THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No. 2017-002481

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Circuit Court Judge

AEP2, LLC f/k/a 2AM Group, LLC.....Respondent

v.

BMW of North America, LLC.....Appellant

FINAL BRIEF OF RESPONDENT

Thomas H. Pope III
Pope Parker Jenkins, P.A.
P.O. Box 190
1508 College Street
Newberry, SC 29108
Phone: 803-276-2532
Fax: 803-276-8684
Email: tom@ppjlaw.com

John P. Freeman
200 W. Highland Drive - Unit 107
Seattle, WA 98119
Telephone: 803-361-6934
Email: jfreemanusc@gmail.com

Attorneys for Respondent

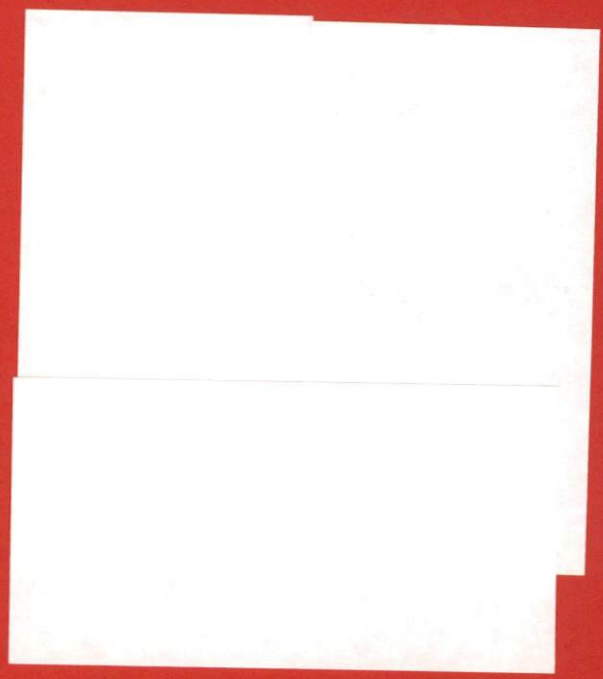


TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES ON APPEAL v

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

STANDARD OF REVIEW 9

ARGUMENT 10

I. THE LOWER COURT ORDER DENYING BMW'S MOTION TO SET ASIDE THE ENTRY OF DEFAULT WAS CORRECT AND IN ACCORDANCE WITH SOUTH CAROLINA LAW 11

A. The Court Correctly Held That BMW Did Not Present a Satisfactory Explanation for its Default 11

1. BMW's default was due to the reckless indifference of its in-house counsel who, after twice personally receiving copies of Plaintiff's suit papers, claimed that the suit was not timely answered because suit papers were "lost in the preverbal shuffle." 11

2. The lower court correctly determined, in accordance with Rule 55 and S.C. case law, that BMW had shown no "good cause" to support relief from being in default 24

B. Assuming BMW Could Have Presented A Satisfactory Explanation for Its Default, the Remaining Factors Do Not Favor Granting Relief from Default 29

II. THE LOWER COURT PROPERLY CALCULATED DAMAGES AND PREJUDGMENT INTEREST 31

A. The Lower Court Correctly Determined the Amount of the Damages Owed by BMW, Regardless of BMW's Argument About the Notice of Damages Provision 31

B. The Lower Court Correctly Determined Prejudgment Interest Under New Jersey Law 35

III. **AS ADDITIONAL SUSTAINING GROUNDS, THE ORDER DENYING BMW'S MOTION TO SET ASIDE THE ENTRY OF DEFAULT SHOULD BE AFFIRMED BECAUSE RESPONDENT IS ENTITLED TO AN ADVERSE INFERENCE FROM BMW'S FAILURE TO PRODUCE RELEVANT, AVAILABLE DOCUMENTS IN ITS POSSESSION ON THE ISSUE OF ITS DEFAULT** 37

CONCLUSION 41

TABLE OF AUTHORITIES

Case	Page
Bd. of Trustees of Sch. Dist. of Fairfield Cty. v. State, 395 S.C. 276, 285, 718 S.E.2d 210, 215 (2011)	19
Caldwell v. K-Mart Corp., 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1991)	39
Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1985)	25
Conway v. 287 Corp. Ctr. Assoc., 187 N.J. 259, 901 A.2d 341 (2006)	31, 34
DialAmerica v. Kay Span Energy, 374 N.J. Super. 502, 865 A.2d 728 (2005)	36
Harbor Island Owners' Ass'n v. Preferred Island Props., Inc. , 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006)	9
Hopper v. Terry Hunt Constr., 373 S.C. 475, 483 n. 1, 646 S.E.2d 162, 166 n. 1 (Ct. App. 2007)	19
In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)	9
Johnson & Dealaman, Inc. v. Wm. F. Hegarty, Inc., 93 N.J. Super. 14, 224 A.2d 510 (1965)	33
Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 965 A.2d 203 (2009)	34
Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990)	39
Ledford v. Pennsylvania Life Ins. Co, 267 S.C. 671, 230 S.E.2d 900 (1976)	23
McClurg v. Deaton, 395 S.C. 85, 86-87, 716 S.E.2d 887, 888 (2011)	28
McMahon v. City of Newark, 195 N.J. 526, 951 A.2d 185 (2008)	31, 34
Mictronics v. S.C. Department of Revenue, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001)	26
Mitchell Supply Co., Inc. v. Gaffney, 297 S. C. 160, 375 S.E.2d 321 (Ct. App. 1988)	9, 22, 23
Mr. T. v. Ms. T, 378 S.C. 127, 662 S.E.2d 413, 417 (Ct. App. 2008)	29

New Hampshire Insurance Co. v. The Bey Corporation, 312 S.C. 47, 435 S.E.2d, 377, 379 (Ct. App. 1993)..... 28

Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 675 S.E.2d 783 (Ct. App. 2009)..... 39

Regions Bank v. Owens, 402 S.C. 642, 741 S.E.2d 51 (Ct. App. 2013)..... 11

Richardson v. PV, Inc., 383 S.C. 610, 682 S.E.2d 263 (2009)..... 8, 23

Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987)..... 23

Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897 (1995)..... 8, 22, 38

Rouvet v. Rouvet, 388 S.C. 301, 696 S.E. 2d 204 (Ct. App. 2010)..... 28

Rova Farms Resort v. Investors Insurance Company of America, 65 NJ 474, 323 A. 2d 495 (1974)..... 35, 36

Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009)..... 8, 20, 23, 24, 28, 29, 30

Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989)..... 29

Tobias v. Rice, 386 S.C. 306, 688 S.E.2d 552, 554 (2010)..... 28

Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E. 2d 779, 782 (1990)..... 28

White Oak Manor, Inc. v. Lexington Insurance Company, 407 S.C. 1, 753 S.E.2d 537 (2014)..... 8, 20, 21, 22, 38

Wisconsin Motor Corp. v. Green, 224 S.C. 460, 79 S.E.2d 718 (1954)..... 39

Other Authorities

Rule 9(c), SCRCP.....31
Rule 55, SCRCP.....6, 7, 8, 10, 11, 20, 21, 22, 24, 27, 40
Rule 55(c), SCRCP.....11, 20, 24, 27, 28
Rule 60, SCRCP.....6, 27, 28, 29
Rule 60(b)(1), SCRCP.....25, 26, 27, 28
Rule 220(c), SCACR.....37, 38

STATEMENT OF THE ISSUES ON APPEAL

I. **WAS THE LOWER COURT CORRECT IN DENYING BMW'S MOTION TO SET ASIDE THE ENTRY OF DEFAULT WHERE THE DEFAULT WAS DUE TO THE RECKLESS INDIFFERENCE OF BMW'S IN-HOUSE COUNSEL WHO, DESPITE MULTIPLE OPPORTUNITIES TO AVOID DEFAULT FAILED TO DO SO, AND THEN CLAIMED THAT THE SUIT WAS NOT TIMELY ANSWERED BECAUSE THE SUIT PAPERS WERE "LOST IN THE PROVERBAL SHUFFLE"?**

II. **WAS THE LOWER COURT DETERMINATION OF DAMAGES, INCLUDING PREJUDGMENT INTEREST, OF $633,206.06 CORRECT UNDER THE APPLICABLE LAW?**

III. **AS ADDITIONAL SUSTAINING GROUNDS, SHOULD THE ORDER DENYING BMW'S MOTION TO SET ASIDE THE ENTRY OF DEFAULT BE AFFIRMED BECAUSE RESPONDENT IS ENTITLED TO AN ADVERSE INFERENCE FROM BMW'S FAILURE TO PRODUCE RELEVANT, AVAILABLE DOCUMENTS IN ITS POSSESSION ON THE ISSUE OF ITS DEFAULT?**

STATEMENT OF THE CASE

Respondent filed its complaint against BMW on February 8, 2017, in which it asserted that BMW had an obligation to indemnify respondent for withdrawal liability which respondent incurred in 2014 to the Western Conference of Teamsters Pension Trust. The summons and complaint were served on BMW's registered agent for service of process, CT Corporation, on February 10, 2017. The answer was due on or before March 12, 2017. It was in default on March 13, 2107.

