THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge
Robert Hood, Circuit Court Judge

Case No. 2017-CP-40-00159
Appellate Case No.: 2016-002308

Leslie Rainey-Gilmore, Respondent,

v.

Sergio Cruz and Sabrina Cruz Appellants.

INITIAL BRIEF OF APPELLANTS

Michael T. Coulter (SC Bar #15177)
Raymond D. Turner (SC Bar #101593)
Michelle N. Endemann (SC Bar #79894)
1164A Woodruff Road (29607)
PO Box 6728
Greenville, SC 29606
T: 864.232.4400

Attorneys for Appellants

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II. STATEMENT OF THE CASE

This matter arises out of a motor vehicle accident that occurred on or about March 15, 2015. On January 12, 2017, Leslie Rainey-Gilmore brought an action alleging negligence against Sergio Cruz and his wife Sabrina Cruz and negligent entrustment of a motor vehicle against Sabrina Cruz. [Complaint] The law firm of Clarkson Walsh and Coulter was retained to represent Mr. and Mrs. Cruz, and timely filed an answer to the complaint on their behalf on February 17, 2017. [Letter of Representation and Answer] A motion to dismiss the negligent entrustment cause of action against Mrs. Cruz was filed on August 17, 2017. [Motion to Dismiss] The parties participated in written discovery, took depositions, participated in motion hearings, and otherwise prepared the case for trial. [See Consent Scheduling Orders] On January 25, 2018 an amended complaint was filed. [Amended Complaint] At this time, Richland County was not utilizing the electronic filing system. Counsel for the Appellants were never served with the amended complaint. Instead, without notice to defense counsel, a process server was sent by counsel for Mr. Rainey-Gilmore to serve Mr. and Mrs. Cruz with the amended complaint. [Affidavits of Service, Plaintiff's Responses to Requests for Admissions] As defense counsel was not aware of the filing of the amended complaint or the service of the same on Mr. and Mrs. Cruz, no answer to the amended complaint was filed or served.

On July 25, 2018, an application for entry of default was filed by Ms. Rainey-Gilmore's counsel. [Application for Entry of Default] The application included as exhibits, *inter alia*, a copy of the amended complaint and the affidavit of serve of the same on Mr. and Mrs. Cruz. [See Exhibits to Application for Entry of Default] This was the first time defense counsel had seen either document. On July 26, 2018, a proposed order granting the application for entry of default was filed by counsel for Ms. Rainey-Gilmore. [Filing Notice for Proposed Order] The proposed order was not sent to defense counsel before it was filed. On the same day the proposed order was submitted, Judge Hood signed and filed the proposed order of default. [Order/Entry of Default] The next day, July 27, 2018, counsel for Mr. and Mrs. Cruz filed a motion to set aside the entry of default. [Motion to Set Aside Default] The motion was heard on October 8, 2018 by Judge Manning. At the hearing, Judge Manning stated:

> THE COURT: Why didn't you go back in front of Judge Hood? He's the one that signed the order. As far as I'm concerned, under Rule 4 I can't go back and undo what he did absent some good reason. I mean, if a judge can sign an order granting him default, then I can't change Judge
> Hood's order without some ---
> ...
> THE COURT: You're familiar with Rule 4. I can't change what another judge has done, whether it's wrong or not. You understand that, don't you? [Transcript of Hearing on Motion to Set Aside Default, pp. 6-7]

The motion was denied by Judge Manning by Order dated November 15, 2018. [Order Denying Motion to Lift Default] On November 20, 2018, defense counsel filed a motion for reconsideration. [Motion to Reconsider] Defense counsel simultaneously filed a notice of appeal [Initial Notice of Appeal], which was dismissed as interlocutory by this Court. [Order of Dismissal] The motion for reconsideration was denied by Judge Manning without hearing on January 3, 2019. [Order Denying Motion for Reconsideration]

A default damages hearing was scheduled before Judge Hood on March 11, 2019. At the hearing, defense counsel objected to going forward with the damages hearing on the ground that the entry of default against Mr. and Mrs. Cruz was not proper. [Transcript of Damages Hearing, pp. 3-6] Judge Hood allowed the damages hearing to go forward, stating:

> THE COURT: I mean, at this point in time, a motion for default was entered. A motion to set aside the default was heard by Judge Manning and that was ruled upon and that motion was denied. I don't have the legal authority at this point in time to undo the default, but I'm going to let you create your record. [Transcript of Damages Hearing, p. 5]

An order of default judgment in favor of Ms. Rainey-Gilmore in the amount of $25,000.00 was filed by Judge Hood on April 18, 2019. [Order of Default Judgment]

On April 18, 2019, Appellants served their Notice of Appeal on counsel for Ms. Rainey-Gilmore.

III. STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies within the discretion of the trial judge. Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162–63, 375 S.E.2d 321, 322–23 (Ct.App.1988). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997).

IV. ARGUMENT

A. Appellants are entitled to Relief Under Rule 55(c) and Rule 60(b)

Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Sundown Operating

Co. v. Intedge Indus., Inc., 383 S.C. 601, 607–08, 681 S.E.2d 885, 888 (2009). Rule 55(c), SCRCP. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Id. 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. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct.App.1989).

1. Appellants have demonstrated "good cause".

Appellants have demonstrated "good cause" for the failure to respond to the amended complaint. The complaint in this action was filed on January 12, 2017. Defense counsel informed counsel for Respondent that they represented Appellants by way of letter dated February 9, 2017, and an answer on behalf of the Appellants was filed on February 17, 2017. [See Answer and Representation letter] An amended complaint was filed on behalf of Respondent on January 25, 2018, but Respondent's counsel never informed the undersigned that an amended pleading was filed.

No motion to amend the complaint was filed. Therefore, the amended is invalid. Rule 15(a) SCRCP states as follows:

> **(a) Amendments.** A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.

The original summons and complaint was filed on January 12, 2017. [Complaint] Appellants were served by personal service on January 14, 2017 and served a timely answer on Respondent's counsel on February 9, 2017, which was filed on February 17, 2017. [Answer] This was the last responsive pleading filed in this action. Therefore, the complaint could only have been amended with leave of court or the written consent of Appellants. Neither of the foregoing is present here.

The amended pleading was never served on Appellants' counsel, in violation of Rule 5(b)(1) SCRCP. Instead, without notice to defense counsel, a process server was sent by counsel for Mr. Rainey-Gilmore to serve Appellants with the amended complaint. [Affidavits of Service, Plaintiff's Responses to Requests for Admissions] Rule 5(b)(1) SCRCP states, "[w]henever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court." Respondent's counsel was fully aware that, on the date of service of the amended complaint, May 20, 2018, Appellants were represented by counsel and had been for over one year. [Answers to Requests for Admissions] Despite knowledge of the defense counsels' representation of Appellants, Respondent's counsel made direct contact with Appellants through the hired agent. [Affidavits of Service] Respondent's counsel did not notify defense counsel that they had made contact with Appellants or that they served Appellants with the amended complaint. [Answers to Requests for Admissions] Further, Rule 4.2 of the South Carolina Rules of Professional Conduct states that: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order". In this instance, Respondent's counsel had no such authority to contact the defendants.

Three depositions of the parties were taken, Sabrina Cruz's motion to dismiss was heard and taken under advisement by the court, and mediation was completed between February of 2017 when Appellant's answer was filed and the date Respondent's counsel filed the amended complaint. Respondent's counsel contacted defense counsel in May of 2018, (approximately four (4) months after the amended complaint was filed), requesting consent to an Amended Scheduling Order, wherein this case would not be called for trial before August 31, 2018. Defense counsel consented, and the Amended scheduling Order was filed on May 18, 2018. [Amended Scheduling Order] Throughout these discussions, Respondent's attorney never notified defense counsel that an amended complaint had been filed or that an answer was due. Appellants have demonstrated "good cause".

2. Appellant's motion for relief was timely.

On July 25, 2018, an application for entry of default was filed by Ms. Rainey-Gilmore's counsel. [Application for Entry of Default] The application included as exhibits, inter alia, a copy of the amended complaint and the affidavit of serve of the same on Mr. and Mrs. Cruz. [See Exhibits to Application for Entry of Default] This was the first time defense counsel had seen either document. On July 26, 2018, a proposed order granting the application for entry of default was filed by counsel for Ms. Rainey-Gilmore. [Filing Notice for Proposed Order] The proposed order was not sent to defense counsel before it was filed. On the same day the proposed order was submitted, Judge Hood signed and filed the proposed order of default. [Order/Entry of Default] The next day, July 27, 2018, counsel for Mr. and Mrs. Cruz filed a motion to set aside the entry of default. [Motion to Set Aside Default] Appellants sought relief from the entry of default within 48 hours of when the application for entry of default was filed. Accordingly, Appellants' request for relief from default was timely.

