

**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
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SC Court of Appeals

PTA-FLA, Inc,

Appellant-Respondent,

v.

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

Respondent-Appellant.

**FINAL REPLY BRIEF OF RESPONDENT-APPELLANT
TW TELECOM HOLDINGS, INC.**

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ARGUMENT ON REPLY

In this cross appeal, the Defendant presents issues challenging the Trial Court's denial of its Rule 55(c) motion to set entry of default and the Trial Court's order granting the Plaintiff's untimely Rule 40(j) motion to restore the case to the roster after the statute of limitations had expired. Those issues have been fully briefed in the Appellant's Brief on this cross appeal. The Defendant now submits this reply to the Plaintiff's arguments that these issues have not been preserved.

1. 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.

As fully briefed in its Petition for Rehearing of the *sua sponte* dismissal of the cross appeal, and the Appellant's Brief on cross appeal, our appellate preservation rules did not require the Defendant 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. Fundamentally, appellate preservation rules are intended to give a trial court a fair opportunity to rule on the issues and provide the appellate court with a record for meaningful review. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). The core rule is that an issue be raised and ruled upon by the trial judge. Here, the issue was raised in a Rule 55(c) motion, preserved with a corresponding Rule 59(e) motion), and the issue was ruled upon by Judge Cooper. Accordingly, the Defendant took all necessary steps to preserve the Rule 55(c) issue for a meaningful appellate review.

On this point, the Defendant would draw the Court's attention to the recent opinion in Corona Campbell v. City of North Charleston, App. No. 2017-001628, Op. No. 5748 (S.C. Ct. App. filed, July 22, 2020) (petition for rehearing pending as of the filing and service of this Initial

Brief on August 31, 2020), where this Court rejected a plaintiff's contention that the defendant was required to file a Rule 60(b) motion for relief from default judgment in order to challenge the entry of default on appeal. Citing Thynes v. Lloyd, 294 S.C. 152, 363 S.E.2d 122 (Ct. App. 1987), the Court held that the defendant properly preserved the issue by a Rule 55(c) motion to set aside the entry of default prior to the entry of the default judgment as well as a subsequent Rule 59(e) motion to reconsider.

Since the mere good cause standard governs a Rule 55(c) motion to set aside entry of default, a Rule 60(b) motion with the more rigorous standard 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. Furthermore, no Rule 60(b) motion was necessary to preserve the appeal from the other interlocutory orders addressing the separate issue regarding Judge Hood's orders granting the untimely Rule 40(j) motion to restore the case to the roster after the statute of limitations had expired.

2. The Defendant has fully preserved its challenge to the Trial Court's order granting the Plaintiff's motion to restore its case to the roster based on grounds of both the untimeliness of the motion and the statute of limitations bar.

After the Trial Court denied the Defendant's motion to set aside the entry of default, the Plaintiff sought to strike the case from the active roster rather than proceed with a damages hearing. The Defendant agreed to striking the case and a Stipulation was executed and filed on April 1, 2013. The express terms of that Stipulation set a one-year deadline: "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 351; Stipulation.] When the Plaintiff filed a motion to restore the case to the roster beyond the agreed upon one-year time limit, the Defendant objected and also contemporaneously filed a corresponding motion for summary

judgment on statute of limitations grounds. The Trial Court issued separate orders granting the motion to restore and denying the motion for summary judgment, and after the Plaintiff served its notice of appeal from the default judgment entered in its favor, the Defendant filed a cross appeal from both interlocutory orders.

While acknowledging that the Defendant did expressly identify the summary judgment order in its notice of cross appeal, the Plaintiff contends that the Defendant has waived the “summary judgment issue” by failing to address the issue in its brief. The Defendant maintains the points raised and arguments made on the untimeliness of the Rule 40(j) motion and the statute of limitations bar overlap and merge into the primary issue of the Trial Court’s error in restoring the case. Upon review and consideration of the Defendant’s brief on cross appeal, the Court will find that, contrary to the Plaintiff’s contention, that those issues have been fully preserved.

Rule 208(b)(1)(B) provides that an appellant’s brief must contain a Statement of Issues on Appeal:

(B) Statement of Issues on Appeal. A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.

