THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-21-03002

Appellate Case No. 2020-000815

Dennis Robert Mitton, ... Respondent,

v.

Danny James, ... Appellant.

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SC Court of Appeals

AMENDED INITIAL BRIEF OF APPELLANT

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II. **Did the lower court abuse its discretion by denying Defendant's Rule 60(b) motion where newly discovered evidence wholly undermined the factual basis for the court's order reinstating the default judgment?**

III. **Did the lower court err by finding that it lacked the ability to rule on Defendant's motion to stay execution on the judgment due to its prior order of reference of supplemental proceedings to a special referee?**

IV. **Did the special referee err by forcing Defendant to assign any potential contract or tort claims against his liability insurer where such claims are unripe and premature?**

INTRODUCTION

This action arises from a motor vehicle accident that occurred on May 16, 2018. The subject matter of this appeal, however, concerns the propriety of the lower court's actions regarding a default judgment entered against Defendant Danny James ("Defendant") due entirely to the actions of his original counsel, Louis Nettles ("Nettles"). The court initially denied Defendant's Rule 55(c) motion to set aside the entry of default, and in the same order, issued a default judgment. On reconsideration pursuant to Rule 59(e), however, the court agreed to set aside the entry of default, which negated the default judgment as well.

Several months later and while the parties were engaged in discovery, Plaintiff filed a motion pursuant to Rule 60(b) requesting that the court vacate its order granting reconsideration in light of alleged misconduct by Nettles. The court then granted this motion, ***vacated*** its order granting reconsideration, and ***reinstated*** the original default judgment. This was erroneous for several reasons. First, Rule 60(b) applies to final judgments and orders and does not provide a mechanism to reconsider and set aside an interlocutory order. Second, when the lower court set aside the entry of default, it ruled that Defendant's answer would be deemed operative. By granting Rule 60(b) relief and reinstating the prior judgment—premised on a finding of attorney misconduct—the lower court's order had the effect of sanctioning Defendant by striking his Answer and placing him in default. Plaintiff never moved to strike Defendant's answer or requested sanctions, and the lower court did not apply the correct standard for determining whether sanctions were appropriate. Therefore, the lower court committed reversible error by utilizing Rule 60(b) as a vehicle to essentially sanction Defendant and strike the Defendant's accepted Answer. Finally, even if Rule 60(b) could provide a proper avenue for the court's actions, which it does not, the court abused its discretion by committing legal error in its analysis and drawing

unreasonable inferences of fact, leading to inaccurate factual findings to support its conclusion. This Court should reverse and vacate the lower court's order, and remand for further proceedings.

Additionally, after the court reinstated the default judgment, Nettles gave an affidavit directly contradicting the lower court's factual underpinning for its order "reinstating" the default judgment. Accordingly, Defendant moved pursuant to Rule 60(b)—with leave of this Court—to set aside the judgment in light of this new evidence (among other direct evidence), which motion the lower court denied. This was also an abuse of discretion as the affidavit and supporting exhibits unequivocally established that the court's rationale and fact basis was fundamentally flawed. This represents an independent ground for reversing the lower court, setting aside the judgment, and permitting the matter to proceed on the merits.

The lower court also erred by refusing to consider Defendant's motion to stay execution of the judgment by finding that it lacked the authority to hear that motion in light of its prior order referring supplemental proceedings to the special referee.

Finally, the special referee erred in issuing an order assigning any potential contract or tort claims of the Defendant against his insurer to the Plaintiff, as such an order was premature.

STATEMENT OF THE CASE & FACTS[1]

I. Factual background and procedural history of default judgment proceedings.

Plaintiff Dennis Mitton ("Plaintiff") filed the Summons and Complaint on November 15, 2018 against Defendant. (Compl.; R. __.) Defendant was served with the pleadings the following day, on November 16, 2018. (Affidavit of Service; R. __.)

[1] Appellant combines the statement of the case and statement of the facts to eliminate repetition due to considerable overlap between the procedural history and facts in this case.

Defendant's car insurance was with South Carolina Farm Bureau Insurance Company ("Farm Bureau"). In accordance with the policy, Farm Bureau retained Attorney Louis Nettles ("Nettles") to represent Defendant on December 7, 2018. Nettles filed his Notice of Appearance that same day. (Notice of Appearance; R. __.) Nettles, however, failed to timely serve or file an Answer or otherwise plead on behalf of Defendant. Plaintiff filed a motion for order of default and hearing on damages on March 27, 2019. (Mot. for Order of Default; R. __.)

On March 27, 2019, the court entered default against Defendant. (Order dated 3/27/2019; R. __.) Defendant moved for relief from the entry of default pursuant to Rule 55(c) on April 4, 2019. (Mot. for Relief, R. __.) In support of the motion, Nettles explained that several personal obligations arose around the time he received the summons and complaint which provided a sufficient explanation for the default. (*Id.*, R. __.) In particular, he was in the process of having his younger brother admitted to assisted living due to early onset dementia and was trying to manage his affairs. (*Id.*, R. __.) He was also assisting his aging and ailing mother, who ultimately passed away in February of 2019. (*Id.*; R. __.) Nettles also argued that the *Wham*[2] factors weighed in Defendant's favor. (Mem. in Supp. of Mot.; R. __.)

Plaintiff opposed this motion, contending that Nettles' negligence was imputed to his client and his personal obligations were an insufficient explanation for the default. (Resp. in Opp'n at 1-2; R. __.) Plaintiff noted that Nettles received the summons and complaint nine days before the deadline and thus had sufficient time to file a response or obtain an extension. (*Id.* at 2; R. __.)

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[2] As the Supreme Court has explained, these factors are: "(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." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607-08, 681 S.E.2d 885, 888 (2009) (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)).

On August 27, 2019, the lower court held a hearing on this motion and verbally noted its intent to decline to set aside the entry of default. (Tr. of 8/27/2019 Hrg. at 14:7-10; R. __.) The court proceeded to immediately hear Plaintiff's damages evidence. On August 30, 2019, the court entered a combined written order denying relief from the entry of default and entering judgment in favor of Plaintiff in the amount of $4,018,653.37. (Order dated 8/30/2019; R. __.) The court found that Nettles' personal issues were not a sufficient explanation for the default and his negligence was imputed to Defendant. (*Id.* at 2; R. __.)

Farm Bureau retained different counsel, G. Murrell Smith, Jr., to represent Defendant shortly after the entry of judgment.[3] On September 9, 2019, Defendant timely filed a motion to reconsider pursuant to Rule 59(e) on September 9, 2019. (Mot. to Reconsider; R. __.) Defendant also conditionally filed an Answer on September 11, 2019, denying any liability for the accident or the resulting harm to Plaintiff. (Answer; R. __.) In the motion to reconsider, Defendant offered further argument and exhibits supporting that Nettles' personal issues warranted reconsideration and setting aside the default under the liberal "good cause" standard applicable to this issue under South Carolina law. (*See* Mot. to Reconsider; R.__.) The exhibits included an affidavit from Nettles and records detailing Nettles' time and effort in caring for his brother and mother. (*See id.* at Exs. C, D, and E; R. __.)

In the affidavit, Nettles explained that in addition to trying to manage his brother's affairs, on multiple occasions his brother became lost while driving and Nettles had to rescue him and take him home. (Mot. for Relief, Ex. 3 – Affidavit of Louis Nettles at ¶ 5, R. __.) Moreover, after he

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[3] Nettles' representation of Defendant terminated around this time. Nettles was inadvertently listed as counsel of record on the court docket until the court and parties realized this oversight at a March 27, 2020 hearing. (*See* Tr. of 3/27/2020 Hrg. at 4:15-5:12; R. __.) As detailed below, however, Nettles' attorney-client relationship with Defendant had terminated long before that time. (*See id.*)

was admitted to the assisted living facility, his brother would sometimes leave the facility and staff would call Nettles to assist. (*Id.*) Nettles' affidavit also explained that his aging mother was experiencing a decline in health during fall 2018, which ultimately resulted in her passing in February 2019. (*Id.* at ¶ 5 R. __.) From before Thanksgiving 2018 until her death, Nettles visited her nearly daily in order to attend to her comfort, monitor her care and medication schedule, and ensure her daily care was satisfactory. (*Id.*) She was alert during the visits and expected his daily presence, which provided her peace of mind. (*Id.*)

The court heard Defendant's motion to reconsider on October 2, 2019. The morning of the hearing, Plaintiff submitted a response asserting that Defendant's motion should be denied due to Nettles' lack of candor with the court. (Resp. in Opp'n; R. __.) Plaintiff contended that the assisted living facility records indicated Nettles' brother was actually admitted on December 3, 2018, which was four days before his involvement in the case. (*Id.*) Plaintiff also contended that the records listed Nettles' brother's daughter as a contact person and that the daughter was available to care for her father's needs. (*See id.*) Plaintiff's counsel further argued that his office attempted to communicate with Nettles three times between when he noticed his appearance and the answer deadline but was unable to reach him. (*Id.* at 2-3; R. __.)

On November 19, 2019, the court entered an order granting Defendant's motion to reconsider and setting aside the entry of default and, as a result, the corresponding default judgment. (Order dated 11/19/2019; R. __.) The court acknowledged that although the parties disputed the timing of Nettles' issues relating to his mother and the degree of responsibility Nettles had regarding his brother, there was good cause under Rule 55(c) to set aside the entry of default. The court noted that, regardless of these disputes, it was "clear" that Nettles was having "extreme personal difficulties" due to the illness and subsequent death of his mother and discovery that his

brother was suffering from dementia. (*Id.* at 4-5; R. __.) The court explained that although the negligence of a party's attorney is imputed to the client, the reasons given by counsel were "satisfactory under the specific facts and circumstances of this case." (*Id.* at 4; R. __.) The court noted that the personal tragedies that befell Nettles caused him "grief making it difficult to balance his work responsibilities with the important task of caring for his family members." (*Id.*) The court explained that attorneys are "human and sometimes make mistakes that can rise to the level of good cause." (*Id.*) The court also found that the *Wham* factors weighed in favor of setting aside the entry of default, as the Defendant's motion for relief was timely and Defendant had a meritorious defense as to damages. (*Id.* at 6-7; R. __.) Finally, the court ordered that the Answer filed on September 11, 2019, would be deemed Defendant's Answer. (*Id.* at 7; R. __.)