3. Appellants have a meritorious defense.

This matter had been in active litigation for over 17 months when the default was entered against Appellants. Appellants answered an asserted seven affirmative defenses to Respondent's claims and actively defended against Respondent's allegations of negligence and negligent entrustment and filed a motion to dismiss certain claims that, on information and belief, was still under advisement when the default was entered. Appellants actively disputed the amount and extent of the damages claimed by Respondent, and Respondent never moved to dismiss or obtain summary judgment against the Appellants in the 17 month duration of the case. In fact, the amended complaint asserted a cause of action under the Family Purpose Doctrine, in response to defenses raised in Defendant's motion to dismiss. [See Motion to Dismiss and Amended Complaint]

4. Respondent suffered no prejudice.

Respondent suffered no prejudice as a result of the failure to respond to the amended complaint as Respondent had already been provided a responsive pleadings to the original complaint, had been provided with written discovery response and document production from Appellants, and had already taken Appellants depositions. The case continued to progressive after the filing of the amended complaint, including the entry of consent scheduling order and order related to the trial date of the case. [Answer, Amended Consent Scheduling Order, Order of Continuance] Further, the gravamen of the Respondent's complaint did not change with the amendment. This case is and has always been a negligent action arising out of a motor vehicle accident. [Complaint, Amended Complaint] Therefore, Respondent suffered no prejudice. Had defense counsel been notified of the filing of the amended complaint or served with a copy of the same, a timely response would have been served as it was in response to the original complaint.

In Roberson v. Southern Finance of S.C., Inc., 365 S.C. 6, 9–10, 615 S.E.2d 112, 114 (2005), the court held that the because the Appellant failed to make a motion for relief from default until after the entry of default judgment, they were not entitled to relief under Rule 55(c) SCRCP. In this case, Appellants moved to set aside the default within 48 hours of the application for default and within 24 hours of the entry of default by Judge Hood. [Motion to Set Aside Default] Further, Appellants protected their objections to the default by filing both a motion to reconsider as well as an appeal with this court. Therefore, Appellants believe they are entitled to relief pursuant to Rule 55(c), SCRCP.

5. Appellants are also entitled to relief under Rule 60(b)

Rule 60(b) SCRCP allows relief from default judgment under the following circumstances: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 17, 594 S.E.2d 478, 481–82 (2004).

Appellants are entitled to relief under Rule 60(b)(1) and (3) SCRCP, as the Respondent violated Rules 15 and 5 of the SCRCP as well as Rule 4.2 of the South Carolina Rules of Professional Conduct in the filing and service of the amended complaint. The only explanation is that it do so in order to attempt to secure a default judgment against Appellants through violations of the rules. As is discussed more fully above, the Respondent did not seek leave or court or written consent to file the amended complaint. Respondent did not serve the amended complaint on defense counsel, nor did Respondent's counsel notify defense counsel of the filing despite months of frequent contact throughout between the filing of the amended complaint on January 25, 2018

and the application for the entry of default on July 25, 2018. Further, as is discussed above, Appellants' motion for relief from default was timely as it was filed within 24 hours of the entry of default. [Motion to Set Aside Default]

Accordingly, the entry of default must be reversed and this case remanded for a trial on the merits.

B. The Lower Court Abused its Discretion in Failing to Set Aside the Entry of Default Against Appellants

The lower court abused its discretion as it failed to apply the "good cause" standard and did not consider the factors under Rule 55(c) SCRCP. The entirety of Judge Manning's "findings of fact and conclusions of law" in the Order denying Appellant's motion to set aside default states as follows:

1. Defendant is in Default having failed to respond to this action.

2. Defendant's Motion to Set Aside the Default is denied.

3. Plaintiff is entitled to a Damages Hearing to be scheduled by the Court.

[Order Denying Motion to Set Aside Default] The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App.1995). However, the Order is completely void of any analysis of good cause or the Rule 55(c) factors. Further, at the hearing, the court's analysis focused on the fact Judge Hood had signed the entry of default against Appellants. At the hearing, Judge Manning stated:

> THE COURT: Why didn't you go back in front of Judge Hood? He's the one that signed the order. As far as I'm concerned, under Rule 4 I can't go back and undo what he did absent some good reason. I mean, if a judge can sign an order granting him default, then I can't change Judge
> Hood's order without some ---
> ...

> THE COURT: You're familiar with Rule 4. I can't change what another judge has done, whether it's wrong or not. You understand that, don't you? [Transcript of Hearing on Motion to Set Aside Default, pp. 6-7]

However, although Judge Hood's July 26, 2018 Order entering default against the Appellants is titled an "Order of Default Judgment", it is simply an entry of default. The entry of default is an official recognition of the failure to appear or otherwise respond, but is not an order or judgment by default. Beckham v. Durant, 300 S.C. 329, 331, 387 S.E.2d 701, 703 (Ct. App. 1989); see also Thynes v. Lloyd, 294 S.C. 152, 153–54, 363 S.E.2d 122, 123 (Ct. App. 1987)("the entry of default is a purely ministerial act which the clerk [i]s required to perform once the default was made to appear" by affidavit or otherwise.) Therefore, Judge Manning was able to hear Appellant's motion to set aside the entry of default. If he was not authorized to hear the motion, he should not have entered an order denying it, the motion should have simply been added to Judge Hood's docket. Denying the Appellants' motion without any analysis of the legal standard for relief and any evidentiary support constitutes an error of law and an abuse of discretion. See In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997).