This provision of Rule 208(b)(1) is not intended to present a strict obstacle to appellate review of an issue that was preserved below and clearly presented in the appellate briefing. See Brown v. Spring Valley Homeowners Ass'n, Inc., No. 2014-002587, 2016 WL 3595791, at *1 (S.C. Ct. App. June 29, 2016) (finding a issue listed in Statement of Issues on Appeal fairly encompassed argument in body of the brief), citing Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in

part) (“[W]here the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.”).

The appellate courts “seek to be flexible interpreting issue statements.” Buckson v. State, 423 S.C. 313, 321, 815 S.E.2d 436, 441 (2018). Even where an issue may not be specifically set out in the statements of issues, the appellate court still can consider the issue if it is reasonably clear from the argument. Herron v. Century BMW, 719 S.E.2d at 642–43, cited in 15 S.C. Jur. *Appeal and Error* § 83. See also Kaiser v. Kaiser, No. 2005-MO-009, 2005 WL 7145257, at *1 (S.C. Feb. 28, 2005) (UP) (multiple arguments “clearly encompassed” in the broader issue as identified on appeal). As similarly found in the treatise, Appellate Practice in South Carolina: “[W]here an issue is not specifically set out in the statement of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from appellant's arguments.” Toal, Vafai, and Muckenfuss, Appellate Practice In South Carolina 75 (2d ed.2002) quoted in Henson v. Int'l Paper Co., 358 S.C. 133, 141, 594 S.E.2d 499, 503 (Ct. App. 2004), aff'd as modified sub nom. Henson ex rel. Hunt v. Int'l Paper Co., 374 S.C. 375, 650 S.E.2d 74 (2007).

Under applicable precedent, the statute of limitations is a proper consideration to raise on a motion to restore. Pers. Care, Inc. v. Theos, 426 S.C. 78, 825 S.E.2d 281 (Ct. App. 2019). The trial documents show that the Defendant clearly presented the statute of limitations issue by filing its motion for summary judgment and corresponding memorandum as a coextensive, counterpart to its objection to the Plaintiff’s motion to restore. [ROA 360, 363, 357; Motion with supporting memorandum, Objection.] Defendant further maintains the issue of the timeliness of the Rule 40(j) motion to restore and the corresponding statute of limitations issue are properly identified in the Issue as stated in the Appellant’s brief for this cross appeal:

- II. Did the Trial Court err in granting the Plaintiff’s motion 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 addition, the argument in the cross- appeal brief included a section clearly addressing the statute of limitations 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.

While the Plaintiff has attempted to restate the issue on the cross appeal as “Did the Trial Court err in restoring this action to the roster?”, the Defendant has stated and argued that same issue with specificity by presenting a two-pronged argument that assigns error based on the untimeliness of the motion together with the point that the statute of limitations period had expired without the protection of the Rule 40(j) tolling.

Accepting, for the sake of this argument, that a defendant who defaults in answering cannot assert a statute of limitations as an affirmative defense to avoid judgment, there is nothing in the law that bars the defendant from objecting to an untimely motion to restore or raising a statute of limitations issue that arises when the plaintiff loses the protection of the tolling. The Plaintiff and Defendant entered into an agreement about striking the case, which was the equivalent of dismissing the case, and the motion to restore was the equivalent to filing a new lawsuit. The prior default in answering the original complaint does not bar the Defendant from relying on the express terms of that Stipulation to contest restoring the case to the roster. The Defendant properly raised the issue to the Trial Court, the Trial Court rejected the arguments, and the Defendant cross appealed from both orders. By its cross appeal, the Defendant has clearly presented the issue of the Trial Court’s error in restoring the case, and the untimeliness of the Plaintiff’s motion to restore is coextensive and fairly encompassed with the statute of limitation argument and subsumed within the issue as stated and argued in the cross-appeal brief.

CONCLUSION

WHEREFORE, based on the foregoing, the Defendant/Respondent-Appellant 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 case should not have been restored to the roster more than one-year from the filing of the Stipulation and after the statute of limitations 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 required under Rule 55(c).

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

/s/ Robert H. Hood, Jr.

Robert H. Hood, Jr. (SC #13491)

October 19, 2020