The parties continued thereafter with litigating the case. At a meeting of counsel during the discovery process, defense counsel produced a release that Nettles had procured from Defendant on August 15, 2019. The release provided that Nettles would: (1) pay Defendant $6,100 dollars in cash, (2) pay for the repairs to Defendant's leased vehicle resulting from the accident, and (3) pay any filing fees or expenses incurred by Defendant in the event he had to file bankruptcy and $15 per hour for any time he spent preparing for and appearing at any bankruptcy proceedings. (*See* Mot. to Vacate, Ex. C – Release; R. __.) In return, Defendant agreed to a general release of Nettles, his heirs and assigns, and all other persons, firms, corporations, or associations from any and all claims for damages arising out of the handling of this suit. (*See id.*) The release, however, contained no admission of liability by Nettles.

On February 20, 2020, Plaintiff filed what was styled as a "Motion to Vacate Order Dated November 19, 2019 and to Reinstate Order Dated August 30, 2019" pursuant to Rule 60(b), SCRCP. (Mot to Vacate; R. __.) In that motion, Plaintiff asserted that Nettles engaged in

"misconduct" by failing to disclose the existence of the release at the time of the initial August 27, 2019 hearing on Defendant's motion to set aside entry of default. (*Id.*) Plaintiff contended that the release was "newly discovered evidence" that constituted a "fraud on the court" preventing him from having a full opportunity to be heard and from fully exhibiting and presenting his case to the court. (*Id.*)

Defendant filed a response in opposition on March 26, 2020. Defendant argued that Rule 60(b) is not a proper procedural mechanism to seek revision of an interlocutory order, as it concerns relief from a "final judgment, order, or proceeding." (Resp. in Opp'n at 3-6; R. __.) Defendant further contended that even if Rule 60(b) could provide a proper procedural mechanism, the existence of the release was irrelevant. It had no impact on whether good cause existed at the time of Nettles' failure to answer since it did exist until long after the relevant time period. (*Id.* at 10-13; R. __.) Defendant asserted that the court properly focused on the facts and circumstances immediately prior to and after the deadline for filing a responsive pleading in determining if the entry of default should be set aside. (*Id.* at 11; R. __.) Finally, Defendant argued that Nettles' actions did not constitute fraud on the court since the existence of the release was irrelevant and, in any event, it did not affect Plaintiff's ability to present his arguments regarding whether the court should consider setting aside the entry of default. (*Id.* at 14-18; R. __.)

The court held a hearing on Plaintiff's motion on March 27, 2020.[4] On April 21, 2020, the court issued an order: (1) granting Plaintiff's motion to vacate the November 19, 2019 order and

[4] This was the outset of the coronavirus restrictions and immediately prior to the lockdown. Nettles came to the courthouse the morning of the hearing, but was not admitted into the building because his name was not on the list of litigants and attorneys. (Tr. of 3/27/2020 Hrg. at 4:6-14; Tr. of 8/19/2020 Hrg. at 7:17-23; R. __.) At the start of the hearing, the court informed counsel of this and asked if Nettles needed to attend. (Tr. of 3/27/2020 Hrg. at 4:17-19; R. __.) Plaintiff's counsel said "[h]e's no longer involved in the case. He's not an attorney of record." (*Id.*) Defense counsel stated he had no objection to Nettles attending and watching, but agreed that he was no longer

(2) reinstating the default judgment against Defendant in the amount of $4,018,653.37. (Order dated 4/21/2020; R. __.) The order was based largely on the existence of the release, which the Court described as "absolv[ing] Nettles from his negligence in failing to answer the complaint." (*Id.* at 4.) The Court found that because of Nettles' failure to inform it of the release or of the circumstances under which it was obtained prior to either the August 27, 2019 or October 2, 2019 hearings, Nettles lacked candor and committed fraud on the court. (*See id.* at 10-11.) The order also revisited its prior factual findings regarding Nettles' personal issues, and found that Nettles also exhibited a lack of candor by: (1) incorrectly stating he was in the process of admitting his brother to an assisted living facility at the time he was retained to defend this case and (2) failing to disclose that his brother had an adult child living in Florence who could attend to her father's needs and instead contended he was the sole available caretaker. (*Id.* at 8; R. __.) Relying on this "pattern of conduct" the court reached a "new and different" conclusion, holding that Nettles' actions were extrinsic fraud that prevented Plaintiff from fully exhibiting and trying his case. (*Id.* at 9, 11; R. __.)

Defendant filed a timely motion to reconsider this latest order on May 1, 2020. (Def.'s Rule 59(e) Mot.; R. __.) Defendant reasserted that Rule 60(b) was not a procedurally proper mechanism for the court to vacate a prior interlocutory order and to reinstate a default judgment. (*Id.* at 5-9; R. __.) Moreover, Defendant again contended that the existence of the release had no bearing on whether there was good cause to excuse the default and, in any event, Nettles' actions did not rise to the level of extrinsic fraud. (*Id.* at 9-14; R. __.) Defendant also argued the court made incorrect findings of fact as to the date of Nettles' brother's admission into the assisted living

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counsel of record. (*See id.* at 4:20-5:12; R. __.) The court then asked if either side had an objection to going forward without Nettles present and both sides confirmed they had no objection. (*Id.* at 5:6-12; R. __.)

facility and that Nettles' brother had an adult daughter living in Florence who was able to provide care. (*Id.* at 7; R. ___.)

The court denied Defendant's motion via order dated May 7, 2020 in all relevant respects for this appeal. (Order dated 5/7/2020; R. __.) The court clarified a factual statement in the prior order to reflect that Nettles was no longer employed by the Folkens Law Firm at the time he obtained the release, but denied all of Defendant's substantive arguments. (*See id.*)

On May 28, 2020, Defendant timely filed and served a notice of appeal of the judgment. (Not. of Appeal; R. __.)

II. Factual background and procedural history of Defendant's Rule 60(b) motion premised on the newly discovered evidence of Nettles' affidavit.

On July 24, 2020, while the initial briefing was ongoing in this Court, Nettles gave an affidavit which directly contradicted the entire factual basis for the court's April 21, 2020 order. In the affidavit, Nettles unequivocally and irrevocably nullified the release and confirmed that it no longer has any force or effect. (Def.'s Rule 60(b) Mot., Ex. 1 – Aff. of Louis Nettles at ¶ 11; R. __.) The affidavit explained that Defendant could keep the benefits the release conferred on him, but that they were entirely gratuitous. (*Id.* at ¶ 12; R. __.) Nettles, however, relinquished any rights or benefits obtained from the release and avowed to never attempt to enforce its terms. (*Id.*) The affidavit also provided additional support and clarification regarding Nettles' statements that he was: (1) involved in admitting his brother to the assisted living facility at the time he was retained in this case and (2) was the only person in the Florence area available to care for his brother at the time. (*See id.* at ¶¶ 14-21; R. __.)

In light of this new evidence, Defendant moved for relief from the judgment pursuant to Rule 60(b)(2) on July 27, 2020. (*See* Def.'s Rule 60(b) Mot.; R. __.) The lower court held a

hearing on August 19, 2020 with leave of this Court.[5] On August 25, 2020, the lower court entered an order denying Defendant's motion. (*See* Order dated 8/25/2020; R. __.) The court found that Nettles could have rescinded the release prior to judgment, and that the other information was either in Defendant's possession at the time of the previous hearings or could have been discovered with the exercise of reasonable diligence. (*See id.* at 3-4; R. __.) Thus, the court held that it was not newly discovered. (*See id.*) The court also found that Nettles' offer to nullify the release did not change the fact that he obtained the release and failed to disclose it to the court. (*Id.* at 4; R. __.) Finally, the court also stated that its prior factual findings "remain[ed] unchanged" despite the supplemental information in the affidavit regarding Nettles' family obligations, which it found was cumulative and untimely in any event. (*Id.* at 4-5; R. __.)

On September 8, 2020, Defendant timely filed and served a notice of appeal of the court's order denying Rule 60(b) relief. (Not. of Appeal; R. __.) The Court *sua sponte* consolidated that appeal with Defendant's appeal of the judgment.

III. Factual background and procedural history of the supplemental proceedings and the special referee's order assigning rights to Plaintiff.

On April 24, 2020—only three days after the lower court entered reinstated the default judgment—Plaintiff sought to execute on the judgment. (*See* Execution Against Property; R. __.) The Sheriff returned the execution *nulla bona* on May 4, 2020. (Mot. for Rule to Show Cause, Ex. A – Affidavit; R. __.) On May 12, 2020, Plaintiff submitted a Motion for a Rule to Show Cause requesting an order requiring Defendant to appear and answer in supplementary proceedings to ascertain and discover all assets in his possession. (Mot. for Rule to Show Cause; R. __.) The Court entered an Order and Rule to Show Cause granting this request on May 14, 2020, and

[5] The Court granted leave for the circuit court to hear the motion via order dated August 14, 2020.

referred the supplemental proceedings to a special referee for resolution. (Order and Rule to Show Cause dated 5/14/2020; R. __.)

