THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Circuit Court Judge

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Appellate Case No. 2019-001286

Lower Court Case No. 2017-CP-26-08184

Jane Doe...Appellant,

v.

Crazy Horse Saloon & Restaurant, Inc. d/b/a
Thee New Dollhouse and Dog Leg Right, LLC ....Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the circuit court properly set aside the entry of default because Respondent timely filed the motion, its failure to answer was justified by good cause, Respondent had a meritorious defense, and Appellant experienced no prejudice?

II. Did the circuit court correctly grant summary judgment in favor of Respondent because Appellant's speculative claims failed as a matter of law?

STATEMENT OF THE CASE

This appeal arises out of the circuit court's grant of summary judgment in favor of Respondent Crazy Horse Saloon & Restaurant, Inc. d/b/a Thee New Dollhouse and Dog Leg Right, LLC because Appellant Jane Doe could not prove her speculative claims. On December 12, 2017, Appellant—a former cocktail waitress at one of Respondent's clubs—filed the instant lawsuit in Horry County, asserting causes of action for negligence, invasion of privacy due to public disclosure of private facts, and intentional infliction of emotional distress. (R. pp. 20–27). Respondent's registered agent was served with the summons and complaint on December 18, 2017. (R. p. 41).

Consistent with the established course of dealing, Respondent immediately forwarded the summons and complaint to its insurance carrier. (R. p. 92). In the intervening weeks, the insurance carrier contacted Appellant's counsel to discuss an extension for filing an answer. (Id.). The insurance carrier, however, did not follow up and obtain an extension. (Id.). After the deadline for filing an answer had already passed, the insurance carrier then notified Respondent of its position that Respondent's policy afforded no coverage for this case and took no further action. (R. p. 93). Interestingly, Respondent's insurance carrier had covered twenty previous claims and, more to the point, a similar claim within the last year. (R. p. 96).

Appellant filed a "motion for default judgment" on February 22, 2018.[1] (R. pp. 28–30). The Horry County clerk of court, however, correctly interpreted the motion as seeking an entry of default and issued an order entering default on February 23, 2018. (R. pp. 14–16). Respondent then filed a motion to vacate the default judgment on March 22, 2018. (R. pp. 48–49). Again, while the motion was captioned as a motion to vacate, the only order issued in this case was an

[1] The procedural history surrounding this motion is somewhat confusing due to the nomenclature adopted by Appellant. At this stage, Appellant would have only been entitled to an entry of default.

entry of default from the clerk of court. Prior to a hearing on the motion, Respondent filed an answer and provided discovery to Appellant. See (R. pp. 50–54, 93).

At the May 15, 2018 hearing, the circuit court understood the motion was one to set aside the entry of default and the appropriate standard was good cause. (R. p. 101). Respondent explained to the circuit court that its insurance company had allowed the default by failing to retain counsel to file an answer, denying coverage, and notifying Respondent of this fact after the deadline for filing an answer expired. (R. p. 93). Further, Respondent informed the circuit court that it had a meritorious defense—and had filed an answer prior to the hearing—and already responded to Appellant's discovery. (Id.). Appellant argued Respondent did not demonstrate good cause. (R. p. 98). The circuit court disagreed, finding the present case distinguishable from one in which an insurance company retains counsel, as required under the policy, and fails to file an answer after notice of the summons and complaint. (R. p. 96). Thus, the circuit court issued an order setting aside the entry of default for good cause shown. (R. pp. 101, 11–13). When asked if Appellant wanted a formal order, she declined and said a Form 4 order would suffice. (R. p. 101). She never filed a Rule 59(e), SCRCP, motion.

Thereafter, the parties engaged in written discovery and took the depositions of Martin James McNamee and Appellant. McNamee testified that no cameras were ever installed in the cocktail waitresses' dressing room in which Appellant claimed she was allegedly videotaped. (R. p. 160). In her deposition, Appellant deviated from the allegations in her complaint and stated she would get dressed in the entertainers' dressing rooms, as well, and sometimes walked around topless. (R. p. 150). Nevertheless, when asked whether she had any evidence that she ever appeared on a livestream video published to the Internet—and, if so, whether anyone saw it—she replied she had no evidence. (R. p. 144).

