THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Circuit Court Judge

Case No. 2017-CP-10-6176

Appellate Case No. 2019-001101

Samantha L. Antley, Plaintiff, ... Respondent,

v.

Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar
and Preston Yelverton, Defendants,

of Whom,

Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar is the ..... Appellant.

INITIAL BRIEF OF APPELLANT

McAngus Goudelock & Courie
Helen F. Hiser
Benjamin B. Davis
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Thomas E. Lydon
1320 Main Street, 10th Floor
P.O. Box 12519
Columbia, South Carolina 29211

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL vi

STATEMENT OF THE CASE 1

FACTUAL BACKGROUND

I. Facts Pertaining to the Incident 4

II. Events Prior to Plaintiff's Filing of Action 5

III. Post-Filing Background 8

STANDARD OF REVIEW 13

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO SET ASIDE DEFAULT 14

A. The Circuit Court's conclusion that there is no evidence that the Mason Law Firm "unequivocally and affirmatively" stated they represented Defendant in this matter lacks evidentiary support 16

B. The Circuit Court's conclusion that Defendant failed to show good cause lacks evidentiary support and is based on legal error 21

C. The Circuit Court committed numerous legal errors which independently and combined require reversal 26

II. THE CIRCUIT COURT ERRED IN FAILING TO GRANT DEFENDANT'S RULE 60(b) MOTION 29

III. THE CIRCUIT COURT ERRED IN FAILING TO GRANT DEFENDANTS' RULE 59(e) MOTION 35

A. The Court erred in awarding Plaintiff future damages in the amount of $418,630.00 36

B. The Court committed several errors in awarding punitive damages 37

C. The Court erred by failing to inquire into Defendant's ability to pay before awarding punitive damages 40

IV. THE MASTER IN EQUITY ERRED IN APPOINTING A RECEIVER FOR DEFENDANT 41

A. In the absence of any evidence of property or assets that could be applied to the judgment, the Master erred in appointing a receiver 41

B. The Master erred in refusing to require Plaintiff to post a bond in connection with the appointment of the receiver 43

C. CONCLUSION 44

TABLE OF AUTHORITIES

CASES

Andrick Development Corp. v. Maccaro,
280 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984).....42

Bodkin v. Bodkin,
388 S.C. 203, 694 S.E.2d 230 (Ct. App. 2010).....35

Branham v. Ford Motor Co.,
390 S.C. 203, 701 S.E.2d 5 (2010).....40

Caldwell v. Wiquist,
402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013).....14, 20

Canopius US Ins., Inc. v. Middleton,
No. 2:15-cv-03673-DCN, 2016 U.S. Dist. LEXIS 3372,
2016 WL 128517 (D. S.C. Jan. 12, 2016).....13, 14

Colleton Prep. Acad., Inc. v. Hoover Universal,
616 F.3d 413 (4th Cir. 2010).....*passim*

Edwards v. Ferguson,
254 S.C. 278, 175 S.E.2d 224 (1970).....13, 14, 22, 30

Elam v. South Carolina Dept. of Transp.,
361 S.C. 9, 602 S.E.2d 772 (2004).....14

Fairchild v. South Carolina Dep't of Transp.,
398 S.C. 90, 727 S.E.2d 407 (2012).....37, 38

ITC Commer. Funding, LLC v. Crerar,
393 S.C. 487, 713 S.E.2d 335 (Ct. App. 2011).....26

Jackson v. Swordfish Invs., L.L.C.,
365 S.C. 608, 620 S.E.2d 54 (2005).....28, 34

Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.,
275 S.C. 556, 274 S.E.2d 287 (1981).....29, 30, 34

Limehouse v. Hulsey,
404 S.C. 93, 744 S.E.2d 566 (2013).....34

Lombrana-Perez v. Sheffield-Wilkes,
No. 6:16:cv-1842-BHH, 2018 U.S. Dist. LEXIS 645,
2018 WL 272276 (D. S.C. Jan. 2, 2018) 20, 26

McClurg v. Deaton,
380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008).....22, 25, 31, 32

Melton v. Olenik,
379 S.C. 45, 664 S.E.2d 487 (Ct. App. 2008).....14, 22, 28

Mictronics, Inc. v. South Carolina Dep't of Rev.,
345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001).....27, 33

Midlands Utility, Inc. v. S.C. Dept. of Health and Environmental Control,
301 S.C. 224, 391 S.E.2d 535 (1989) 42

Mitchell Supply Co. v. Gaffney,
297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988).....13, 25, 30, 31, 33

Myers v. Food Town Stores, Inc.,
276 S.C. 571, 281 S.E.2d 108 (1981) 25, 30, 31, 33

Pacific Ins. Co. v. American Nat'l Fire Ins. Co.,
148 F.3d 396 (4th Cir. 1998) 14, 35

Regions Bank v. Owens,
402 S.C. 642, 741 S.E.2d 51 (Ct. App. 2013).....15

Richardson v. P.V., Inc.,
383 S.C. 610, 682 S.E.2d 263 (2009) 13, 24

Ricks v. Weinrauch,
293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987).....14, 22, 24, 28

Rochester v. Holiday Magic, Inc.,
253 S.C. 147, 169 S.E.2d 387 (1969.....30, 33

Sears, Roebuck & Co. v. Ramey,
170 Ga. App. 873, 318 S.E.2d 740 (Ga. Ct. App. 1984) 24

Strickland v. Consolidated Energy Prods. Co.,
274 S.C. 554, 265 S.E.2d 682 (1980) 25, 30, 31, 33

Sulton v. Healthsouth Corp.,
400 S.C. 412, 734 S.E.2d 641 (2012) 40

Sundown Op. Co. v. Intedge Indus.,
383 S.C. 601, 681 S.E.2d 885 (2009) 15, 24, 30

Top Value Homes v. Harden,
319 S.C. 302, 460 S.E.2d 427 (Ct. App. 1995) 15

Vasiliades v. Vasiliades,
231 S.C. 366, 98 S.E.2d 810 (1957) 42

Wham v. Shearson Lehman Bros., Inc.,
298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989) 13, 15, 19, 26

Wilder v. Blue Ribbon Taxicab Corp.,
396 S.C. 139, 719 S.E.2d 703 (Ct. App. 2011) 28, 29

Williams v. Vanvolkenburg,
312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994) 24

STATUTES & RULES

S.C. Code Ann. § 15-27-130 30
S.C. Code Ann. § 15-27-150 35
S.C. Code Ann. § 15-65-10 ..... 42, 43
S.C. Code Ann. § 15-65-90 ..... 43, 44
Rule 55(c), SCRCP ..... *passim*
Rule 59(e), SCRCP ..... *passim*
Rule 60(b), SCRCP ..... *passim*
Rule 803(6), SCRE 39
Rule 4.2, RPC, Rule 407, SCACR 25

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO SET ASIDE DEFAULT?

II. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO GRANT DEFENDANT'S RULE 60(B) MOTION?

III. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO GRANT DEFENDANTS' RULE 59(E) MOTION?

IV. WHETHER THE MASTER IN EQUITY ERRED IN APPOINTING A RECEIVER FOR DEFENDANT?

STATEMENT OF THE CASE

This appeal arises out of an altercation that occurred on or about September 24, 2015 in Mount Pleasant, South Carolina. On that date, Plaintiff Samantha Antley was a patron at The Shelter Kitchen & Bar. Plaintiff filed a Complaint on December 4, 2017 in the Charleston County Court of Common Pleas, and then an Amended Complaint on December 11, 2017 against Defendants Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar ("Defendant" or "The Shelter"), and Preston Yelverton ("Yelverton"), alleging that Yelverton assaulted her after both were asked to leave The Shelter.[1]

On January 11, 2018, Plaintiff filed an Affidavit of Service, indicating that the Complaint had been served on The Shelter's authorized agent, Ashley Berry, on or about December 12, 2017. (Affidavit of Service, filed Jan 11, 2018). Subsequently, on January 30, 2018, Plaintiff moved for entry of default, (Affidavit of Default and Motion for Default Judgment, filed January 30, 2018), which the Court granted in an Order filed on February 5, 2018. (Order of Default and Hearing to Ascertain Damages, filed February 5, 2018) ("Entry of Default").

On March 8, 2018, Defendant moved both to set aside the Entry of Default, (Defendant Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar's Notice of Motion and Motion to Set Aside Entry of Default and Incorporated Memorandum of Law and Exhibits in Support, filed March 8, 2018) ("Motion to Set Aside Default"), and to continue the damages hearing until its Motion to Set Aside Default could be heard. (Defendant Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar's Notice of Motion and Motion to Continue the Damages Hearing Set for March 19, 2018 Until Said Defendant's Motion to Set Aside Entry of Default Can be Heard by the Court, filed March 8, 2018) ("Motion to Continue").

---

[1] Plaintiff dismissed Defendant Yelverton without prejudice on April 10, 2018. (Notice of Dismissal Without Prejudice, filed April 10, 2018).

The pending motions were heard by the Honorable D. Craig Brown on December 14, 2018. (Dec. 14 Tr.). The Court declined to allow Plaintiff's counsel to submit evidence in the form of testimony by one of her counsel, Edward L. Phipps, and suggested Mr. Phipps could submit an affidavit and Defendant would have three days to respond to that affidavit. (Dec. 14 Tr. 13:7-14; 31:6-18). Subsequently, on December 19, 2018, Plaintiff filed an affidavit by Phipps, (Affidavit of Edward L. Phipps, filed December 19, 2018) ("Phipps Affid."), and, on January 4, 2019, counsel for The Shelter filed a responding affidavit. (Second Affidavit of Salah H. Hibri, filed January 4, 2019). On January 15, 2019, the Circuit Court denied the Motion to Set Aside Default. (Order Denying Defendant's Motion to Set Aside Default, filed January 15, 2019) ("Default Order").

On March 13, 2019,[2] a damages hearing was held before the Honorable William H. Seals, Jr. Subsequently, on March 26, 2019, the Court entered an Order of Judgment, awarding Plaintiff actual damages in the amount of $432,025.00 (comprised of $13,305.00 in past medicals, $18,010.00 in future medicals, and $400,620 for pain and disfigurement that Plaintiff "may suffer" for the rest of her life). The Court also awarded punitive damages in the amount of $450,000.00 for a total of $882,025.00. (Order of Judgment, filed March 26, 2019) ("Order of Judgment").

Defendant moved to alter or amend the Order of Judgment, (Defendant Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar's Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Rule 59(e), SCRCP, and Memorandum in Support, filed April 5, 2019) ("Rule 59(e) Motion"), and for relief from the default judgment. (Defendant Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar's Notice of Motion and Motion for Relief Pursuant to Rule 60(b),

[2] On February 25, 2019, Benjamin B. Davis entered his appearance on behalf of the Defendant. (Notice of Appearance, filed Feb. 25, 2019).

SCRCP, and Memorandum in Support, filed April 5, 2019) ("Rule 60(b) Motion"). The Court denied both motions in separate orders filed June 12, 2019. (Order Denying Defendant Dart Shelter, LLC's Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP, filed June 12, 2019) (Order Denying Defendant Dart Shelter, LLC's Motion to Alter or Amend Pursuant to Rule 60(b), SCRCP, filed June 12, 2019). On July 2, 2019, Defendant appealed these two orders, as well as the January 15, 2019 Default Order and the March 26, 2019 Order of Judgment.

