THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
In the Court of Common Pleas for the First Circuit

Walter H. Sanders, Jr., Special Referee

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Case No. 2018-CP-18-01194

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Marjorie Faye Rickenbaker and Steve L. Rickenbaker .................................... Respondents

v.

Schumacher Homes of South Carolina, Inc. ......................................................... Appellant

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# APPELLANT'S REPLY BRIEF

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## ARGUMENT

In their initial brief, Respondents contend that this Court must dismiss this appeal because Schumacher Homes did not first move to vacate the default judgment under Rule 60(b) of the South Carolina Rules of Civil Procedure. The Rickenbakers cite *Winesett v. Winesett*, in which a defaulting former spouse appealed a judgment terminating her right to alimony entered prior to her appearance and absent her participation in any hearing or other proceeding. Under these circumstances, the South Carolina Supreme Court articulated a general rule that prior to taking an appeal, a defaulting party must file a motion under Rule 60(b), SCRCP, seeking to vacate the judgment. However, the *Winesett* court also articulated its justification for this general rule, and the circumstances presented here are distinguishable such that a prerequisite Rule 60(b) Motion would serve no meaningful purpose and should not be applied. This Court should consider Schumacher Homes' appeal on the merits.

### I. This Court may consider this appeal even though Schumacher Homes has not filed a Rule 60(b) motion to vacate the judgment.

Respondents refer to *Winesett v. Winesett* to support a blanket requirement that a party seeking to appeal a default judgment must first file a motion to vacate that judgment under Rule 60(b) as a mandatory prerequisite. However, the circumstances presented to the South Carolina Supreme Court in *Winesett* are readily distinguishable, and the justifications provided in that case simply do not apply here. Consequently, this Court should deny Respondents' request to dismiss this appeal and proceed to evaluate it on the merits.

A party failing to respond or otherwise plead within the time prescribed by Rule 11, SCRCP, has two avenues to seek relief from default: first, prior to the entry of a judgment, the defaulting party may move to lift the entry of default under Rule 55(c); and second, after the judgment has been entered, by seeking to vacate that judgment under the more exacting standard set by Rule 60(b). Rule 60(b), SCRCP; *see also Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). In either case, the party seeking relief from default carries the burden of establishing that it has a reasonable explanation for its failure to answer and should be relieved from default due to some kind of excusable mistake, neglect, unfair surprise, or fraud or other misconduct by the other party. *See* Rules 55(c), 60(b) SCRCP; *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888–89.

In *Winesett v. Winesett*, the South Carolina Supreme Court declined to entertain a direct appeal brought by a defaulting party who had failed to answer, defend, or otherwise appear until after the judgment had been entered. *Winesett*, 387 S.C. at 333–34, 338 S.E.2d at 341. The court held that under the circumstances, the defaulting appellant was required to file a Rule 60(b) motion seeking to vacate the judgment before taking an appeal, and offered three grounds for justification: first, that the appellant lacked any standing to appeal from the judgment because she had failed to appear or answer; second, that the appellant was precluded from raising issues on appeal because they had not been argued or ruled upon below; and third, that because her first appearance was made at the appellate level, the appellant could not provide the court with a record sufficient to allow for adequate review of any of the issues raised. *Id.* Specifically, the Court noted that one of the

appellant's key arguments—that she had never received proper notice of the hearing below—had never been argued before, leaving the appellate court with no record at all to consider in order to evaluate this dispute of fact. *Id.* at 334, 338 S.E.2d at 341. These arguments, which could have been raised in a Rule 60(b) motion to vacate, were instead raised for the first time directly to the appeals court, leaving it with no prior ruling to review and no record regarding the propriety of notice or service or whether the appellant should have been excused from default.

The facts and justifications presently before the court are easily distinguished. First, Appellant Schumacher Homes is not appearing for the first time through an appeal. Counsel for the Appellant appeared, requested certain relief, and participated in the damages hearing before the special referee prior to the entry of judgment. This undisputed procedural fact negates the first justification offered by the *Winesett* court: Appellant appeared prior to the entry of the default judgment and actively participated in the damages proceedings, negating any argument that Appellant had waived any standing at all to take a position in court.

Second, Appellant in this case does not seek to raise new issues that were not argued below. All of Appellant's arguments on appeal were heard and ruled on by the Special Referee. Significantly, Appellant here is not seeking relief from default based on any deficiencies in service, notice, or due to any surprise, excusable neglect, or any of the other specifically enumerated circumstances properly raised by a Rule 60(b) motion. To the contrary, Schumacher Homes has not and does not contend that it was entitled to relief from default under even the permissive "good cause" standard applied under Rule 55(c). Obligating Appellant to move for relief to which it acknowledges it is not entitled before

permitting it to seek appeal on legitimately contested issues would constitute a waste of judicial economy, serving no meaningful purpose. The genuinely disputed issues Schumacher Homes seeks to have reviewed on appeal were heard, argued, and ruled upon below. The general rule precluding an appellant from raising an issue for the first time on appeal does not apply here, and this Court should not require an appealing party to undergo unnecessary procedural formalities.

Third, unlike the *Winesett* appellant, Schumacher Homes can and has produced an adequate record for appellate review. Schumacher Homes appeared prior to the entry of the default judgment, requested and was denied certain relief, and participated in the hearing on that relief. Schumacher Homes is not attempting to that argue it is not in default, or that it should have been granted relief from default and permitted to file an Answer and proceed on the merits. To the contrary, Appellant concedes that it failed to timely answer or otherwise defend the Rickenbakers' lawsuit, and that it can show no legally sufficient explanation or good cause for doing so. Instead, Appellant seeks to appeal specific rulings that were raised, heard, and preserved for appeal before the Special Referee. The third and final justification articulated by the *Winesett* court—that a defaulting party cannot produce an adequate record for review—does not apply.