Respondent therefore filed a motion for summary judgment on February 26, 2019. (R. pp. 55–56). Appellant filed a memorandum in opposition on April 1, 2019. (R. pp. 57–62). The case was called for a hearing on April 3, 2019, during which Respondent submitted a brief memorandum in support along with excerpts from Appellant's deposition.[2] (R. pp. 105–19, 63–82). Although Appellant objected to the court's consideration of this memorandum, the circuit court—exercising its discretion—accepted all submissions, including additional evidence submitted by Appellant at the hearing, and proceeded to consider the arguments of counsel. (R. pp. 108–09). Because Appellant admitted she could not produce any evidence that she ever appeared nude on a video published to the Internet, nor was she aware of anyone who had seen such an alleged video, the circuit court found she could not prove an essential element of her claims. (R. p. 118). Accordingly, the circuit court granted Respondent's motion for summary judgment. (R. pp. 118, 4–10).

Subsequently, Appellant filed a Rule 59(e) motion to reconsider. (R. pp. 83–89). In her motion, Appellant claimed the circuit court erred in moving forward with the hearing when Respondent failed to file an accompanying memorandum in support pursuant to Justice Toal's administrative order regarding the civil motions pilot program and, in her view, did not give sufficient notice to Appellant of the grounds for the motion under Rule 7(b)(1), SCRCP. (R. pp. 84–85). For the first time, Appellant also contended she was not afforded a full and fair opportunity to conduct discovery prior to the entry of summary judgment. (R. pp. 87–88). At a hearing on the motion, Respondent noted that it had no control over the third-party company that

[2] Given that Appellant moved at the outset of the case to proceed as Jane Doe to protect her identity, Respondent explained it did not feel comfortable publicly filing her deposition transcript with the circuit court. (R. p. 107). Appellant made the same representation regarding McNamee's transcript given that it contained personal identifying information. (R. pp. 112–13).

hosted—not recorded—a livestream feed. (R. p. 128). In any event, Respondent stated that the company and the records no longer exist. (Id.).

The circuit court denied Appellant's motion to alter or amend and then entered an order to that effect. (R. pp. 128, 1–3). This appeal followed.

ARGUMENT

I. *The circuit court properly set aside the entry of default because Respondent timely filed the motion, its failure to answer was justified by good cause, Respondent had a meritorious defense, and Appellant experienced no prejudice.*

A. *The circuit court's order setting aside the entry of default is reviewed under a clear abuse of discretion standard.*

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." Roberson v. S. Fin. of S.C., Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005). On appeal, the circuit court's decision will not be disturbed absent "a clear showing of abuse of discretion." Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (1988). "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

B. *Appellant's arguments regarding the appropriate standard and prejudice are not preserved for appellate review.*

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review." Wilder Corp v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Under our preservation rules, a "losing party must first try to convince the lower court that it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." I'On, LLC v. Town of Mt.

Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "This principle underlies the long-established preservation requirement that the losing party generally must both present [her] issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." Id.

If "an issue has not been ruled upon by the [circuit court] nor raised in a post-trial motion, such issue may not be considered on appeal." Caldwell v. Wiquist, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013) (quoting Pelican Bldg. Ctrs. of Horry–Georgetown, Inc. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993)). "Although a Rule 59(e)[, SCRCP,] motion may effectively seek a reconsideration of issues and arguments, this type of motion is often required for issue preservation purposes." Home Med. Sys., Inc. v. S.C. Dep't of Revenue, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). "A party must file such a motion when an issue or argument has been raised, but not ruled on, . . . to preserve it for appellate review." I'On, LLC, 338 S.C. at 422, 526 S.E.2d at 724. After all, "[a]n appellate court may not . . . reverse for any reason appearing in the record." Id. at 421–22, 526 S.E.2d at 724.

In this case, Appellant's argument on the circuit court's use of the good cause standard—as opposed to excusable neglect—in deciding Respondent's motion is not preserved for appellate review. Appellant never argued the circuit court was applying the wrong standard. In fact, Appellant herself argued Respondent failed to demonstrate good cause. (R. p. 98) (arguing "that's not good cause"). Nor did Appellant argue that she would experience any prejudice from the circuit court setting aside the entry of default. When asked if she had any objection to the circuit court issuing a Form 4 order, Appellant indicated she did not. (R. p. 101). Thereafter, Appellant never filed a Rule 59(e) motion. Because she failed to bring these issues to the circuit court's attention, she has waived the right to raise them for the first time on appeal. See Caldwell, 402

S.C. at 576, 741 S.E.2d at 589 (quoting Pelican Bldg. Ctrs. of Horry–Georgetown, Inc., 311 S.C. at 60, 427 S.E.2d at 675).

