STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity
Case No. 2015-CP-10-3392

Appeal No. 2017-001628

Ct. App. Opinion No. 5748 – Filed July 22, 2020

Corona Campbell as Personal Representative
of the Estate of Ann M. Blandin,

Respondent-Appellant,

v.

City of North Charleston,

Appellant-Respondent.

PETITON FOR REHEARING
on behalf of
APPELLANT-RESPONDENT CITY OF NORTH CHARLESTON

This automobile accident case involves cross appeals from the judgment entered in Plaintiff's favor after a default damages trial. The Defendant City of North Charleston appealed from the trial court's denial of its Rule 55(c) motion to set aside entry of default, and the Plaintiff cross-appealed from the amount of the damages as capped at $300,000 in accordance with S.C. Code 15-78-120(a). The Court of Appeals has issued its opinion affirming the trial court's rulings on both issues. Pursuant to Rule 221, SCARC, the City of North Charleston submits this petition for rehearing on the Rule 55(c) issue on the ground that the Court has overlooked or misapprehended the applicable precedent which delineates and explains the distinction between a

Rule 55(c) motion to set aside an entry of default and Rule 60(b) motion for relief from a default judgment.

First, the Court has misapplied the precedent established in Roche v. Young Brothers of Florence, 318 SC 207, 456 S.E.2d 897 (1995). In its opinion, the Court states:

> In *Roche v. Young Bros. of Florence*, our supreme court held the failure to forward a summons and complaint after receiving it does not constitute inadvertence or excusable neglect sufficient to put aside a default judgment. 318 S.C. 207, 210-12, 456 S.E.2d 897, 899-901 (1995).

While the Court did hold in Roche that "[l]osing a summons and complaint within the corporation is not a ground to set aside a default judgment," the more rigorous Rule 60(b) standard does not apply because this Defendant made a Rule 55(c) motion to set aside entry of default that should be determined on the more lenient, mere good cause standard.

The affidavits presented to the trial court in this case established mere good cause based on facts that a legal assistant for the City accepted service, emailed copy of the summons and complaint to the City Risk Manager who in turn forwarded the summons and complaint by email on her cell phone to another City employee to forward to the claims handler. Unfortunately, due to a gap in communication from an unexpected human error, the summons and complaint did not get forwarded to the liability claims handler. The holding in Roche might support a finding that this would not be a sufficient ground to meet the Rule 60(b) standard for relief from a default judgment, but it should be sufficient to more lenient Rule 55(c) standard.

Second, as fully argued in its briefing, which is incorporated herein as if fully restated, the City of North Charleston met the requisites for Rule 55(c) as articulated in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), by explaining the default and

showing the interests of justice, and also making a proper showing on the three Wham[1] factors: (1) the City filed the Rule 55(c) motion within two days of being made aware of the default; (2) the Defendant City had shown a meritorious defense through the accident report that indicates the Plaintiff was at fault in disregarding the stop sign; and (3) no prejudice would have resulted to the Plaintiff as a result of setting aside the entry of default other than having to prove their case.

Third, while the Court has cited to Sundown Operating Co. v. Intedge Indus., Inc., supra, the decision reflects a misapprehension of the different standards applicable to a Rule 55(c) motion in contrast to a Rule 60(b) motion and misapplication of the more rigorous standard. As explained by the Supreme Court in Sundown, the standard for setting aside an entry of default under Rule 55(c) is mere "good cause" while the standard for granting relief from a default judgment under Rule 60(b) is a more rigorous standard which includes "(1) mistake, inadvertence, surprise, or excusable neglect." The different standards reflect an intent to make it more difficult for a party to avoid a default after the court has entered a judgment, while allowing more leniency at the earlier point of the clerk's administrative entry of default.

While "inadvertence" is listed as one of the specific, alternative grounds for a Rule 60(b) motion, the Defendant's linguistic use of the words "inadvertent" and "inadvertence" in explaining the City's facts of the default in this case did not elevate the appropriate standard from mere good cause to the more rigorous Rule 60(b) standard. As the Supreme Court further explained in Sundown, the Rule 60(b) factors may be relevant to a Rule 55(c) analysis, but the absence of a Rule 60(b) factor does not negate a finding of good cause: "an 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.

[11]Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E.2d 499, 501–02 (Ct. App. 1989).

Finally, the Appellant-Respondent respectfully submits that the Court's misapprehension of the more lenient, mere good cause standard is reflected in its reliance on Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 177–78, 463 S.E.2d 636, 638 (Ct. App. 1995), and Nelson v. Coleman Co., 41 F.R.D. 7, 9-11 (D.S.C. 1966). In Dixon, the defendant had been duly served and retained out-of-state counsel who secured an extension and told him to get local counsel, but then the defendant purportedly "overlooked" the new deadline and neglected to retain local counsel to answer as he had been advised to do. That scenario in Dixon is not comparable to the facts as shown in this case whereby a City employee made a mistake in failing to forward an email. Nor is this case fairly comparable to the situation in Nelson, where the federal trial court denied the defendant's Rule 55(c) motion based on facts showing that the summons and complaint passed through multiple company employees/managers but ended up in the home office in the hands of the General Counsel who had no explanation for his delay in taking action.

Further, the district court's order in Nelson reflects a misapplication of the tougher Rule 60(b) standard and a misapprehension of the appropriate judicial policy toward Rule 55(c) motions. While the Nelson district judge voiced a philosophy of "low esteem" for any failure to timely answer, that is not the current policy position as reflected in more recent South Carolina precedent on defaults. The Sundown decision clearly articulates a lenient Rule 55(c) standard in contrast to a more rigorous Rule 60(b) standard. And, more generally, South Carolina jurisprudence reflects a policy of favoring the disposition of issues on their merits rather than on technicalities, see Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001), and liberally construing Rule 55(c) to promote justice and dispose of cases on the merits. Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008). This policy position corresponds to the federal standard disfavoring defaults:

> We have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits. *** This imperative arises in myriad procedural contexts, but its primacy is never doubted.

Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., 616 F.3d 413, 417 (4th Cir. 2010) (citations omitted). The rejection of this Defendant's explanation for failing to timely answer contravenes that policy.

CONCLUSION

WHEREFORE, based on the foregoing, the Defendant City of North Charleston respectfully requests that the Court reconsider its decision in affirming the denial of the Rule 55(c) motion, and instead, reverse the judgment, set aside the entry of default and remand to allow the City to responsively plead to Plaintiff's complaint and defend on the merits.

HOOD LAW FIRM, LLC

/s/ Robert H. Hood, Jr.
Robert H. Hood, Jr. (SC #13491)
Deborah H. Sheffield, *Of Counsel* (SC #2757)
172 Meeting Street ~ P.O. Box 1508
Charleston, South Carolina 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630

LAW OFFICES OF J. BRADY HAIR
J. Brady Hair (SC# 9040)
Derk Van Raalte IV (SC # 9286)
2500 City Hall Lane North
P.O. Box 61896
Charleston, South Carolina 29419
Phone: (843) 843-572-8700
Facsimile: (843) 843-745-1082

Attorneys for the Appellant/Respondent
City of North Charleston

August 20, 2020