Defendant filed a motion to stay the execution of judgment on July 28, 2020. (Mot. to Stay; R. __.) As Defendant explained, the default judgment had been appealed and Defendant had also recently filed the Rule 60(b) motion premised on Nettles' affidavit. (*Id.* at 4; R. __.) Defendant contended that a stay of execution was appropriate under these unique circumstances to prevent the contested issues relating to the judgment from becoming moot. (*Id.*)

Plaintiff opposed Defendant's motion, asserting that issues related to the execution had been referred to the special referee and should be resolved by him. (Resp. in Opp'n; R. __.) Plaintiff also contended that Defendant failed to meet his burden of demonstrating the need for a stay of execution because, regardless of the outcome of the appeal, the judgment for actual damages would still be substantial. (*Id.* at 2-4; R. __.) In the body of this response brief, Plaintiff also acknowledged for the first time that the real objective of the supplemental proceedings was to "obtain an assignment of Defendant's rights to pursue tort and contract claims against his liability insurer." (*Id.* at 4; R. __.) Plaintiff stated that, if he was successful in obtaining such an assignment, he would begin prosecution of those claims. (*Id.*)

The lower court initially scheduled Defendant's Motion to Stay for a hearing along with Defendant's Rule 60(b) motion. However, in its order following the hearing, the court found that the special referee should hear the motion to stay pursuant to the order of reference of the supplemental proceedings. (Order dated 8/25/2020; R. __.)

The special referee heard Defendant's motion on August 31, 2020. At the hearing, Defendant reiterated his request for a stay pending the resolution of the appeal of the judgment. Defense counsel confirmed on the record that Defendant had no intention of selling or transferring

any causes of action and would consent to an injunction prohibiting transfer. (Tr. of 8/31/2020 Hrg. at 8:9-9:6; R. __.) Defense counsel also stipulated that Defendant has no assets and noted that the only asset Plaintiff has indicated he seeks is the possible claim against Farm Bureau. (*Id.* at 9:7-18; R. __.) As Defense counsel explained, however, the appeal of the judgment would need to be finally concluded before any such claim would become viable. (*Id.* at 9:7-10:5; R. __.)

In response, Plaintiff contended the assignment would protect Defendant because he would incur no prejudice and would be "out of harm's way." (*Id.* at 11:7-18; R. __.) Plaintiff noted that an assignment would permit him to stand in the shoes of Defendant "for the manner in which Farm Bureau mishandled the claim . . . by its adjustment" and in Nettles' negligence. (*Id.*) Plaintiff asserted that this would be to Defendant's benefit since any sums he might collect from Farm Bureau is "like a pro tanto release." (*Id.* at 15:7-12; R. __.) Finally, Plaintiff explained that permitting direct action against Farm Bureau would incentivize Farm Bureau "to try to resolve the case sooner than later." (*Id.* at 14:7-15; R. __.)

On September 18, 2020, the special referee entered an order assigning all contract and tort claims Defendant "has or may have" against Farm Bureau to Plaintiff subject to any rights or defenses that Farm Bureau would have against those claims. (Order dated 9/18/2020 at 3; R. __.) The special referee stated there was evidence that Defendant has a "potential asset" in these claims and they are both choses in action and assignable. (*Id.* at 1-2; R. __.) The order further provided that any amounts Plaintiff may recover would be applied towards satisfaction of the judgment and, if the Plaintiff recovered additional amounts, the parties shall apply to the Court for a determination of how to distribute the funds. (*Id.* at 4; R. __.)

On October 16, 2020, Defendant timely filed and served a notice of appeal of the special referee's order. (Not. of Appeal; R. __.) The Court *sua sponte* consolidated that appeal with the other consolidated appeals of the judgment and the denial of Defendant's Rule 60(b) motion.[6]

STANDARD OF REVIEW

I. Rule 55(c) and Rule 60(b).

This Court applies the same standard of review of an order under Rule 55(c) and Rule 60(b). *See Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009) ("A motion under Rule 55(c) is addressed to the sound discretion of the trial court."); *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006) ("Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge."). "The circuit court's decision to set aside an entry of default or a default judgment 'will not be disturbed on appeal absent a clear showing of an abuse of that discretion.'" *Campbell v. City of N. Charleston*, __ S.C. __, __ S.E.2d __, 2020 WL 4197373, at *2 (S.C. Ct. App. July 22, 2020) (quoting *Regions Bank v. Owens*, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013)).

Pursuant to Rule 60(b)(2), SCRCP, the Court may grant relief based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." *Id.* In considering whether to set aside a default judgment, the court should consider: "(1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties." *McClurg v. Deaton*, 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008).

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[6] The Court directed Defendant to file one brief and designation of matter, with the time for perfecting the appeal running from the service of the last notice of appeal. This placed Defendant's deadline at November 16, 2020.

"An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal[,] conclusions[] is without evidentiary support." *Regions Bank*, 402 S.C. at 647, 741 S.E.2d at 54. However, "[t]he discretionary element makes it clear that the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default." *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). Finally, Rule 55(c) "should be liberally construed so as to promote justice and dispose of cases on the merits." *Id.*

II. Supplementary proceedings.

"Supplementary proceedings are equitable in nature." *Ag–Chem Equip. Co. v. Daggerhart*, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984). "In an equitable matter referred to a master for final judgment with direct appeal . . . the appellate court may determine the facts in accordance with its own view of the preponderance of the evidence." *A Fast Photo Exp., Inc. v. First Nat. Bank of Chicago*, 369 S.C. 80, 84, 630 S.E.2d 285, 287 (Ct. App. 2006).

ARGUMENT

I. The lower court's order granting Plaintiff's Rule 60(b) motion was procedurally improper, wrongly sanctioned Defendant without conducting the required analysis, and was premised on flawed legal analysis and facts without evidentiary support.

The lower court erred in granting Plaintiff's Rule 60(b) motion to "reinstate" its earlier default judgment, which it had previously set aside. First, the Rule 60(b) order improperly utilized Rule 60(b) to vacate an interlocutory order, which no South Carolina authority permits. Second, at its heart, the lower court's order really represented a sanction of the Defendant since it had the effect of striking Defendant's Answer and placing him into default. The lower court, however, did not apply the applicable legal standard for determining whether sanctions were appropriate. The lower court thus abused its discretion by failing to engage in the proper analysis. Finally, the lower court's legal analysis concerning the relevance of the release and its finding that Nettles

committed extrinsic fraud were fundamentally flawed and premised in part on inaccurate factual findings.

A. The lower court erred by utilizing Rule 60(b) to vacate an interlocutory order.

The plain language of Rule 60(b) states that a court may relieve a party from a "***final*** judgment, order, or proceeding." Rule 60(b), SCRCP (emphasis added). The adjective "final" modifies the three nouns that follow it. *See Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510, 548 S.E.2d 223, 225-26 (Ct. App. 2001) (noting Rule 60(b) allows a party to "be relieved from a final order"); *see also Chewning v. Ford Motor Co.*, 354 S.C. 72, 80, 579 S.E.2d 605, 609 (2003) (explaining that Rule 60(b) requires balancing "the interest of finality against the need to provide a fair and just resolution of the dispute"). If the Supreme Court intended Rule 60(b) to apply to interlocutory judgments or orders, it would have said so via its rule-making authority. *Cf. Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 531, 818 S.E.2d 758, 764 (2018) (noting that if the Supreme Court intended to impose a time limit for filing a Rule 11 motion, it would have done so via this authority).

North Carolina courts have interpreted the identical language of that state's Rule 60 in like manner.[7] As this Court has explained in a case examining North Carolina law, a "Rule 60(b) motion for relief from the judgment in North Carolina is a motion filed for relief from a *final* judgment." *NationsBank of N.C., N.A. v. Parsons*, 324 S.C. 506, 514, 477 S.E.2d 735, 739 (Ct. App. 1996) (emphasis in original). As a result, North Carolina courts have found that Rule 60(b) "has no application to *interlocutory* judgments, orders, or proceedings of the trial court." *Id.*

[7] Federal courts have also acknowledged that Rule 60(b) is not a proper vehicle for reconsidering an interlocutory order. *See, e.g.*, *Malone v. Securitas Sec. Servs. USA, Inc.*, 669 F. App'x 788, 790 (7th Cir. 2016) (collecting cases); *Adams v. State Farm Mut. Auto. Ins. Co.*, No. CV 10-02150-PHX-DAE, 2012 WL 12548148, at *1 (D. Ariz. Dec. 14, 2012) (explaining that Rule 60(b) does "not contemplate reconsideration of non-final, unappealable interlocutory orders").

(emphasis in original) (quoting *Sink v. Easter*, 217 S.E.2d 532, 540 (N.C. 1975)). Applying these principles, in *Pratt v. Staton*, 556 S.E.2d 621 (N.C. Ct. App. 2001), the North Carolina Court of Appeals found that the lower court improperly reviewed an order granting dismissal of some, but not all, claims through Rule 60(b), since the dismissal order was not a final order. *Id.* at 624.

South Carolina law is clear that orders both setting aside the entry of default under Rule 55(c) and orders setting aside a default judgment under Rule 60(b) are interlocutory—not final—orders. *See, e.g.*, *Ateyeh v. United Of Omaha Life Ins. Co.*, 293 S.C. 436, 437-38, 361 S.E.2d 340, 340-41 (Ct. App. 1987) (dismissing an appeal of an order setting aside entry of default pursuant to Rule 55(c) because the order was interlocutory and not final); *Dibble v. Schade*, 308 S.C. 88, 93, 417 S.E.2d 104, 107 (Ct. App. 1992) (explaining that an order vacating a default judgment is interlocutory). This comports with the established principle that an order is interlocutory when it "leav[es] some further act to be done by the court before the rights of the parties are determined." *Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005).

Therefore, Plaintiff's Rule 60(b) "motion to vacate" the lower court's interlocutory order granting reconsideration and setting aside the entry of default was procedurally improper. The lower court erred by utilizing Rule 60(b) in this manner. This Court should thus reverse and vacate that order.

B. The lower court erred by utilizing Rule 60(b) to essentially sanction Defendant for the conduct of his counsel without making the requisite findings to support the harsh punishment of striking Defendant's Answer and entering default.

