STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

Robert E. Hood, Circuit Judge
G. Thomas Cooper, Jr., Circuit Judge

Case No. 2017-CP-40-06433
Appeal No. 2020-000218

PTA-FLA, Inc,

Appellant-Respondent,

v.

TW Telecom Holdings, Inc., a Delaware corporation; and DOES 1-10, inclusive,

Respondent-Appellant.

INITIAL APPELLANT'S BRIEF OF RESPONDENT-APPELLANT TW TELECOM HOLDINGS, INC.

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STATEMENT OF THE CASE

Overview: This is a breach of contract case in which the Defendant failed to timely answer the complaint and judgment was entered for the Plaintiff after a damages trial. On appeal this Court is presented which a number of issues for appellate review of the final judgment awarding damages to the Plaintiff as well as various pretrial orders. The primary appeal filed by the Plaintiff presents issues challenging the amount of the judgment, and the cross appeal filed by the Defendant presents issues challenging the Trial Court's denial of its Rule 55(c), SCRCP, motion to set entry of default and the Trial Court's order granting the Plaintiff's untimely motion to restore the case to the roster under Rule 40(j), SCRCP, after the statute of limitations had expired. The Court has also raised an issue of appellate jurisdiction over the cross appeal. The pertinent procedural history as to each set of issues presented on this cross appeal is set forth below.

The Motion to Set Aside the Entry of Default: The Plaintiff PTA FLA, Inc. filed a complaint on March 3, 2015. [ROA ___; Complaint.] The Defendant TW Telecom Holdings, Inc. ("TW Telecom") was served by certified mail on its registered agent on March 16, 2015. [ROA __; Certificate of Service with green receipt card.]

The Plaintiff also filed a motion to seal the complaint along with the summons and complaint. [ROA ___; Motion.] Before the time had even expired for answering, that motion was set for hearing, and notice was sent to the Plaintiff's counsel on April 7, 2015. [See ROA ___; Civil Court Docket for 2015CP4001394.] No one appeared for either party. [ROA ___; 4.22.15 Form 4 Order.]

The Plaintiff PTA FLA filed an Affidavit of Default and a Motion for Entry of Default on May 1, 2015. [ROA ___, ___; Affidavit, Motion.] The Clerk of Court made an entry of default on May 6, 2015. [ROA ___; Entry of Default.] The Defendant TW Telecom appeared and served

an answer on May 7, 2015, together with a Motion to Set Aside Entry of Default and for a Late Answer. [ROA ___, ___, ___; Answer, Motion, Affidavit of Ryan McManis.] The motion to set aside entry of default came for a hearing before the Honorable G. Thomas Cooper, Jr. on June 24, 2015. [ROA ___; 6.24.15 Transcript.] By order filed July 16, 2015, Judge Cooper denied the motion to set aside entry of default. [ROA ___; 7.16.15 Order.] The Defendant TW Telecom timely filed a motion for reconsideration, which was denied by Judge Cooper in an order filed August 26, 2015. [ROA ___, ___, ___; Motion, filed 6.24.15 with Memorandum in Support, Order.]

The Motion to Restore: The case was dismissed under Rule 40(j) pursuant to a consent stipulation of dismissal filed on April 1, 2016 which stated that: "The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time within one calendar year from the date of the filing of this stipulation." [ROA ___; Stipulation.] The Plaintiff waited for more than one calendar to move to restore the case, and did not file its motion until April 6, 2017. [ROA ___; Motion.] The Defendant TW Telecom opposed the restoration as untimely and also filed a corresponding motion for summary judgment on the ground that the claim was barred by the statute of limitations because the untimely restoration negated the tolling allowed by Rule 40(j). [ROA ___, ___, ___; Opposition, Motion with supporting memo, all served 4.12.17.] These motions came before Judge Cooper for hearing on September 6, 2017, who granted the motion to restore and denied the motion for summary judgment by orders filed October 5, 2017. [ROA ___, ___, ___; 9.6.17 Transcript, Orders.]