Accordingly, the Court should decline to address Appellant's arguments regarding the good cause standard and prejudice because these issues are not preserved for appellate review. See Wilder Corp, 330 S.C. at 76, 497 S.E.2d at 733.

C. In any event, the circuit court appropriately exercised its discretion in setting aside the entry of default.

"The standard for granting relief from an entry of default is good cause under Rule 55(c), SCRCP, while the standard is more rigorous for granting relief from a default judgment under Rule 60(b), SCRCP." Richardson v. P.V., Inc., 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009). "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co., 383 S.C. at 607, 681 S.E.2d at 888.

In addition, the circuit court must consider (1) the timing of the motion, (2) whether the moving party has a meritorious defense, and (3) the degree of prejudice the plaintiff will experience if relief is granted. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct. App. 1989). "The decision whether to set aside an entry of default . . . lies solely within the sound discretion of the trial judge." Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006) (quoting Roberson, 365 S.C. at 9, 615 S.E.2d at 114). And our appellate courts have recognized that Rule 55(c) should be "liberally construed to promote justice and dispose of cases on the merits." Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995).

As a preliminary matter, Appellant's filing was incorrectly styled as a "motion for default judgment." As the clerk of court correctly recognized, this was substantively a motion for entry

of default because that was the only relief to which Appellant was entitled at that stage of the proceedings. Although the clerk signed Appellant's proposed order, which was improperly captioned as a default judgment, the signature page clarified it was an order entering default. After all, a clerk of court could not enter a default judgment. Compare Rule 55(a), SCRCP (requiring the clerk to enter default when a party fails to answer), with Rule 55(b)(1), SCRCP (allowing only a judge to enter a default judgment when appropriate). Further, the circuit court never held a damages hearing or entered a judgment against Respondent.

Thus, while the monikers assigned to Appellant's motion and the corresponding order may have created some confusion, this was merely a matter of semantics. This was an entry of default, and the substance of the motion and the order is beyond dispute. Respondent was held in default, and its motion was to set aside that entry of default. Cf. Sundown Operating Co., 383 S.C. at 607, 681 S.E.2d at 888 (noting "confusion in the case law regarding the application of the standards for relief set forth in Rule 55(c) and Rule 60(b)" and recognizing "an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment"); see also Melton v. Olenik, 379 S.C. 45, 49 n.6, 664 S.E.2d 487, 489 n.6 (Ct. App. 2008) (noting the Court is "free to treat the motion based upon its substance and effect as opposed to how it was captioned"). Respondent was therefore only required to demonstrate good cause under Rule 55(c), SCRCP.

When properly viewing the case through the prism of good cause, the circuit court appropriately exercised its discretion in setting aside the entry of default in the interests of justice. As for the first prong, Respondent timely filed the motion. The clerk of court entered the order of default on February 23, 2018. Less than a month later, on March 22, 2018, Respondent moved to vacate. Respondent then filed an answer on April 12, 2018, see (R. pp. 50–54), and "entered into some discovery already in good faith" by responding, for example, to Appellant's requests for

admission, (R. p. 93). Appellant's affidavits of service indicate the complaint was served upon Respondent on December 18, 2017. In sum, just over three months transpired between service of the complaint and Respondent (1) filing its motion to set aside the default, (2) submitting an answer, and (3) responding to discovery. This hardly caused an unreasonable delay of the case.

Further, although Appellant points to an isolated statement of Respondent's counsel about the case having a meritorious defense and involving cameras, see Initial Br. App. p. 6, this statement was not the sole basis upon which Respondent established a meritorious defense. Respondent also told the circuit court an answer was filed prior to the hearing. See Savage v. Cannon, 204 S.C. 473, 480, 30 S.E.2d 70, 72 (1944) (asserting that "the submission of [a] proposed answer [is] in accordance with the [suggested] practice" to establish a meritorious defense). Indeed, in its answer, Respondent denied the allegations raised in Appellant's complaint and asserted the following defenses: contributory negligence because Appellant knew of the cameras and allowed herself to be photographed, waiver, assumption of risk, and unconstitutionality of punitive damages. (R. pp. 50–54). In any event, it is well-settled that an attorney may properly represent "that from statements made to him by his client, he thought his client had a meritorious defense." Savage, 204 S.C. at 480, 30 S.E.2d at 72. Although no affidavits were submitted, cf. id., Respondent's counsel made representations to the court pursuant to Rule 11, SCRCP.