By Order of The Honorable Deadre Jefferson dated March 23, 2017, entry of default was awarded to respondent.[1] BMW filed its motion to set aside entry of default on April 25, 2017, which was 43 days after its default. The defendant's motion to set aside the default based on Rule 55 SCRCP was heard before The Honorable J. C. Nicholson, Jr. on June 13, 2017. In his Order filed July 21, 2017, the circuit court denied BMW's motion. On August 8, 2017, BMW filed its motion to alter or amend the judgment or for relief from the judgment pursuant to Rules 59(e) and 60(b)(1). By Form 4 Order dated October 4, 2017, these motions were denied.

A damages hearing was held on October 12, 2017. The Court took testimony from an employee of respondent who identified the amounts and dates of each payment made for which respondent is seeking indemnification from BMW. The testimony of Dr. Oliver G. Wood was also taken on the computation of damages and prejudgment interest. Following that hearing, the Court entered an Order for Default Judgment in the amount of $633,206.06 on November 27, 2017.[2]

---

[1] On March 24, 2017, BMW removed the case to federal court. Because its removal was not timely, the federal court granted respondent's motion to remand (with consent of BMW).

[2] This Order superseded the Order of default judgment of $647,309.06, which was previously entered on

STATEMENT OF FACTS

The summons and complaint (hereinafter "complaint" or "suit papers") were filed on February 8, 2017, and were served on BMW via its registered agent, CT Corporation, on February 10, 2017. (R. p. 86.) BMW did not timely file an answer. On March 23, 2017, Circuit Judge Deadra Jefferson signed an Order of Entry of Default. On April 25, 2017, BMW filed its motion to set aside default along with its proposed answer. By that time, BMW had been in default for 43 days.

In its motion to set aside default, BMW argued that "good cause" existed to lift the default. Along with its memorandum, BMW ultimately supplied three affidavits signed by its in-house corporate counsel, Richard Spitaleri,[3] who stated that he was responsible for handling incoming legal process and for assigning suit papers to local counsel for defense. (R. p. 188.) BMW claimed below that its handling of "this particular filing was an exception to the rule of prompt internal communications in terms of the proper service date. Thus, the failure to timely remove was the result of a clerical error." (R. p. 76.) In its Order, the lower court found:

> "According to BMW, its failure to answer the complaint was due to a minor technical error. See Defendant's Motion to Set Aside Default, at 4, "Defendant's conduct amounts only to an omission caused by a clerical person's carelessness." However, the so-called 'clerical person' was in truth BMW's own in-house legal counsel who was charged with handling the company's legal process."
>
> (R. p. 12.)

November 2, 2017.

[3] The first Spitaleri affidavit was dated April 25, 2017; the second was dated June 12, 2107. Subsequently, on October 9, 2017, BMW filed a third affidavit signed by Mr. Spitaleri.

Mr. Spitaleri's job responsibilities include serving as Corporate Counsel for BMW of North America. (R. p. 187.) He is tasked with "managing litigation brought against BMW NA." (R. p. 187.) It is Mr. Spitaleri's job for BMW to handle the routing of legal process to outside counsel once suit papers are received. (R. p. 188.)

Mr. Spitaleri had two chances to handle the receipt of Plaintiff's suit papers in this case. First, on February 13, 2017, he received "the summons and complaint in this action" from his BMW Department Coordinator. (R. p. 188.) As noted above, those suit papers had earlier been served on BMW by serving CT Corporation on February 10, 2017. His second instance of receiving the suit papers was entirely fortuitous. This instance arose out of a 30-minute telephone conversation Mr. Spitaleri had on February 21, 2017, with Charleston lawyer Bruce Wallace, Esquire. (R. p. 123.)

The contact between Messrs. Wallace and Spitaleri occurred because Mr. Wallace had been trying to arrange to take the deposition of one of BMW's in-house lawyers, Courtney Anderson, in a different case (AEP2, LLC v. Buxton). That case involved legal malpractice claims against Mr. Wallace's client brought by AEP2. (R. pp. 122-123.) BMW was not a party in the malpractice case. The chief claim in the malpractice case was that Mr. Wallace's client, a lawyer, had committed malpractice by not properly handling an issue involving ERISA withdrawal liability, costing AEP2 actual damages of $605,669. (R. p. 122.)

In defending that case, Mr. Wallace sought to show "that BMW of North America was obligated to indemnify AEP2, for the $605,000 in withdrawal liability. . . ." (R. p. 124.) Mr. Wallace's aim was to prove that, because of BMW's indemnity obligation, Mr.

Wallace's client in the malpractice case had no responsibility to AEP2 for damages attributable to the withdrawal liability.

In laying the discovery groundwork for his BMW indemnity defense, Mr. Wallace had served a subpoena on BMW seeking in-house lawyer Anderson's testimony. (R. p. 123.) Mr. Wallace's deposition subpoena in the legal malpractice case ended up in Mr. Spitaleri's hands. (R. p. 123.) This led to Mr. Wallace calling Mr. Spitaleri on February 21, 2017. (R. p. 123.) In the course of his conversation with Mr. Spitaleri about the BMW employee's deposition Mr. Wallace wanted to take, Mr. Wallace told Mr. Spitaleri about this lawsuit. (R. p. 124.)

Mr. Wallace explained that the indemnity obligation arose out of the 2014 Assignment, Assumption, and Consent Agreement in 2014 that had been produced to him in discovery by BMW via a subpoena duces tecum (R. pp. 123-124.) The Agreement was filed with the lower court. (R. pp. 126-130.) It carries a Bates Stamp of BMW000128 to BMW000130. That Agreement has a provision located on p. 2, para. 3, calling for indemnification by BMW "with respect to any potential withdrawal liability to the Pension," including "all potential liability to the Pension Fund as of the Assignment Date." It was this contractual obligation on BMW's part that led Mr. Wallace to notice the deposition of Ms. Anderson.[4]

In the course of his February 21, 2017, conversation with BMW's in-house counsel, Mr. Wallace told Mr. Spitaleri that he [Wallace] had noticed the deposition of BMW in-house attorney, Courtney Anderson, in the malpractice case he was defending because (1) he intended to ask Ms. Anderson to acknowledge that BMW had an

[4] The deposition of Ms. Anderson was scheduled, but then later cancelled by BMW during the pendency of this case.

indemnity obligation to AEP2 for the withdrawal liability of $605,000 and (2) that there was a pending suit, namely this case, that had been brought to address the issue (AEP2 v. BMW). (R. p. 124.) Wallace also had received BMW emails (R. pp. 226-229) showing Ms. Anderson's involvement with the 2014 Assignment, Assumption and Consent Agreement under which it was agreed that "BMW's indemnification of [AEP2] . . . covers all potential withdrawal liability to the Pension Fund. . . ." (R. pp. 126-130.)

Though Mr. Wallace is not a lawyer in this lawsuit, he had a copy of the complaint that plaintiff, AEP2, filed against BMW. He was asked by Mr. Spitaleri "to forward a copy of the complaint filed in this case [i.e., the present one] involving BMW." (R. p. 124). Mr. Wallace did so by email. (R. p. 124.)

Mr. Spitaleri conceded below that he had a telephone conversation on February 21, 2017, with Bruce Wallace, Esquire, and that he received a copy of the complaint in this case by email from Mr. Wallace later that same day. (R. p. 189.) The complaint specified BMW's exposure for its indemnity obligation totaling $605,669.06. (R. p. 30.)

By way of excuse for BMW's failure to timely answer the complaint, Mr. Spitaleri filed two affidavits that asserted that the failure to timely file an answer was due to the complaint becoming "lost in the proverbial shuffle" (R. pp. 86, 188), "notwithstanding BMW's internal requirements and protocols in place to facilitate timely responses to legal process." Id.[5]

It was further acknowledged by BMW at the June 13 default hearing that Mr. Spitaleri's "excuse" for BMW being in default was that the complaint got "lost in the

[5] The nature and substance of those "requirements and protocols" promulgated by BMW for the handling of suit papers were never specified below, nor were they produced by BMW.

proverbial shuffle."[6] BMW's then-counsel admitted "that is exactly what happened." (R. p. 261.[7]) The hearing transcript does not reflect any assertion before the lower court that BMW was confused or mistaken about the date of service of the complaint.

The lower court's Order Denying Motion to Set Aside Entry of Default of July 21, 2017, was based on the parties' filings and the arguments presented at the hearing on June 13, 2017. At that hearing, BMW's counsel stipulated that the applicable rule for its motion was Rule 55, SCRCP. (R. p. 234, lines 3-6.) The motion did not cite or rely on Rule 60 SCRCP. (R. pp. 75-80.)

In the Order Denying Motion to Set Aside Entry of Default, the trial court ruled that the default was due to the neglect of BMW corporate counsel, Mr. Spitaleri.[8] The

---

[6] (R. p. 261.):

7 THE COURT: . . . Did
8. he says it got lost in the shuffle; is that his language
9 in the affidavit?
10 MR. ABEL: In his first affidavit he said it was ---
11 THE COURT: In his first affidavit that is his
12 language?
13 MR. ABEL: He said it ---
14 THE COURT: It got lost in the shuffle?
15 MR. ABEL: --- got lost in the process. Yes.
16 THE COURT: In the process or the shuffle?
17 MR. ABEL: I think he may have used the word
18 shuffle. But in his second affidavit ---
19 THE COURT: Does he use the word shuffle?
20 MR. FREEMAN: Proverbial shuffle.
21 THE COURT: Proverbial shuffle.
22 MR. FREEMAN: Lost in the proverbial -- and, Your
23 Honor ---
24 MR. ABEL: And I think that is exactly what
25 happened, Your Honor.