The Trial on Damages: The case came before the Honorable Robert E. Hood for a trial of damages on January 31, 2019. [ROA ___; 1.31.19 Transcript.] After the Defendant had the opportunity to cross examine the Plaintiff's witnesses, Judge Hood recessed the trial and ordered

the Plaintiff to provide the Defendant with financial records to test the reliability of the profit and loss summary Plaintiff had moved into evidence as a foundation for its request damages of $1,742,580.42. [ROA ___; 1.31.19 Tr. 20. ROA ___; 2.4.19 Form 4 Order for production.] The trial on damages resumed on December 3, 2019, at which time the Defendant cross examined the Plaintiff's development manager regarding the inaccuracies and lack of support for the profit and loss summary upon which Plaintiff relied in seeking damages. [ROA ___; 12.3.19 Transcript.] Judge Hood found that the Plaintiff had not presented sufficient evidence to support the amount of delay damages sought, and awarded an amount of $9,218.42 in direct damages for overpayments under the contract by order filed on January 13, 2020. [ROA ___; Order.]

The Appellate Process: Plaintiff did not make any motion for reconsideration, and instead served a notice of appeal on February 11, 2020. [ROA ___; Notice of appeal.] After receipt of the Plaintiff's notice of appeal, the Defendant served and filed a notice of cross appeal seeking review of Judge Cooper's interlocutory orders on the Rule 55(c) motion as well as his orders on the untimely restoration of the case under Rule 40(j). [ROA ___; Notice of Cross Appeal, served 2.17.20[1].] The Court *sua sponte* dismissed the cross appeal based on the ground that the TW Telecom did not file a Rule 60(b) motion. [ROA ___; 2.25.20 Order.] TW Telecom filed a petition for rehearing on ____. [ROA ___; Petition.] The Court granted the petition and reinstated the cross appeal by order of May 22, 2020. [ROA ___; Order.]

[1] February 16, 2020 was a Sunday.

ARGUMENT

The Law Applicable in Defaults – The Distinction between a Rule 55(c) Motion to Set Aside Entry of Judgment and a Rule 60(b) Motion for Relief from a Default Judgment

"The entry of default is an official recognition of the failure to appear or otherwise respond, but is not a judgment by default." Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987) (citing See H. Lightsey, J. Flanagan, South Carolina Civil Procedure, 77 (2nd Ed.1985)). Rule 55(c), SCRCP, generally provides: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." Rule 60(b), SCRCP, provides for relief for a final judgment for specified reasons, including "(1) mistake, inadvertence, surprise, or excusable neglect." As the Supreme Court addressed in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), there are clear distinctions between the "mere" good cause standard for setting entry of default and the more rigorous standard for relief from a default judgment under Rule 60(b):

> The standard for granting relief from an entry of default under Rule 55(c) is ***mere*** "good cause." Rule 55(c), SCRCP. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct.App.1989). ****
>
> Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default judgment under Rule 60(b) is ***more rigorous*** than the "good cause" standard established in Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App.1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRCP. ***The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default.***

> It is often observed, as the court of appeals held in the present case, that the criteria for obtaining relief from judgment under Rule 60(b)—mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation—are relevant in determining whether good cause has been shown under Rule 55(c), SCRCP. *See New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 378–79 (Ct.App.1993) (holding that, "as a practical matter," the 60(b) factors are relevant under both rules). However, we caution that this language invites trial courts to apply a heightened standard to Rule 55(c) motions. ***The Rule 60(b) factors are indeed relevant to a Rule 55(c) analysis, but only insomuch as proof of any one of these factors is sufficient to show "good cause."*** No trial court should ever find good cause lacking based solely on the absence of a Rule 60(b) factor.

Id. at 888-89 (emphasis added).

Here, the Trial Court failed to appreciate and apply the more lenient ***mere*** good cause standard of Rule 55(c) where TW Telecom made the threshold showings for a Rule 55(c) motion as delineated in Sundown Operating, namely (1) an explanation for the default, and (2) reasons why vacation of the default entry would serve the interests of justice.

Standard of Review

The standard for review of a ruling on a Rule 55(c) motion is abuse of discretion:

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

Sundown Operating, 681 S.E.2d at 888.

The ruling on the Rule 40(j) motion to restore is a question of law subject to de novo review. Personal Care, Inc. v. Theos, 426 S.C. 78, 85, 825 S.E.2d 281, 284 (Ct. App. 2019).