The *Winesett* court addressed the procedural requirements when a defaulting party who has failed to appear, raise contested issues before the lower tribunal, or create a record for review, seeks to directly appeal a default judgment. This matter involves a party in default who nevertheless made an appearance below, participated in lower proceedings, raised and argued contested issues, and now seeks appellate review of holdings and specific findings made by the Special Referee. These distinctions are not merely procedural

formalities: the justifications for *Winesett*'s prerequisite Rule 60(b) motion do not exist in this case, and this Court should proceed to consider Schumacher Homes' appeal on the merits.

II. Even if the Order of Reference had offered a reason to appoint the Special Referee in lieu of an available Master-in-Equity, it was nevertheless improper to appoint a Special Referee situated outside of the county where the action is pending.

Respondents argue that the limitations incorporated into S.C. Code Ann. § 14-11-60, authorizing appointment of a special referee in cases of a vacancy or disqualification of the master-in-equity or for "any other reason for which cause can be shown," is superseded by Rule 53 of the South Carolina Rules of Civil Procedure, which imposes no such limitation or requirement of an articulated reason. Respondents' interpretation of the interplay between these two statutes completely overlooks the language of Rule 53(a), SCRCP, which specifically identifies and incorporates by reference the requirements of S.C. Code Ann. § 14-11-60. *See* Rule 53(a), SCRCP ("The term 'special referee' means a member of the South Carolina Bar to whom a matter has been referred *under S.C. Code Ann. § 14-11-60*") (emphasis added). Rule 53 does not contradict or supplant Section 14-11-60; to the contrary, it incorporates its language and requirements by restricting the definition of a "Special Referee" to only those individuals appointed in accordance with its limitations and parameters. The South Carolina Rules of Civil Procedure do not negate the statutory framework permitting the appointment of a special referee only where there is an absent or disqualified master-in-equity, or for some other reason or cause; to the contrary, they reinforce the position that a "special referee" appointed outside of the parameters established by Section 14-11-60 is not a special referee at all.

However, even if the Respondents can show that this matter was properly referred to the Special Referee, despite the presence of a competent master-in-equity presiding in Dorchester County and in the absence of any articulated reason or cause, the Order of Referral in this matter was nevertheless improper because both the special referee statute and the South Carolina Rules of Civil Procedure contain an implied requirement that any special referee appointed to execute the powers of a master-in-equity be situated in the county where the action is pending.

Respondents correctly note that the South Carolina Rules of Civil Procedure are the prevailing authority over rules of practice and procedure, and that statutes must be construed in light of their purpose and framework, "with reference to the whole system of law of which they form a part." Resp'ts Initial Br. at 7 (citing *Roche v. Young Bros., Inc. of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998)). This being the case, it would be improper to read Rule 53, SCRCP and Section 14-11-60 independently of other applicable statutes and case law governing where pending disputes must be adjudicated. The South Carolina legislature has imposed statutory limitations that plainly restrict the county or location where disputes may be tried. *See* S.C. Code Ann. §§ 15-7-10 *et seq.* Reading the rules governing procedure and referral to special referees independently of these restrictions and the limitations on venue would disregard this principle of statutory construction, as articulated by Respondents.

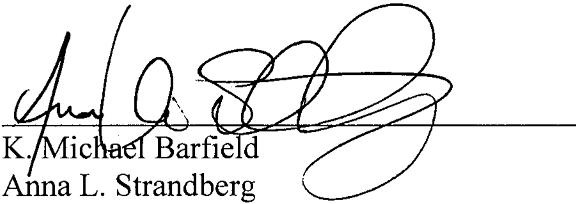
Respondents elected to bring suit in Dorchester County, and specifically alleged that "[v]enue of the case is proper in Dorchester County, South Carolina pursuant to S.C. Code Ann. § 15-7-30 as it is the county where the most substantial part of the act or omission giving rise to the cause of action occurred." Pl.'s Am. Compl. at ¶ 3. As

Schumacher Homes concedes that it is in default, this allegation is deemed admitted and must be taken as true. *See Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 546, 633 S.E.2d 497, 500 (2006). But when issuing the Order of Reference, the Chief Administrative Judge not only bypassed the sitting master-in-equity for Dorchester County, but reached beyond the proper and correct venue altogether to appoint a special referee elsewhere, in Allendale County. Nothing in the allegations of Respondents' Amended Complaint suggests that Allendale County is a proper venue for these proceedings. Nothing in the Order of Reference suggests why it was proper for the Chief Administrative Judge to disregard South Carolina's clearly delineated statutory and common law regarding venue to reach outside of Dorchester County to assign a special referee. Nor should Respondents be allowed to, in effect, retroactively amend their Complaint following Appellant's default to modify their own allegations regarding the proper venue and County for adjudication of this dispute. Even assuming without admitting that a special referee may be appointed despite the availability of a master-in-equity and for no articulated cause or reason, it was nevertheless improper for the Court to appoint an adjudicator and fact finder situated outside of the County serving as the undisputed proper venue for this proceeding.

## CONCLUSION

For the foregoing reasons and those incorporated into Appellant's Initial Brief on Appeal, Appellant Schumacher Homes of South Carolina, Inc., respectfully requests that the Order of Reference to Special Referee be voided, vacated, and/or set aside; that the Special Referee be disqualified from any further handling of this case; and that the case be returned to the Circuit Court for further disposition.

Barnwell Whaley Patterson & Helms, LLC



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