1. The lower court's order ignored the effect of Defendant's Answer

The lower court also committed reversible error due to the remedy granted in its Rule 60(b) order premised on the purported misconduct of Louis Nettles, which operated essentially as a drastic sanction against Defendant. The lower court's November 19, 2019 order relieved Defendant from the entry of default, which necessarily set aside the default judgment by its

operation. Importantly, the order stated that the "Answer filed on September 11, 2019, shall be deemed the Defendant's Answer as required by Rule 7 of the [SCRCP]." (Order dated 11/19/2019 at 7; R. __.) This restored the case to the posture of a typical litigation matter. At that juncture, Defendant had appeared, answered, and proceeded with litigating the merits. The parties were in the midst of discovery at the time Plaintiff filed the Rule 60(b) motion.

The court's order granting Rule 60(b) relief "reinstated" both the entry of default and the default judgment premised on the "newly discovered evidence" regarding Nettles' conduct. There is no South Carolina rule or precedent that permits this. In fact, the Supreme Court rejected a similar attempt by the circuit court in *Nettles v. MacMillan Petroleum Corp.*, 208 S.C. 81, 84, 37 S.E.2d 134, 134 (1946). In that case, the court originally entered a default judgment. However, it later permitted the defendant to answer. After a period of time, the plaintiff returned to the court and moved the court to set aside its prior order and reinstate the default judgment. The court granted this motion. The defendant appealed and asserted that the court lacked jurisdiction, after relieving the defendant from default, to later declare the defendant to be in default again and reinstate the default judgment. *See id.* at 84, 37 S.E.2d at 135. The Supreme Court agreed that the lower court lacked jurisdiction to do this. As the court explained, the answer of the defendant was on file and had never been dismissed. Thus, the judge erred in "reinstating the default judgment." *Id.* at 86, 37 S.E.2d at 135.

Missouri and Montana courts have held similarly. In *State ex rel. Eichorn v. Luten*, 561 S.W.2d 435 (Mo. Ct. App. 1978), the lower court set aside a default judgment and the defendants filed their answers. *Id.* at 437. As the Missouri Court of Appeals explained, once the defendants answered, they were no longer in default. *Id.* Since they were not in default, the court lacked the power to reinstate the default judgment. *Id.* Similarly, in *ABC Collectors, Inc. v. Birnel*, 176 P.3d

1067 (Mont. 2008), the lower court purported to "reissue" a previous order granting a default judgment that had been set aside. *Id.* at 1070. The Montana Supreme Court found that the lower court abused its discretion by "reissuing" this order, as such a procedure was not recognized by the Montana Rules of Civil Procedure. *See id.*

Therefore, the lower court's April 21, 2020 order was procedurally improper since it purported to "reinstate" the entry of default and default judgment. Once the court set aside the entry of default and Defendant answered, Defendant was necessarily no longer in default. The order ignored the effect of Defendant's Answer entirely, and the impact of its order was to essentially sanction Defendant by: (1) striking his Answer, (2) forcing him back into default, and (3) re-imposing a multimillion dollar judgment, which no longer existed since it had been set aside, against him. Neither the court nor the Plaintiff cited any South Carolina authority which would permit the court to engage in such action through Rule 60(b). Moreover, *MacMillan Petroleum* expressly supports that this is not allowed under South Carolina law.[8]

2. Plaintiff never argued that the court should sanction Defendant, and the lower court erred by essentially imposing sanctions without conducting the proper analysis.

Plaintiff's arguments entirely hinged on the conduct of Nettles during the course of the litigation. If Plaintiff believed the appropriate sanction for Nettles' purported lack of candor was

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[8] Although South Carolina appellate courts do not appear to have ordered this relief in several decades, Defendant acknowledges that South Carolina precedent indicates that an ***appellate court*** may direct that a default judgment be reinstated if it finds an abuse of discretion by the lower court in setting it aside. *See, e.g.*, *Sanders v. Weeks*, 270 S.C. 214, 215-16, 241 S.E.2d 565, 566 (1978) (reversing trial court's order which lacked a specific finding of excusable neglect and directing that the original default judgment be reinstated); *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 166, 375 S.E.2d 321, 324 (Ct. App. 1988) (finding that there was an insufficient basis for the trial court's finding of mistake, inadvertence, or excusable neglect and remanding with instructions to reinstate the default judgment). Appellate review of whether a lower court properly exercised its discretion is a separate and distinct situation. These cases do not support that the ***circuit court*** may use Rule 60(b) to reinstate a judgment that it previously set aside where the defendant has answered and the parties are in the midst of litigation.

to strike Defendant's Answer and place Defendant in default, Plaintiff should have argued for that sanction. Instead, Plaintiff's motion entirely relied on Rule 60(b). The lower court did not make the requisite findings to support the sanctions that, by its operation, its order in effect imposed. Those considerations do not support the punishment of striking Defendant's Answer and forcing him into default under these facts.

a. The lower court did not analyze the proper factors for determining whether to issue sanctions.

South Carolina courts have addressed the standard for imposing the sanction of striking a pleading or ordering default in the discovery abuse context. Here, the court's ruling could be viewed as akin to a discovery violation sanction, as it found that Nettles failed to produce the release or disclose its existence. In determining the appropriateness of a such a sanction, "the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 199, 511 S.E.2d 716, 718 (Ct. App. 1999). Although sanctions are within the court's discretionary powers, the court's sanction must have "reasonable factual support" and not result "in prejudice to the rights" of the sanctioned party. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997).

Rule 37, SCRCP provides that the trial court has the power to strike a pleading or order judgment by default for violation of a court order or, upon motion, for a party's failure to respond to discovery. *Id.* "***However***, when the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is nevertheless ***harsh medicine that should not be administered lightly***." *Id.* at 542-43, 489 S.E.2d at 681 (emphasis added). Importantly, "[w]here the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Griffin*

Grading & Clearing, 334 S.C. at 198-99, 511 S.E.2d at 718-19; *see also Rickerson v. Karl*, 412 S.C. 215, 221-22, 770 S.E.2d 767, 771 (Ct. App. 2015) (explaining that the sanction of a default judgment "has been deemed 'too severe' without a showing of intentional misconduct or willful disobedience" (emphasis added)).[9] Ultimately, any "sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Karppi*, 327 S.C. at 543, 489 S.E.2d at 681. Moreover, the sanction should be "***aimed at the specific misconduct of the party sanctioned***." *Id.* (emphasis added).

As this Court recently noted, a common thread amongst the appellate cases upholding a sanction of striking an answer is that the sanction was issued in response to a violation of a specific court order by the defendant. *See Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 458-59, 814 S.E.2d 643, 657-58 (Ct. App. 2018), *reh'g denied* (2018), *cert. denied* (2018) (collecting cases). The *Skywaves* Court found that this rendered those cases "factually and legally distinguishable" from cases where no court order had been violated. *Id.*

Finally, although South Carolina law recognizes that an attorney's negligence or misconduct is "imputable to the client," *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009),[10] when imposing sanctions, the court should still take the

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[9] This aligns with South Carolina's general policy disfavoring judgments by default and favoring "the trial of cases on the merits." *Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981). As the Supreme Court has recognized, a default judgment is a "harsh and drastic action," and if there is "any good reason for denying the judgment," the defendant should be given the opportunity to assert it. *Petty v. Weyerhaeuser Co.*, 272 S.C. 282, 288, 251 S.E.2d 735, 738 (1979).

[10] Note, however, that this Court has stated that even where imputation applies, it is "not a hard and fast rule" and is "'to be applied rationally, with a fair recognition that justice to the litigants is always the polestar.'" *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001) (quoting 7A C.J.S. *Attorney & Client* § 181, at 284 (1980)) (examining propriety of laches argument premised on counsel's dilatory conduct).

above considerations into account. *See Griffin Grading & Clearing*, 334 S.C. at 198-99, 511 S.E.2d at 718-19.

b. Other courts have found that harsh sanctions should not be imposed on a party where counsel is at fault and the party lacked knowledge of counsel's actions.

In the innocent party-culpable counsel context, other courts have cautioned against imposing a default judgment as a sanction. *See* Douglas R. Richmond, *Sanctioning Clients for Lawyers' Misconduct-Problems of Agency and Equity*, 2012 Mich. St. L. Rev. 835, 859-60 (2012) (explaining that although some courts continue to adhere to "simplistic notions of agency and visit lawyers' misconduct on their innocent clients[,] [i]ncreasingly . . . courts are willing to focus sanctions on culpable lawyers rather than imputing liability for lawyers' misdeeds to innocent clients").

Atkins v. Fischer, 232 F.R.D. 116 (D.D.C. 2005) extensively addressed this question. In *Atkins*, the district court explained that although the court has the power to enter a default judgment against a defendant as a sanction for previous malfeasance, this is "a very severe sanction that is contrary to the 'judicial system's strong presumption in favor of adjudications on the merits.'" *Id.* at 128 (quoting *Shepherd v. Am. Broadcasting Cos.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995)). Default judgment is a "drastic step, normally to be taken only after unfruitful resort to lesser sanctions." *Id.* (quoting *Shepherd*, 62 F.3d at 1478). Moreover, as the court explained, "***the sins of an attorney should not be visited upon an innocent client***." *Id.* (emphasis added); *see also Shea v. Donohoe Constr. Co.*, 795 F.2d 1071, 1077 (D.C. Cir. 1986) (explaining that where "the client's only fault is his poor choice of counsel," default judgment is a "disproportionate sanction" and an attempt should first be made to sanction the attorney). The district court may only enter a sanction as severe as a default judgment if it finds by clear and convincing evidence that the fraudulent conduct occurred ***and*** determines that a less severe sanction would not sufficiently punish and deter the

abusive conduct while allowing a full and fair trial on the merits. *See Atkins*, 232 F.R.D. at 128. As the court explained, "[g]iven these stringent standards, it is clear that 'default judgment must be a sanction of ***last resort***.'" *Id.* at 128-29 (emphasis added) (quoting *Butera v. Dist. of Columbia*, 235 F.3d 637, 661 (D.C. Cir. 2001)); *see also NHL v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976) (noting that default judgment is an appropriate sanction when a party acts in "flagrant bad faith" and its counsel shows "callous disregard for their responsibilities").