Respondent therefore made a sufficient showing to meet the low threshold of establishing a meritorious defense for purposes of setting aside the entry of default. See, e.g., McClurg v. Deaton, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008) ("To establish that he has a meritorious defense, a complainant need not show that he would prevail on the merits, but only that his defense is meritorious."); cf. Gaskins v. Cal. Ins. Co., 195 S.C. 376, 381, 11 S.E.2d 436, 438 (1940) (noting that the defendant "might well have gone into greater detail, but enough [was]

stated to make a prima facie showing of a good and substantial defense"). The fact that Respondent prevailed on the merits when given the opportunity to defend the case is the principal evidence that it had a meritorious defense. If Respondent ultimately prevailed on a motion for summary judgment, then certainly it satisfied the low burden of demonstrating a meritorious defense at this earlier stage in the proceedings. Thus, Respondent satisfied the second requirement for setting aside the entry of default.

Turning to the prejudice prong, Appellant fares no better. In her brief, Appellant merely states in a general, conclusory fashion that the circuit court did not consider "the obvious prejudice to Appellant." Initial Br. App. p. 6. As noted above, Appellant failed to argue prejudice to the circuit court and, therefore, this argument is not preserved for appellate review. Additionally, "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). Because Appellant's prejudice argument consists of a conclusory, one-sentence statement, she abandoned it on appeal. See id. Nor can she raise it for the first time in a reply brief. See McClurg, 395 S.C. at 87 n.2, 716 S.E.2d at 888 n.2 (stating an issue may not be raised for the first time in a reply brief); Glasscock, 348 S.C. at 81, 557 S.E.2d at 691–92 (finding an appellant's argument unpreserved because it was short, conclusory, and cited no authority and asserting that, even though the argument was more fully addressed in the reply brief, an argument in a reply brief cannot present an issue to the appellate court that was not addressed in the initial brief).

Even on the merits, Appellant was not prejudiced by the circuit court's decision to set aside the entry of default given the minimal passage of time, Respondent's prompt filing of an answer, and Respondent's immediate furnishing of discovery prior to the hearing. After all, a plaintiff

must show something more than "mere delay" to establish the "substantial" prejudice necessary for a court to refuse to set aside an entry of default. 49 C.J.S. Judgments § 523 (2019); see also Nelson v. Simpson, 826 S.W.2d 483, 486 (Tenn. Ct. App. 1991) ("The mere passage of time is not the sort of prejudice that supports declining to set a default judgment aside."); Krantz v. KLI, Inc., No. 6:09-cv-01623-JMC, 2011 WL 1642375, at 4 (D.S.C. May 2, 2011) (asserting "a plaintiff must show something more than mere delay to establish this prejudice, such as loss of evidence, greater difficulty in discovery or trial, or opportunity for fraud and collusion"). Here, the only possible prejudice Appellant experienced is that she was required to prove her case on the merits. Courts, however, have recognized a plaintiff is not prejudiced when "the setting aside of the default has done no harm to [the] plaintiff except to require [her] to prove [her] case." Lacy v. Sitel Corp., 227 F.3d 290, 293 (5th Cir. 2000) (quoting Gen. Tel. Corp. v. Gen. Tel. Answering Serv., 277 F.2d 919, 921 (5th Cir. 1960)). "Generally, there is no cognizable prejudice in requiring a plaintiff to prove a defendant's liability." Krantz, 2011 WL 1642375, at 4.

Appellant contends Respondent's detrimental reliance upon its insurer was an insufficient basis for the circuit court to set aside the entry of default. But Appellant's myopic view of Respondent's argument misses the point. Indeed, while our supreme court has held that "a defendant may not be relieved from the entry of default solely because it relied to its detriment on a negligent insurance agent," the court has recognized "the presence of other factors, in the totality of the circumstances, may amount to a showing of 'good cause.'" Sundown Operating Co., 383 S.C. at 609, 681 S.E.2d at 889 (emphasis added). Respondent, of course, was not solely relying upon the negligence of its insurer in seeking to set aside the entry of default. Rather, Respondent argued it had a meritorious defense to Appellant's claims, and Appellant experienced no prejudice from Respondent's brief delay in filing an answer in this case. Thus, when considering the totality

of the circumstances, the circuit court properly found good cause to set aside the entry of default. See Dixon, 320 S.C. at 178, 463 S.E.2d at 638 (recognizing that Rule 55(c) should be "liberally construed to promote justice and dispose of cases on the merits").