After obtaining the judgment, Plaintiff's counsel sent an Execution of Judgment to the Charleston County Sheriff's Department. (Execution Against Property, dated July 10, 2019). On July 17, 2019, the sheriff returned the Execution with a statement that the judgment was "NULLA BONA PER ATTORNEY'S REQUEST." (Return of Execution, dated July 17, 2019). Plaintiff's counsel then filed a Motion for Supplemental Proceedings in which she requested the issuance of a Rule to Show Cause and a hearing to examine Defendant regarding its assets. (Motion for Supplemental Proceedings, dated July 26, 2019). A Rule to Show Cause was issued by the Court and filed on August 7, 2019. (Rule to Show Cause, filed August 7, 2019). Plaintiff's counsel then filed a Motion for Attachment and Appointment of a Receiver. (Notice of Motion and Motion for Attachment and Appointment of Receiver, dated August 21, 2019).

The hearing on the Rule to Show Cause and Motion to Appoint Receiver was held on September 13, 2019. At the hearing, the Master in Equity granted the Motion to Appoint Receiver and denied Defendant's request that Plaintiff be required to post a bond. On September 18, 2019, the Master in Equity filed a form Order appointing the receiver. (Order, dated Sept. 18, 2019). On October 18, 2019, Defendant filed a Notice of Appeal in connection with the form Order.

Thereafter, on October 25, 2019, the Master entered a comprehensive Order Appointing Receiver, which set forth the terms and conditions of the receivership. (Order Appointing Receiver, entered Oct. 25, 2019). The Order Appointing Receiver did not address the issue of whether Plaintiff was required to post a bond and, on November 7, 2019, Defendant filed a Motion to Alter or Amend the Order Appointing Receiver. A hearing on the Motion to Alter or Amend, as well as other motions, was held on November 13, 2019. Following the hearing, the Master filed an Order Relating to Various Motions on November 27, 2019, in which he specifically denied Defendant's request that Plaintiff be required to post a bond as a condition of the receivership. On December 3, 2019, Defendant filed an Amended Notice of Appeal, in order to include both the comprehensive Order Appointing Receiver and the Order Relating to Various Motions in its appeal.

BACKGROUND FACTS

I. Facts Pertaining to the Incident.

Plaintiff's Amended Complaint asserts she was assaulted and injured on September 24, 2015 by Yelverton. She acknowledges she arrived at the Shelter at approximately 12:15 a.m., and that the Shelter "functioned solely as a bar after 12:00 a.m." (Amended Complaint, ¶¶ 9, 34). After an interaction with Yelverton inside The Shelter, Plaintiff alleges that she and Yelverton left the bar at the same time, and that she was then able to make it to the safety of the passenger seat of a car. When Yelverton approached and began to hit the driver's side window of the car, she exited the vehicle, at which point she was assaulted and knocked unconscious by Yelverton. (Amended Complaint, ¶¶ 12, 13, 16).

Plaintiff testified at the March 13, 2019 damages hearing that she woke up in the street. (Damages Tr. 26:7-9; 34:25-35:2). An email dated November 10, 2017 from Thomas Berry, an

Owner and Manager of The Shelter, confirms that "[t]he altercation [that resulted in Plaintiff's injuries] took place on public property after both parties left our restaurant." (Rule 60(b) Motion, Exh. B). Affidavits signed by Thomas Berry and Ashley Berry confirm that the incident that gave rise to Plaintiff's injuries occurred off the Defendant's premises, were the result of an intentional criminal act of a third party, and occurred after Plaintiff had reached the safety of an automobile which she chose to exit. (Rule 60(b) Motion, Exh. C, ¶ 16; Exh D, ¶ 16).

II. Events Prior to Plaintiff's Filing of Action.

On October 12, 2017, Plaintiff's counsel, Daniel S. Slotchiver, sent The Shelter a damages package and a draft Complaint. The cover letter directed Defendant to contact its insurance carrier and to contact Mr. Slotchiver's office by the Friday of the following week to schedule a time to discuss the matter. (Rule 60(b) Motion, Exh. E).

On October 17, 2017, Thomas Berry called Mr. Slotchiver and followed up with an email, copying his "insurance broker (Billy McQueeney) and counsel (Salah Hibri, Mason Law) … so everyone is in the loop." Thomas Berry's email advised that "Salah and I spoke at length about the issue with Sam[antha][3] and he indicated he will speak with you directly in more detail about a course of action." (Rule 60(b) Motion, Exh. F).

Mark Mason, with The Mason Law Firm, P.A., confirmed that, "[o]n or about October 17, 2017, my law firm was formally engaged by Shelter to handle the legal matter involving Mr. Slotchiver's client, Samantha L. Antley. The matter was assigned to Mr. Hibri." (Rule 60(b) Motion, Exh. G, ¶ 5). Both Mr. Mason and Mr. Hibri stated that Defendant "has paid Mason Law Firm for its work related to this matter." (Rule 60(b) Motion, Exh. H, ¶ 17; Exh. G, ¶ 7).

[3] *See* Dec. 14 Tr. 26:13-22.

In response to an inquiry from Mr. McQueeney, on October 31, 2017, Ashley Berry emailed all the parties, including Mr. Slotchiver, indicating that, "Salah with Mason Law Firm is our attorney and he is copied here as well. I spoke with him today and he said it would be easiest for you two to work directly on whatever y'all need from each other. I am giving you both permission to talk to one another on our behalf to move forward on this matter." (Motion to Set Aside, Exh. 4 to Exh. B).

Later that same day, October 31, 2017, Mr. Hibri emailed Mr. Slotchiver directly, advising that The Shelter was his client and that the claim had been forwarded to Defendant's insurance agent so that the claim could be opened with the carrier. He explained that, "[o]nce the carrier has retained counsel for The Shelter, my firm will continue on as private counsel. I am assuming the carrier should pick up the defense once the claim is opened though." Mr. Slotchiver responded, "[m]y guess is that you will get a reservation of rights." (Rule 60(b) Motion, Exh. J). Mr. Hibri later confirmed in a second sworn affidavit that his October 31, 2017 email was intended "to unequivocally put Mr. Slotchiver on notice that my law firm represents The Shelter ***and will continue to represent them in the event the insurance carrier should hire defense counsel for The Shelter at some point in the future.*** In no way whatsoever was this communication intended for any purpose other than to make it absolutely clear that my firm would not be stepping aside, even if an insurance carrier hired defense counsel for The Shelter." (Rule 60(b) Motion, Exh. K, ¶¶ 9, 31).

Mr. Mason stated in his Affidavit that Defendant has been a client of The Mason Law Firm since 2012. (Rule 60(b) Motion, Exh G, ¶ 2; *see also* Exh. K, ¶ 34 (Hibri confirming same)). Mr. Slotchiver had called Mr. Mason in October 2017 "asking if I represented Shelter. I advised that I did. Mr. Slotchiver then explained he represented a client that had a claim against

Shelter and asked if I would get him a copy of Shelter's commercial general liability policy." Mr. Mason advised Mr. Slotchiver he would "look into it." (Rule 60(b) Motion, Exh. G, ¶ 3).

On November 10, 2017, Mr. Hibri forwarded Plaintiff's demand package and draft Complaint to the insurance adjuster assigned to handle Plaintiff's claim. Mr. Hibri also requested a copy of the applicable policy. (Rule 60(b) Motion, Exh. L). Mr. Hibri explained that he had requested the policy "so that [he] could provide a copy of the insurance policy to Plaintiff's counsel as they had requested." (*Id.*, Exh. H, ¶ 14). Upon receiving the policy later that month, Mr. Hibri provided it to Plaintiff's counsel, Mr. Phipps, who came to The Mason Law Firm to pick it up. (*Id.*, Exh. H, ¶¶ 15, 16). Mr. Hibri stated that the fact that he continued to represent The Shelter in this matter was confirmed when he delivered the insurance policy to Mr. Phipps. (*Id.*, Exh. H, ¶ 25).

Mr. Hibri further stated under oath that "I never made any representation to Mr. Slotchiver, nor to Mr. Phipps that my representation of Shelter was ending. To the contrary, my position – which I made abundantly clear in writing – was that I would continue to serve as Shelter's attorney, even if the carrier hired separate defense counsel to represent Shelter in the event suit was filed." (Rule 60(b) Motion, Exh. H, ¶ 28).

There is no evidence that anyone advised Plaintiff or her counsel that the insurer had retained separate defense counsel for Defendant, yet the Amended Summons and Amended Complaint were filed and served on Defendant without any notice to Mr. Hibri or The Mason Law Firm. Plaintiff's counsel neither inquired whether The Mason Law Firm continued to represent Defendant in this matter, despite ample opportunity to do so, (Rule 60(b) Motion, Exh. H, ¶ 23), nor provided counsel with notice of or a copy of the Amended Summons and Amended Complaint. (*Id.*, Exh. H, ¶¶ 20, 21, 24).

III. Post-Filing Background.

Plaintiff filed her Amended Summons and Amended Complaint on December 11, 2017. On January 11, 2018, she filed an Affidavit of Service, in which her counsel, Mr. Slotchiver, affirmed that he had served a copy of the Amended Summons and Amended Complaint on Defendant by sending a copy to Defendant's registered agent, attaching a registered mail return receipt signed by Ashley Berry and date stamped by the U.S. Postal Service on December 22, 2018. (Rule 60(b) Motion, Exh. M).

Ashley Berry, who signed for the Amended Summons and Amended Complaint, filed a sworn Affidavit stating that, while she is the Defendant's registered agent, she has no legal training. She referenced the communications between herself, Mr. Slotchiver and Mr. Hibri documenting that Mr. Hibri and The Mason Law Firm represented Defendant. In particular, she explained that, after she sent the October 31, 2017 email advising Mr. Slotchiver and others that "Salah with Mason Law Firm is our attorney and he is copied here as well," she "believed that Shelter's attorney Mr. Hibri was in direct contact with all the players involved and the matter was being handled." (Motion to Set Aside, Exh. B, ¶¶ 2, 6; *see also Id.* Exh. 4 to Exh. B). Ashley Berry indicated that, when she looked at the envelope's contents, she "believed it was duplicative of the Complaint that Shelter had previously received from Mr. Slotchiver in October 2017." Furthermore, when she received the copy of the Amended Summons and Amended Complaint, Mr. Hibri continued to represent Defendant, causing Ashley Berry to believe "that Shelter's attorney and its insurance carrier were already handling the matter" and that "Plaintiff's counsel, Mr. Slotchiver, was providing all communications with Shelter to Shelter's attorney, Mr. Hibri." (*Id.*, Exh. B, ¶ 7). As Mr. Hibri explained, Defendant "reasonably believed their attorneys were representing them in this matter and had notified opposing counsel of their

representation of The Shelter." Defendant's "registered agent's confusion arose on what to do with the letter containing the then-filed Summons & Complaint when Plaintiff's counsel cut The Mason Law Firm out of the loop and improperly communicated directly with The Shelter after receiving written notice of my representation of Shelter." (*Id.*, Exh. K, ¶¶ 36, 38).

On January 30, 2018, Plaintiff moved for entry of default against Defendant, asserting that more than 35 days had passed since service of the Amended Summons and Amended Complaint on Defendant and that Defendant had not filed an Answer or Notice of Appearance or Rule 12(b) Motion. Despite no evidence suggesting that The Mason Law Firm no longer represented Defendant in this matter, the Motion for Default Judgment does not list Mr. Hibri or The Mason Law Firm as counsel for Defendant. (Affidavit of Service; *see also* Rule 60(b) Motion, Exh. G, ¶ 9).