[7] Lawyer Spitaleri's Affidavit dated April 25, 2017, states:

> Although our registered agent delivered the summons and complaint to us, it became lost in the proverbial shuffle notwithstanding our internal requirements and protocols in place to facilitate timely responses to legal process. (R. p. 86.)

[8] The Court determined that the default was not occasioned by local South Carolina counsel for BMW, but rather was the fault of BMS's in-house counsel, Mr. Spitaleri. "Local South Carolina counsel, Ashley Abel, had no role to play in the default of BMW, as the affidavits clearly indicate that Abel was told by Spitaleri that service of the complaint was on February 21." (R. p. 13.)

Order noted that service of the summons and complaint had been made on BMW's agent for service, CT Corporation, on February 10, 2017. (R. p. 8.) The Court found that BMW's motion was filed 43 days after it was in default. (R. p. 14.) The Court found that, under Rule 55, the defaulting party must provide a justifiable explanation for the default and give reasons why vacation of the default entry would serve the interests of justice, and that BMW failed to show good cause under Rule 55. (R. pp. 14-15.) It also found that there was a woeful lack of diligence on the part of BMW's legal counsel, Mr. Spitaleri: "[I]nstead of acting diligently, Mr. Spitaleri turned a blind eye to his job functions and to the summons and complaint in this case, despite being twice copied with the legal process and despite being a lawyer who was charged by BMW with handling suits against BMW." (R. p. 12.)

The Court found that Mr. Spitaleri acknowledged that he [Mr. Spitaleri] received the complaint on February 13, 2017. (R. pp. 111, 188). The Court found Mr. Spitaleri's assertion that the complaint was "lost in the proverbial shuffle" and/or that it was not assigned to outside counsel for a prompt response because of a purportedly "mere innocuous clerical error" did not constitute "good cause." (R. pp. 11-12.)[9]

BMW's "clerical error" defense was rejected by the lower court, which found that the "so-called 'clerical person'" responsible for the purported clerical error, was not a low-level functionary, but rather it "was in truth BMW's own in-house legal counsel who was charged with handling the company's legal process." (R. p. 12.) The Court found no legitimate basis in the record for Mr. Spitaleri to have been "confused" or to ignore legal

[9] It is undisputed that by February 13, 2017, the summons and complaint served on BMW's registered agent on February 10, had been forwarded to Mr. Spitaleri. (R. pp. 188-189.) This first set of suit papers was never assigned to outside counsel for any action whatever. It was this set of papers that Mr. Spitaleri conceded were "lost in the shuffle" in his first two affidavits. (R. pp. 86, 188.)

process that had been delivered to him. Id. The Court further found that his omission to act was "careless in the extreme" and that Mr. Spitaleri "clearly turned a blind eye to the obvious." (R. p. 13.) The Court also rejected BMW's position that Mr. Spitaleri's actions in failing to timely file responses to the suit papers he twice received sufficed to establish "good cause" for relief from default. Id.

The Order of the lower court relied on the rulings of our Supreme Court in construing Rule 55, SCRCP. See White Oak Manor, Inc. v. Lexington Insurance Company, 407 S.C. 1, 753 S.E.2d 537 (2014) (no good cause where defaulting party's insurance agent was negligent in failing to answer the complaint); Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897 (1995) ("losing complaint within the corporation" was not a ground to set aside default); Richardson v. PV, Inc., 383 S.C. 610, 682 S.E.2d 263 (2009) (negligence of an attorney or an insurance company is imputable to a defaulting litigant); Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009) (negligence of insurance agent was not "good cause").

The Order concluded with a finding that BMW's in-house lawyer's repeated neglect was "inexcusable" (R. p. 16), particularly in view of his telephone call with Bruce Wallace (11 days after service) that precipitated Mr. Wallace's email to Mr. Spitaleri with an additional set of suit papers. The Court's Order Denying BMW's Motion to Set Aside Entry of Default was filed on July 21, 2017. BMW's motion to reconsider was denied by Form 4 Order of the lower court filed on October 4, 2017. On October 9, 2017, BMW filed a document denominated "Third Affidavit of Richard Spitaleri, Jr." (R. pp. 209-216.) Even though it was not timely filed, Respondent does not object to it being included in this record because it references, but does not produce, an email of February

13, 2017, of Spitaleri's supervisor. The absence of this email entitles respondent to an adverse inference that the email is not favorable to BMW's current position.

The Honorable John C. Hayes, III, held a damages hearing on October 12, 2017, at which plaintiff called a company witness to verify the date and amount of each payment made by plaintiff for which it sought indemnification from BMW. The amounts totaled $605,669.06. Respondent's expert Dr. Oliver Wood, economist, computed prejudgment interest on that amount based on the applicable New Jersey law – in the amount of $27,537. By Order of Default Judgment filed November 27, 2017, Judge Hayes awarded judgment against BMW in the amount of $633,206.06.

STANDARD OF REVIEW

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).

ARGUMENT

As reflected in the factual statement above, the entry of default in this case is well-founded. BMW's default is not attributable to simple neglect, but rather egregious neglect. In this case, defendant's agent has acknowledged receiving service of the complaint *twice*, from two *different* sources, both of whom provided the suit papers to him within the time to answer. BMW's oft-repeated justification, that the suit papers "were lost in the proverbial shuffle," is legally deficient. That it happened twice is not proof of good faith, it is an indication of extreme carelessness by Mr. Spitaleri. If losing twice-delivered suit papers "in the proverbial shuffle" suffices to establish good cause for relief from default in South Carolina, there will be no point in continuing to maintain the default provisions of Rule 55 SCRCP.

Since being in default, BMW has asserted several inconsistent explanations for its default which have one thing in common: no record proof. BMW initially said that the default was the "result of a clerical error" and due to a failure of the fact of service of the suit papers to be "effectively communicated within the Defendant." (R. p. 76) In its Motion to Set Aside Entry of Default, BMW also asserted that "[d]efendant's conduct amounts only to an omission caused by a clerical person's carelessness." (R. p. 77.) In BMW counsel Abel's affidavit, dated April 25, 2017, he asserted that BMW was "not alerted by their Registered Agent to the actual date of service, which had occurred on February 10, 2017." (R. p. 88.) (emphasis added).

Thus, as of the BMW filings on April 25, 2017, BMW was blaming "a clerical person" (unnamed) and/or its registered agent (R. pp. 87-89) for its default. No evidence supporting such assertions exists in the record. Mr. Spitaleri's excuses for inaction

likewise fail to jibe. In his original affidavit, Mr. Spitaleri maintained "I did not become aware of service upon our registered agent, CT Corporation until March 30, 2017." (R. p. 85.) (emphasis added.) His second affidavit, in contrast, refers to the suit papers being routed to him from CT Corporation via "our Department Coordinator" and them "forwarded to me" or "sent . . . to my attention," in both cases "on February 13, 2017." (R. p. 188). (emphasis added.)

I. THE LOWER COURT'S ORDER DENYING BMW'S MOTION TO SET ASIDE THE ENTRY OF DEFAULT WAS CORRECT AND IN ACCORDANCE WITH SOUTH CAROLINA LAW.

The lower court correctly denied BMW's motion to set aside entry of default. Its Order was correct under Rule 55(c) SCRCP, and a proper exercise of discretion. The court's decision as to whether to set aside an entry of default should not be disturbed absent abuse of discretion. Regions Bank v. Owens, 402 S.C. 642, 741 S.E.2d 51 (Ct. App. 2013). BMW has shown no abuse of discretion. The Order is largely premised on findings of fact drawn from BMW's own filings in this case.

A. The Court Correctly Held That BMW Did Not Present a Satisfactory Explanation for its Default.

1. BMW's default was due to the reckless indifference of its in-house counsel who, after twice personally receiving copies of Plaintiff's suit papers, claimed that the suit was not timely answered because suit papers were "lost in the proverbial shuffle".

It was well within the court's discretion to deny the motion to set aside under Rule 55 SCRCP. It was stipulated by BMW at the June 13, 2017, hearing that its motion was made pursuant to Rule 55 SCRCP. (R. p. 234, lines 3-4.)

In its Brief at 11-13, BMW contends that the lower court had no evidentiary support for its findings that BMW's failure to timely answer was due to having "lost" or "misplaced" the complaint. Yet this is exactly what BWM claimed below. Here is what BMW told the lower court:

> Defendant's explanation is reasonable and understandable. Defendant's conduct amounts only to an omission caused by a clerical person's carelessness. The conduct, therefore, constitutes excusable neglect, in a liberal exercise of discretion, and the entry of default should be set aside.
>
> (R. p. 77.) (emphasis added).

In lawyer Spitaleri's second affidavit dated June 12, 2017, he repeats the claim made in his earlier affidavit, quoted above, that the complaint that was served on BMW's Registered Agent CT Corporation, and which was forwarded to him on February 13, 2017, was "lost in the proverbial shuffle." In his second affidavit, Mr. Spitaleri went on to say that the reason BMW is in default was that it was "nothing more than a simple human error." (R. pp. 188, 76.)