The Rule 55(c) Entry of Default Issue

I. The Trial Court abused its discretion in denying the Defendant's Rule 55(c) motion to set aside entry of default.

A. The Defendant made the requisite showing of good cause articulated in Sundown Operating.

The Defendant TW Telecom was served by certified mail upon its registered agent who in turn sent the summons and complaint via email to the General Counsel for the Defendant's parent corporation, Ryan McManis. McManis' affidavit was submitted with the Rule 55(c) motion to establish good cause to set aside the entry of default. [ROA ___; McManis Affidavit.] As explained by Mr. McManis, at the time the complaint was forwarded to him, he was involved in a series of business meetings and presentations which required him to be out of his office for extended periods. During this time, his time and attention also was diverted by family responsibilities caring for his four young children who needed his attention and which also kept him from his office. Unfortunately, during this hectic time, Mr. McManis overlooked the pleading, but as soon as Mr. McManis became aware of the default, he associated local defense counsel and began working diligently with the attorneys at the Hood Law Firm to immediately serve an answer and a motion to set aside entry of default pleading the very next day. [See also ROA ___; Affidavit of H. Cooper Wilson.]

By immediately addressing the default with service of the responsive pleading and Rule 55(c) motion, the Defendant thereby met one of the Wham factors[2] – a timely motion for relief. The answer denying the fraud allegations or any breach of contract met the second Wham factor

[2] Having erroneously ruled, as a matter of law, that the Defendant's explanation was not an acceptable good cause, the Trial Court declined to address the Wham factors. [ROA ___; 8.26.15 Order, p. 5.]

of showing a meritorious defense. As to the third Wham factor, there was no evidence that the Plaintiff would suffer any cognizable prejudice by allowing the Defendant to answer and proceed on the merits Plaintiff where no evidence had been lost and the short delay in pleading in no way presented any difficulty to the Plaintiff in pursuing its claims. Under these circumstances, setting aside the entry of default would serve the interests of justice for a resolution on the merits. Melton v. Olenik, 379 S.C. 45, 664 S.E.2d 487, 492 (2008) ("Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits.").

On this point of justice, the record will show that the Plaintiff itself had been less than diligent by failing to appear for the hearing on its own motion to seal. [ROA ___; 4.22.15 Order.] In addition as to the lack of any prejudice from the delay, the record further shows that despite the fact that the Plaintiff was able to establish liability by operation of the default, it had the case stricken from the docket under Rule 40(j) and then delayed in moving to restore the case for trial on damages, as discussed below.

B. The law does not conclusively establish that the loss of a summons and complaint within a corporation can never constitute good cause.

In denying the Defendant's Rule 55(c) motion, the Trial Court held that "As a matter of law, failing to answer a Summons and Complaint because the papers were lost within a corporation is not good cause," stating it reasoning:

> South Carolina courts have recognized that the mishandling of service of process and losing track of a summons and complaint within a corporation is not good cause to set aside default. *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 212, 456 S.E.2d 897, 900 (1995) (upholding trial courts entry of default where "[l]osing a summons and complaint within the corporation" offered as reason to set default aside); *Bage, LLC*, 373 S.C. at 473, 646 S.E.2d at 162 (finding defendant "mishandled the service of process of this lawsuit"); *Stark Truss Co.*, 360 S.C. at 506, 602 S.E.2d at 102 (finding corporate defendant failed to send summons and complaint to its attorneys until after 30 days from service). The case at hand falls squarely into this line of cases.

[ROA ___-___; 7.16.15 Order, pp. 4-5.] The Trial Court erred as a matter of law by relying on a vacated appellate opinion and otherwise by confusing the Rule 55(c) mere good cause standard with the more rigorous Rule 60(b) "excusable neglect" standard as demonstrated by its citation and misplaced reliance on opinions addressing appellate court rulings under Rule 60.