After the Entry of Default was filed on February 5, 2018, "Mr. Phipps and Mr. Slotchiver came by The Mason Law Firm unannounced and stated that they had a 'misunderstanding' as to whether Mason Law Firm represented Shelter and this is why they failed to notify Mason Law Firm of their actions relative to the case." Mr. Hibri stated that, at that meeting, he reaffirmed that he continued to represent The Shelter in this matter. (Rule 60(b) Motion, Exh. H, ¶¶ 24, 25). Mr. Mason stated that, "Mr. Hibri and I were adamant about the fact we represented Shelter in this matter from its inception as unequivocally stated in the October 31, 2017 email to Mr. Slotchiver and that we should have been notified about the filing and service of the pleadings." Despite the Mason Law Firm's request, Plaintiff's counsel refused to withdraw the entry of default. Mr. Mason could "reach no other conclusion than Mr. Slotchiver was purposefully trying to keep my law firm in the dark to take unfair advantage of my client." (*Id.*, Exh. G, ¶¶ 10, 11).

On March 8, 2018, the Mason Law Firm, which continued to serve as Defendant's counsel, filed two motions. First, they moved to set aside the entry of default and, second, they moved to continue the damages hearing until their motion to set aside the default could be heard. (Motion to Set Aside Default; Motion to Continue).

At the December 14, 2018 hearing, Mr. Hibri and Mr. Mason stated multiple times that they consistently advised Plaintiff's counsel that the Mason Law Firm represented The Shelter, would continue to represent The Shelter even if the insurer hired separate defense counsel, and at no time did they ever state that they no longer represented The Shelter. Because Plaintiff's counsel knew The Shelter was represented by counsel, the Mason Law Firm was "entitled to notice of communications with our client at a minimum," which they did not receive. (Dec. 14 Tr. 5:23-6:3; 11:4-16; 12:1-20; 21:13-22; 28:20-29:9; 30:3-9). In response to Mr. Slotchiver's allegations that the Mason Law Firm told him they were no longer representing The Shelter and would not accept service of the Complaint, (*Id.*, 14:21-15:3), Mr. Hibri flatly denied the allegations. "I could not make it more clear. They are my clients. We represent them. We will continue to represent them. We're always going to represent them … the assertion that I would ever say … that I would stop representing them could not be further from the truth. I never said that …" (*Id.*, 21:13-21; 8:8-13). Both Mr. Hibri and Mr. Mason stated that Ashley Berry had received at least two other draft copies of the Complaint prior to being served with the Amended Complaint. (*Id.*, 6:15-17; 11:17-12:1). Defendant acted diligently when Plaintiff's counsel advised them of the claim and presented a demand, by notifying their insurer and counsel. Furthermore, it would be unjust to hold Defendant in default as the result of Plaintiff's counsel's "slight [sic] of hand." (*Id.*, 9:19-10:21). Both Mr. Hibri and Mr. Mason set out Defendant's affirmative meritorious defenses, pointing out that they also had raised them in the Motion to Set

Aside. (*Id.*, 9:12-18; 22:14-23:16). On January 15, 2019, the Court denied Defendant's Motion to Set Aside Default. (Default Order).

Consequently, on March 13, 2019, the parties appeared before the Honorable William H. Seals, Jr, for a damages hearing. At that hearing, Plaintiff testified that, following the assault, her concerns about her appearance kept her from going out socially; however, on cross-examination she did not dispute that she returned to the Shelter on October 18, 2015, October 20, 2015, October 24, 2015 and October 30, 2015. (Damages Tr. 41:20-43:11). Plaintiff acknowledged that, despite claiming intense "10 out of 10" pain every day, she had not been seen by any medical provider since August 11, 2016 until she saw Dr. Craig Rowan in March 2019. (*Id.* 38:9-21; 40:6-25).[4]

Dr. Rowan, a plastic surgeon, acknowledged that he had never treated Plaintiff and, in fact, although the altercation occurred in early October 2015, had never met with Plaintiff until March 1, 2019, just two weeks before the damages hearing. (Damages Tr. 15:25-16:9). Dr. Rowan acknowledged that, "[i]t's been years," since Plaintiff treated with anyone for her injuries. (*Id.* 18:13-22). The open rhinoplasty surgery that Dr. Rowan proposed was based on two concerns: 1) cosmetics, and 2) to address any breathing problems. (*Id.* 19:23-21:20). With respect to these concerns, however, Dr. Rowan acknowledged there was no objective evidence of any breathing obstructions. (*Id.*, 20:8-21:12). Furthermore, Plaintiff's medical records indicate that, on December 16, 2015, she reported being happy with her appearance. (Rule 59(e) Motion, Exh. A (MUSC notes indicating Plaintiff "returns s/p a closed nasal reduction on 10/5/15 with Dr. Patel. Much improved and happy feels that nose looks straighter")).

[4] Although Plaintiff testified that she had a "[p]retty vivid memory," (Damages Tr. 26:5), she was unable to recall a surprising number of details on cross-examination. (*Id.* 36:18-23; 39:21-23; 40:4-5; 40:13-15; 41:2-5; 42:8-20).

B.J. Kale, owner of a security company, Trifecta Security Group, (Damages Tr. 53:13-14), testified that he worked for The Shelter prior to September 24, 2015, from Spring 2014 to Spring 2015. Mr. Kale confirmed that customers of The Shelter parked "up and down" the streets around the restaurant's location. (*Id.* 55:15-19). Although Mr. Kale testified that The Shelter had more "911" calls than his other clients, (*Id.* 58:19-23), he refused to identify any of those other clients in order to determine whether they were comparable establishments. (*Id.* 61:9-18).

Thomas Berry testified that Mr. Kale's company was terminated because Mr. Kale failed to produce a required certificate of insurance. (Damages Tr. 66:6-67:1). Thomas Berry also confirmed that The Shelter receipts demonstrate that Plaintiff visited the restaurant only five times in the 125 days prior to the incident but then returned five times in the 35 days following the incident. Plaintiff typically drank vodka and stayed each time until closing at 2:00 a.m. (*Id.* 68:5-69:7).

Plaintiff's medical records were entered into the record at the damages hearing. (Damages Tr. 30:16-25). She underwent a "closed reduction of nasal fracture and reduction of septal fracture" on October 5, 2015. (MUSC operative notes Oct. 5, 2015). At a post-operative visit on October 13, 2015, Plaintiff reported that "her pain has improved tremendously" after removal of a nasal splint. (MUSC medical notes for Oct. 13, 2015). In August 2016, Plaintiff returned to MUSC after a new trauma to her nose; however, it was determined there was no new fracture and, although she was supposed to return in a month for her one-year follow-up, she wanted "to postpone that visit since there were not abnormalities seen on today's exam." (MUSC medical notes for Aug. 11, 2016).

STANDARD OF REVIEW

An appellate court reviews a lower court's decision regarding whether to set aside an entry of default under the abuse of discretion standard. *Richardson v. P.V., Inc.*, 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009). "An order based on an exercise of that discretion, however, will be set aside if it is controlled by some error of law or lacks evidentiary support." *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989). Furthermore, although trial judges are vested with discretion to decide whether to set aside an entry of default, that discretion "must be liberally exercised." *Canopius US Ins., Inc. v. Middleton*, No. 2:15-cv-03673-DCN, 2016 U.S. Dist. LEXIS 3372 *3, 2016 WL 128517 (D. S.C. Jan. 12, 2016).

Similarly, the grant or denial of relief pursuant to Rule 60(b) is within the sound discretion of the trial judge and "will not be disturbed on appeal unless there is a clear showing of abuse of discretion." *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 162-163, 375 S.E.2d 321, 322-323 (Ct. App. 1988). An abuse of discretion occurs when the deciding judge "was controlled by some error of law," or "where the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Edwards v. Ferguson*, 254 S.C. 278, 283, 175 S.E.2d 224, 226 (1970).

Appellate review of a denial of a Rule 59(e) motion is also under the abuse of discretion standard, with the appellate court looking at whether the lower court failed "to take relevant factors intended to guide its discretion into account or when it acts on the basis of 'legal or

factual misapprehensions,' respecting those factors." *Pacific Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396, 402 (4th Cir. 1998).[5]

ARGUMENTS

I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO SET ASIDE DEFAULT.

Rule 55(c) provides that, "[f]or 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)." Rule 55(c), SCRCP. "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). It is well-established that a "party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default." *Ricks v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535, 537 (Ct. App. 1987). In fact, default judgments are disfavored, and South Carolina courts have a clear preference for resolving cases on their merits. *See, e.g., Caldwell v. Wiquist*, 402 S.C. 565, 575, 741 S.E.2d 583, 588 (Ct. App. 2013); *Edwards*, 254 S.C. at 283, 175 S.E.2d at 226 (what is now Rule 55(c) "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits"); *see also Colleton Prep. Acad., Inc. v. Hoover Universal*, 616 F.3d 413, 417 (4th Cir. 2010) (noting that "[w]e have repeatedly expressed a strong preference that ... defaults be avoided and that claims and defenses be disposed of on their merits"); *Canopius*, 2016 U.S. Dist. LEXIS *5 (in deciding whether to set aside an entry of default, "[t]he court should always keep an eye toward the preference for meritorious resolutions of disputes"). As a result, "Rule 55(c) motions

[5] "Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004).

must be 'liberally construed in order to provide relief from the onerous consequences of defaults and default judgments.'" *Colleton Prep.*, 616 F.3d at 421.

The standard for setting aside an entry of default is "mere 'good cause.'" *Regions Bank v. Owens*, 402 S.C. 642, 648, 741 S.E.2d 51, 54 (Ct. App. 2013). The party seeking relief from entry of default must first "'provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.'" *Id.*, *quoting Sundown Op. Co. v. Intedge Indus.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Once a party has put forward 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." *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888. Reversible error occurs where, for example, a trial court applies "the more rigorous standard of 'excusable neglect,' a standard used under Rule 60(b)," or where the decision "is controlled by some error of law or lacks evidentiary support." *Wham*, 298 S.C. at 465, 381 S.E.2d at 501; *see also Top Value Homes v. Harden*, 319 S.C. 302, 305-306, 460 S.E.2d 427, 429 (Ct. App. 1995) (same).

The Default Order must be reversed because it is based on conclusions that lack evidentiary support. More specifically, the Circuit Court's determinations that Defendant did not meet the "good cause" standard, lacked a meritorious defense, and did not timely move for relief lack evidentiary support. In addition, the Circuit Court committed legal error by relying on irrelevant factors and applying an incorrect legal analysis. Even a cursory reading of the Default Order demonstrates that the Circuit Court applied the more rigorous standard under Rule 60(b) to Defendant's Motion to Set Aside Default.

A. The Circuit Court's conclusion that there is no evidence that the Mason Law Firm "unequivocally and affirmatively" stated they represented Defendant in this matter lacks evidentiary support.

First, with respect to the lack of evidentiary support, the Circuit Court based its denial of the Motion to Set Aside, in part, on its finding that "[t]here was nothing wherein Defense Counsel unequivocally and affirmatively indicated they were representing the Defendant in this matter." (Default Order, ¶ 14). However, documented and verifiable evidence in the record demonstrates that Plaintiff's counsel was told repeatedly that Mr. Hibri and the Mason Law Firm were representing The Shelter with respect to this claim ***until*** the insurer appointed different defense counsel and, even in that event, ***would continue to represent them*** as private counsel.