Further, at the default damages hearing, Judge Hood's reasoning echoed that of Judge Manning. Judge Hood allowed the damages hearing to go forward over Appellants' objection, stating:

> THE COURT: I mean, at this point in time, a motion for default was entered. A motion to set aside the default was heard by Judge Manning and that was ruled upon and that motion was denied. I don't have the legal authority at this point in time to undo the default, but I'm going to let you create your record. [Transcript of Damages Hearing, p. 5]

Based on Judge Manning's analysis, only Judge Hood could hear Appellants' requests for relief from default. However, when presented with them at hearing, Judge Hood claimed he did not have authority to set aside the default because of Judge Manning's Order. Rule 55(c) should be "liberally construed to promote justice and dispose of cases on the merits." Melton v. Olenik, 379 S.C. 45,

54, 664 S.E.2d 487, 492 (Ct. App. 2008). Therefore, the entry of default and default judgment against Appellants' motion be reversed and the case remanded for trial.

V. CONCLUSION

Respondent's amended complaint was improperly filed without leave of court over a year after the original complaint was filed and eleven months after an answer to the complaint was served by Appellants. Further, even if the amended complaint was properly filed, it was not properly served on Appellants' counsel as required by Rule 5(b)(1) SCRCP. The lower court abused its discretion in failing to conduct any analysis under the applicable rules. Therefore, this Court should reverse the entry of default and default judgment against the Appellants and remand the case for a trial on the merits.

Respectfully Submitted by:

CLARKSON, WALSH & COULTER, P.A.

Michael T. Coulter (SC Bar #15177)
1164A Woodruff Road (29607)
PO Box 6728
Greenville, SC 29606
T: 864.232.4400
mcoulter@clarksonwalsh.com

Raymond D. Turner (SC Bar #101593)
T: 843-203-1660
rturner@clarksonwalsh.com
Michelle N. Endemann (SC Bar #79894)
T: 843-936-5043
mendemann@clarksonwalsh.com
1233 Ben Sawyer Blvd., Ste 900 (29464)
PO Box 2219
Mount Pleasant, SC 29465

Attorneys for Appellants

Mt. Pleasant, SC

August 9, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge
Robert Hood, Circuit Court Judge

Case No. 2017-CP-40-00159
Appellate Case No.: 2016-002308

Leslie Rainey-Gilmore,

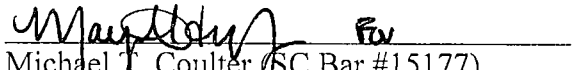
Respondent,

v.

Sergio Cruz and Sabrina Cruz, Appellants.

PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter on Appeal on Leslie Rainey-Gilmore by depositing a copy of it in the United States Mail, postage prepaid, on August 9, 2019, addressed to her attorney of record, Tony Dessausure, 1928 Barnwell Street, Columbia, South Carolina 29201.



Michael T. Coulter (SC Bar #15177)
1164A Woodruff Road (29607)
PO Box 6728
Greenville, SC 29606
T: 864.232.4400
mcoulter@clarksonwalsh.com

Raymond D. Turner (SC Bar #101593)
T: 843-203-1660
rturner@clarksonwalsh.com

Michelle N. Endemann (SC Bar #79894)
T: 843-936-5043
mendemann@clarksonwalsh.com
1233 Ben Sawyer Blvd., Ste 900 (29464)
PO Box 2219
Mount Pleasant, SC 29465

Attorneys for Appellants

Mt. Pleasant, SC

August 9, 2019

CLARKSON | WALSH | COULTER
Attorneys at Law

Michelle N. Endemann
mendemann@clarksonwalsh.com
(843) 936-5043

August 9, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court for the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Leslie Rainey Gilmore vs. Sergio and Sabrina Cruz
C.A. No.: 2017-CP-40-00159
Appellate Case No.: 2019-000679

Dear Ms. Kitchings:

Enclosed herewith, please find an original and one (1) copy of the Appellants' Initial Brief and Designation of Matter on Appeal with the Proof of Service for the same. Please file the originals in your office and return the filed copies to me in the self-addressed stamped envelope provided for your convenience.

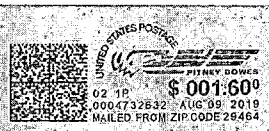
Should you have any questions or require further information, please do not hesitate to contact me.

Very truly yours,

Clarkson, Walsh & Coulter, P.A.

FCV
Michelle N. Endemann

MNE/kea
Enclosures
cc: Tony Dessausure, Esq. (w/enclosures)



CWC

CLARKSON | WALSH | COULTER
Attorneys at Law

Post Office Box 2219
Mount Pleasant, SC 29465

RECEIVED
AUG 12 2019
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court for the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211