018. Defendant filed her answer September 19, 2018 and subsequently filed an amended answer on September 24, 2018. Defendant then moved on

December 11, 2018 for the entry of default signed by Judge Seals to be set aside. The Court convened a hearing on this motion on April 15, 2019 at the Marion County Courthouse.

ANALYSIS

The first matter for the Court is which standard of review is appropriate for this case. Defendant urges that this case be reviewed under the "good cause" standard found in Rule 55(c), SCRCP. However, Plaintiff argues that because the entry of default was denominated an Order of Default, and was signed by a Circuit Judge, that the standard for default judgments found in Rule 60(b), SCRCP, is appropriate. The Court finds that the appropriate standard is "good cause" as found in Rule 55(c).

As a first matter the Court must turn to language of the rule itself. Rule 55(c) states "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." "In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Id.* Rule 55(c) is clearly unambiguous, the standard to be used is determined by whether the order in question is an entry of default or a default judgment. Plaintiff contends that the order of default is a default judgment because it was signed by a Circuit Judge and not the Clerk of Court. The Court finds this argument unpersuasive. "The entry of default is an official recognition of the failure to appear or otherwise respond, but is not a judgment by default. Judgment by default is not properly entered until damages are determined." *Beckham v. Durant*, 300 S.C. 329, 331, 387 S.E.2d 701, 703 fn. 2

(Ct. App. 1989).[1] It is undisputed here that no damages were set or determined by Judge Seals in his September 13 order. Therefore, as this is not a default judgment, but an entry of default, the Court will proceed under the "good cause" standard found in Rule 55(c).

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Sundown Op. Co., Inc. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). The standard under Rule 55(c) requires that the moving party give an explanation why the setting aside of the default would serve the interests of justice. *Id* at 607, 681 S.E.2d at 888. "Once a party has put forth a satisfactory explanation for the default, the trial court must also 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." *Id* at 607-08, 681 S.E.2d at 888 (*citing Wham v. Shearson Lehman Bros., Inc.,* 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)). Counsel for the Defendant has indicated to the Court that reason for the delay was some confusion on the part of the insured and the insurance company as to the complaint. The Court finds that this, when considered in light of the *Wham* factors, is a satisfactory explanation. As to the *Wham* factors the Court finds that each points towards setting aside the default in this case. Turning to the first factor the Court finds that Defendant was diligent once it found that default had been entered. The Defendant made her answer the day after the entry of default, and moved to set aside the default less than three months later. The Court finds that this factor weighs in favor of setting aside the default. As to the second factor the Court finds that Defendant does indeed have a meritorious defense. "To establish a meritorious defense, a party is not required to show an absolute defense." *Mictronics,*

[1] Indeed the Court of Appeals in *Beckham* made it clear that it make no difference whether the entry of default is signed by a judge or by the clerk of court. In *Beckham* the entry of default was actually made by a Circuit Judge after a hearing.

Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). "A meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to essential facts arising from conflicting or doubtful evidence." *Graham v. Town of Loris*, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978). After a careful review of the factual allegations in the Plaintiff's complaint the Court finds that the Defendant has at least one meritorious defense, namely comparative negligence. Therefore, the second *Wham* factor weighs in favor of setting aside the default. Finally, turning to the third factor the Court finds that the Defendant will suffer no prejudice. Plaintiff argues that he will suffer prejudice because he will be forced to litigate the cause of the accident. Plaintiff cites to *Hill v. Dotts*, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001), for this proposition. The Court finds that *Hill* is distinguishable in this case. In *Hill* the Court of Appeals was considering a default judgment, not an entry of default. As the Court of Appeals recognized the factors are construed more liberally when considering an entry of default as opposed to a default judgment. *Id.* at 309-10, 547 S.E.2d at 897 fn. 1. If the Court were to consider the Plaintiff prejudiced simply because the Plaintiff will now have to contest liability this would weigh against setting aside a default in almost all cases. Such a position would be inconsistent with the general policy of South Carolina to resolve issues on the merits instead of on technicalities. *Mictronics*, 345 S.C. at 511, 548 S.E.2d at 226. Therefore, the Court finds that Plaintiff would suffer no appreciable prejudice in this case and finds that the third *Wham* factor weighs in favor of setting aside the default.

CONCLUSION

Therefore, for the reasons stated above the Court finds that Defendant's Motion to Set Aside Default should be **GRANTED.**

AND IT IS SO ORDERED!

April 17, 2019
Marion, South Carolina

/s/ Michael G. Nettles
Presiding Judge, 12th Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Marion
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP3300534

James Washington, Jr
PLAINTIFF(S)

Crystal Denise Dudley
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

After a full and careful consideration of Plaintiff's Motion for Reconsideration of the Court's Order Setting Aside Default the Court finds that it has not been persuaded to alter or amend its prior order. The Court finds that oral arguments are not necessary in this matter. See SCRCP Rule 59(f).

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/30/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

EXHIBIT
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Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Marion Common Pleas

Case Caption: James Washington Jr VS Crystal Denise Dudley

Case Number: 2018CP3300534

Type: Order/Electronic Form 4

So Ordered

s/ The Honorable Michael G. Nettles #2140

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2019-000759
Civil Action No. 2018-CP-33-00534

James Washington, Jr.,.....Appellant,

v.

Crystal Denise Dudley,.....Respondent.

PROOF OF SERVICE

I certify this 21st day of June 2019, that I have served a copy of Memorandum of Respondent upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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June 21, 2019

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: James Washington, Jr. v Crystal Denise Dudley
Appellate Case No.: 2019-000759
C/A No..: 2018-CP-33-00534
TP File No.: 90001.01108

Dear Madam Clerk:

We enclose the original and one copy of Respondent's Memorandum in Support of Dismissal of Appeal and Proof of Service in this case. Please file the original and return a filed copy to our courier.

If you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

TURNER PADGET GRAHAM & LANEY, P.A.

Christel

Christel M. Layton
Paralegal to Alexander S. Hogsette

/cml
Enclosures

Cc: Gene M. Connell, Jr., Esquire