In response to the demand package sent by Plaintiff, Thomas Berry both spoke with Mr. Slotchiver and emailed him on October 17, 2017, advising that he had copied The Shelter's "counsel (Salah Hibri, Mason Law) on this so everyone is in the loop." (Motion to Set Aside, Exh. 2 to Exh. A). On October 31, 2017, Ashley Berry confirmed in an email to Mr. Slotchiver and others, titled "Update on Sam Antley," that "***Salah with Mason Law Firm is our attorney***," and instructing the parties to work together "on our behalf to move forward on this matter." (*Id.*, Exh. 3 to Exh. A) (emphasis added). Later on October 31, 2017, Mr. Hibri emailed Mr. Slotchiver directly, advising that he had spoken with his client, The Shelter, and had reached out to the carrier with regard to this matter, and that even "[o]nce the carrier has retained counsel for The Shelter, ***my firm will continue on as private counsel***," to which Mr. Slotchiver merely responded, "[m]y guess is that you will get a reservation of rights." (*Id.*, Exh. 5 to Exh A) (emphasis added).[6] In addition, Thomas Berry emailed The Shelter's insurer on November 10,

[6] This email is contemporaneous, objective evidence that disputes the assertion in Mr. Phipps' Affidavit that, on October 27, 2017, just days prior, Mr. Hibri told him the Mason Law Firm "would not be defending The Shelter and that the Mason Law Firm would be 'out of the case

2017 stating that he had "copied the private counsel we retained. His name is Salah Hibri with the Mason Law Firm. He has been in contact with Ms. Antley's attorney and will likely be able to provide you more current information than I." (*Id.*, Exh 7 to Exh. A). Mr. Hibri, in turn, requested a copy of the insurance policy, which he handed to Mr. Phipps on November 30, 2017. (*Id.*, Exh. A, ¶¶ 14, 15, 16, *see also* Exh. 9 to Exh. A). Four days later, Plaintiff's counsel filed the Summons and Complaint without notifying the Mason Law Firm or the insurer. (*Id.*, Exh. A, ¶ 18).

This is overwhelming contemporary evidence that Mr. Hibri and the Mason Law Firm represented Defendant in this matter and would continue to do so in some capacity even in the event the insurance company assigned different counsel to defend this claim. In light of this evidence, the Circuit Court's finding that there was "nothing wherein Defense Counsel unequivocally or affirmatively indicated they were representing the Defendant in this matter," is unsupported and should be reversed. Indeed, on one hand, the Court appears to accept, without any reservation, Mr. Phipps' self-serving statement that Mr. Hibri told him the Mason Law Firm was not going to represent Defendant in the action and refused to accept service, (Default Order, ¶¶ 11, 16, 17, 18), while on the other, instructing that, when Ashley Berry was served with the Amended Complaint, she "should have immediately forwarded such to their insurance carrier ***or their attorneys at The Mason Law firm to ensure that an Answer was timely filed.***" (*Id.*, ¶ 10) (emphasis added). This latter statement both contradicts any idea that the Mason Law Firm was

---

unless the carrier refuses to defend,'" or that Mr. Hibri refused to accept service and that Plaintiff would have to serve Defendant directly. (Phipps Affid. ¶ 40). Regardless of Mr. Phipps' email to Mr. Slotchiver on October 27, 2017, Mr. Hibri's "email to Mr. Slotchiver directly, on October 31, 2017 made it very clear the opposite was the case." (Rule 60(b) Motion, Exh. K, ¶¶ 15, 16). Mr. Hibri directly disputes any allegation that he ever refused to accept service on behalf of Defendant. (*Id.*, Exh. K, ¶ 35).

no longer representing The Shelter, and also constitutes a tacit acknowledgment by the Circuit Court that the Mason Law Firm did, in fact, represent The Shelter in this matter.

Conversely, there is no objective or contemporary evidence that Mr. Hibri told Plaintiff's counsel either that the Mason Law Firm no longer represented Defendant with respect to this claim and/or would not accept service on its behalf. Mr. Phipps' self-serving assertions are based on alleged but undocumented statements made during unconfirmed "conversations." (Phipps Affid. ¶¶ 4, 8, 9). While Mr. Phipps attached an email to co-counsel for Plaintiff to his Affidavit, that email was never sent to the Mason Law Firm and simply is *Mr. Phipps'* version of what was said, not a statement by Mr. Hibri or anyone else at the Mason Law Firm.[7]

In fact, as noted above, Mr. Hibri emailed Mr. Slotchiver on October 31, 2017, ***after*** the alleged conversion between Mr. Hibri and Mr. Phipps that purportedly occurred on October 27, 2017. (Phipps Affid., ¶ 4). Mr. Hibri advised Mr. Slotchiver that he had contacted the insurer and confirmed that, "[o]nce the carrier has retained counsel for The Shelter, ***my firm will continue on as private counsel.*** I am assuming the carrier should pick up the defense once the claim is opened though." (Motion to Set Aside, Exh. 5 to Exh. A) (emphasis added). Furthermore, Ashley Berry had emailed Mr. Slotchiver earlier that day advising that "***Salah with Mason Law Firm is our attorney*** and he is copied here as well." (*Id.*, Exh. 4 to Exh. B) (emphasis added).

[7] Even Mr. Phipps' allegation that Mr. Hibri stated that "[t]he Mason Law Firm will be out of the case unless the carrier refuses to defend," (Phipps Affid., Exh. A), however, does not amount to a statement that the Mason Law Firm was no longer representing Defendant in this matter and/or that it would not accept service of the Complaint. Significantly, there is no objective evidence, fabricated or otherwise, that Plaintiff can point to that indicates other counsel had been appointed to defend Defendant or that the Mason Law Firm would not accept service on Defendant's behalf. At the time Plaintiff's counsel filed and served the Amended Complaint, the Mason Law Firm unquestionably still represented The Shelter's interests in this matter.

In addition, the Circuit Court erroneously based its Default Order on its finding that "Plaintiff referenced these 'refusal to accept service' statements by Counsel for the Defense in their written correspondence with Counsel for the Defense on or about February 27, 2018—no response was ever made by Defendant disputing the same." (Default Order, ¶ 16). First, there is no "written correspondence" in the record between Plaintiff's counsel and defense counsel dated on or about February 27, 2018 referencing any refusal on the part of Mason Law Firm to accept service on behalf of Defendant to support this finding. *See, e.g.*, *Wham*, 298 S.C. at 465, 381 S.E.2d at 501 (even under the deferential abuse of discretion standard, an order "will be set aside if it is controlled by some error of law or lacks evidentiary support"). Second, because no such written correspondence is in the record or even exists,[8] it is hardly surprising that Defendant's Counsel did not respond to it.

The Circuit Court points to assertions in Plaintiff's Amended Memorandum concerning the alleged "refusal to accepts service" statements, asserting that Defendant did not respond to these allegations until after receiving Mr. Phipps' affidavit. (Default Order, ¶¶ 17, 18). However, until Mr. Phipps filed his affidavit on December 19, 2018, Plaintiff's counsel had not put forward even purported evidence to back up its claim that Mason Law Firm ever stated they would be "out of the case" and/or refused to accept service. Argument of counsel simply is not evidence. *See, e.g.*, *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

---

[8] While Plaintiff's Amended Memorandum mentions that "Plaintiff's Counsel wrote the Mason Law Firm regarding the default and again confirmed that they had served the Defendant directly per Mr. Hibri's instruction and based upon the representations that Mason Law Firm did not intend to be involved in the defense of this action," (Amended Memorandum FULL CITE, pp. 7-8), no such written communication was submitted as part of the record and, frankly, simply does not exist. Furthermore, even if it did, it would contradict Plaintiff's counsel's position that it believed the Mason Law Firm was out of the case. In other words, if Plaintiff's counsel truly believed the Mason Law Firm no longer represented Defendant with regard to this case, there is no reasonable explanation why they would write to advise them regarding the default and presenting explanations about the service of process.

Furthermore, contrary to the Circuit Court's criticism that Defendant did not respond to these allegations, they were contested directly and repeatedly at the December 14 hearing. (*See* Dec. 14 Tr. 21:13-21 (Mr. Hibri stating, "I could not make it more clear. They are my clients. We represent them. We will continue to represent them. We're always going to represent them ... the assertion that I would ever say ... that I would stop representing them could not be further from the truth. I never said that ..."); 8:8-13 (stating Plaintiff's counsel's allegation that they had been told the Mason Law Firm was no longer representing the Shelter and/or that they were "totally out of this case," was not only unsupported but untrue); *see also Id.* 5:23-6:3; 11:4-16; 12:1-20; 21:13-22; 28:20-29:9; 30:3-9 (pointing out the multiple times Plaintiff's counsel was advised they represented The Shelter)).

In other words, on one hand, the Circuit Court had objective, contemporaneous written communications between counsel for Plaintiff and Defendant wherein Mr. Hibri and Ashley Berry clearly affirmed that the Mason Law Firm was serving as counsel for The Shelter in this matter concerning "Sam[antha] Antley." On the other hand, the Court had unsupported allegations based on undocumented conversations suggesting (incorrectly) that Mr. Hibri and the Mason Law Firm no longer represented The Shelter and/or refused to accept service on behalf of Defendant. Given the fact that default judgments are disfavored, *Caldwell*, 402 S.C. at 575, 741 S.E.2d at 588, and that Rule 55(c) motions are to be liberally construed, *Colleton Prep.*, 616 F.3d at 421, even taking the allegations in such motions as true, *Lombrana-Perez v. Sheffield-Wilkes*, No. 6:16:cv-1842-BHH, 2018 U.S. Dist. LEXIS 645 *5-6, 2018 WL 272276 (D. S.C. Jan. 2, 2018) (taking the defaulting defendants' allegations as true and liberally construing Rule 55(c) to relieve them of default), the Circuit Court should have accepted the contemporaneous documented evidence and consistent sworn statements of Messrs. Hibri and Mason. As noted

above, the objective written evidence fully supports Messrs. Hibri's and Mason's version of events, whereas Mr. Phipps' statements are wholly unsupported by any contemporaneous documentation.

B. The Circuit Court's conclusion that Defendant failed to show good cause lacks evidentiary support and is based on legal error.

The Circuit Court's determination that Defendant failed to show good cause lacks evidentiary support and, is based on legal error. The Circuit Court's finding appears to be based on the fact that Defendant was properly served, which is not disputed, and the Court's not finding the Defendant's argument "persuasive" that it "confused an unsigned document clearly marked 'DRAFT' with a clerk-stamped, signed copy of the Amended Summons & Complaint" with a cover letter. (Default Order, ¶¶ 8, 9, 10, 11). However, Ashley Berry's explanation that, having told Plaintiff's counsel that Mr. Hibri and the Mason Law firm were representing The Shelter and that the parties should discuss this matter directly between themselves from that point on, presents a rational explanation of her failure to forward the Amended Complaint to the insurer or Mr. Hibri. She reasonably believed that Plaintiff's counsel was continuing to discuss the claim with the Mason Law Firm and that anything sent to The Shelter would also be sent to Defendant's counsel. This is not a case where Plaintiff's counsel was unaware of the Mason Law Firm's representation of the The Shelter. Instead, here, Plaintiff's counsel communicated with Mason Law attorneys frequently on this and other matters, but specifically failed to provide a copy or even notify Defendant's counsel that a complaint had been filed and served. At a very minimum, here as in *Colleton Prep.*, Defendant offered a rational explanation of its failure to answer the Amended Compliant. 616 F.3d at 420 (distinguishing case at hand, where entry of default should have been vacated, from prior case where the defaulting party offered *no explanation* for the disappearance of the summons and complaint ...").