BMW's current contention that it did not "lose" the complaint is incorrect or at best a semantic exercise. At the default hearing, BMW's counsel admitted that the suit papers got lost in the shuffle. The lower court asked: "Did he say it got lost in the shuffle; is that his language in the affidavit?" This colloquy ensued:

> MR. ABEL [Counsel for BMW]: In his first affidavit he said it was ---
> THE COURT: In his first affidavit that is his language?
> MR. ABEL: He said it ---
> THE COURT: It got lost in the shuffle?
> MR. ABEL: --- got lost in the process. Yes.
> THE COURT: In the process or the shuffle?
> MR. ABEL: I think he may have used the word shuffle. But in his second affidavit ---
> THE COURT: Does he use the word shuffle?
> MR. FREEMAN: Proverbial shuffle.
> THE COURT: Proverbial shuffle.

MR. FREEMAN: Lost in the proverbial -- and, Your Honor ---
MR. ABEL: And I think that is exactly what happened, Your Honor.

(R. p. 261, lines 7-25).

According to BWM's counsel, "exactly what happened" is that the summons and complaint got lost. And it got lost not by a "clerical person's carelessness," as BMW argued below without record support (R. p. 77), but because of grossly negligent indifference on the part of the BMW lawyer charged with processing and safeguarding the suit papers.[10]

Mr. Spitaleri attempted to excuse his behavior as minor, saying he moved the suit papers "to an incorrect electronic folder." (R. pp. 188-189.) This, of course, is a distinction without a difference. The lower court noted: "Well, putting it in the wrong electronic file is just the same as losing it and throwing it in the trash can." (R. p. 249, lines 3-5.)

In BMW's filings, it has directly or obliquely blamed its default on a low-level clerical worker (false), its registered agent for service (false), or some unnamed actor on whose account the papers simply became "lost in the proverbial shuffle notwithstanding our internal requirements and protocols in place to facilitate timely responses to legal process." (R. p. 86.) There is a ring of truth to the "lost in the shuffle" explanation, but it does not equate to good cause for relief.

Left undiscussed by BMW is what BMW's "internal requirements and protocols in place to facilitate timely responses to legal process" actually entail. This information was never supplied to the court below prior to the court's July 21, 2017, order being

[10] It is undisputed that Mr. Spitaleri is the attorney for BMW who handles any process that BMW receives regarding labor and employment issues and that the legal department coordinator had sent the summons and complaint in this case to him on February 13, 2017. (R. p. 188.)

issued. A reviewing court, therefore, is unable to gauge the degree of departure by BMW from the standard of conduct it set for itself.[11] But the failure of BMW to submit its "internal requirements and protocols . . . [for] legal process" does provide an inference that the degree of departure from BMW's acceptable standards in this case was huge.

In any event, BMW had the burden of showing good cause for relief from default, and it completely failed. BMW provided no facts showing a clerical error, nor any failure by its registered agent for service to forward the complaint to BMW. What BMW did show is gross neglect by its legal counsel, and that neglect is imputable to BMW, the client.

Startlingly, Mr. Spitaleri managed to mishandle the suit papers *twice*. He had two chances to avoid default: first, on February 13, 2017 (when his BMW legal department coordinator emailed the complaint to him),[12] and second, on February 21, 2017, when Bruce Wallace, Esquire, emailed the suit papers to him and discussed in detail BMW's liability to AEP2.[13] There was no prompt, accurate follow-up by Mr. Spitaleri; instead, there was reckless indifference to duty, and then an effort to cast blame in order to cover up the dereliction.

BMW's latest "good cause" argument evidenced by its brief in this Court edges away from the phantom "clerical error" and damning "lost-in-the-shuffle" excuses

---

[11] Also undisclosed by BMW is the email of Coordinator Carbone sent to Spitaleri on February 13, 2017, which attached the complaint and which Spitaleri's affidavit says informed him that the service date was February 10, 2017. (R. pp. 209-210.). Failure to produce Carbone's email is puzzling. Did it say "get the pleadings to South Carolina counsel and be sure this case gets removed before the March 12 deadline"? Or did it say: "be sure you, don't let BMW go into default"? Or did it say something else that would also establish that BMW's default was for no good cause?

[12] (R. pp. 188, 209-210.)

[13] (R. p. 124.)

offered below. The latest reason for default, according to BMW's brief, is that "the uncontroverted evidence establishes that the default was 'caused' by a mistake of fact as to the correct date of service." (Appellant's Br. 11.) Respondent begs to differ. This latest hollow claim, like its predecessors, is simply bogus.

BMW's latest reason for default is that lawyer Spitaleri's failure properly to handle the first set of suit papers is irrelevant and is to be overlooked, ignored, or totally forgiven. Mr. Spitaleri's failing in disregarding the first suit papers served on him is not absolved because he managed to mishandle the second set of suit papers he later received. Using untimely evidence that was not submitted to the lower court prior to its July 20, 2017, order,[14] BMW now argues that Mr. Spitaleri "made a good faith mistake as to the date of service, believing it to be the date of his receipt of the pleadings, or February 21, 2017." (BMW's Brief, p. 6.) There are glaring problems with BMW's new "good faith mistake" position.

Mr. Spitaleri, per his third affidavit dated October 5, 2017, two and one-half months after the Order being appealed, claims he received the suit papers on February 21, 2017, the date Bruce Wallace emailed him courtesy copies of the summons and complaint, and he took that date to be the actual service date for his client. This third affidavit mentions, in passing, that BMW Supervisor Carbone told him in an email on February 13, 2017, that the date of service was February 10, 2017.[15] (R. pp. 209-210.) The email has not

[14] The hearing in this matter was held on July 13, 2017; the lower court's order was signed on July 20, 2017, and filed on July 21, 2017. (R. pp. 8, 17.) BMW's motion for reconsideration was denied by Form 4 Order signed on October 4, 2 017, and filed on October 5, 2017. The purported evidence BMW is now relying on is Mr. Spitaleri's untimely third affidavit, filed October 9, 2017, which was never presented to the lower court for its consideration on the good cause issue.

[15] In Mr. Spitaleri's own words, "[O]n February 13, 2017, . . . I received an e-mail from BMW NA's Legal Department Coordinator regarding the February 10, 2017 service of the Summons and Complaint upon BMW NA's registered agent for service of process (CT Corporation)." (R. pp. 209-210.)

been produced by BMW. This begs the obvious question: Why on earth would Mr. Spitaleri ignore BMW supervisor Carbone's email pegging the true date of services as February 10, 2017, and instead assume that the date of receipt of a courtesy copy of suit papers from a third-party lawyer not appearing in the case was the actual date of service applicable to filing a responsive pleading? No reasonable lawyer would ever assume he could simply make up a service date and use it with no repercussions. It was imprudent per se for Mr. Spitaleri simply to "assume" service of process was made on a certain date without double-checking with BMW's registered agent or his supervisor.

There is nothing uncertain about the date BMW was actually served in this case. It is undisputed that the complaint was served on BMW on February 10, 2017, by serving CT Corporation System. That is a cold, hard fact. The date Mr. Spitaleri first got the pleadings in this case was not February 21, 2017. It is undisputed that the summons and complaint filed by Plaintiff were sent to him by his supervisor on February 13, 2017. (R. pp. 188-189.) When he received the complaint from his supervisor on February 13, he was told in her email that service was on February 10, 2017. (R. pp. 209-210.) That is a fact. BMW's failure to produce this email entitles respondent to an inference that, if produced, its content would be adverse to BMW's position. See Additional Sustaining Ground Argument, infra.

Another cold, hard fact worth noting is that the courtesy copy of the complaint sent to him by Mr. Wallace, bore a filing date of February 8, 2017. (R. pp. 124, 145.) This disclosure put Mr. Spitaleri on inquiry notice that the actual date of service could have been (and was) earlier than February 21, 2017.

Mr. Spitaleri had no reason to think that Mr. Wallace was serving as an agent or process server for respondent. There is no evidence that respondent had any clue about Mr. Wallace contacting Mr. Spitaleri in February of 2017. Mr. Wallace spoke with Mr. Spitaleri and sent him the suit papers because he (Mr. Wallace) was functioning as a lawyer in a related case, not as a process server or as Plaintiff's agent. As Mr. Spitaleri, a lawyer, well knew, Mr. Wallace was in no position to function as Plaintiff's agent because he was litigation counsel for a party who had been sued by respondent, and thus was adverse to respondent.

Once he received the suit papers forwarded by Mr. Wallace, Mr. Spitaleri is presumed to have known that, most likely, BMW had already been served, most likely time to respond was running, and he needed to verify when a response was due or risk going into default. All Mr. Spitaleri needed to do was act prudently by figuring out the date a response was due and taking care of business based on that. This simple, everyday job was never done.

It needs to be added that Mr. Spitaleri may now claim not to have known for sure when service had been made on BMW, but BMW as an entity did. After all, BMW's registered agent had received service on February 10, 2017, and Mr. Spitaleri's Department Coordinator had forwarded the suit papers to Mr. Spitaleri on February 13, 2017. The knowledge of these two agents is imputed to BMW. So is the knowledge that Mr. Spitaleri got on February 13, 2017, when he got the suit papers and an email from his supervisor.