The Trial Court erred on a point of law by citing to Bage, LLC v. Se. Roofing Co. of Spartanburg, 373 S.C. 457, 646 S.E.2d 153 (Ct. App. 2007), because that opinion had been vacated by the Supreme Court. 383 S.C. 489, 681 S.E.2d 867 (2009). As reported by the Supreme Court, a writ of certiorari had been issued to review the decision of the Court of Appeals, but after oral argument had been heard by the Court[3], the parties settled the case and the decision was vacated. Accordingly, the Bage opinion was effectually extinguished and has no legal force or effect. *See* Builders Mut. Ins. Co. v. Bob Wire Elec., Inc., 424 S.C. 161, 165, 817 S.E.2d 807, 809 (Ct. App. 2018).

The Trial Court also erred on a point of law in its citation of and reliance on Roche v. Young Bros., Inc. of Florence, supra, because the defendant in that case did not make a Rule 55(c) motion to set aside entry of default. Rather, the defendant made a Rule 60(b) motion to set aside a default judgment and the pertinent question presented to the court in that case was whether the default was the result of inadvertence or excusable neglect. Contrary to the Trial Court's interpretation, the Supreme Court did not hold that losing a summons and complaint in a corporation is not good cause to set aside an entry of default under Rule 55(c). Rather, the Trial Court stated: "Losing a summons and complaint within the corporation is not a ground to set aside a default judgment." 456 S.E.2d at 900. As the Supreme Court made clear in Sundown, "an

[3]As a point of interest, oral argument in the seminal Sundown appeal was heard by the Supreme Court during the same week of court.

entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment." 681 S.E.2d at 888. Here, the question is whether effectively "losing" the summons and complaint in a corporate email inbox during the circumstances evidenced by Mr. McManis meets the less rigorous mere good cause standard applicable to the Rule 55(c) motion to set aside the entry of default. TW Telecom submits that it does meet the applicable standard.

The Trial Court's reliance on Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004), is also misplaced. In that case, the defendants moved to set aside both an entry of default and a default judgment after the trial court issued an order simultaneously granting entry of default and a default judgment against both defendants. On appeal from the denial of the Rule 55(c) and Rule 60(b) rulings, the Court of Appeals reversed the default judgments because the defendants had not been given notice of any damages hearing, while upholding the entry of default. Contrary to the Trial Court's misapprehension, there was no evidence offered or argument made that the defendant corporations lost the complaint; rather, the proffered explanation was that the president of one of the corporate defendants failed to take action because he was suffering from depression. The other corporation offered no explanation at all. The Court of Appeals declined to find an abuse of discretion to reverse the trial court's refusal to set aside the entry of default based on the facts as conceded by the defense counsel:

> The attorney for Appellants informed the circuit court that Superior's president had no good reason, other than depression, for failing to act when he was served with the summons and complaint. The attorney did not give any reason for National's failure to serve and file its answer to the summons and complaint. Based on these facts, we find there was evidence to support the circuit court's refusal to set aside the entry of default.

602 S.E.2d at 103. No such concession was made in this case. Rather, Mr. McManis offered an explanation of good cause as to why he inadvertently failed to realize the existence of the complaint.

The Trial Court's apparent confusion as to the appropriate Rule 55(c) mere good cause standard in contrast to the more rigorous Rule 60(b) standard is also reflected in its conclusion that TW Telecom has not offered a "reasonable and specific explanation." [ROA ___; 8.26.15 Order.] While Rule 60(b) requires a "more particularized showing," Sundown, 681 S.E.2d at 888, the Supreme Court has not articulated any comparable heightened requirement for a "reasonable and specific explanation" under Rule 55(c). Per Sundown, Rule 55(c) requires an explanation for the default, and reasons why vacation of the default entry would serve the interests of justice. Id. Nonetheless, this Defendant maintains that it did offer evidence of a reasonable and specific explanation by the General Counsel which met the mere good cause standard. In addition, the Defendant also offered the reasons that the interest of justice would be served by allowing the presentation of meritorious defenses and disposition on the merits.

As discussed above, the cases cited by the Trial Court do not support its conclusion that the law conclusively establishes that failing to answer a Summons and Complaint because the papers were lost within a corporation cannot establish the mere good cause required by Rule 55(c). The Trial Court's rejection of the Defendant's explanation for failing to timely answer also contravenes the policy of serving justice by disposing of cases on the merits. Accordingly, this error of law amounts to an abuse of discretion requiring reversal of the Trial Court's order denying the Rule 55(c) motion to set aside entry of default.