In addition, it is not merely the fact that Ashley Berry was mistaken as to the content of the registered mail for which she signed that satisfies the lenient "good cause" standard under Rule 55(c). *See, e.g.*, *Melton*, 379 S.C. at 54, 664 S.E.2d at 492 ("Rule 55(c) should be 'liberally construed to promote justice and dispose of cases on the merits'"); *Edwards*, 254 S.C. at 283, 175 S.E.2d at 226 (what is now Rule 55(c) "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits"). Here, as was the case in *Ricks*, it is "all of the factors considered together," 293 S.C. at 375, 360 S.E.2d at 537, that demonstrate good cause. In this case the relevant factors include: 1) that both Thomas Berry and Ashley Berry had made clear to Mr. Slotchiver that the Mason Law Firm represented The Shelter and that future communications from Plaintiff's counsel should be directed to Mr. Hibri, 2) the repeated, consistent and verifiable statements from Defendant and Messrs. Hibri and Mason to Plaintiff's counsel that they represented Defendant and would continue to do so, and 3) the fact that the Mason Law Firm attempted to negotiate a settlement with Plaintiff's counsel, provided them with a copy of the insurance policy and otherwise consistently held themselves out as Defendant's counsel, all of which combined establish that Ashley Berry acted reasonably in assuming that Plaintiff's counsel either advised or conveyed a copy of the Amended Complaint to The Shelter's legal counsel. In other words, as was the case in *McClurg v. Deaton*, 380 S.C. 563, 573, 671 S.E.2d 87, 92-93 (Ct. App. 2008), here it was reasonable for Ashley Berry, based on communications between herself, Thomas Berry and Mr. Hibri, on one hand, and Plaintiff's counsel, on the other hand, to believe Plaintiff's counsel was in contact with and would at a minimum notify Mr. Hibri and/or the insurer that suit had been filed.

In her affidavit, Ashley Berry stated that, after she emailed Plaintiff's counsel, Mr. Slotchiver, and others on October 31, 2017, instructing that Mr. Hibri "with Mason Law Firm is

our attorney and he is copied here as well," and giving Mr. Slotchiver and Mr. Hibri "permission to talk to one another on our behalf to move forward on this matter," she "believed that Shelter's attorney Mr. Hibri was in direct contact with all of the players involved and the matter was being handled." When Ashley Berry, who has no legal training, signed for registered mail from Mr. Slotchiver on December 22, 2017, she "believed it was duplicative of the Complaint that Shelter had previously received from Mr. Slotchiver in October 2017 and had immediately provided to Shelter's insurance broker, insurance company, and Shelter's attorney Mr. Hibri." In addition, Ashley Berry reasonably "believed that Shelter's attorney and its insurance carrier were already handling the matter. Further, I believed Plaintiff's counsel Mr. Slotchiver was providing all communications with Shelter to Shelter's attorney, Mr. Hibri." (Motion to Set Aside Default, Exh. B).

On November 10, 2017 and again on November 29, 2017, Mr. Hibri sought a copy of the insurance policy to provide in response to Plaintiff's counsel's request for same. On November 30, 2017, Mr. Hibri provided a copy of the relevant policy to Plaintiff's counsel, Mr. Phipps, who came to the Mason Law Firm to pick it up. Neither "Mr. Phipps nor Mr. Slotchiver asked Mason Law Firm whether we still represented Shelter." Furthermore, Mr. Hibri's affidavit states "I never made any representation to Mr. Slotchiver, nor to Mr. Phipps that [his] representation of Shelter was ending. To the contrary, my position – which I made abundantly clear in writing – was that I would continue to serve as Shelter's attorney, even if the carrier hired separate defense counsel to represent Shelter in the event suit was filed." A mere four days later, Plaintiff's counsel filed the Summons and Complaint, and on December 11, 2017, the Amended Summons and Amended Complaint, without notifying or providing a copy to Defendant's counsel or insurer. (Motion to Set Aside Default, Exh. A).

Subsequently, on January 29, 2018, Mr. Hibri and Mr. Phipps engaged in a telephone conference on another matter and, during the thirty-minute phone call, Mr. Phipps failed to mention that a suit had been filed or that The Shelter had been served with the Amended Complaint. In fact, it was not until February 22, 2018 that Mason Law Firm learned that Plaintiff's counsel had obtained an entry of default. (Motion to Set Aside Default, Exhs. A & C).

Based on the foregoing facts, and measured by any reasonable standard, Defendant established a reasonable explanation for failing to file a timely Answer to the Amended Complaint. As noted above, this Court previously has found that a combination of facts, including that the defendant had notified both her insurer and her counsel of the suit and believed it was being handled, established good cause. *Ricks*, 293 S.C. at 375, 360 S.E.2d at 537. In reaching that conclusion, this Court quoted from *Sears, Roebuck & Co. v. Ramey*, 170 Ga. App. 873, 318 S.E.2d 740 (Ga. Ct. App. 1984) to the effect that, "[t]he law should not blindly impose standards which require individuals, in the conduct of their daily business, to distrust the parties with whom they deal. Likewise, a litigant should not unnecessarily be forced into default as a consequence of having reasonably relied up on the word of his fellow particularly when no innocent party will suffer if the default is opened." *Ricks*, 293 S.C. at 375, 360 S.E.2d at 537.

To be clear, unlike in *Sundown*, 383 S.C. at 609, 681 S.E.2d at 889, *Richardson*, 383 S.C. at 616, 682 S.E.2d at 266, or *Williams v. Vanvolkenburg*, 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994), here, there is no question of negligence on the part of the insurer or Defendant's counsel that is imputed to Defendant. Instead, it was Plaintiff's counsel's strategic decision to not advise or provide a copy of the Amended Complaint to either the Mason Law Firm or the insurer, with full knowledge that the Mason Law Firm represented Defendant, that contributed to Defendant being in default. In short, in violation of Rule 4.2 of the South Carolina Rules of

Professional conduct,[9] Plaintiff's counsel continued to communicate directly with The Shelter without including or notifying the Mason Law Firm, after having been told repeatedly that Mason Law represented The Shelter and would continue to do so even in the event the insurer hired other counsel for the defense of this case. Even under the much more stringent standard under Rule 60(b), courts are much more likely to excuse default when actions of opposing counsel contribute to the failure to timely respond. *Mitchell Supply*, 297 S.C. at 165-166; 375 S.E.2d at 324 (courts are "less reluctant to set aside default judgments where the defaulting party or his counsel was misled by the conduct or acts of the opposing counsel"); *Myers v. Food Town Stores, Inc.*, 276 S.C. 571, 572, 281 S.E.2d 108, 108 (1981) (finding placement of summons on the inside back cover of the complaint with no other reference to have "sufficiently misled or confused the respondent and constituted excusable neglect"); *Strickland v. Consolidated Energy Prods. Co.*, 274 S.C. 554, 558, 265 S.E.2d 682, 684 (1980) (finding opposing counsel's failure to immediately reply to defense counsel's request for an extension of time to file an answer "was sufficient, under the present facts, to mislead appellants' counsel and render his neglect to answer the complaint excusable"); *see also McClurg*, 380 S.C. at 573, 671 S.E.2d at 92-93 (given prior communications and negotiations between plaintiff and defendant's insurer, the failure by plaintiff's counsel to notify the insurer of the filed complaint "raises serious concerns ... and quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3)"). Here, as was the case in *McClurg*, Plaintiff's counsel contributed to the default by not copying or advising the Mason Law Firm that they had filed and served the Amended

[9] Rule 4.2 provides, in pertinent part, that, "[i]n 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." Rule 4.2, RPC, Rule 407, SCACR. Comments to Rule 4.2 explain that knowledge of the representation "may be inferred from the circumstances," and a "lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious." Comment 8.

Complaint, given the repeated and verifiable statements to Mr. Slotchiver that Mr. Hibri represented The Shelter. 380 S.C. at 573, 671 S.E.2d at 92-93.

Because the Circuit Court's conclusion that Defendant failed to demonstrate good cause lacks evidentiary support and is based on legal error, this Court should set aside the Entry of Default and allow Plaintiff to attempt to prove her claims. "An order based on an exercise of ... discretion ... will be set aside if it ... lacks evidentiary support." *Wham*, 298 S.C. at 465, 381 S.E.2d at 501.

C. The Circuit Court committed numerous legal errors which independently and combined require reversal.

First, as noted above, the Circuit Court appears to have applied the more rigorous standard applied to a Rule 60(b) motion for relief from judgment to Defendant's Rule 55(c) Motion to Set Aside Default. For example, while Rule 55(c) motions are to be liberally construed, *Colleton Prep.*, 616 F.3d at 421, even taking the allegations in such motions as true, *Lombrana-Perez*, 2018 U.S. Dist. LEXIS 645 *5-6 (taking the defaulting defendants' allegations as true and liberally construing Rule 55(c) to relieve them of default), here the Circuit Court resolved nearly every factual issue against Defendant and, instead, relied on unsubstantiated, self-serving assertions by Plaintiff's counsel.

Furthermore, the Circuit Court was highly critical of Defendant's actions and, combined with its resolution of every factual issue against Defendant, erroneously found Defendant failed to demonstrate good cause. However, in *ITC Commer. Funding, LLC v. Crerar*, this Court noted that, even where defense counsel conceded that defendant had been negligent in her handling of the served complaint (patently not the case here), which was insufficient to meet the standard for relief under Rule 60(b), the facts may have established "good cause to set aside the entry of default under Rule 55, SCRCP." 393 S.C. 487, 495, 713 S.E.2d 335, 339 (Ct. App. 2011).

While the Circuit Court referenced the "'good cause' standard" once, (Default Order, ¶ 8), the rest of the Default Order reflects application of a much more stringent standard. This constitutes reversible error.

In addition, the Circuit Court notes several times that that Plaintiff was under no "duty to serve Defendant by and through their private Counsel." (Default Order, ¶¶ 11, 13, *see also* ¶ 15). However, Defendant did not argue that Plaintiff was under a duty to ***serve*** it through the Mason Law Firm, but that, knowing The Shelter was represented by legal counsel, at a minimum Plaintiff's counsel was required to either ***notify*** or ***copy*** Defense counsel on correspondence with the Defendant. (Motion to Set Aside Default, pp. 5-7; 11-12; *see also Id.* Exh. A, ¶¶ 18-24; Exh. C, ¶ 10). In other words, the Circuit Court denied the Motion to Set Aside Default based on its resolution of an issue not before it, *i.e.*, whether Plaintiff had a legal duty to serve Defendant through their private counsel. This constitutes reversible legal error.

Moreover, the Circuit Court committed legal error by basing its conclusions that Defendant lacked a meritorious defense and that it had not "moved expeditiously in seeking relief" on the fact that Defendant had not filed an Answer. (Default Order, ¶¶ 6, 7, 9). That is not the proper test for either prong of the analysis and, tellingly, the Default Order cites no case law in support of its assertion that, in order to prove a meritorious defense or timely file a motion to set aside an entry of default, a defendant has to have filed an Answer.

In order to meet this element, "a party is not required to show an absolute defense," but instead, "only one which is worth of a hearing or judicial inquiry." *Mictronics, Inc. v. South Carolina Dep't of Rev.*, 345 S.C. 506, 512, 548 S.E.2d 223, 226 (Ct. App. 2001) (finding the defendant's prehearing statement outlining certain tax exemptions sufficient to establish a meritorious defense). Here, Defendant presented compelling evidence of a meritorious defense.

First, the alleged assault took place, not on The Shelter's premises but, instead, "took place on public property after both parties left our restaurant." (Motion to Set Aside Default, Exh. 7 to Exh. A). The Shelter is not responsible for the criminal acts of a third party (Yelverton) that occur off its premises. *See Jackson v. Swordfish Invs., L.L.C.*, 365 S.C. 608, 612-613, 620 S.E.2d 54, 56-57 (2005) (finding as a matter of law that a landlord is not liable for criminal acts of third party on property neither controlled nor possessed by landlord). Second, the Amended Complaint demonstrates that, after exiting The Shelter, Plaintiff had reached the safety of an automobile and chose to exit the vehicle in order to confront Yelverton. Thus, Plaintiff herself is responsible for some or all of her damages. In addition, Defendant raised other defenses, such as that it did not over-serve Yelverton, that Yelverton's off-premises criminal actions served as a superseding intervening cause of Plaintiff's damages, and that The Shelter was entitled to have damages apportioned. (Motion to Set Aside Default, pp 10-11; *see also* Dec. 14 Tr. 9:12-18; 22:14-23:16). The Circuit Court committed legal error by concluding that Defendant did not present a meritorious defense based on its failure to file an Answer.