According to Appellant, "BMW NA made a good faith mistake regarding the date of service and inadvertently miscalculated the due date for a responsive motion." (BMW Br. 12-13). The argument fails.

This record reflects no "inadvertently miscalculated . . . due date." (BMW Br. 12). The record reflects an alleged due date that, at best, Mr. Spitaleri made up out of thin air and which was eight days after his Department Coordinator sent him the complaint and informed him that service was on February 10, 2017. (R. pp. 209-210.) Here, there was no mistake of fact as to the date of service.

Appellant BMW argues that the lower court mischaracterized its explanation for default by finding that BMW "lost the pleadings" and "turned a blind eye" to the matter. This argument is incorrect. It was BMW itself that presented two affidavits of its own in-house attorney asserting that the default was due to the pleadings being "lost in the proverbial shuffle". (R. pp. 85, 188.)

The question of whether the suit papers were lost was discussed by then-BMW counsel and the lower court at the June 13, 2017, hearing on the BMW motion to set aside default:

> The Court: "It got lost in the shuffle?
> Mr. Abel: . . .got lost in the process. Yes.
> The Court: In the process or the shuffle?
> Mr. Abel: I think he may have used the word shuffle...
> The Court: Does he use the word shuffle?
> Mr. Freeman: Proverbial shuffle.
> The Court: Proverbial shuffle.
> Mr. Freeman: Lost in the proverbial . . . and, Your Honor. . .
> Mr. Abel: And I think that is exactly what happened, Your Honor . . ."
>
> (R. p. 261, lines 14-25.) (emphasis added)

Mr. Abel: ". . . it got lost in the proverbial shuffle.
The Court: I thank you. I understand. That is the language"

(R. p. 262, lines 4-7.)

BMW counsel Spitaleri and Abel both informed the Court that the complaint was "lost." As for the use of the phrase "turned a blind eye," the lower court used that figure of speech correctly, when it found as follows:

> The facts indicate that instead of acting diligently, Mr. Spitaleri turned a blind eye to his job functions and to the summons and complaint in this case, despite being twice copied with the legal process and despite being a lawyer who was charged by BMW with handling suits against BMW.

(R. p. 12.)

Various South Carolina courts have referred to parties turning a "blind eye" to facts. See, e.g., Bd. of Trustees of Sch. Dist. of Fairfield Cty. v. State, 395 S.C. 276, 285, 718 S.E.2d 210, 215 (2011) ("turning a blind eye to legislative constitutional infractions"); Hopper v. Terry Hunt Constr., 373 S. C. 475, 483 n. 1, 646 S.E.2d 162, 166 n. 1 (Ct. App. 2007) (turning "a blind eye to the subcontractor's obvious lack of coverage").

In this case, Mr. Spitaleri's conduct amounted to reckless neglect of what applicable legal standards required. Acting as a lawyer, not as an unknowing lay person or "clerical" employee, he failed to come to grips with the task of timely handling legal process, which is the job he was hired to perform. In his second affidavit, he blamed his failure to do his job correctly on misfiling the paperwork due to being overworked,[16] not on being mistaken about the date of service.

[16] According to Mr. Spitaleri, his error in handling respondent's suit papers served on BMW "was made in the course of my sorting through the hundreds and sometimes thousands of e-mails I receive each week. The volume of my e-mail was particularly high during this time period as I had been bearing an extraordinary number of responsibilities since November 1, 2016 when a colleague of mine had left the Legal Department and I found myself handling many of her prior responsibilities in addition to my own." (R. p. 189.) Note that in the quoted passage Mr. Spitaleri implicitly blames BMW itself for overworking him, contributing to his failure to perform his duties properly. Blaming the client for giving rise to a lawyer's breach of duty is not "good cause" for BMW being in default.

In any event, no logical, clear-thinking BMW in-house lawyer can confuse receipt of a courtesy copy of a complaint with actual service of process. This is particularly so when the courtesy copy is sent by a lawyer adverse to the party who filed the complaint, and especially where, as here, the actual complaint was forwarded to the same in-house lawyer eight days earlier upon receipt by BMW's agent for service of process.

The lower court did not misapply Rule 55(c) SCRCP. The court reviewed the evidence presented by BMW to ascertain whether BMW has established a satisfactory explanation for being in default and properly ruled that BMW had not met the good cause standard of Rule 55(c) SCRCP.

The lower court followed our Supreme Court rulings as to the standard under Rule 55 for granting relief, which is as follows:

> The standard for granting relief from an entry of default under Rule 55(c) is "mere good cause." '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. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).
>
> '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.' Id. at 607-08, 681 S.E.2d at 888. (emphasis added).

White Oak Manor, Inc., v. Lexington Insurance Company, 407 S.C. 1, 753 S.E.2d 537 (2014).

In the White Oak case, the circuit court found and concluded that the defendant had provided no reasonable explanation for why it failed to respond to the initial

complaint and noted that the only excuse offered was that Defendant Lexington had "lost the pleadings." The circuit court concluded that ground was insufficient and denied the motion.

On appeal to the Court of Appeals, the decision was reversed. Our Supreme Court reversed the Court of Appeals opinion and affirmed the circuit court's order denying the motion to set aside the default, finding that there was no error in the lower court's holding that losing the complaint did not constitute good cause. BMW's lawyer's act of placing the complaint in an incorrect folder is in fact synonymous with losing it just as the lower court found, and there was no abuse of discretion by the lower court in denying the motion to set aside.

BMW finds itself in a dilemma created by its own in-house counsel's failure to make any one of three inquiries that would have led him to know that service was on February 10. Assuming Mr. Spitaleri was in doubt about the date of service, all Mr. Spitaleri had to do was contact BMW's agent for service of process, call the Clerk's office, or contact Plaintiff's counsel. He conducted no investigation. Instead, he guessed or assumed that the date he got a courtesy copy of the complaint from Mr. Wallace, a third party's lawyer, amounted to the actual date of service. His guess or assumption was nonsensical and unprofessional. Unprofessional conduct cannot be equated to good cause.

There is no support in this record for BMW's contention that there is good cause under Rule 55. As explained by the Supreme Court of South Carolina in White Oak Manor, id., a determination of "good cause" under Rule 55, SCRCP, requires first that the defaulting party must provide a justifiable explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. In the instant case,

this has not been done.

The White Oak case is the culmination of many appellate decisions in South Carolina where our appellate courts have steadfastly applied Rule 55, SCRCP, to reject motions to set aside default where the defaulting party has not been diligent in responding timely to lawsuits. In an earlier case, which is on point, Roche v. Young Brothers, Inc., 318 S.C. 207, 456 S.E.2d 897 (1995), the Supreme Court ruled that "losing a summons and complaint within the corporation" was not a ground to set side default. Id. at 212, 456 S.E.2d at 900. In that case, the Supreme Court reinstated the entry of default and remanded the case for a damages hearing. The ruling of Roche makes it clear that our Supreme Court has already established that the excuse that a complaint was "lost within a corporation" is not good cause under Rule 55.

Mr. Spitaleri's June 12, 2017, affidavit claimed he was fooled by the caption of the suit papers into thinking that this case was the same as a different case, the Buxton case (the one Mr. Wallace called about), in which Courtney Anderson was a witness. (R. pp. 188-189.) However, a subpoena is not a complaint. Likewise, the Buxton caption did not mention BMW. Likewise, the case numbers are not the same. Buxton is styled Case No. 2016-CP-10-02014, whereas this lawsuit is Case No. 2017-CP-10-00644. There was no logical basis upon which BMW's general counsel could have been confused. When the "confusion" defense was offered below, the Court was incredulous: "[H]e got it confused? . . . . Can he read?" (R. p. 248, lines 18-21.)

Here, as in Mitchell Supply Co., Inc. v. Gaffney, 297 S. C. 160, 375 S.E.2d 321 (Ct. App. 1988), Mr. Spitaleri may have been momentarily confused upon seeing two different legal documents with slightly similar captions (but only one of which named

BMW), each with AEP2 named as a plaintiff. However, here, as in Mitchell, the fact that the matters were different would have been revealed upon "[e]ven a cursory examination" of the papers. Id. at 165, 375 S.E.2d at 324. Here, like the party seeking relief in Mitchell, BMW "has shown neglect, but no excuse for it." Id. See also Ledford v. Pennsylvania Life Ins. Co., 267 S.C. 671, 230 S.E.2d 900 (1976) (counsel's misinterpretation of documents in the file does not excuse default "where even a cursory examination" of documents in the file "would readily have disclosed the fallacy of the assumption which he made." Id. at 677, 230 S.E.2d at 903.

The carelessness of a defendant's agents is imputed in default cases. In Richardson v. PV, Inc., 383 S.C. 610, 682 S.E.2d 263 (2009), the Supreme Court held that the insurance company's negligence in failing to timely answer was imputed to the insured and was not "good cause." The courts in this state have consistently held that "the negligence of an attorney or an insurance company is imputable to a defaulting litigant." Richardson, 682 S.E.2d at 267, citing Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987). In Roberts, a motion to set aside was filed two months after entry of default; the lower court order finding no "good cause" and denying the motion was affirmed.

In Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), the defendant forwarded the complaint to its insurance agent two weeks after notifying the agent of the suit. The lower court denied the motion to set aside default. The Court of Appeals affirmed, and the Supreme Court affirmed on the ground that the defaulting defendant failed to show good cause. It specifically ruled as follows:

> "... we do not believe that petitioner meets even the most minimal showing of good cause and is therefore not entitled to relief from the entry of default." Id. at 607, 681 S.E.2d 888 (emphasis added).

BMW's motion is based on facts (intra-corporate negligence) that do not constitute good cause under applicable authority. BMW has not presented to this Court a single reported case supporting relief from default where the defaulting party contended the papers were "lost in the proverbial shuffle." Nor has it presented authority that lawyers are free to make up service dates when it suits them.

Our appellate courts have consistently held that if the trial court determines that the defaulting party has failed to establish a satisfactory explanation for the default, its decision will not be reversed for failing to make a specific finding of fact on the record for each of the three factors identified in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009),[17] if there is sufficient evidentiary support on the record for the finding of the lack of good cause. Id. at 608.

2. The lower court correctly determined, in accordance with Rule 55 and S.C. case law, that BMW had shown no "good cause" for to support relief from being in default.

BMW did not present competent, credible evidence that BMW's default was due to a mistake of fact sufficient to constitute "good cause" for relief under Rule 55(c). The claimed facts surrounding default presented by BMW in its Rule 55 filings include: the pleadings were "lost in the proverbial shuffle"[18]; default was the "result of a clerical

[17] In that case, the Supreme Court provided that once a party puts forth a satisfactory explanation for the default, the next step for the trial court is to also consider: "(1) the timeliness 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." Id. at 888.

[18] (R. pp. 86, 188.)

error"[19]; BMW's "conduct amounts only to an omission by a clerical person's carelessness"[20]; BMW's date of service was "not effectively communicated within [BMW]"[21]; BMW in-house Legal Department Coordinator emailed BMW in-house counsel a copy of the complaint on February 13, 2017, but Mr. Spitaleri "moved this email to an incorrect electronic folder"[22]; and Mr. Spitaleri's failure was due to him being overworked, i.e., "bearing an extraordinary number of responsibilities."[23] None of these excuses are valid, and BMW's efforts to blame unnamed clerical personnel have no record support.

Upon receiving the suit papers a second time through Mr. Wallace, BMW counsel was reckless in not ascertaining the true date of service from the information sent directly to him (including a file-stamp of February 8, 2017, affixed to the pleading). Rather than fact-check, Mr. Spitaleri made up a service date out of thin air. BMW argues that Mr. Spitaleri's behavior establishes good cause based on BMW's "mistake of fact as to date of service" pursuant to Rule 60(b)(1) SCRCP, citing two cases, which are not applicable here.

In the first, Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct. App. 1985), the Court of Appeals 33 years ago found there was a "good faith mistake of fact" about the date of service because the defendant mistakenly told his lawyer he was served one day after the actual date of service, which caused the lawyer to file the answer late.

---

[19] (R. p. 77.)

[20] (R. p. 77.)

[21] (R. p. 76.)

[22] (R. p. 189.)

[23] (R. p. 211.)

Galvin presents a simple, straightforward, case of "good faith mistake." This makes it unlike the instant case where BMW's lawyer was misled by nobody but simply was guilty of dereliction of duty. Missing from this record is proof that CT Corporation, Mr. Wallace, Plaintiff AEP2, or anyone else ever misled anybody at BMW about the date of service. Nobody told Mr. Spitaleri about any service date, other than his coordinator Carbone and CT Corporation, both of which reported the correct date to BMW and were ignored. The service date Mr. Spitaleri relied on is one that he simply made up.

The second case cited by BMW, Mictronics v. S.C. Department of Revenue, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001), did not involve default in responding to a complaint. Rather, the plaintiff Mictronics failed to appear at a hearing, causing the Administrative Law Judge to dismiss plaintiff's case. Mictronics failed to attend the hearing due to a mistake as to the hearing date. The Administrative Law Judge staff member had spoken to the plaintiff about the hearing date, but plaintiff "misheard" the date and put it down on his calendar for a later day. The Court of Appeals ruled that this was a "good faith mistake" to grant relief under Rule 60(b)(1) SCRCP.

In Mictronics, the plaintiff made an honest mistake based on a phone call with the staff at the Administrative Law Court. In this case, Mr. Spitaleri did not "mishear" anyone. Mr. Spitaleri did not ask anyone what the service date was. In this case, nobody misinformed Mr. Spitaleri about the service date. On the contrary, he was actually well informed. He received notification via CT Corporation as to the exact date of service, but he ignored it. Mr. Wallace never opined about the service date, he just forwarded a copy of the complaint "showing a filing date of February 8, 2017" (R. p. 124), which should have aroused concern. Unlike Mictronics, the actor in this case, a lawyer, did not

misinterpret anything. Rather, he simply made up a supposed service date out of thin air, and he guessed wrong. BMW has completely failed to present a legally sufficient factual explanation for its default.

BMW's brief includes a discussion of Rule 55 and Rule 60 SCRCP. The rules are not interchangeable, but distinct. The "good cause" requirement for relief from default is under Rule 55(c). Rule 60(b) grants limited authority for a court to award a party relief from an order where a party can establish that the order was "induced by mistake, inadvertence, surprise, fraud, or excusable neglect." There is no basis in the record to conclude that the lower court erred in finding a lack of "good cause." Good cause simply was not and has not been shown.

Mr. Spitaleri's handling of the complaint was less attentive than any reported case which respondent's research has found. Tellingly, he had two opportunities to do it right and failed each time. Nor is there any evidence supporting relief based on "inadvertence, surprise, fraud, or excusable neglect." Here there was plenty of neglect or recklessness on the part of Mr. Spitaleri. But none of his misconduct is excusable, and the Court correctly so found.

Mr. Spitaleri's cavalier "lost in the proverbial shuffle" excuse does not exculpate, it incriminates. His uncaring, dismissive, blame-casting behavior is insufficient to be good cause in and of itself. Worse, the argument's weakness is exacerbated because of Mr. Spitaleri's attorney status, a status made more egregious because he was the BMW lawyer charged with receiving suit papers and assigning cases to counsel for timely responses.

Furthermore, BMW's showing of "mistake" must be based on the record established as of June 13, 2017, the date of the hearing. No exculpatory evidence is in the record. A ruling on a motion under Rule 60 is discretionary and will not be disturbed absent an abuse of discretion, Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E. 2d 779, 782 (1990). The Court gave BMW a fair hearing, and its ruling is justifiable and amply supported.

Rule 60(b) SCRCP requires the moving party to provide a particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. Tobias v. Rice, 386 S.C. 306, 688 S.E.2d 552, 554 (2010); Sundown Operating, 383 S.C. at 608, 681 S.E.2d at 888-89. No particularized showing has been made here, nor can one be made. BMW has asserted multiple explanations or "excuses" for its default. They all either lack record support or are legally insufficient.

It is well settled that the moving party under a Rule 60(b) motion has the burden of presenting evidence entitling him to relief. McClurg v. Deaton, 395 S.C. 85, 86-87, 716 S.E.2d 887, 888 (2011); Rouvet v. Rouvet, 388 S.C. 301, 696 S.E. 2d 204 (Ct. App. 2010). No such evidence has been or can be adduced.

The criteria for obtaining relief from judgment under Rule 60(b) are not relevant to a Rule 55(c) analysis, except insomuch as proof of any one of the factors of Rule 60 is sufficient to show "good cause." No such evidence exists. BMW has presented no facts showing any excusable neglect, surprise, misrepresentation, or misconduct by an adverse party in this case. As stated in the case of New Hampshire Insurance Co. v. The Bey Corporation, 312 S.C. 47, 435 S.E.2d, 377, 379 (Ct. App. 1993), the decision to set aside a

default is within the discretion of the trial judge and will not be reversed on appeal absent an abuse of discretion. The Court did not abuse its discretion; Mr. Spitaleri's indifference to duty – his blatant, repeated failure to do his job – left the Court with no choice in the matter.

Rule 60 motions should not be granted except when based on "rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake or one based in equity for fraud upon the court." Mr. T. v. Ms. T, 378 S.C. 127, 662 S.E.2d 413, 417 (Ct. App. 2008). Relief under Rule 60 lies within the sound discretion of the trial court and the trial court's conclusions will not be disturbed absent an abuse of discretion, such as the order being controlled by an error of law or without evidentiary support. Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989). There has been no abuse of discretion here. The Court's Order was well-reasoned and correct.

B. Assuming BMW Could Have Presented A Satisfactory Explanation for Its Default, the Remaining Factors Do Not Favor Granting Relief from Default.

Our appellate courts have consistently held that if the trial court determines that the defaulting party has failed to establish a satisfactory explanation for the default, its decision will not be reversed for failing to make a specific finding of fact on the record for each of the three factors identified in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E. 2d 885, 888 (2009),[24] if there is sufficient evidentiary support on the record for the finding of the lack of good cause. Id. at 608, 681 S.E.2d at

[24] In that case, the Supreme Court provided that once a party puts forth a satisfactory explanation for the default, the next step for the trial court is to also consider: "(1) the timeliness 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." Id. at 888.

888.