What is more, Respondent and the circuit court distinguished the case law upon which Appellant relies regarding the imputation of the insurance company's negligence to a party. Cf. Roberts v. Peterson, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987) (recognizing the negligence of an insurance company is imputable to the defaulting litigant). Here, a critical distinction is that the insurance company not only failed to retain counsel to file a timely answer, but also subsequently denied coverage. While insurers often stand in the place of the insureds for purposes of the pocket from which money comes in the event of a settlement or a verdict, that is not the case here. Appellant cannot offer any justification for imputing the negligence of the insurer to the insured. Indeed, to do so would thwart the policy behind the rule and relegate the merits of a case to secondary status.

Under these circumstances, the circuit court properly set aside the entry of default for good cause shown. See, e.g., Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535, 537 (Ct. App. 1987) (holding that good cause was shown in the totality of the circumstances even when defendant's reliance upon insurance agent was misplaced); see also Sears, Roebuck & Co. v. Ramey, 318 S.E.2d 740, 742 (Ga. Ct. App. 1984) ("The 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 upon the word of his fellow, particularly when no innocent party will suffer if the default is opened." (quoting Cobb Cty. Fair Ass'n, Inc. v. R.A. Boyle, 240 S.E.2d 136, 138 (Ga. Ct. App. 1977))).

D. Respondent also satisfied the excusable neglect standard.

Even if the order could somehow have been construed as entering a default judgment, Respondent still satisfied the burden for vacating a default judgment. Under Rule 60(b)(1), SCRCP, "[o]n motion and upon such terms as are just, the court may relieve a party" from a default judgment based upon a "mistake, inadvertence, surprise, or excusable neglect." The rule further requires that a party file the motion within a reasonable time not to exceed more than one year after the judgment was entered. Id. "In determining whether a default judgment should be set aside under Rule 60(b)(1), '[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant." Hill v. Dotts, 345 S.C. 304, 309, 547 S.E.2d 894, 897 (Ct. App. 2001) (quoting N.H. Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993)).

For the reasons set forth above, Respondent also satisfied this heightened standard of excusable neglect due to the insurance company's departure from the prior course of dealing. Further, Respondent promptly moved to vacate the default, established a meritorious defense, and Appellant was not prejudiced. Accordingly, irrespective of the manner in which the motions were styled, the circuit court did not clearly abuse its discretion in letting Respondent out of default. The Court should thus affirm.

II. The circuit court correctly granted summary judgment in favor of Respondent because Appellant's speculative claims failed as a matter of law.

A. The Court reviews the grant of summary judgment under the same standard as the circuit court.

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); see also Gibson v. Epting, 426 S.C. 346, 350, 827 S.E.2d

178, 180 (Ct. App. 2019) (noting an appellate court uses "the same yardstick as the [circuit] court" in reviewing an order granting summary judgment). Summary judgment is proper when no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004); Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a factfinder." S. Glass & Plastics Co. v. Duke, 367 S.C. 421, 427, 626 S.E.2d 19, 22 (Ct. App. 2005).

"In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." BPS, Inc. v. Worthy, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). Indeed, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

Although "[t]he summary judgment standard governing [the plaintiff's] claims requires her to produce only a 'scintilla' of evidence to avoid judgment as a matter of law," our appellate courts have recognized that "a scintilla is a perceptible amount." Gibson, 426 S.C. at 352, 827 S.E.2d at 181. In other words, "[t]here still must be a verifiable spark, not something conjured by shadows." Id.; see also Crosby v. Seaboard Air Line Ry., 81 S.C. 24, 31–32, 61 S.E. 1064, 1067 (1908) (asserting that "a scintilla of evidence is any material evidence which, taken as true, would tend to establish the issue in the mind of a reasonable juror").

B. Appellant failed to present a scintilla of evidence creating a genuine issue of material fact as to any cause of action.

Although Appellant advances several technical, procedural arguments surrounding the circuit court's grant of summary judgment, she skirts right past the merits. Indeed, Appellant does not once cite the law governing the claims on which she bore the burden of proof. Nevertheless, the circuit court properly recognized Appellant's three claims are without merit because—aside from a mere hunch—she cannot prove she was videotaped or that anyone saw it.