With respect to timeliness, the Motion to Set Aside Default was filed on March 8, 2018, two weeks after Defendant learned on February 22, 2018 that it had been placed in default. (Motion to Set Aside Default, Exhs. A & C). This clearly is timely. *See Ricks*, 293 S.C. at 373, 360 S.E.2d at 535 (motion for relief from entry of default filed before the damages hearing was conducted); *cf. Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 145, 719 S.E.2d 703, 707 (Ct. App. 2011) (motion to set aside entry of default filed a year after the defendant was served with the complaint was untimely); *Melton*, 379 S.C. at 55, 664 S.E.2d at 492 (Rule 55(c) motion untimely where it was filed five months after the entry of default and 30 days after defendant received notice of the damages hearing). The Circuit Court committed legal error by concluding

that Defendant did not file a timely motion for relief based, in part, on its failure to file an Answer. Defendant filed the Motion to Set Aside Default two weeks after learning of the default and only a month after the default was entered.

Finally, Plaintiff would not have been prejudiced in any way by setting aside the Default Order and the Entry of Default. Plaintiff lost no time for discovery, *cf. Wilder*, 396 S.C. at 146, 719 S.E.2d at 707 (finding the plaintiff would have been prejudiced if the matter was further delayed after a year had passed before the defendant moved for relief from the default), and cannot otherwise establish any prejudice from having to prove her allegations through litigation. *See Colleton Prep.*, 616 F.3d at 419 ("[m]oreover, as obvious as it may be, it bears mention that no cognizable prejudice inheres in requiring a plaintiff *to prove* a defendant's liability, a burden every plaintiff assumes in every civil action"). Plaintiff will not be prejudiced if the Default Order is overturned and the Entry of Default is vacated. Instead, she simply will be required to prove her claim. Unquestionably, "[i]t is the policy of the law to favor the trial of cases on the merits." *Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.*, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981).

For all the reasons stated herein, this Court should reverse the Default Order, and grant Defendant relief from the Entry of Default and subsequent default judgment pursuant to Rule 55(c), SCRCP.

II. THE CIRCUIT COURT ERRED IN FAILING TO GRANT DEFENDANT'S RULE 60(b) MOTION.

Rule 60(b), SCRCP, provides, in pertinent part, that, "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; .... (3) fraud, misrepresentation, or other misconduct of an adverse party." A Rule

60(b)(1) or (3) motion must be made within a reasonable time and no more than a year after the judgment was entered.

While the standard to set aside a default judgment under Rule 60(b) is more rigorous than the mere good cause standard under Rule 55(e), *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888, the overarching tenet is that both rules "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits." *Edwards*, 254 S.C. at 283, 175 S.E.2d at 226; *see also Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 169 S.E.2d 387 (1969) (holding that the predecessor to Rule 60(b) "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits").

"It is generally recognized that courts should closely scrutinize default judgments," because "[i]t is the policy of the law to favor the trial of cases on the merits." *Lewis*, 275 S.C. at 560, 274 S.E.2d at 289. Furthermore, as discussed above, South Carolina courts are "less reluctant to set aside default judgments where the defaulting party or his counsel was misled by the conduct or acts of the opposing counsel." *Mitchell Supply*, 297 S.C. at 165-166; 375 S.E.2d at 324, *citing Myers*, 276 S.C. at 572, 281 S.E.2d at 108 (finding placement of summons on the inside back cover of the complaint with no other reference to have "sufficiently misled or confused the respondent and constituted excusable neglect"), and *Strickland*, 274 S.C. at 558, 265 S.E.2d at 684 (finding opposing counsel's failure to immediately reply to defense counsel's request for an extension of time to file an answer "was sufficient, under the present facts, to mislead appellants' counsel and render his neglect to answer the complaint excusable"), as examples.[10] While the facts in *Myers* and *Strickland* are not identical to the facts of this case,

[10] Although *Lewis*, *Myers* and *Strickland* analyzed the proper application of S.C. Code Ann. § 15-27-130, notes to Rule 60, SCRCP, indicate that "Rule 60(b) is substantially the same as Code § 15-27-130."

both they and *Mitchell* stand for the proposition that, when plaintiff's counsel engages in action or inaction that contributes to a defendant's neglect, that neglect is more likely to be found to be excusable.

Here, as was the case in *Mitchell*, *Myers*, *McClurg* and *Strickland*, Plaintiff's counsel contributed to the failure of Defendant to file a timely Answer, rendering that failure excusable neglect. As set out above, as early as October 17, 2017 and multiple times thereafter, Mr. Slotchiver was advised both orally and in writing that Mr. Hibri and the Mason Law Firm represented Defendant in this matter and would continue to do so as private counsel in the event the insurance carrier appointed separate counsel. Both Thomas Berry and Ashley Berry communicated directly with Mr. Slotchiver informing him that Mr. Hibri and The Mason Law Firm were serving as Defendant's counsel in this matter. (Rule 60(b) Motion, Exh. C, ¶¶ 8, 9, 10; Exh. D, ¶¶ 8, 9, 10; Exh. F; Exh. I). It is undisputed that Plaintiff's counsel was in communication with Mason Law Firm in an attempt to resolve the claim pre-suit, and that Mason Law Firm provided Plaintiff's counsel with a copy of the relevant insurance policy. (Rule 60(b) Motion, Exh. J; Exh. H, ¶¶ 14, 15, 16, 25; Exh. G, ¶ 3). In response to Mr. Hibri's October 31, 2017 communication to Mr. Slotchiver regarding Mr. Hibri's continuing legal representation and efforts to move this case forward with the carrier, Mr. Slotchiver responded, "[m]y guess is that you will get a reservation of rights." (Rule 60(b) Motion, Exh. J). Conversely, there is no objective evidence of any correspondence or communication whatsoever to Plaintiff's counsel, prior to filing the Complaint or the Amended Complaint, that the insurer had assigned defense counsel and/or that anyone other than the Mason Law Firm was representing Defendant and/or that the Mason Law Firm was in any way withdrawing their representation or would refuse to accept service. (Rule 60(b) Motion, Exh. G, Exh. H, Exh. K)

As a result of the straightforward and repeated communications to Plaintiff's counsel regarding the Mason Law Firm's representation with regard to this claim, it is entirely reasonable and understandable that, when Ashley Berry received the registered mail from Plaintiff's counsel, she believed Mr. Slotchiver was providing copies of any correspondence with Defendant to Mr. Hibri. It is also reasonable and understandable that, when Ashley Berry received the registered mail from Plaintiff's counsel, she believed it was duplicative of the draft Complaint previously received. Ashley Berry has no legal training, was represented by counsel at that time, (Rule 60(b) Motion, Exh. N, ¶¶ 2, 6), and Mr. Slotchiver was well aware of that legal representation when he filed and served the Amended Summons and Amended Complaint.[11] This satisfies the mistake, inadvertence or excusable neglect element set forth in Rule 60(b)(1), SCRCP.

Furthermore, Mr. Slotchiver's failure to provide Mr. Hibri with a copy of and/or at the very minimum, notice of the filed Amended Summons and Amended Complaint, when he knew Mr. Hibri was representing Defendant in this claim unless and until the carrier assigned counsel and, critically, there had been no communication whatsoever to Mr. Slotchiver that separate defense counsel had been named, raises serious questions about Mr. Slotchiver's conduct and "quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3)." *See McClurg*, 380 S.C. at 573, 671 S.E.2d at 92-93. Both the Affidavits produced by Defendant and the contemporaneous email communications demonstrate that Mr. Slotchiver was clearly and repeatedly told Mr. Hibri was representing Defendant in this claim, and Mr. Slotchiver was not notified otherwise.

[11] In addition, as both Mr. Hibri and Mr. Mason stated at the December 14 hearing, Ashley Berry had received at least two other draft copies of the Complaint prior to being served with the Amended Complaint. (Dec. 14 Tr., 6:15-17; 11:17-12:1).

In addition, as was the case in *Myers* and *Strickland*, here it is the combination of prior communications with and actions on the part of Plaintiff's counsel that led Ashley Berry to mistakenly believe Mr. Slotchiver was continuing to provide relevant information to Defendant's counsel. Mr. Slotchiver's strategic decision not to do so resulted in Defendant mistakenly, inadvertently and excusably going into default. As noted above, courts are "less reluctant to set aside default judgments where the defaulting party or his counsel was misled by the conduct or acts of the opposing counsel." *Mitchell*, 297 S.C. at 165-166, 375 S.E.2d at 324.

Although Defendant maintains that Ashley Berry acted in reasonable reliance on the fact that Plaintiff was advised repeatedly and knew The Shelter was represented in this matter by Mr. Hibri when she assumed anything sent to her was also sent to Defendant's counsel, even if this Court finds some fault in her actions, which Defendant denies, that does not preclude setting aside the Default Order. In *Rochester*, for example, the Supreme Court overturned an order refusing to vacate a default judgment despite pointing to numerous failures on the part of the defendant to ensure it had local counsel appointed. 253 S.C. at 154, 169 S.E.2d at 390-391.

As to promptness, Defendant received notice of the Default Judgment on March 26, 2019 and moved for relief within ten days of notice. Rule 60(b) provides that motions for relief must be made "within a reasonable time" and may be filed up to a year after the judgment, Rule 60(b), SCRCP. Unarguably, a motion filed within ten days of the judgment meets the promptness element.

As explained above, Defendant has established a meritorious defense. In order "[t]o establish a meritorious defense, a party is not required to show an absolute defense," *Mictronics*, 345 S.C. at 511, 548 S.E.2d at 26, nor is a party required to file an Answer in order to demonstrate a meritorious defense. *See Owen*, 288 S.C. at 135, 341 S.E.2d at 630 (finding the

defendant's prehearing statement outlining certain tax exemptions sufficient to establish a meritorious defense). The alleged assault did not take place on The Shelter's premises. (Rule 60(b) Motion, Exh. B; *Id.*, Exh. C, ¶ 16; *Id.*, Exh. D, ¶ 16; Damages Tr. 26:7-9; 34:25-35:2). As a matter of law, the Shelter is not responsible for the criminal acts of a third party (Yelverton) that occur off its premises. *See Jackson,* 365 S.C. at 612-613, 620 S.E.2d at 56-57. After leaving The Shelter, Plaintiff had reached the safety of an automobile and chose to exit the vehicle in order to confront Yelverton. (Amended Complaint ¶¶ 12, 13, 16). In addition, Defendant denied that it over-served Yelverton, and argued that Yelverton's off-premises criminal actions served as a superseding intervening cause of Plaintiff's damages, and that The Shelter was entitled to have damages apportioned. (Rule 60(b) Motion, pp 11-12; *see also* Motion to Set Aside Default, pp 10-11; *see also* Dec. 14 Tr. 9:12-18; 22:14-23:16).

Plainly, Plaintiff will not be prejudiced by setting aside the Default Judgment. *See Colleton Prep.*, 616 F.3d at 419 ("[m]oreover, as obvious as it may be, it bears mention that no cognizable prejudice inheres in requiring a plaintiff *to prove* a defendant's liability, a burden every plaintiff assumes in every civil action"). Instead, she simply will be required to prove her claim. Unquestionably, "[i]t is the policy of the law to favor the trial of cases on the merits." *Lewis*, 275 S.C. at 560, 274 S.E.2d at 289.