In the instant case, BMW has established no satisfactory explanation for the default. As to the three factors set forth in the Sundown Operating Co. case, these were each addressed by the lower court. The timing of BMW's motion for relief (43 days after default) does not weigh in its favor. Further, on the second factor, BMW has not met its burden of demonstrating a meritorious defense. Indeed, the proposed answer it attached with its motion to set aside default amounts to nothing more than a general denial. The affidavit submitted by BMW is deficient in this regard. Bruce Wallace's affidavit is most telling. He had a 30-minute telephone call with BMW's in-house counsel more than two weeks before BMW's answer was due in which he fully explained to BMW counsel why it was liable to indemnify plaintiff and how he expected to depose BMW's in-house lawyer on that issue. (R. pp. 123-124.)

On the final issue, prejudice to plaintiff if entry of default is set aside, it is noted that BMW's indemnity obligation accrued because of a transaction in 2014 arising out of an agreement BMW had with plaintiff to indemnify it for the withdrawal liability, if any.[25] The prejudice is that plaintiff is entitled to be indemnified without any further delay or costs involved with engaging in discovery, taking depositions, and being at the bottom of a one to two year trial roster.

[25] BMW's liability is premised on an Assignment, Assumption and Consent Agreement of February 2014, which BMW produced in response to the subpoena duces tecum of Bruce Wallace, Esquire. This agreement between plaintiff 2AM Group, LLC and BMW, provided that BMW would indemnify plaintiff for all withdrawal liability. BMW has argued this agreement is unsigned; however, it was produced from BMW's files and the transaction which triggered the withdrawal liability could not have occurred without BMW's approval.

II. THE LOWER COURT PROPERTLY CALCULATED DAMAGE AND PREJUDGMENT INTEREST.

A. The lower court correctly determined the amount of damages owed by BMW regardless of BMW's argument about the Notice of Damages Clause.

The lower court determination of damages was appropriate under New Jersey law. Witness Denise Haden, the respondent's office manager, identified the amounts and dates of each of the 13 payments made by AEP to the Teamsters Pension Trust, the total of which was $605,669.06. (R. pp. 278-282, 22). The lower court damage award in this amount was correct and supported by New Jersey law. Two decisions of the New Jersey Supreme Court describe how, under New Jersey law, a trial court can consider any relevant evidence to determine the meaning of a contract, even when the express terms are unambiguous. Conway v. 287 Corp. Ctr. Assoc., 187 N.J. 259, 901 A.2d 341 (2006), "in order to apply a rational meaning." McMahon v. City of Newark, 195 N.J. 526, 951 A.2d 185 (2008). Overriding this is the fact that BMW is in default and all allegations in the complaint are deemed to be true. BMW is bound by these admissions and is estopped to deny them and argue otherwise.

BMW, despite being in default, argues that the lower court erred by partially enforcing the contract and disregarding the Notice of Damages clause. This is incorrect. First, even though it had long been in default at the time on April 25, 2017, BMW filed, with its motion to set aside entry of default, a proposed answer, which did not assert, or even mention Section 18 of the Services Agreement (the notice of damage clause) as relevant to this case.[26] Second, BMW overlooks that there are two contractual documents relating to the withdrawal liability claim by AEP – the Services Agreement of late 2011

[26] Rule 9(c) SCRCP provides that denial of performance shall be specifically pled; the proposed answer does not reference the notice clause.

between the parties (Exhibit A to complaint) and the Assignment, Assumption and Consent Agreement between AEP and BMW in February 2014, when AEP sold its assets to a third party (Sustained Quality, LLC) and BMW consented to same. (R. pp. 122-130.) The first agreement included a notice of damages clause which provided that claims for damages "shall be made in writing to such other party within a reasonable time after the first observation of such injury or damage." The second agreement, the Assignment of 2014 did not include a notice of damages claim clause. (R. pp. 128-130.)

As a starting point, the language of the notice of damage claim clause in the 2011 Services Agreement is, in pertinent part, as follows:

> "a. Should either party to this Agreement suffer injury to person or property. . . claim should be made in writing to such other party within a reasonable time after the first observation of such injury or damage."
> (R. p. 42.) (emphasis added).

Its intent is that notice of a claim for personal injury or property injury must be given within a reasonable time after same is "observed." Notably, the 2014 Assignment does not have a requirement of notice for a claim of indemnity for payment of withdrawal liability to the Teamsters Trust, and such claim is not a claim for injury "to persons or property" under the 2011 Agreement. The rationale for this clause is that damage to person or property in fairness should be brought to the attention of the opposing party so it can possibly investigate or seek mitigation, and prompt notice of such claims would allow for investigation, mitigation, or defense of such claims. This rationale is not present for an indemnity claim such as in this case. Further, New Jersey law supports the position of respondent.

BMW's brief cites one case of the New Jersey Superior Court Appellate Division involving a notice of damages clause under New Jersey law, where the court ruled against a plaintiff that did not give notice to the carrier of a claim for a damaged crane boom where there was a clause in the bill of lading that required notice in writing within nine months after delivery. In that case, Johnson & Dealaman, Inc. v. Wm. F. Hegarty, Inc., 93 N.J. Super. 14, 224 A.2d 510 (1965), the New Jersey Superior Court (Appellate Division) reversed the lower court order granting relief to the plaintiff because it did not give the carrier notice of the damaged boom within nine months of delivery and because of the application of the Interstate Commerce Act. The Superior Court reasoned that for physical damage claims in interstate commerce, as a matter of contract, the notice requirement in the bill of lading under the federal law was to avoid opening the door to false claims for alleged damage to goods. Without a reasonable notice provision, parties could make damage claims, and there would be no evidence available to refute them after the passage of time. Even though the carrier had actual notice of the damage, the failure to give the notice of claim within nine months was fatal under federal law. That law does not apply here.

The claim in the instant case is not for "physical" damage; it is for monies owed. If notice of this claim had been given by AEP to BMW for withdrawal liability indemnification before suit was filed, BMW's position would not be improved by that notice. There are/were no "physical" or personal injury damages alleged, and notice of withdrawal liability would not have helped BMW to prepare its defense, assuming it had one. Thus, the lower court in the instant case properly found actual damages to be $605,669.06. BMW has suffered no prejudice by not receiving sooner notice of AEP's

indemnity claim.

On pages 19-20 of its brief, Appellant BMW argues that under New Jersey law "contract construction is reviewed *de novo*." This is an incorrect statement of New Jersey law. The case cited by appellant, Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 965 A.2d 203 (2009), decided by an intermediate appellate court, held that only where the lower court set aside a settlement agreement, essentially rewriting the contract, appellate review would be *de novo* because the trial judge was rescinding an entire agreement in an attempt to rewrite the contract. Here, the trial court did nothing of the sort. Therefore, BMW's reliance on the Kaur case from the New Jersey Superior Court (Appellate Division) is misplaced, and it overlooked rulings of the Supreme Court of New Jersey.

In Conway v. 287 Corp. Ctr. Associates, 187 N.J. 259, 901 A.2d 341 (2006) where the Supreme Court of that state ruled that under New Jersey law (unlike the law of South Carolina) the lower court can consider any relevant evidence in determining the meaning of a contract, even when the express terms are unambiguous. Id. at 347. In another opinion of the Supreme Court of New Jersey, McMahon v. City of Newark, 195 N.J. 526, 951 A.2d 185 (2008), the Supreme Court of that state held that under New Jersey law the court can consider any relevant evidence in determining the meaning of a contract, even when the express terms are unambiguous, in order to apply a "rational meaning." Id. at 197.

In the instant case, the notice of damage claim clause clearly relates to claims for physical damage to persons or property where it would be important for the damaged party to give reasonable notice so that the defendant could have a chance to investigate said physical damages and/or personal injuries to determine the validity of the claim. The trigger point in the notice clause is a reasonable time "after the first observation of such

injury or damage." (R. p. 42.) (emphasis added.) In the instant case, no such reason exists for notice any prompter than was given by respondent where no physical damage or personal injury is involved and there was nothing to have been "observed" with regard to the indemnity claim in which BMW is in default.

B. The Lower Court Correctly Determined Prejudgment Interest Under New Jersey Law.

The lower court correctly found and concluded that the amounts paid by respondent for the withdrawal liability were for sums certain and that its indemnity claim against BMW for these amounts was subject to "prejudgment interest under New Jersey law." (R. p. 22.) It calculated prejudgment interest at the New Jersey interest rate of 2.25% "from the date plaintiff's payments were made."

Appellant BMW has not challenged the interest rate, but urges that the lower court erred in making an award of prejudgment interest and calculating same. However, BMW admits a decision on prejudgment interest under New Jersey law is "within the sound discretion of the trial court." (Brief of Appellant, p. 21.) Respondent agrees that the cases cited by BMW in its brief on this point are generally accurate propositions of New Jersey law, but they do not support BMW's position.

As stated by the New Jersey Supreme Court in Rova Farms Resort v. Investors Insurance Company of America, 65 N.J. 474, 323 A.2d 495 (1974), in reversing a trial court's refusal to award prejudgment interest, the primary consideration in determining prejudgment interest is the presumed loss to a plaintiff from the defendant having the use of moneys which it (defendant) should have paid previously. It wrote: "[t]he interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier

entitled." Id. at 506. Its ruling in Rova Farms, a bad faith insurance case, was that plaintiff was entitled to prejudgment interest from the date the insured paid a portion of the judgment to claimant.