1. Negligence

"To recover on a claim for negligence, a plaintiff 'must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." Carolina Chloride, Inc. v. Richland Cty., 394 S.C. 154, 163, 714 S.E.2d 869, 873 (2011) (quoting Tanner v. Florence Cty. Treasurer, 336 S.C. 552, 561, 521 S.E.2d 153, 158 (1999)). "The absence of any one of these elements renders the cause of action insufficient." Andrews v. Piedmont Air Lines, 297 S.C. 367, 369, 377 S.E.2d 127, 128–29 (Ct. App. 1989).

2. Invasion of Privacy—Disclosure of Private Facts

"Invasion of privacy consists of the public disclosure of private facts about the plaintiff, and the gravamen of the tort is publicity as opposed to mere publication." McCormick v. England, 328 S.C. 627, 640, 494 S.E.2d 431, 437–38 (Ct. App. 1997). "The defendant must intentionally reveal facts which are of no legitimate public interest," and "the disclosure must be such as would be highly offensive and likely to cause serious mental injury to a person of ordinary sensibilities." Id. at 640, 494 S.E.2d at 438; see also Wright v. Sparrow, 298 S.C. 469, 471, 381 S.E.2d 503, 505 (Ct. App. 1989) (holding that, "[t]o state a cause of action for invasion of privacy the plaintiff must allege either: (1) the unwarranted appropriation or exploitation of his personality; or (2) the publicizing of his private affairs with which the public has no legitimate concern; or (3) the

wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities").

3. Intentional Infliction of Emotional Distress

> To state a claim for intentional infliction of emotional distress, a plaintiff must show (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Bergstrom v. Palmetto Health All., 358 S.C. 388, 401, 596 S.E.2d 42, 48 (2004).

4. Appellant has not and cannot prove her claims.

Here, Appellant failed to demonstrate that Respondent (1) owed a duty to her and breached that duty, (2) publicly disclosed private facts about Appellant, or (3) took any actions to cause Appellant distress so severe that no reasonable person could be expected to endure it. See Carolina Chloride, Inc., 394 S.C. at 163, 714 S.E.2d at 873 (quoting Tanner, 336 S.C. at 561, 521 S.E.2d at 158); Wright, 298 S.C. at 471, 381 S.E.2d at 505; Bergstrom, 358 S.C. at 401, 596 S.E.2d at 48; see also Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545–46 (1991) ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." (alteration in original) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986))). As the circuit court cogently recognized, Appellant's three claims fail as a matter of law because she cannot prove Respondent ever published a video of her on the Internet or that anyone saw it.

In her complaint, Appellant alleged "she would enter the establishment in her personal clothing and then change into the mandatory 'cocktail waitress' outfit and/or uniform inside of a dressing room specifically for the cocktail wait staff." (R. p. 22). She further alleged that "exotic dancers and/or strippers had a separate and distinct dressing room from the [p]laintiff and the other cocktail wait staff." (Id.). According to Appellant, "she was told that the dressing room for the 'cocktail waitresses' was private." (R. p. 23). Importantly, Appellant contended "she was told by the Defendants that when she changed into her cocktail outfit that it would be in the privacy of the 'cocktail waitress' dressing room and that under no circumstance would the [p]laintiff be filmed, be on a camera[,] or be recorded while changing." (Id.).

Martin James McNamee, the individual who installed the cameras at Thee Dollhouse, testified he did not install any cameras in the cocktail waitress changing room. (R. p. 160). Following his deposition, Appellant attempted to skirt the allegations in her complaint, contending for the first time that she got dressed in multiple dressing rooms at the club. Appellant, however, never asked to amend her complaint. But even when putting aside the curious shift in her argument, Appellant still could not prove her claims. In her deposition, Appellant merely said she felt like she was videotaped and people saw it. Respectfully, that is insufficient to survive summary judgment because Appellant, who bears the burden of proof, cannot rest upon sheer speculation to move forward on her case. See Gibson, 426 S.C. at 352, 827 S.E.2d at 181 (stating "a scintilla is a perceptible amount," and "[t]here still must be a verifiable spark, not something conjured by shadows"); McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 389, 684 S.E.2d 566, 570 (Ct. App. 2009) ("South Carolina courts have consistently held evidence must amount to more than speculation and conjecture to submit a case to the jury.").