Finally, this Court should scrutinize the punitive damage award "to ensure the verdict is not excessive and is supported by the evidence." *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 579 (2013). In *Limehouse*, the Supreme Court upheld the limited role allowed to defense counsel in damages hearings based in part on the ability of an appellate court to review and correct excessive judgments. As explained in more detail below, both the future actual

damages award and the punitive damages award are excessive and not supported by the evidence in this case.

For all the reasons stated herein, this Court should grant Defendant relief from the default judgment pursuant to Rule 60(b)(1) and/or 60(b)(3), SCRCP.

III. THE CIRCUIT COURT ERRED IN FAILING TO GRANT DEFENDANT'S RULE 59(e) MOTION.

Rule 59(e), SCRCP, allows for a motion to alter or amend a judgment to be served and filed "not later than 10 days after receipt of written notice of the entry of the order." Notes to Rule 59(e) indicate that it is "substantially the Federal Rule," and "consistent with Code 15-27-150." One of the well-recognized grounds for granting a motion to alter or amend a judgment is in order "to correct a clear error of law or prevent manifest injustice." *Pacific Ins. Co.*, 148 F.3d. at 403.

While Rule 59(e), SCRCP, does not contain a defined standard for reconsideration, federal cases outline three "grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pacific Ins. Co.*, 148 F.3d at 403. Finally, if a lower court fails to rule on an issue raised before it, a party must file a Rule 59(e) motion in order to preserve that issue for later appeal. *E.g.*, *Bodkin v. Bodkin*, 388 S.C. 203, 219, 694 S.E.2d 230, 239 (Ct. App. 2010).

The Circuit Court committed several clear errors of law in awarding both actual and punitive damages. The future damages award is speculative and not supported by reliable evidence. The punitive damages award is not supported by properly admitted or clear and convincing evidence and, in addition, the Court failed to inquire into Defendant's ability to pay.

As a result of these errors, both individually and in combination, the future damages and punitive damages portion of the award should be eliminated or significantly reduced.

A. The Court erred in awarding Plaintiff future damages in the amount of $418,630.00.

The Court erred by finding that the evidence supports a future actual damages award of $418,630.00, comprised of future medical bills in the amount of $18,010.00 and future pain and suffering/disfigurement in the amount of $400,620.00. While Defendant does not contest the amount of Plaintiff's past medical bills, the future medicals and pain and suffering/disfigurement amounts lack evidentiary support. First, with regard to Plaintiff's alleged pain and suffering and/or disfigurement, medical records from MUSC indicate that, a little over two months after her closed nasal reduction, Plaintiff was "[m]uch improved and happy feels that nose looks straighter." She was "[h]appy with lateral nose scar. No complaints. No clear otorrhea, smell intact." (Rule 59(e) Motion, Exh. A). Furthermore, despite claiming intense daily pain levels of "10 out of 10," Plaintiff had not been seen by any medical provider from August 11, 2016 until she saw Dr. Craig Rowan in March 2019. (Damages Tr. 38:9-21; 40:6-25).

Second, Plaintiff's future damages award relies heavily on the testimony of Dr. Rowan, who acknowledged he has never treated Plaintiff and saw her for the first time only two weeks prior to the damages hearing. (Damages Tr. 15:25-16:9). In fact, he admitted Plaintiff had not sought any medical treatment of any kind for her nose for almost four years, calling into question both Plaintiff's claim of on-going pain and suffering and/or the need for any future surgery. (*Id.* 18:13-22). Dr. Rowan acknowledged that the only reason for the future surgery he proposed – an open rhinoplasty – would be cosmetic, to address any dissatisfaction Plaintiff had with her appearance, and to address breathing problems. As noted above, contemporaneous medical records indicate Plaintiff was happy with her appearance and, in addition, Dr. Rowan agreed that

objective tests for breathing problems were negative. (*Id.* 19:23-21:20; 20:8-21:12) (Rule 59(e) Motion, Exh. A (MUSC notes indicating Plaintiff "returns s/p a closed nasal reduction on 10/5/15 with Dr. Patel. Much improved and happy feels that nose looks straighter")).

Third, to the extent the Court was moved by Plaintiff's testimony regarding her appearance, Plaintiff failed to submit any pre-incident photos to demonstrate any change in her appearance. Furthermore, Plaintiff failed to present any credible evidence that the incident has damaged either her career or her social life. Tellingly, while Plaintiff testified that, following the incident, she refrained from social engagements, there was testimony that she returned to The Shelter no fewer than five times in the 35 days following the incident, staying each time till the 2:00 a.m. closing. (Damages Tr. 68:5-69:7). In sum, Plaintiff's claim of future pain and suffering and/or disfigurement is speculative, at best. Indeed, the Default Judgment apparently recognizes the speculative nature of the future damages award, as it is based on "pain and disfigurement" Plaintiff "*may suffer* ... for the reminder [sic] of her life." (Order of Judgment, p. 4) (emphasis added).

As a result, this Court should reverse the Order of Judgment and eliminate or reduce the amount of actual damages based on future surgery and alleged pain and suffering/disfigurement awarded to Plaintiff.

B. The Court committed several errors in awarding punitive damages.

Punitive damages are recoverable only where there is clear and convincing evidence that the defendant's conduct was reckless, willful, or wanton. *Fairchild v. South Carolina Dep't of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411-412 (2012). In this case, the proof of any alleged recklessness, willfulness or wantonness on Defendant's part is speculative, at best, and compounded by legal error.

First, the Court committed legal error and violated Defendant's due process rights by denying Defendant the right to cross-examine Plaintiff regarding the alleged reprehensibility of Defendant's conduct on the night of the incident. Defense counsel maintained that, although the allegations in the Amended Complaint are deemed admitted for purposes of liability, Defendant was entitled to cross-examine Plaintiff for purposes of exploring the basis for punitive damages. (Damages Tr. 35:17-36:8 (the Court acknowledging Defense counsel had a right to cross-examine Plaintiff on punitive damages); 37:1-38:7; 43:12-44:12 (the Court disallowing questions going to proof of punitive damages)). Because Defense counsel was prohibited from cross-examining Plaintiff with regard to Defendant's alleged reckless, willful or wanton conduct, the punitive damages award should be eliminated or significantly reduced.

Second, to the extent the Court relied on the Amended Complaint to support its punitive damages award, the Amended Complaint contains contradictory allegations on this point and, thus, falls short of clear and convincing evidence. *See, e.g.*, *Fairchild*, 398 S.C. at 99, 727 S.E.2d at 412 (a plaintiff must prove entitlement to punitive damages by clear and convincing evidence"). Plaintiff asserts she was assaulted and injured on September 24, 2015 by Yelverton. According to Plaintiff's Amended Complaint, The Shelter "functioned solely as a bar after 12:00 a.m." (Amended Complaint, ¶ 34). She acknowledges she arrived at The Shelter at approximately 12:15 a.m., at a time she understood The Shelter to operate "solely as a bar." (Amended Complaint, ¶ 9). After an interaction with Yelverton inside The Shelter, Plaintiff acknowledges that she left the bar, went to a car in which she sought safety with her friends. When Yelverton banged on the car window, Plaintiff exited the car, after which she was assaulted by Yelverton. (Amended Complaint, ¶¶ 12, 13, 16). Thus, Plaintiff had reached a place of safety – a locked automobile – and, on her own volition, left the safety of the car to

confront Yelverton, who then assaulted her. Furthermore, Plaintiff does not allege that the assault took place on premises owned or controlled by The Shelter because, in fact, it did not. At the damages hearing, she testified that the first thing she remembered after the altercation was waking up in the street. (Damages Tr. 26:7-9; 34:25-35:2).

Finally, the Court erred by admitting the list of 911 calls into evidence, over the timely objections of Defense counsel based on lack of foundation, hearsay, and relevance. Although the list of 911 calls was accompanied by an affidavit by the Records Custodian for Charleston County Consolidated 911 Center, there was no hearing witness to provide a proper foundation for their admission. The list of 911 calls was allowed into evidence via the Plaintiff; however, she only could testify she had seen them previously. On cross-examination, she admitted she had no experience or familiarity with 911 dispatch records. (Damages Tr. 50:23-52:12).

Pursuant to Rule 803(6), business records may serve as an exception to the hearsay rule if certain conditions are met, including that the records are "kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness ..." Rule 803(6), SCRE. Here, there was no testimony by "the custodian or other qualified witness" to explain how the 911 list was prepared or maintained, or to explain any other aspect of the record. (Damages Tr. 46:12-50:14). As a result, the list of 911 calls were improperly admitted and lack any relevance as to Defendant's purported culpability or the alleged reprehensibility of its actions or failure to act.

Despite the fact that he would not reveal anything about his other clients, Mr. Kale testified, based on the 911 dispatch records, that The Shelter "had very high calls that we went through on a weekend basis, and comparable to other clients I have." (Damages Tr. 58:4-22).

Mr. Kale's refusal to identify his other clients with which he was comparing The Shelter rendered his testimony speculative at best.[12] Defendant has been substantially prejudiced by the erroneous admission of the 911 dispatch list and Mr. Kale's testimony regarding the contents of that list, as the Court relied on both, in part, in arriving at its punitive damages award.

As a result of these errors, the Court should reverse the Order of Judgment and either eliminate or reduce the punitive damages awarded to Plaintiff.

C. The Court erred by failing to inquire into Defendant's ability to pay before awarding punitive damages.

Although the Order of Judgment states that "this Court opined from the record that the Defendant is able to pay the verdict," the Court erred by failing to inquire into the Defendant's ability to pay before awarding punitive damages in the amount of $450,000.00. There is no evidence or testimony as to Defendant's net worth. "In assessing punitive damages, however, "'the wealth of a defendant is a relevant factor' in determining the defendant's ability to pay ..." *Sulton v. Healthsouth Corp.*, 400 S.C. 412, 420, 734 S.E.2d 641, 645 (2012). A defendant's wealth, as measured by its net worth, "is a relevant factor in assessing punitive damages." *Branham v. Ford Motor Co.*, 390 S.C. 203, 240, 701 S.E.2d 5, 24-25 (2010). This omission was raised to the Circuit Court in Defendant's Rule 59(e) Motion; however, the Court still did not address the issue.

There is no evidence whatsoever in this record regarding Defendant's net worth. Thus, there is no evidence to support the Court's opinion that Defendant is able to pay the verdict, including a punitive damages award that is in excess of the amount of Plaintiff's actual damages.

[12] It is important to keep in mind that Mr. Kale's security contract with The Shelter pre-dated the 911 list in any event. Moreover, Mr. Kale's contract with The Shelter extended from Spring 2014 to Spring 2015, when he was fired by The Shelter, whereas the 911 list covers March 10, 2016 to February 26, 2019.

In addition, to the extent the Circuit Court was operating under the assumption that liability insurance is available to pay any verdict, this case is being defended under a reservation of rights which leaves the question of coverage open.

As a result, this Court should reverse the Order of Judgment and either eliminate or significantly reduce the amount of the punitive damages award.

IV. THE MASTER IN EQUITY ERRED IN APPOINTING A RECEIVER FOR DEFENDANT.

A. In the absence of any evidence of property or assets that could be applied to the judgment, the Master erred in appointing a receiver.