The Rule 40(j) Restoring the Case Issue

II. The Plaintiff was not entitled to restore this action to the roster beyond the time set by the agreement of the parties in the stipulation of dismissal and after the statute of limitations period had expired.

Rule 40(j), SCRCP provides:

> Case Stricken From Docket by Agreement. A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter

> of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

When the case came up on the roster for a damages hearing in March 2016, the Plaintiff requested that the case be stricken from the trial docket pursuant to Rule 40(j) and the Defendant consented. The parties entered into a stipulation of dismissal which included the provision that: "The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time within one calendar year from the date of the filing of this stipulation." [ROA ___; Stipulation.] The Stipulation was filed April 1, 2016, and thus, by the plain language of the Stipulation, the Plaintiff had until April 3, 2017[4] to restore its case. However, the Plaintiff did not file or serve its motion to restore until April 6, 2017.

The Defendant opposed the motion to restore as untimely under Rule 40(j) and the terms of the Stipulation, and also moved for summary judgment on ground that the statute of limitations period had expired during the meantime. Pers. Care, Inc. v. Theos, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019) (statute of limitations is a proper consideration on motion to restore). The Trial Court allowed the case to be restored, holding that: "South Carolina Rule of Civil Procedure 40(j) does not bar the restoration of a case to the trial docket more than a year after it is stricken as Defendant contends." [ROA ___; 10.5.17 Order.] By a separate order, the Court denied the motion for summary judgment on the grounds that: the default deprived the Defendant of the right

[4] April 1, 2017 was a Saturday, so the deadline fell to the next Monday.

to move for summary judgment on statute of limitations grounds, and the Plaintiff was entitled to tolling under Rule 40(j) because the motion to restore was filed within one year of the date the Form 4 order was entered after the Stipulation had already been filed. [ROA ___; 10.5.17 Order.]

By operation of the default, which is separately challenged by this appeal, the Defendant is deemed to have admitted the allegations of the complaint. However, that default does not, as the Trial Court held, amount to forfeiture of all the Defendant's legal rights. It is clear that the Defendant still has rights, though limited, under Howard v. Holiday Inns Inc., 271 S.C. 238, 246 S.E.2d 880 (1978), as reaffirmed in Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013), including notice of a damages trial along with rights to cross-examine witnesses and object to evidence. There are no grounds to refuse to allow the Defendant a right to oppose the motion to restore, particularly, as here where the case was stricken by stipulation.

The Plaintiff needed the Defendant's consent to strike the case from the trial roster by the terms of Rule 40(j). They entered an agreement, which was reduced to writing and filed with the Court in compliance with Rule 43(k), SCRCP. The Plaintiff's right to restore was specifically and directly defined by agreement in the Stipulation to within one year of the filing of the stipulation. Accordingly, that Stipulation is enforceable by its terms – apart from the provisions of Rule 40(j) as interpreted by the Trial Court. Kirkland v. Allcraft Steel Co., 329 S.C. 389, 392–93, 496 S.E.2d 624, 626 (1998) ("Stipulations ... are binding upon those who make them."). The fact that the Circuit Court issued a Form 4 order on April 7, 2016, merely referencing the Stipulation that had already been filed, did not trigger a new one-year period contrary to the express agreement, as memorialized in the Stipulation, that the trigger date was the filing of the Stipulation. By the terms of the Stipulation, the Plaintiff should not have been allowed to restore its case because it waited too late. It would be a disservice to justice if the Plaintiff is allowed to take advantage of the

Defendant's failure to timely plead and then be relieved of any consequences for its own failure to timely restore the case.

In addition, the Plaintiff should not have been allowed to restore the case because the three-year statute of limitations, per S.C. Code §15-3-530(1), had expired. The striking of a case under Rule 40(j) is the equivalent of dismissing the case, and the motion to restore is the equivalent to filing a new lawsuit. Pers. Care, Inc. v. Theos, 825 S.E.2d at 285. A plaintiff does not have an automatic right to restore, and when a motion is made to restore, the defendant can raise an issue of how the Rule 40(j) tolling provision impacts the statute of limitation issue. Id. Here, the Stipulation acted as a dismissal which reactivated the running of the SOL clock, and the filing of the motion to restore amounted to filing a new law suit to which the Defendant was entitled to object and raise the timeliness issues. Based on this settled law, the Trial Court's orders of October 5, 2017, should be reversed because the record clearly established that the Plaintiff did not timely move to restore its case within the time set in the Stipulation and that the three-year statute of limitations had expired. Accordingly, since the case should have not been restored, the judgment awarding damages should be vacated.