Accordingly, because Appellant failed "to make a showing sufficient to establish the existence of an element" that was "essential to" her case on which she "will bear the burden of proof at trial," the circuit court properly granted summary judgment in favor of Respondent. Baughman, 306 S.C. at 116, 410 S.E.2d at 545–46. Simply put, Appellant has not and cannot produce any evidence to support her speculative claims.

C. Appellant had a full and fair opportunity to conduct discovery.

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." CEL Prods., LLC v. Rozelle, 357 S.C. 125, 129, 591 S.E.2d 643, 645 (Ct. App. 2004) (quoting Carolina Alliance for Fair Emp't v. S.C. Dep't of Labor, Licensing & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999)). When the nonmoving party "claims summary judgment [is] premature because" she has "not been provided a full and fair opportunity to conduct discovery," she "must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." Guinan v. Healthsystems of Hilton Head, Inc., 383 S.C. 48, 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009).

As a preliminary matter, this argument is not preserved for appellate review because Appellant raised it for the first time in her Rule 59(e) motion. See Repko v. Cty. of Georgetown, 424 S.C. 494, 502, 818 S.E.2d 743, 748 (2018) ("It is settled that '[a]n issue may not be raised for the first time in a motion to reconsider.'" (quoting Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009))). A review of Appellant's memorandum in opposition to summary judgment, as well as the hearing transcript, reveals she never brought this issue to the

attention of the circuit court. Rather, Appellant only took issue with Respondent's response to her discovery request for a list of subscribers to the livefeed in the exotic dancers' changing room. Because Appellant never argued she was not given a full and fair opportunity to conduct discovery until after she lost summary judgment, the Court should decline to address this issue because it is not preserved for appellate review. See Repko, 424 S.C. at 502, 818S.E.2d at 748 (quoting Johnson, 381 S.C. at 177, 672 S.E.2d at 570).

In any event, Appellant's argument that she did not have a full and fair opportunity to conduct discovery simply finds no support in the record. The parties took multiple depositions and exchanged written discovery for the better part of a year. It appears Appellant's main contention is that she was not given sufficient time to serve a subpoena on a defunct company. Nobody stopped Appellant from serving a subpoena in this case. She merely contends it would have been useless to do so because Respondent already filed a motion for summary judgment. Appellant could have still issued a subpoena on the company, and had she done so, the circuit court may have been more willing to continue the case.

But Appellant came to the hearing, which was weeks after she became aware of the third-party company, and still had not attempted to serve a subpoena. To the extent Appellant thought she lacked evidence to refute Respondent's motion for summary judgment, this was a result of her failure to pursue that evidence when she had the opportunity, not because of a lack of opportunity. Respectfully, that is no one's fault but her own. Nevertheless, the company went out of business before Appellant filed her lawsuit and no longer had any of its records. (R. p. 117). And Respondent was under no obligation to ensure a nonparty—and, more importantly, a totally separate and distinct business—preserve its business records prior to closing shop.[3]

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[3] Further, Appellant's throwaway assertion that Respondent withheld evidence is manifestly without merit. Notably, she never filed a motion to compel or a motion for sanctions stemming from any alleged spoliation

Because Appellant failed to "advance a good reason why the time was insufficient under the facts of the case" or otherwise show how "further discovery would uncover additional relevant evidence and create a genuine issue of material fact," the circuit court properly granted Respondent's motion for summary judgment. Guinan, 383 S.C. at 54–55, 677 S.E.2d at 36.

D. Appellant's procedural arguments seek to elevate form over substance and do not change the result.

Rule 7(b)(1), SCRCP, provides that a motion "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Our supreme court has recognized "[t]he particularity requirement 'is to be read flexibly in recognition of the peculiar circumstances of the case.'" Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (quoting Cambridge Plating Co., Inc. v. Napco, Inc., 85 F.3d 752, 760 (1st Cir. 1996)).

Likewise, the court cautioned that "[t]he particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized." Id. (quoting Andreas v. Volkswagen of Am., Inc., 336 F.3d 789, 793 (8th Cir. 2003)). "As a general rule, a party must establish prejudice as the result of another's failure to comply with Rule 7(b)(1), SCRCP." Chastain v. Hiltabidle, 381 S.C. 508, 517, 673 S.E.2d 826, 831 (Ct. App. 2009). "To demonstrate prejudice in a matter involving allegedly insufficient notice, an appellant must establish that if . . . she had received appropriate notice," then "she would have done something different, thereby affecting the decision of the [circuit] court and advancing . . . her case." Id.