After obtaining the judgment, Plaintiff's counsel sent an Execution of Judgment to the Charleston County Sheriff's Department, requesting that the sheriff's department "satisfy the said judgment out of the property of said judgment debtor, Dart Shelter, LLC within your County belonging to such judgment debtor..." (Execution Against Property, dated July 10, 2019). On July 17, 2019, the sheriff returned the Execution with a statement that the judgment was "NULLA BONA PER ATTORNEY'S REQUEST," indicating that Dart Shelter had no assets from which the judgment could be satisfied. (Return of Execution, dated July 17, 2019). Plaintiff's counsel then filed a Motion for Supplemental Proceedings in which she stated that she was "informed and believes that the Defendant may have property and assets which it unjustly refuses to apply toward the Satisfaction of the said Judgment." (Motion for Supplemental Proceedings, dated July 26, 2019). Plaintiff's counsel thereafter filed a Motion for Attachment and Appointment of a Receiver, in which she alleged that "upon information and belief Defendant has assets available for the satisfaction of the subject Judgement but Defendant refuses to apply such assets to the satisfaction of the Judgment" and that "upon information and belief Defendant nor its members are prepared to properly operate and maintain the Company to

satisfy the debt, will waste Company assets for their betterment to the detriment of creditors, and that the operation of the Company will be seriously and adversely affected so as to destroy and deplete available assets that should be applied to the satisfaction of the judgment." (Notice of Motion and Motion for Attachment and Appointment of Receiver, ¶¶ D. and E.). Plaintiff did not file an affidavit or other documents in support of the Motion to Appoint Receiver.

The appointment of a receiver is a drastic remedy and should be granted only with reluctance and caution. *Midlands Utility, Inc. v. S.C. Dept. of Health and Environmental Control*, 301 S.C. 224, 391 S.E.2d 535 1989; *Vasiliades v. Vasiliades,* 231 S.C. 366, 98 S.E.2d 810 (1957). Indeed, the statute which authorizes the appointment of a receiver specifically provides that a "receiver may be appointed by a judge of the circuit court...," indicating that the appointment of receiver is never mandatory. S.C. Code §15-65-10 (emphasis added); *see also, Andrick Development Corp. v. Maccaro*, 280 S.C. 103, 311 S.E.2d 95 (Ct. App. 1984) (appointment of a receiver rests within the discretion of the court to which application is made).

The statute that authorizes the appointment of a receiver sets forth the circumstances under which a receiver may be appointed. The only one of those circumstances applicable in this case is set forth in subsection (3) of the statute, which states that a receiver may be appointed "[a]fter judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment..." S.C. Code § 15-65-10(3). However, Plaintiff did not present evidence in her motion or at the hearing that The Shelter had any property to be preserved during the appeal or that it owned property that could be applied to the judgment.

As stated above, all of the allegations in Plaintiff's Motion to Appoint a Receiver are based "upon information and belief," and the motion was not supported by an affidavit or other evidence. At the hearing on the motion, Plaintiff's counsel presented no testimony or other evidence to establish that The Shelter had any property to be preserved during the appeal or that could be applied in satisfaction of the judgment. Instead, she simply argued that due to the "nature of the judgment and the nature of the business which we believe appears to have a healthy business in light of - - the patronage as you can see as you drive by, we believe that it's critical to have the receiver appointed as the statute allows for." (Transcript of hearing September 13, 2019, p. 5, lines 7-12). Similarly, in granting the motion, the Master noted that "[e]very time I drive by there the place is pretty busy." (Transcript of hearing September 13, 2019, p. 23, lines 22-23). However, the mere observations of Plaintiff's counsel and the Master are not a sufficient basis for the appointment of a receiver under Section 15-65-10(3). The moving party must present evidence that the judgment debtor has property to be preserved during an appeal or that he refuses to apply in satisfaction of the judgment, as is required by subsection (3) of Section 15-65-10.

B. The Master erred in refusing to require Plaintiff to post a bond in connection with the appointment of the receiver.

Section 15-65-90 provides a means by which a party can recover damages if it is determined that a receiver was improperly appointed. Specifically, if it is determined that a receiver should not have been appointed, the party opposing the appointment of a receiver may apply to the court to "have his actual damages by reason of such receivership ascertained and assessed and for judgment therefor against the party or parties having procured such receiver." S.C. Code §15-65-90. This code section is of particular significance in a case such as this, where the judgment that provides the basis for the appointment of a receiver is on appeal.

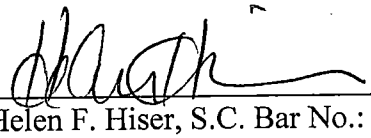
In order for Section 15-65-90 to operate as intended, the party obtaining the appointment of a receiver should be required to post a bond, so that the party for which the receiver was appointed will have a means to recover its actual damages, should it be determined that the receiver was improperly appointed. Otherwise, that party may not be able to recover the damages allowed under the statute. As such, the Master erred in not requiring Plaintiff to post a bond in connection with the appointment of the receiver.

CONCLUSION

For all the reasons stated herein, this Court should reverse the Circuit Court, grant Defendant's Motion to Set Aside Default, and/or Rule 60(b) Motion, and/or Rule 59(e) Motion. In addition, this Court should rule that the Master in Equity erred in appointing a receiver and in failing to require Plaintiff to post a bond in connection with that appointment.

Respectfully submitted,

January 29, 2020



Helen F. Hiser, S.C. Bar No.: 76124
Benjamin B. Davis, S.C. Bar No.: 74955
735 Johnnie Dodds Blvd., Suite 200
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Thomas E. Lydon, S.C. Bar No. 10242
1320 Main Street, 10th Floor
P.O. Box 12519
Columbia, South Carolina 29211

Attorneys for Appellant Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr., Circuit Court Judge

Case No. 2017-CP-10-6176

Appellate Case No. 2019-001101

Samantha L. Antley, ... Respondent,

v.

Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar
and Preston Yelverton, ... Defendants,

of Whom,

Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar is the ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Appellant's Designation of Matter on Samantha L. Antley, by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorneys of record, and to other counsel of record as follows:

Daniel S. Slotchiver, Esq.
Andrew J. McCumber, Esq.
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Blvd., Suite 100
Mount Pleasant, South Carolina 29464

Edward L. Phipps, Esq.
Phipps Law Firm, LLC
155 King Street, Floor 2
Charleston, South Carolina 29401

Mark A. Mason, Esq.
Salah Hibri, Esq.
The Mason Law Firm
Post Office Box 1271
Mt. Pleasant, South Carolina 29465-1271

Mary L. Arnold, Esq.
749 Johnnie Dodds Blvd., Ste. B
Mount Pleasant, South Carolina 29464

January 29, 2020

Makenzie Broughton
Legal Assistant to Helen F. Hiser

McANGUS GOUDELOCK & COURIE LLC
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Appellant Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar

mgc

Reply To
HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

January 29, 2020

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Samantha L. Antley v. Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar and Preston Yelverton
Civil Action No.: 2017-CP-10-6176 (Charleston)
Date of Incident: September 24, 2015
Carrier Claim No.: JY15J0673002
MGC File No.: 20205.18007
Appeal No.: 2019-001101

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. the original and one copy of the Initial Brief of Appellant Dart Shelter, LLC d/b/a The Shelter Kitchen & Bar;
2. the original and one copy of Appellant's Designation of Matter to be Included in the Record on Appeal; and
3. the original and one copy of Appellant's Proof of Service concerning items one and two.

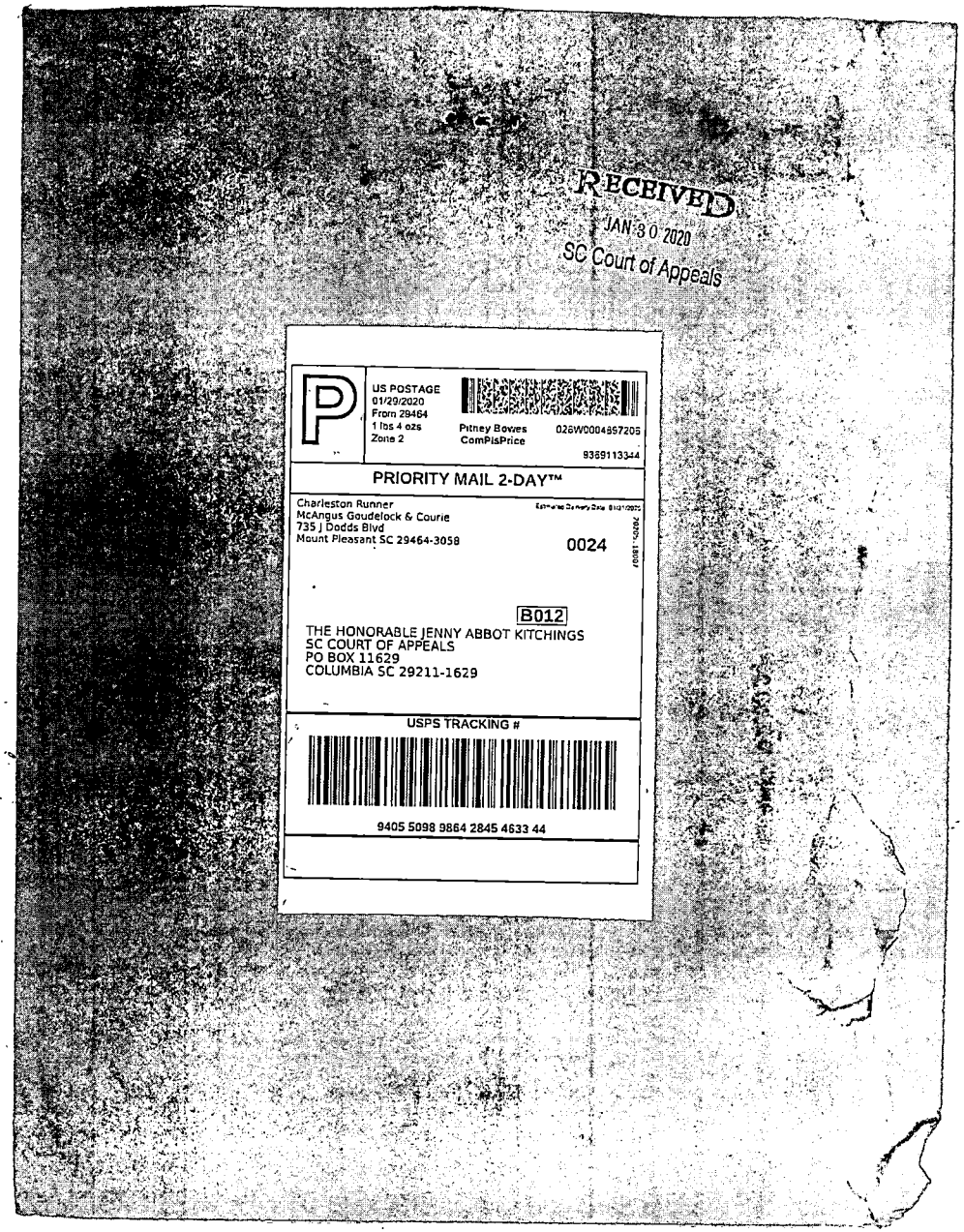
Please file these documents and return the clocked-in copies in the enclosed, self-addressed stamped envelope. If you have any questions, please do not hesitate to contact me.

Sincerely,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Daniel S. Slotchiver, Esq.
Andrew J. McCumber, Esq.
Edward L. Phipps, Esq.
Salah H. Hibri, Esq.
Mark A. Mason, Esq.
Mary L. Arnold, Esq.


RECEIVED
JAN 30 2020
SC Court of Appeals
US POSTAGE
01/29/2020
From 29464
1 lbs 4 ozs
Zone 2
Pitney Bowes
ComPsPrice
026W0004897205
9369113344
PRIORITY MAIL 2-DAY™
Charleston Runner
McAngus Goudelock & Courie
735 J Dodds Blvd
Mount Pleasant SC 29464-3058
0024
B012
THE HONORABLE JENNY ABBOT KITCHINGS
SC COURT OF APPEALS
PO BOX 11629
COLUMBIA SC 29211-1629
USPS TRACKING #
9405 5098 9864 2845 4633 44