Several federal circuits have echoed these same concerns. *See Shea*, 795 F.2d at 1078 n.5 (noting that in addition to the D.C. Circuit, the Fourth, Fifth, and Sixth circuits had all recognized "the injustice of punishing a client when appropriate action against the attorney would serve the court's goals"). The Eleventh Circuit addressed this question in *In re Porto*, 645 F.3d 1294 (11th Cir. 2011), noting that while a client may be made to suffer litigation losses because of her attorney's missteps, precedent rejected the notion "that an innocent client must also suffer sanctions because of misconduct by her attorney that is not fairly attributable to her." *Id.* "Without more, the rule that the sins of the lawyer are visited on the client does not apply . . ., and a court must specify conduct of the plaintiff herself that is bad enough to subject her to sanctions." *Id.* Similarly, the Second Circuit has explained that: "[w]e have long-suggested imposing sanctions directly on dilatory lawyers in appropriate cases, and we continue to commend to our district court judges this sound practice." *Dodson v. Runyon*, 86 F.3d 37, 40 (2d Cir. 1996). In *Litton Sys., Inc. v. AT & T Co.*, 700 F.2d 785 (2d Cir. 1983), the Second Circuit affirmed the trial court's sanction of attorney's fees instead of dismissal given the trial court's reluctance to "visit upon the client the sins of counsel, absent client's knowledge, condonation, compliance, or causation." *Id.* at 828.

These authorities further support that although an attorney's acts may be imputed to the client, in considering an appropriate sanction, the court should evaluate whether the client

participated in or approved of the misconduct. In the absence of complicity, a default judgment is not an appropriate sanction.

c. The lower court's order does not address these considerations.

In vacating the prior order relieving Defendant from default and reinstating the multi-million dollar default judgment, the court's order had the effect of sanctioning the Defendant—who was entirely innocent and unaware of Nettles' misconduct—for actions of his counsel without conducting the proper analysis. This warrants reversal.

Each of the factors for analyzing the appropriateness of sanctions weighs in Defendant's favor. First, there was no evidence of any willfulness on the part of Defendant. Neither Defendant nor Nettles disobeyed any order of the court. Additionally, although Defendant was a signatory to the release, there is no evidence that he had any knowledge of Nettles' failure to disclose its existence to the court. There is certainly no evidence supporting that Defendant was complicit in concealing the release from the court. In fact, the record supports that Defendant was unsophisticated as to the nature of the release and what it was designed to do. In his deposition, Defendant acknowledged that he did not know what the release meant and thought it had something to do with the accident, not Nettles missing a deadline.[11] (Dep. of Danny James at 15:3-16; R. __.) Defendant even said he thought it might have related to a mistake of his own. (*Id.* at 15:3-8; R. __.) Defendant testified that he believed Nettles was ***protecting him***, and he did not know what he was releasing or giving up. (*Id.* at 15:17-16:25; R. __.) Defendant also stated that he was not made aware of either the August 27, 2019 or October 2, 2019 hearings. (*Id.* at 17:15-21; R. __.) Furthermore, there is no evidence that Defendant was aware of or endorsed Nettles' alleged factual misrepresentations to the court about the care of his mother and brother. Defendant

[11] Plaintiff filed Defendant's deposition with the court on March 26, 2020, ahead of the hearing on the motion to vacate.

testified that the only time he met with Nettles was the August 15, 2019 meeting where he signed the release, and he did not recall receiving any letters or emails from Nettles. (*Id.* at 9:23-10:2, 18:1-4; __.) Therefore, it is undisputed that Defendant did not act with any willfulness.

Further, as detailed more fully below, the relevant time frame for examining whether there was good cause to set aside the entry of default was long before the release came into existence. Moreover, Nettles did not disobey any court order or refuse to comply with a clear directive from the court in failing to disclose the release.

The lower court's order also failed to consider the prejudice to the Defendant that would result from the sanctions. As South Carolina courts have repeatedly recognized, a sanction of striking a pleading or ordering default is a severe punishment. Although misconduct of counsel is a serious issue warranting the court's attention, the court failed to consider how these punishments would impact ***the Defendant*** as opposed to Nettles. Here, Defendant ultimately bore the brunt of the sanction since the end result was the reinstatement of a multi-million-dollar judgment against him.[12] The order should thus be reversed.

Finally, the court failed to consider the posture of the case. Discovery was ongoing and the court had not yet ruled on the merits of any issues. As set forth more fully in Section III, Nettles' actions did not prevent Plaintiff from conducting full and complete discovery to support the merits of his claim or from presenting the entirety of his case to the trier of fact.

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[12] Plaintiff's memorandum in support of his Rule 60(b) motion acknowledged that Defendant would suffer the consequences, noting that Nettles "cheated his client" through his actions, but nevertheless urged the Court to deal with ***Nettles'*** misconduct "harshly" by reinstating the default judgment against ***Defendant***. (Mem. in Supp. of Rule 60(b) Mot. at 6; R. __.)

Therefore, the court's ruling was procedurally improper under Rule 60(b) and fundamentally deficient since it imposed sanctions without accounting for the relevant and necessary considerations, each of which weighs in Defendant's favor. This Court should reverse.

d. Striking Defendant's answer and reinstating the default judgment were not appropriate sanctions under these facts.

Lastly, if the court had engaged in the proper sanctions analysis, it would have been apparent that the punishment imposed on Defendant did not align with the nature of the misconduct or comport with the policy considerations behind the sanctions power. As this Court has explained, a sanction "should be aimed at the specific misconduct of the party sanctioned" and "be a rifle-shot, not a shotgun blast." *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990). The court's sanction was primarily aimed at ***Defendant***, not Nettles. This directly conflicts with the policy reasons for the imposition of sanctions, which are to "penalize those whose conduct may be deemed to warrant such a sanction, and to deter those who might be tempted to such conduct in the absence of such a deterrent." *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 545, 489 S.E.2d 679, 683 (Ct. App. 1997) (quoting *Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 643 (1976)). The court's sanctions were not reasonable, narrowly tailored sanctions designed to punish Nettles, assuming *arguendo* that punishment was deserved. Instead, like in *Balloon Plantation*, the sanctions here went beyond even a shotgun blast—they were "a hydrogen bomb" dropped directly on Defendant without warning. *Id.*

Karppi v. Greenville Terrazzo Co., 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997) is instructive. In *Karppi*, this Court found that the sanction issued by the trial court was an abuse of discretion since it was not tailored to address the specific violation at issue. *See id.* at 543, 489 S.E.2d at 682. The court went beyond what was "reasonably necessary" to redress the wrong of

noncompliance with a prior order, which resulted in a windfall to a co-defendant due to the sanction's overbreadth. *Id.* The court's order "ran afoul of the requirement that the sanction imposed be reasonable—comprehensive, yet not overly broad." *Id.* at 544, 489 S.E.2d at 682. This Court noted that, under the circumstances, "any number of lesser, more narrowly tailored sanctions would have sufficed to protect [plaintiff] while adequately punishing the wrongdoing of [defendant]." *Id.* at 544-45, 489 S.E.2d at 683. Critically, the Court highlighted that although the trial court was well within its rights to punish the defendant for disobeying the order, the record supported that the party's attorney "was at least as much to blame as the party itself[] for its indiscretions." *See id.* at n.6, 489 S.E.2d at 683 n.6. This weighed against the imposition of such a harsh sanction.

Moreover, contrast the facts of the present case with *Griffin Grading & Clearing v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999). In *Griffin Grading*, although the court acknowledged that the acts of an attorney are directly attributable to a client, this was not the lynchpin of its ruling. *See generally id.* As the Court explained in upholding the sanction of striking the defendant's answer, by the time the trial court issued this sanction it had already imposed a lesser sanction of attorneys' fees, which did not result in meaningful compliance. *Id.* Moreover, the trial court had "clearly and explicitly" warned the defendant of the consequences of future lack of compliance. *Id.* When the court issued the sanction, the defendant had ignored four prior court orders and "the record was full of multiple, egregious discovery abuses that blocked the opposing party's attempts to conduct meaningful discovery." *Id.* Finally, unlike this case, there was no evidence that the defendant lacked knowledge of the acts of its counsel. *Id.*

Therefore, even if the order was procedurally proper, it represented an abuse of discretion by exceeding the bounds of a proper sanction for the conduct at issue. This Court should reverse.

C. The lower court abused its discretion in granting Rule 60(b) relief because the order contained legally erroneous analysis and relied on facts without evidentiary support.

1. The release was irrelevant to the issue of whether Defendant was entitled to Rule 55(c) relief

Even if Rule 60(b) was a proper mechanism for the court's reconsideration of its prior order, the court abused its discretion by granting Plaintiff's motion. First, the lower court committed legal error by finding that the release was relevant to the Rule 55(c) analysis. Its existence did not change the veracity of any of the facts regarding Nettles' personal difficulties, which formed the basis of the court's finding of good cause in its November 19, 2020 order. The appropriate time frame for evaluating whether Defendant was entitled to relief from default was between the service of the summons and complaint on Defendant on November 16, 2018, and Defendant's time to Answer, as well as Defendant's motion for relief from the entry of default on April 4, 2019. A release that did not come into existence until August 15, 2019, simply has no bearing on whether Defendant had a satisfactory explanation ***for the default*** that occurred in December of 2018. The release did not change the fact that Nettles was dealing with significant personal issues at the time of the default.[13] Moreover, it did not undermine the court's findings that Defendant timely moved for relief from the entry of default and has a meritorious defense as to the issue of damages. The court committed an error of law by holding otherwise.

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[13] In its April 21, 2020 order, the court found that Nettles' failure to disclose the release cast into doubt the veracity of Nettles' evidence about his personal issues. (*See* Order dated 4/21/2020 at 8; R. __.) The court, however, failed to reconcile this with the unrebutted affidavit testimony of Nettles—sworn under penalty of perjury—and related documentary evidence providing direct support for his personal difficulties. The mere existence of the release is not probative of untruthfulness of Nettles' factual assertions.