BMW argues that, even though the amount awarded is for a "sum certain," no prejudgment interest should be awarded until the time that suit commenced, not the date payments were made. However, under New Jersey case law, prejudgment interest may be awarded at the trial court's discretion "after the application of equitable principles". DialAmerica v. Kay Span Energy, 374 N.J. Super. 502, 865 A.2d 728 (2005) (prejudgment interest is calculated within the discretion of the court).

As an equitable matter, BMW should not have use of the monies it owes to respondent without paying the New Jersey rate of 2.25% from the date of each payment made by respondent as set forth in the Order of Judge Hayes. (R. p. 22.)

Under New Jersey case law, unlike South Carolina, the application of equitable principles by a trial court is permissible when it is determining whether to award prejudgment interest and how much. The lower court award is appropriate under New Jersey law and should be affirmed.

III. AS ADDITIONAL SUSTAINING GROUNDS, THE ORDER DENYING BMW'S MOTION TO SET ASIDE THE ENTRY OF DEFAULT SHOULD BE AFFIRMED BECAUSE RESPONDENT IS ENTITLED TO AN ADVERSE INFERENCE FROM BMW'S FAILURE TO PRODUCE RELEVANT, AVAILABLE DOCUMENTS IN ITS POSSESSION ON THE ISSUE OF ITS DEFAULT.

Pursuant to Rule 220(c) SCACR, the appellate courts may affirm a judgment for any reason appearing in the record. In this case, BMW failed to produce its internal requirements for timely response to legal process and the likely enlightening email from the Legal Department Supervisor to lawyer Spitaleri about service of the complaint on February 13, 2017. BMW's failure to produce these documents entitle respondent to prevail because there is an adverse inference that, if produced, they would not support BMW's position.

In the record of this case, BMW's affidavits supplied in support of its motion to set aside the entry of default included reference to "[BMW] internal requirements and protocols in place to facilitate timely responses to legal process" (R. p. 86), and "our internal requirements and protocols in place to facilitate timely responses to legal process." (R. p. 188.) BMW did not produce any of its internal documents. All such documents have been withheld from view.

BMW's affidavits in support of its motion to set aside default also included reference to a significant email, which BMW did not provide. In the third Affidavit of Spitaleri, he states that the way BMW's system works is that the Legal Department Coordinator "receives email notice that process had been served on CT Corporation . . . and after saving the served papers, the Department Coordinator then forwards the papers along to the appropriate attorney for handling." (R. p. 213.) None of the emails or documents referenced in this third affidavit were produced, attached, or otherwise

revealed by BMW.[27] This third Spitaleri affidavit also refers to the fact that he received an email from Coordinator Carbone with the served papers and she informed Spitaleri that service was on February 10. (R. pp. 209-210.) He says that "Ms. Carbone's February 13, 2017, email ended up in the wrong electronic folder at some point." (R. p. 214.) Spitaleri explains later in his affidavit that all of the mistakes he made trace back to his "misplacement of a single email . . . ." (R. p. 215.)[28] Yet, this, single email that supposedly is at the heart of BMW's case was never produced by BMW in the lower court. The email has been withheld from respondents and from the record in this case.

The absence of evidence is striking because BMW has the burden of proving its entitlement to relief from default. The issue before the lower court was whether or not BMW could establish that it had a reasonable explanation for being in default, and whether it has "good cause" for its default to be set aside. With BMW's diligence squarely in issue, it has chosen to conceal documents bearing on that exact issue. BMW's failure to produce the internal procedures and protocols of BMW on the legal requirements of service of process entitle respondent to an inference that, if produced, these records would not support BMW's position. BMW's failure to produce the February 13 email to Mr. Spitaleri in which he received the complaint and was told the date of service was February 10, 2017, also entitles respondent to an adverse inference

[27] Had the BMW email been produced, it may have reflected that Carbone is equally neglectful with Spitaleri, which weakens BMW's position even more, if that is possible.

[28] In arguing under Rule 220(c) SCACR, respondent continues to rely on its main argument that BMW's act of "misplacement," i.e., losing the suit papers, does not amount to good cause is South Carolina. White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 12, 753 S.E.2d 537, 543 (2014) (losing the complaint was not "good cause."). See also Roche v. Young Bros. of Florence, 318 S.C. 207, 212, 456 S.E.2d 897, 900 (1995) ("Losing a summons and complaint within the corporation is not a ground to set aside a default judgment.").

against BMW. It is reasonable to infer that the documents that BMW has elected to withhold from view are harmful to, or even contrary to, BMW's current position.

It is the law in South Carolina that, where a party possesses, but fails to produce available records on a material issue, it may be inferred that the contents of the records, if presented, would be adverse to the party who failed to present the records. Wisconsin Motor Corp. v. Green, 224 S.C. 460, 79 S.E. 2d 718 (1954).

The most recent ruling of our Supreme Court on the issue of whether there is an inference to be drawn when a party fails to produce evidence is Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E. 2d 369 (1990). In that case, the Supreme Court upheld a jury charge that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." Id. at 372. In the instant case, BMW referred to the critical email of February 13 and its internal protocol for legal process, but never produced these documents. As an additional sustaining ground, its failure to do so supports the lower court's denial of BMW's motion to set aside default, as the inference to be drawn from BMW's conduct is that these documents would not have supported "good cause" for BMW to have relief from default.[29]

In 2009, the Court of Appeals cited Kershaw County Board of Education with approval in Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 675 S.E. 2d 783 (Ct. App. 2009). In Pringle, the court of appeals also noted that the party seeking the inference had

[29] Internal corporate manuals and protocols are admissible to show the reasonableness of a corporate employee's actions. In Caldwell v. K-Mart Corp., 306 S.C. 27, 410 S.E. 2d 21 (Ct. App. 1991); rehearing denied November 4, 1991; certiorari denied January 7, 1992, the K-Mart loss prevent manual was admissible in a false imprisonment case to show the reasonableness of the conduct of store employees, regardless of the fact that a statute addressed a good faith defense to false imprisonment suits. The court held that an inference could be drawn as to whether K-Mart's actions were reasonable in time and reasonable in manner. BMW talked extensively in its affidavits about internal corporate requirements, yet failed to produce or quote them.

to show that the document might reasonably support whatever prescription is being requested by the fact finder. Id. at 405, 787. In the present case, BMW produced six affidavits, some with attachments, but the transmittal email and the set of BMW's own internal procedures and protocols have consistently been withheld. They would clearly relate to whether BMW had an acceptable justification for failing to timely answer the complaint. While the record is replete with facts showing no "good cause" for BMW's motion to set aside default, the adverse inference from BMW's consistent, repeated failure to provide these documents bearing on its diligence in handling the suit papers is an additional sustaining ground supporting the lower court's order denying BMW's motion under Rule 55.

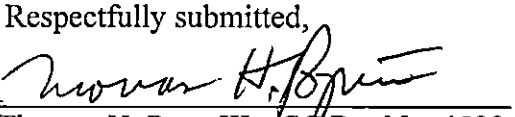
The fact that the second and third Spitaleri affidavits reference, but do not quote or attach, the email from his supervisor dated February 13 referencing the February 10 date of service of the summons and complaint is suspicious. It is also telling because it appears that this email from Carbone actually contradicts a portion of the affidavit of former BMW counsel who averred that BMW was "not alerted by their registered agent to the actual date of service..." (R. p. 88.) The fact that the never-produced email of February 13, 2017, directly contradicts the affidavit of former BMW counsel is significant and entitles respondent to an adverse inference about credibility that it is not favorable to BMW's position in this case.

CONCLUSION

The record herein shows egregious neglect by an in-house BMW lawyer whose job it was to handle legal process. It further shows multiple conflicting "excuses" for BMW's default, none of which rise to the level of "good cause" for relief to be granted.

For the reasons set forth herein, the lower court Order denying BMW's motion to set aside entry of default and the Order of Default Judgment in favor of respondent in the amount of $633,206.06 should be **AFFIRMED**.

Respectfully submitted,

By: 

Thomas H. Pope III – SC Bar No. 4508
POPE PARKER JENKINS, P.A.
Post Office Box 190 - 1508 College Street
Newberry, SC 29108
Telephone: 803-276-2532; Fax: 803-276-8684
Email: tom@ppjlaw.com

John P. Freeman – SC Bar No. 2128
200 W. Highland Dr. Unit 107
Seattle, WA 98119
Telephone: 803-361-6934
Email: jfreemanusc@gmail.com

July 18, 2018

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No. 2017-002481

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Circuit Court Judge

AEP2, LLC f/k/a 2AM Group, LLC.....Respondent

v.

BMW of North America, LLC.....Appellant

CERTIFICATE OF COUNSEL

I, Thomas H. Pope, III, Esquire, do hereby certify that the Final Brief of Respondent complies with Rule 211(b).

Thomas H. Pope III – SC Bar No. 4508
POPE PARKER JENKINS, P.A.
Post Office Box 190
1508 College Street
Newberry, SC 29108
Telephone: 803-276-2532
Fax: 803-276-8684
Email: tom@ppjlaw.com

July 18, 2018

Attorney for Respondent AEP2, LLC f/k/a 2AM Group, LLC