The Appellate Jurisdiction Issues

III. The Defendant properly preserved its right to cross appeal from the Trial Court's interlocutory orders by timely serving a notice of cross appeal after receiving the Plaintiff's notice of appeal from the judgment entered in its favor after the trial on damages.

In its order reinstating the cross appeal, this Court stated that the appealability issue could be raised in the briefing. For those reasons as previously argued in its Petition for Rehearing and restated below, TW Telecom affirmatively maintains that the cross appeal was timely and properly taken from the interlocutory orders after the Plaintiff noticed an appeal from the final judgment

awarding damages and the Court has appellate jurisdiction to review those orders pursuant to S.C. Code Ann. § 14-3-330(1) and applicable case law.

A. The interlocutory orders are subject to review on appeal after the final judgment.

TW Telecom could not file an immediate appeal from the Rule 55(c) order (or the associated order denying the motion for reconsideration) because the law is well settled that an order on a Rule 55(c) motion is not appealable until after final judgment. Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 317, 368 S.E.2d 456, 456 (1988); Ateyeh v. United of Omaha Life Ins. Co., 293 S.C. 436, 361 S.E.2d 340 (Ct. App. 1987); Thynes v. Lloyd, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (Ct. App. 1987); Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 428 S.C. 261, 266, 834 S.E.2d 204, 206 (Ct. App. 2019). Likewise, TW Telecom could not file an immediate appeal from the order granting the motion to restore. Shields v. Martin Marietta Corp., 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) ("The decision on a motion to restore the case to the active docket is not a final judgment and is interlocutory and, therefore, not immediately appealable.").

However, the law is equally clear that such intermediate orders are reviewable on appeal from final judgment:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, ***that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;...*** (emphasis added).

S.C. Code Ann. § 14-3-330; 15 S.C. Jur. *Appeal and Error* § 15 ("After final judgment has been entered, however, a party may seek review of all decisions by the trial court that are material to the judgment.")

Although TW Telecom chose not to appeal from the final judgment entered on Judge Hood's award of damages, it still is entitled to seek review of the interlocutory orders by cross appeal in response to PTA-FLA's appeal from the final judgment. *See* Morgan v. Smith, 59 S.C. 49, 37 S.E. 43, 44 (1900) (an intermediate order of one judge could be reviewed on appeal from a final decree of another judgment); Link v. Sch. Dist. of Pickens Cty., 302 S.C. 1, 7, 393 S.E.2d 176, 179 (1990) (party does not have to challenge final judgment to appeal interlocutory orders).

B. The Defendant was not required to make a Rule 60(b) motion for relief from judgment to preserve its right to review of the order denying the Rule 55(c) motion to set aside the entry of default.

The Court *sua sponte* dismissed the cross appeal on the ground that the Defendant could not appeal a default judgment without first making a Rule 60(b) motion, stating:

> This appeal arises out of an order of the circuit court granting PTA-FLA Inc.'s motion for default judgment. Because a defaulting party may not appeal from a default judgment, we dismiss the notice of appeal filed by TW Telecom Holdings, Inc. See *Winesett v. Winesett*, 287 S.C. 332, 334,338 S.E.2d 340, 341 (1985) (explaining a direct appeal does not lie from a default judgment; instead, the proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP). A partial remittitur will be sent as provided by Rule 221 (b) of the South Carolina Appellate Court Rules. The notice of appeal filed by PTA-FLA, Inc. will be allowed to proceed. All future filings should utilize the above caption.

[ROA ___; 2.25.20 Order.] TW Telecom maintains that our appellate preservation rules did not require the Defendant to make an inappropriate and unnecessary Rule 60(b) motion after having already made a Rule 55(c) motion.