2. Nettles' procurement of the release did not rise to the level of extrinsic fraud.

Furthermore, regardless of whether the existence of the release has any relevance, the lower court also erroneously concluded that Nettles' failure to disclose its existence constituted extrinsic fraud on the court warranting Rule 60(b) relief. This was improper for several reasons.

Rule 60(b)(3) permits a court to grant relief from final judgment due to the "fraud, misrepresentation, or misconduct of an adverse party." Rule 60(b)(3), SCRCP. However, "in order for a party to be entitled to relief based on fraud, the moving party must demonstrate extrinsic fraud." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 273, 644 S.E.2d 755, 768 (Ct. App. 2007).

"Extrinsic fraud is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" *Chewning v. Ford Motor Co.*, 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003) (quoting *Hilton Head Ctr. of S.C. v. Public Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). Extrinsic fraud warrants relief "on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." *Hilton Head*, 294 S.C. at 11, 362 S.E.2d at 177. As the *Chewning* court explained, "[t]he subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud," since such actions by an attorney "effectively preclude[] the opposing party from having his day in court." 354 S.C. at 82, 579 S.E.2d at 610-11. "Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial." *Id.* at 81, 579 S.E.2d at 610. "It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud." *Id.* Importantly, in order to obtain relief from a default judgment due to extrinsic fraud on the court, a

party must show "that the perpetrator acted with the ***intent to defraud***." *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 47, 590 S.E.2d 502, 504-05 (Ct. App. 2003) (emphasis added).[14]

In the Rule 60(b) order, the court found Nettles committed "an intentional act meant to deprive the Court of relevant and material evidence that would have impacted the Court's ruling on the Rule 59(e) Motion." (Order dated 4/21/2020 at 6; R. __.) The court determined that by remaining silent about the release, Nettles satisfied the *Chewning* standard since his actions prevented Plaintiff from "fully exhibiting and trying his case" such that there has "never been a real contest." (*Id.* at 11; R. __.)

This was error. First, *Chewning* is distinguishable and should not have formed the basis of the court's decision here. In *Chewning*, the court was examining whether the plaintiff provided sufficient allegations to support amending the complaint to assert fraud on the court. Moreover, the purported actions by counsel in that case were truly egregious. The plaintiff asserted defense counsel hired an expert witness under an express agreement that he would testify falsely on their client's behalf, and then knowingly concealed documents from discovery which would have evidenced this fact. 354 S.C. at 76, 84-86, 579 S.E.2d at 607, 612. This misconduct spanned across multiple trials. *See id.* The Supreme Court found that this would constitute fraud on the court warranting relief from the subject judgment "[i]f proven by clear and convincing evidence." *Id.* at 86, 579 S.E.2d at 612. The Supreme Court cautioned, however, that the opinion dealt with "unique facts," and "in no way alter[ed] the Court's longstanding policy towards final judgments." *Id.* at 86, 579 S.E.2d at 613.

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[14] The backward-looking analysis of Rule 60(b)(3) further supports that this rule applies solely to final judgments. The extrinsic versus intrinsic fraud distinction looks to the entirety of the proceedings. If the purported fraud merely factored into the court's decision-making, relief from the judgment is not proper. However, if the purported fraud deprived a party of its day in court, akin to a due process violation, relief may be appropriate.

In this case, Plaintiff was not deprived of the opportunity to present the merits of his case against Defendant in its entirety. At the Rule 55(c) and Rule 59(e) stages, Plaintiff extensively argued why Nettles' personal issues were not good cause to set aside the entry of default. At the Plaintiff's Rule 60(b) stage, Plaintiff relied on the ***exact same factual arguments and evidence*** as to whether Nettles accurately represented the date his brother was admitted to the facility and that he was the sole person available to help. The only new allegations concerned the existence and alleged nondisclosure of the release which, as noted above, had no relationship to Nettles' personal difficulties that formed the basis for the court's grant of relief from entry of default. Most importantly, although Plaintiff and the lower court both cited *Chewning*'s standard about depriving a party from "fully exhibiting his case," neither articulated how Nettles' "silence" about the release met this standard. The court offered no explanation for how Nettles' actions prevented Plaintiff from presenting full and complete arguments as to the default issue. Moreover, the court did not explain how it would have prevented Plaintiff from fully exhibiting the merits of his negligence claim against the Defendant if the matter proceeded to trial. The parties were in the midst of discovery at the time of the order, and the court had not even reached the merits. The Rule 60(b) order does not detail how Nettles' actions prevented Plaintiff from continuing to develop the necessary evidentiary support for his claims and fully presenting them to the trier of fact. Therefore, the lower court abused its discretion in making the conclusory, unsupported finding, that Nettles' actions met the *Chewning* standard. This court should thus reverse.

3. The court's finding of a "pattern of conduct" was premised on two other factual findings that were without evidentiary support.

Finally, in addition to the legally erroneous findings regarding the import of Nettles' "silence" about the release, the lower court's order relied on two additional factual findings to

support the purported lack of candor exhibited by Nettles.[15] First, the court found that "when Mr. Nettles represented to the Court that he was in the process of admitting his brother to the nursing home and attending to his needs when he was hired by Farm Bureau to represent the Defendant, he did not disclose to the Court that his brother had already been admitted to the nursing home on December 4, 2018, and that Farm Bureau had not retained his services until December 7, 2018." (Order dated 4/21/2020 at 8; R. __.) Second, the court found that "Mr. Nettles did not disclose to the Court that his brother had an adult child who lived in Florence and was capable of, and did, in fact, attend to her father's needs during the same time that Mr. Nettles contended he was the sole adult who could take care of his brother." (*Id.*) Neither of these factual findings was supported by any record evidence.

Respectfully, the first finding is based on an unreasonable inference drawn from an emergency contact form for the assisted living facility where Nettles' brother was admitted, which listed a date of December 3, 2018. (*See* Mot. to Alter or Amend, Ex. D at 1; R. __). The actual assisted living facility records, however, expressly state that Nettles' brother was not admitted until December 11, 2018. The first entry in the nurse's notes section is from 11:30 a.m. on December 11, 2018 and states that "resident was admitted to assisted living at this time." (*See id.* at 11; R. __.) No other staff notes predate that initial note or reflect an earlier date. (*See generally id.*; R. __.) Moreover, the physician's orders sheet also states that his arrival date was December 11, 2018. (*See id.* at 7; R. __.) Therefore, the lower court's finding that Nettles' brother was admitted on December 4, 2018 is not supported by the record evidence.

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[15] The court addressed the same arguments and supporting documents on these two factual points in considering Defendant's initial Rule 59(e) motion. The court noted that there was some dispute about how much responsibility Nettles had for the care of his brother, but nevertheless found in Defendant's favor since it was "clear" Nettles was having "extreme personal difficulties." (Order dated 11/19/2019 at 6; R. __.)

The second finding is again an unreasonable inference taken from the same contact form, which listed Nettles' brother's daughter, Connor Nettles, as a secondary contact person. There was ***no evidence*** in the record supporting the court's extrapolation from this emergency contact that this meant Connor was both living in Florence ***and*** in a position to take care of her father.[16] Therefore, the lower court's finding that Nettles misrepresented that he was the sole person available to assist his brother at the time was also without evidentiary support.

As detailed above, a court abuses its discretion in entering a default judgment where the judgment is controlled by error of law or where the order is based on factual conclusions that are "without evidentiary support." *Regions Bank v. Owens*, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013). These two erroneous factual findings—both of which were based on unreasonable inferences only and not any record evidence—also support reversal. Moreover, they do not constitute evidence of a pattern of "lack of candor" to the court. This court should thus reverse and vacate the lower court's order.

II. The lower court erred by denying Defendant's Rule 60(b) motion premised on newly discovered evidence that directly contradicted the factual findings supporting the court's order reinstating the default judgment.

Finally, regardless of the propriety of the lower court's reinstatement of the default judgment, it committed reversible error by denying Defendant's Rule 60(b) motion. As detailed above, the lower court's order was premised on a finding that Nettles lacked candor and perpetuated a fraud on the court because of: (1) the existence of the release and his nondisclosure thereof and (2) information on an intake form for the assisted living facility that the court found contradicted Nettles' assertions about his family situation. Nettles' July 24, 2020 affidavit

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[16] In fact, as Defendant argued in his reply in support of the Rule 59(e) motion, Nettles' brother has two nineteen-year-old daughters, one of which is Connor. (Reply at 2 n.1; R. __.) During the relevant time, both daughters were attending college full time at Appalachian State University in Boone, North Carolina. (*Id.*)

undermined these findings in their entirety and constituted new evidence warranting relief from the judgment.

A. The Nettles affidavit invalidated the entire factual basis of the court's order reinstating the judgment.

Nettles' July 24, 2020 affidavit expressly contradicted the court's finding that he lacked candor. The primary reason that the court reinstated the default judgment against Defendant was its learning of the existence of the previously undisclosed release. In the affidavit, however, Nettles unequivocally and irrevocably nullified and voided the release and confirmed that it no longer has any force or effect. (Def.'s Rule 60(b) Mot., Ex. 1 – Affidavit of Louis Nettles at ¶ 11; R. __.) Nettles provided that the payment and other benefits conferred on Defendant were totally and completely provided on a gratuitous basis only, and Nettles would not seek reimbursement of those funds. (*Id.* at ¶ 12; R. __.)

The other basis for the court's reinstatement of the default judgment was its speculative factual findings relying on inferences drawn from the intake form for the assisted living facility. Nettles' affidavit clarified and confirmed via sworn testimony what the unrebutted documentary evidence already showed—that the lower court's factual findings were simply not accurate. As detailed above, the court's finding that Nettles' brother was admitted to The Manor assisted living facility on December 4, 2018 appeared to be drawn from a date listed at the top of the intake form, which said December 3, 2018. However, Nettles' affidavit confirmed that this was merely the day he began filling out the form to start the admission process. (*Id.* at ¶ 16; R. __.) It was not the actual admission date—accurately stated by the facility records as December 11, 2018. (*Id.* at ¶ 17; R. __.) Therefore, Nettles truthfully and accurately informed the court that he was in the process of admitting his brother to assisted living at the time he was retained by Farm Bureau on

December 7, 2018. The lower court overlooked this unrebutted fact and abused its discretion by concluding that Nettles lacked candor because the "real" admission date was December 4, 2018.