In its motion for summary judgment, Respondent sought "dismissal of all causes of action," stating the motion was based upon "all the pleadings, evidence exchanged in discovery exchanged to date, applicable state and federal statutory/case law, and the South Carolina Rules of Civil

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of evidence. Even if she had, the motion would have failed. Respondent has no control over a third-party vendor's records, and South Carolina courts do not recognize an independent cause of action for third-party spoliation. See Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011).

Procedure." (R. p. 55). Respondent then based its summary judgment argument solely on the allegations in the plaintiff's complaint and the plaintiff's deposition testimony. (R. p. 108); see also (R. pp. 63–68). Appellant hardly could have been surprised that Respondent would rely upon the portion of her deposition in which she admitted she had no proof she was videotaped or that anyone saw it. Indeed, to counter Respondent's motion for summary judgment, Appellant almost exclusively relied upon the deposition testimony of James McNamee. These two depositions were the primary "evidence" in the case.

Appellant contends she had no time to counter the motion, but the record simply does not support this assertion. Respondent filed the motion for summary judgment on February 26, 2019. On April 1, 2019, Appellant filed a memorandum in opposition to summary judgment, with deposition testimony attached as an exhibit, before the April 3, 2019 hearing on the motion. Regardless, Appellant has made no effort to show that "she would have done something different" at the summary judgment hearing if "she had received appropriate notice." Chastain, 381 S.C. at 517, 673 S.E.2d at 831. The parties were simply arguing about her complaint and the two depositions taken to date. In other words, even if the notice of motion was not technically proper under the rules, Appellant cannot demonstrate any prejudice.

Nor can Appellant demonstrate any prejudice stemming from Respondent submitting a memorandum in support of the motion for summary judgment at the time of the hearing.[4] Appellant contends the circuit court should not have moved forward with the hearing because Respondent failed to comply with Justice Toal's administrative order regarding a civil motions pilot program. See Order, Civil Motions Pilot Program (S.C. Sup. Ct. filed Sept. 10, 2015). But the order gives the circuit court discretion to lengthen or shorten the deadline for filing a

[4] As a threshold matter, it is worth noting this is common practice in circuit courts across the state.

memorandum. See id. Nevertheless, as noted above, the substance of Respondent's argument was not surprising because it centered solely on the allegations in Appellant's complaint and her deposition testimony. Appellant therefore cannot demonstrate any prejudice stemming from any technical failure to adhere to a pilot program order designed to clear the common pleas dockets of pending motions.

As former Chief Judge Alex Sanders once cogently remarked, "appellate courts recognize—or at least they should recognize—an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter." McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987). Simply put, none of these alleged procedural irregularities matter. Appellant has not and cannot prove her case, and nothing about the manner in which the motions were filed or how the hearing went forward would change that result. She was not prejudiced. The Court should therefore affirm the circuit court's grant of summary judgment in favor of Respondent because Appellant's hypertechnical procedural arguments are without merit and did not affect the outcome of the ruling.

CONCLUSION

The circuit court properly set aside the entry of default because Respondent's motion was timely, its failure to answer was justified by good cause, Respondent had a meritorious defense, and Appellant experienced no prejudice from having to prove her case on the merits. When pressed to do so, she could not produce a scintilla of evidence to support her speculative claims. Accordingly, the circuit court correctly granted summary judgment in favor of Respondent. The Court should affirm.

Respectfully submitted,

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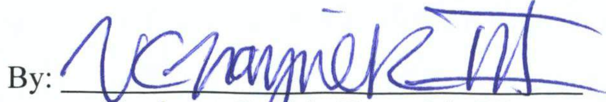
By: 

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Columbia, South Carolina
March 26, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2019-001286

Lower Court Case No. 2017-CP-26-08184

Jane Doe..Appellant,

v.

Crazy Horse Saloon & Restaurant, Inc. d/b/a
Thee New Dollhouse and Dog Leg Right, LLC ....Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

(Signature page to follow)

Respectfully submitted,

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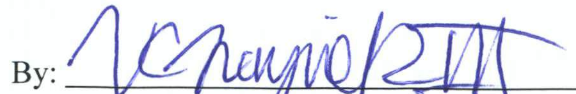
By: 

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