In an appropriate context, Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985), could support the proposition that a direct appeal does not lie from a default judgment and that the proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b). However, TW Telecom maintains that this proposition is inapposite in this case because the Defendant first made a Rule 55(c) motion to set aside entry of

default and final judgment was entered on the Trial Judge's damage award after a default damages hearing. Accordingly, Rule 60(b) was not applicable.

As discussed above, one of the more recent seminal cases on default is Sundown Operating Co. v. Intedge Indus., Inc., supra, which had a procedural history comparable to this case. In Sundown, the defendant made a Rule 55(c) motion to set aside entry of default which was denied, and then after a damages hearing was held and judgment entered, both parties appealed. In that opinion, the Supreme Court purposefully sought to clarify confusion in the case law regarding the application of the differing standards for relief set forth in Rule 55(c) and Rule 60(b). There was no holding or discussion in that opinion regarding any jurisdictional issue about the defendant not having made a Rule 60(b) motion after final judgment was entered.

As the distinction between Rule 55(c) and Rule 60(b) is explained by the Court in Sundown, it is clear that the timing of the defaulting defendant's awareness of the default is the pertinent factor to whether Rule 55(c) or Rule 60(b) is the proper process to seek relief. If default has been entered, but judgment has not yet been entered, the defendant's option is a motion under Rule 55(c) to move to set aside the entry of default. In contrast, if a default judgment already has been entered, the defendant must move for relief from that judgment under Rule 60(b). Neither Winesett nor Sundown hold that the defaulting defendant must make a Rule 60(b) after a Rule 55(c) has been denied and a trial on damages has been held. Nothing in the Rules or legal logic support any requirement that a Rule 60(b) motion must be made in circumstances such as here where a Rule 55(c) motion has been made and ruled upon.

The appropriate limitation/qualification on the holding referenced from Winesett is explained in the context of basic appellate principles by the Court in Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 157–58, 399 S.E.2d 439, 442 (Ct. App. 1990):

> In support of its argument, The Balloon Plantation relies on Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985). There, the Supreme Court held that "a default judgment may not be appealed to this Court. The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP." Id. at 334, 338 S.E.2d at 341. The Court gave three reasons for requiring this procedure: (1) "a defendant who does not appear and answer 'has no status in court which will enable him to appeal from the judgment rendered'"; (2) "a party appealing a default judgment will ordinarily be precluded from raising any issues on appeal because they were not first presented below"; and (3) "the appellant will often not be able to meet his burden of providing this Court with a record sufficient to permit an adequate review." Id. at 333, 338 S.E.2d at 341.
>
> The procedure required by the Court in Winesett is not required in the instant case. Here, unlike there, the defendants did appear and answer. They are not in default because of their failure to do so. Rather, they are in default because the circuit judge decided they should be in default. Here, unlike there, the trial court explicitly ruled on the question of whether the defendants should be in default. This Court is not being asked to rule on an issue not first presented below. There is no point in requiring the defendants to ask the circuit judge to rule on the same question twice. Here, unlike there, the appellants are able to provide this Court with a sufficient record on appeal. Rule 60(b) provides that a court may relieve a party from a final judgment, order or proceeding for "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc." The defendants do not seek relief based on any of these grounds. Therefore, a motion pursuant to Rule 60(b) would not make any sense. *Nam ratio legis est anima legis; cessante ratione legis cessat et ipsa lex* (or, so they say). (Footnote omitted)

Under a comparable analysis, the Defendant TW Telecom did appear by making a Rule 55(c) motion to set aside entry of default in which the mere good cause standard was raised and ruled upon. After the damages trial, the Trial Court entered a final judgment setting the damages from which an appeal has been taken by the Plaintiff PTA-FLA because it is dissatisfied with the amount of the award. A Rule 60(b) motion on specified grounds with a more rigorous standard (per Sundown) was not required and would have served no logical or jurisprudential purpose, particularly in this case, where the Defendant TW Telecom chose not to appeal the final judgment entered on the damages award. However, TW Telecom is entitled to cross appeal to seek review of the interlocutory orders forming a foundation for the final judgment brought to this Court for review by operation of Plaintiff's own appeal.