Likewise, the lower court's finding that Nettles' brother had an adult child living in Florence was also an unreasonable inference drawn from the admission form. In the affidavit, Nettles clarified and established via sworn testimony that at the time his brother's health declined, both of his brother's children were full time "in-state" college students attending school at Appalachian State University in Boone, North Carolina. (*Id.* at ¶ 19; R. __.) Neither had resided in Florence since they moved to Charlotte, North Carolina at the age of four. (*Id.* at ¶ 21; R. __.) They had North Carolina driver's licenses, phone numbers with North Carolina area codes, and were living in an apartment in Boone, North Carolina. (*Id.*; Nettles Aff., Ex. C - Lease and Driver's License; R. __.) Nettles listed one of the daughters as a secondary contact solely for HIPAA purposes in case she needed to access information about her father from the facility, and put her father's address down since that was a permanent mailing address. (*Id.* at ¶¶ 20-21; R. __.) Again, this unrebutted testimony sworn under penalty of perjury directly contradicted the court's finding that Nettles lacked candor because the address on the contact form meant that the daughter was both living in the Florence area and in a position to care for her father.

Therefore, the three critical factual findings forming the basis for the court's order reinstating the default judgment were all directly undermined by Nettles' affidavit. The existence of the release is particularly irrelevant now that is has no force and effect. Moreover, the court's findings that Nettles acted without candor about the admission date and being the sole person available to care for his brother were clearly erroneous in light of the undisputed, verified record evidence directly supporting Nettles' statements.

B. The Nettles affidavit met the Rule 60(b)(2) standard.

The Nettles affidavit represented newly discovered evidence satisfying the standard for setting aside the default judgment under Defendant's Motion based on Rule 60(b)(2). As this Court explained in *McClurg v. Deaton*, in considering whether to set aside a default judgment on this basis, the court should consider: "(1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties." 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008). Here, each of the factors weighs in Defendant's favor.

In denying Defendant's motion, the lower court abused its discretion by finding that the affidavit was not newly discovered because Defendant could have obtained it earlier in the case. This was erroneous. The release was not repudiated prior to the court's order reinstating the judgment due to Nettles and defense counsel's good faith view that the release did have any relevance to the issue of whether there was good cause to set aside the entry of default against Defendant. The applicable time period for examining good cause was between Nettles' retention on December 7, 2018 and the Clerk's entry of default on March 27, 2019. Nettles did not discuss a release with Defendant until August of 2019, and it was not executed until August 15, 2019. Thus, as Defendant has consistently maintained, its existence had no relationship to the reasons why Nettles failed to timely answer the complaint. Likewise, defense counsel believed in good faith, for the reasons detailed above, that regardless of the effect of the release and its nondisclosure, Rule 60(b) was not a proper procedural mechanism for reinstating a default judgment that had been set aside. The potential that the mere existence of the release could upend the entire case, prevent a trial on the merits, and result in the previously set aside default judgment being "reinstated" was unforeseeable. Circumstances changed, of course, once the court held otherwise for the first time in its April 21, 2020 order.

Following the Court's order, defense counsel promptly discussed the release with Nettles, through his counsel, and inquired whether he would be willing to nullify it since it was the principal basis for the Court's ruling. Nettles agreed to give an affidavit and Defendant sought relief from the judgment under Rule 60(b)(2) within three days of receipt. Therefore, the first two elements supporting Rule 60(b)(2) relief are satisfied. Defendant acted promptly and there were good reasons for the timing of the affidavit and related motion.

In denying Defendant's motion, the court faulted Defendant for not obtaining the affidavit sooner and incorrectly implied that this was within the Defendant's control. (*See* Order dated 8/25/2020 at 5; R. __ (noting that "Defendant and his attorneys controlled the factual matters relating the release; thus, they could have 'discovered' the evidence related to it (that is, rescinded the release) prior to the earlier hearing").) As Defendant explained at the hearing, however, at the time Plaintiff filed his Rule 60(b) motion to reinstate the default judgment premised on the release, Nettles was being represented by personal counsel for any potential malpractice claim. (*See* Tr. of 8/19/2020 Hrg. at 9:13-17; R. __.) Thus, Defendant's present counsel had to follow the ethical rules governing communicating with represented party and could not "call[] [Nettles] up out of the blue" about disavowing the affidavit. (*Id.* at 9:20-21:3; R. __.) Defendant had no mechanism to ***force*** Nettles to disavow the release—it had to be on his own volition. After Nettles and his counsel reviewed the court's order and identified that the release was the primary driver for the court's order reinstating the judgment, Nettles' attorney contacted defense counsel and informed him that Nettles intended to disavow the release. (*See id.* at 10:4-21; R. __.) After Nettles provided the affidavit, Defendant promptly sought relief only three days later.

Southeastern Housing Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008) is instructive. In *Smith*, a nonprofit affordable housing foundation brought suits against its former

attorney and an insurance agency. The trial court found that the nonprofit's newly appointed board was not properly installed and thus was not unauthorized to file suit on its behalf. *Id.* at 627, 670 S.E.2d at 683. The court granted summary judgment as a result. *Id.* The nonprofit subsequently rectified the appointment issue and ratified the filing of the lawsuits via resolution. *See id.* at 634, 670 S.E.2d at 687. It then sought relief from judgment under Rule 60(b)(2), contending that the resolution was newly discovered evidence. *Id.* The trial court agreed, explaining that although the new board may have been illegally formed and thus the filing of the lawsuits was a voidable act, "the subsequent ratification by legally-appointed custodians cured that voidable act." *Id.* On appeal, this Court rejected the appellant's contention that Rule 60(b) relief was inappropriate since the resolution was "manufactured" after summary judgment and thus was not newly discovered evidence. *Id.* at 636, 670 S.E.2d at 688. Because the facts supported that the ratifying resolution could not have been procured prior to the entry of judgment, it constituted new evidence under Rule 60(b)(2).

And contrast the facts here with *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005). *Lanier* concerned a domestic dispute where the parties had entered into an antenuptial agreement that was subsequently lost. After judgment, the wife located the agreement in a desk drawer and sought relief under Rule 60(b)(2). *Id.* at 214-25, 612 S.E.2d at 458. As the court explained, this was not newly discovered evidence since the wife admitted the agreement was in her possession and she "both knew of and possessed the agreement prior to trial." *Id.* at 219, 612 S.E.2d at 460.

The facts here are analogous to *Smith* since the importance of nullifying the release did not come into focus until the court issued its order reinstating the default judgment—similar to the resolution at issue there. Defendant had no control over Nettles' actions and could not direct him

to repudiate the release. Nettles' independent, unilateral decision to give an affidavit voiding the release following the order constituted newly discovered evidence that Defendant was unable to procure prior to judgment. It was entirely appropriate for Defendant to rely on this evidence, which directly undermined the basis for the court's order reinstating the judgment, in Defendant's Rule 60(b) motion. These facts differ significantly from *Lanier*, as the document there already existed and was merely misplaced.

The other two elements for Rule 60(b)(2) relief are also met under these facts. In addition to Defendant's prompt action and appropriate reason for not acting sooner, a meritorious defense exists. The lower court previously found that the *Wham* factors supported relief from the entry of default and that Defendant has a meritorious defense as to the issue of damages awarded. (*See* Order dated 11/19/2019 at 7.) Plaintiff did not dispute this argument and the court did not repudiate its prior finding on this point when it reinstated the judgment. Therefore, Defendant also satisfied this factor.

Finally, the Plaintiff would suffer minimal prejudice. South Carolina "policy favor[s] the disposition of issues on their merits rather than on technicalities." *Mictronics, Inc. v. South Carolina Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). Moreover, requiring Plaintiff to litigate his case on the merits does not constitute as sufficient "prejudice to require the default judgment to stand." *G & C Land v. Farmland Mgmt. Servs.*, No. 5:12-CV-134-C, 2012 WL 12863112, at *2 (N.D. Tex. Oct. 12, 2012). Thus, this factor also weighed in Defendant's favor.

C. The lower court abused its discretion by denying Defendant's Rule 60(b) motion.

Because Defendant met all of the factors for relief, the lower court abused its discretion by finding that Nettles' nullification of the release did not change the findings in its prior order

regarding the release and its effects. The lower court first found that Nettles' procurement of the release affected his credibility. Again, there was a legitimate basis for Nettles to believe that the existence of the release was irrelevant to whether there was good cause to excuse the default. Regardless though, it was improper for the court to conclude that Nettles lacked credibility as to ***all*** of his sworn factual assertions merely because he did not disclose the existence of the release. Aside from his affidavit testimony, Nettles never testified or appeared before the court where the issue could be explored. Thus, there was no evidentiary basis for assigning nefarious intent to his nondisclosure. The record does not contain any evidence rebutting ***any*** of Nettles assertions—sworn under penalty of perjury—and, in fact, ***all*** of the record evidence supports their veracity. Ultimately, it appears the court improperly overlaid its opinion that the release was unsavory across the unrebutted record evidence to reach its conclusion that the entirety of the evidence was tainted. This was error.[17]

Additionally, the lower court abused its discretion in finding that the release was tantamount to an "admission" by Nettles that he acted without due diligence in response to the underlying lawsuit. (Order dated 8/25/2020 at 4; Tr. of 8/19/2020 Hrg. at 12:23-13:5, 14:17-19, 18:9-12; R. __.) By doing so, the court erroneously ascribed significance to something that was never in dispute. Nettles has not contested that he made a grave mistake—one that all lawyers fear making—which resulted in him acting "without due diligence in response to the present lawsuit" as the order states. (*See* Order dated 8/25/2020 at 4; R. __.) The crux of his argument and that of subsequent defense counsel for setting aside the entry of default involved asking for forgiveness for this oversight due to the personal issues that were afflicting Nettles at the time. It was not

[17] Questions surrounding the propriety of the release and are between Defendant and Nettles and have no bearing on the merits of this car wreck case and whether Defendant was entitled to relief from the entry of default.

premised on a contention that Nettles did somehow act with due diligence. The release does not support the court's erroneous extrapolation that it represented an unequivocal admission that there was no good cause to set aside the entry of default under the ***legal standard*** of Rule 55(c).