Moreover, beyond being unnecessary, a Rule 60(b) motion would have not been permissible because it would have contravened the rule that one judge cannot overrule another judge. Charleston Cty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995) ("There is a long-standing rule in this State that one judge of the same court cannot overrule another."). Judge Cooper already had ruled on the Rule 55(c) motion and the corresponding Rule 59(e) motion. Judge Hood, who presided over the damages trial could not have reversed Judge Cooper's decision.

Finally, to require that a defendant make a Rule 60(b) motion after final judgment to preserve a ruling on a prior Rule 55(c) motion would be wholly inconsistent with the long-established, fundamental appellate preservation rules.

> 'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). The mere good cause issue had been raised in the Rule 55(c) motion and the Circuit Judge had ruled on that issue in its order of July 18, 2015. In an abundance of caution to preserve the issue, the Defendant made a Rule 59(e) motion for reconsideration which was denied by order of August 26, 2015. Accordingly, the Defendant took all necessary steps to preserve the Rule 55(c) issue for a meaningful appellate review.

CONCLUSION

WHEREFORE, on the threshold matter of appellate jurisdiction, the Defendant/Respondent TW Telecom respectfully maintains that it properly preserved its rights to appellate review of the interlocutory orders by timely giving notice of this cross appeal in

compliance with Rule 203, SCACR, and this Court has appellate jurisdiction under S.C. Code § 14-3-330(1).

FURTHERMORE, apart from the arguments separately presented in response to the Plaintiff PTA FLA's appeal from the amount of the judgment, the Respondent/Appellant TW Telecom respectfully submits that the judgment should be vacated and the case dismissed because the law and the evidence establish that the Plaintiff was not entitled to restore this action to the roster beyond the time set by the agreement of the parties in the Stipulation of Dismissal and after the statute of limitations period had expired. In the alternative, TW Telecom submits that the Court should remand the case to allow the Defendant to answer and defend on the merits because it made the requisite showing of mere good cause as articulated in Sundown, and the Trial Court erred on points of law in denying the Rule 55(c) motion to set aside entry of default.

Respectfully submitted,

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/s/ Robert H. Hood, Jr.

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TW Telecom Holdings, Inc.

June 22, 2020

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

Robert E. Hood, Circuit Judge
G. Thomas Cooper, Jr., Circuit Judge

Case No. 2017-CP-40-06433
Appeal No. 2020-000218

RECEIVED
Jun 22 2020
SC Court of Appeals

PTA-FLA, Inc,

Appellant-Respondent,

v.

TW Telecom Holdings, Inc., a Delaware corporation; and DOES 1-10, inclusive,

Respondent-Appellant.

CERTIFICATE OF SERVICE

The undersigned certifies that on this 22nd day of June, 2020, the **Initial Appellant's Brief on behalf of Respondent-Appellant TW Telecom Holdings, Inc**. together with its **Designation of Matter to be Included in the Record Appeal** and a **Motion to Allow Late Filing**, were served by depositing copies in the U.S. Mail, with sufficient first class postage, on Counsel for the Appellant-Respondent at the address listed below:

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June 22, 2020

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: PTA-FLA, Inc. v. TW Telecom Holdings, Inc., a Delaware corporation; and DOES 1-10, inclusive
C/A No. 2017-CP-40-06433, Richland CP
Appellate Case No. 2020-000218
HLF File No. 576.000

Dear Ms. Kitchings:

We are in receipt of the correspondence from the Court dated June 18, 2020, regarding the initial appellant's brief in connection with the cross appeal by the Respondent-Appellant TW Telecom Holdings. When this Court issued an order on May 22, 2020 reinstating the cross appeal, there was no direction regarding a due date for our brief so we calculated and diaried for the initial brief and designation to be due within 30 days per Rules 208(a) and 209, SCACR -- Monday, June 22, 2020. In accordance with our calculations, we are this day serving and filing our initial appellant's brief and designations in connection with our cross appeal. To the extent that the Court has determined that the time for filing already has expired, we also are submitting a motion requesting permission to serve and file the brief out of time as directed by the letter of June 18th. Also enclosed is our certificate of service evidencing service on same on Counsel for the Appellant-Respondent and a check for the $50.00 motion filing fee.

Kind regards,

Yours truly,

/s/ Robert H. Hood, Jr.

Robert H. Hood, Jr.

RHHjr./mde
Enclosure
cc: Joshua E. Austin, Esquire