For all these reasons, the lower court erred by denying Defendant's Rule 60(b) motion for relief from the judgment. The lower court's finding that Nettles suffered extreme personal hardships warranting relief from the entry of default remains unrebutted by any record evidence. As detailed above, the lower court should never have "reinstated" the default judgment, and by denying Defendant's Rule 60(b) motion, it compounded that error. This court should thus reverse.

III. The lower court erred by finding that it lacked authority to hear Defendant's motion to stay in light of its prior order of reference.

The lower court erred for this additional reason. Rule 241 of the Appellate Court Rules requires that an application for an order for supersedeas "must first be made ***to the lower court*** or administrative tribunal ***which entered the order or decision on appeal***." Rule 241(d)(1), SCACR (emphasis added). Thus, the lower court should have heard Defendant's motion to stay since it was the court that entered the judgment on appeal.

The lower court, however, erroneously determined that its prior order referring the supplemental proceedings to the special referee meant that he should also hear the motion to stay. Under Rule 53, SCRCP, a special referee "has no power or authority ***except that which is given to him by an order of reference***." *Wells Fargo Bank, NA v. Smith*, 398 S.C. 487, 492, 730 S.E.2d 328, 331 (Ct. App. 2012) (emphasis added). When a matter is referred, the special referee is "given the power to conduct hearings in the same manner as the circuit court ***unless*** the order of reference specifies or limits the [special referee's] powers." *Id.* (emphasis added).

Here, the order for a rule to show cause, which predated Defendant's motion to stay, referred supplemental proceedings on Plaintiff's execution of judgment to a special referee. The

order stated the special referee would have authority to enter a final order disposing of the issues before him including, but not limited to, "issuing Orders to appropriate property, directing sale of property, issuing writs of assistance, enforcing Orders and matters of Contempt, which authority includes issuing a fine, ordering incarceration, or both." (Order dated 5/14/2020 at 1; R. __.) Nothing in the order contemplated the special referee hearing a ***subsequently*** filed motion to stay execution of the judgment seeking to halt the supplemental proceedings. Therefore, the lower court erred by refusing to hear Defendant's motion and finding that, due to the Order and Rule to Show Cause, "the Special Referee has the power and authority over all matters related to execution of the judgment, including the Motion to Stay." (Order dated 8/25/2020 at 2; R. __.) Further, Rule 241(d)(1), SCACR requires a motion to stay to "first be made to the lower court or administrative tribunal which entered the order or decision on appeal."

By refusing to consider Defendant's motion and tasking the special referee with considering whether the supplemental proceedings should by stayed, the court essentially asked the special referee to consider whether the terms of its order of reference should be overruled. As the authorities detailed above explain, the special referee lacked the authority to make this determination. This renders both of his orders denying a stay and assigning rights to the Plaintiff ineffective and a nullity. Although the special referee would have had the power to consider the propriety of an assignment ***if the lower court first denied Defendant's motion to stay,*** he did not under these facts. This Court should thus reverse.

IV. The special referee erred by forcing Defendant to assign his potential claims against Farm Bureau.

Finally, the special referee's order assigning rights was legally erroneous since it purported to force Defendant to assign speculative "choses in action" that he may or may not have against

Farm Bureau. Any such claims are unripe pending the outcome of this appeal and, as a result, this relief was premature.

A. The special referee lacked the authority to force an assignment.

Although South Carolina law does generally permit assignment of a chose in action, *see Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007), it appears the appellate courts have never addressed assignability circumstances like those at issue here. Because it appears no South Carolina law permits involuntary judicial assignment of an insured's potential bad faith claim against his insurer, the special referee erred by ordering this relief.

South Carolina courts have stated that "[a] chose in action is the right of proceeding in a court to procure the payment of a sum of money, or the right to recover a personal chattel or a sum of money by action. . . . In South Carolina a chose or thing in action is statutorily included in one's personal property and is assignable." *Id.* (quoting S.C. Jur. *Assignments* § 19 (2006)). After assignment, the assignee acquires "all the same rights and privileges, including the right to sue . . . as the assignor." *Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct. App. 1999). However, "the assignee of a non-negotiable chose in action takes it subject to all equities and defenses which could have been set up against the assignor at the time of the assignment." *Chet Adams Co. v. James F. Pedersen Co.*, 308 S.C. 410, 413, 418 S.E.2d 337, 338 (Ct. App. 1992).

Here, the special referee erred by involuntarily assigning Defendant's potential claims against Farm Bureau. The order correctly noted that supplemental proceedings furnish a means of reaching, in aid of judgment, property beyond the reach of an ordinary execution such as choses in action. However, it does not appear South Carolina courts have expressly approved of ***involuntary*** judicial assignment of potential legal claims belonging to the debtor. In fact, in *Moore*, the Court noted that an assignment of a right "is a ***manifestation of the assignor's***

intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." 373 S.C. at 219-20, 644 S.E.2d at 745; *see also Pac. Mills v. Textile Workers' Union of Am.*, Local No. 254, 197 S.C. 330, 15 S.E.2d 134, 138 (1941) (explaining that a partial assignment is not recognized unless made with the consent or ratification of the debtor).

Therefore, as with any other contract under South Carolina law, there must be mutual assent between assignee and assignor for a valid assignment of a chose in action to exist. *See Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct. App. 1998) ("In order for a contract to be binding, there must be a mutual manifestation of assent between the parties to the terms of the contract."). This is consistent with other states who have examined assignability of choses in action. *See, e.g.*, *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 239-40 (Minn. 2020) (noting that assignment of a chose in action is valid and complete "upon ***mutual assent of the assignor and assignee***" (emphasis added)); *Denley Rentals, LLC v. Etheridge*, No. W2000-00189-COA-R3CV, 2001 WL 792646, at *3 (Tenn. Ct. App. July 11, 2001) (finding that the assignment of a chose in action "is considered to be a contract, and, as with any contractual agreement, it must meet requisites such as mutual assent and consideration").

Indiana's Supreme Court specifically addressed involuntary judicial assignment of a potential bad faith claim in *State Farm Mut. Auto. Ins. Co. v. Estep*, 873 N.E.2d 1021 (Ind. 2007) and determined it was inappropriate. *Id.* at 1028. As the court explained there, such relief would run afoul of several policy concerns. For example, it would adversely affect the bargaining process by injecting the possibility of an excess coverage claim and cost of litigating it into the equation, which would exacerbate potential conflicts of interest between the insured and insurer. *See id.* at

1027. Moreover, increased risk and cost would be borne by insureds who never make a claim and find their insurance service satisfactory. *Id.* Allowing a judgment creditor to force an assignment in an attempt to recover judgments above the insured amount "would render meaningless the bargains made in the marketplace between millions of insureds and hundreds of insurers about the amounts of policy coverage and premiums necessary under standard underwriting principles to covert those policy amounts." *Id.* Additionally, drivers who never have an accident "would have to pay additional premiums to cover the requests of claimants who think the insureds' carriers did not do as good a job for the insureds as the insureds themselves think they did." *Id.*

Furthermore, the authorities relied on by the special referee ***do not*** support the propriety of an involuntary assignment of a bad faith claim. First, none of the cases cited in the assignment order support that the court may forcibly assign potential causes of action. Most of the cited cases did not address assignability at all. *See Lynn v. Int'l Bhd. of Firemen & Oilers*, 228 S.C. 357, 90 S.E.2d 204 (1955) (determining whether a local union's obligation to pay parent union a percentage of dues was a chose in action that the court could order be applied in payment of a judgment against the parent union); *Katzburg v. Katzburg*, 410 S.C. 184, 764 S.E.2d 3 (Ct. App. 2014) (considering whether the lower court lacked subject matter jurisdiction to issue a contempt order for violation of a divorce judgment from New York); *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 459 S.E.2d 900 (Ct. App. 1995) (analyzing whether court could order bank to deliver funds deposited by judgment debtor in general deposit account to satisfy creditor's judgment, and determining it would be appropriate through supplemental proceedings against the debtor since the deposited funds were, in essence, a chose in action against the bank for recovery of the deposit).

Schneider v. Allstate Insurance Company, 487 F. Supp. 239 (D.S.C. 1980), is similarly irrelevant. The special referee correctly noted that *Schneider* found that a bad faith claim is

assignable under South Carolina law. *Id.* at 242-43. However, the order ignored the critical fact that the assignment of the bad faith claim in *Schneider* was ***voluntarily*** made by the insured. *Id.* at 240. Therefore, *Schneider* does not support the proposition that a court may force an ***involuntary*** assignment of a bad faith claim.

Likewise, *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013) examined in *dicta* whether the ***insurer's*** consent was necessary to effectuate an assignment of claims. It did not address the propriety of an involuntary judicial assignment.

Defendant opposed Plaintiff's request for an assignment by requesting a stay of execution of the judgment. As defense counsel explained at the hearing, Defendant had "no intentions of assigning" any claims he may have. (Tr. of 8/31/2020 Hrg. at 8:19-21; R. __.) Defense counsel noted that Defendant was willing to agree to an injunction prohibiting him from assigning any claims he might have. (*Id.* at 8:19-21; R. __.) Finally, defense counsel stipulated that Defendant has no assets and noted that Defendant "did not stipulate that the assignment or that any cause of action against Farm Bureau was one." (*Id.* at 8:19-21, 17:14-21; R. __.)

Moreover, permitting such an assignment under these circumstances would be inequitable. Unlike the typical circumstance where a Defendant voluntarily assigns a bad faith claim and, in exchange, receives a covenant not to execute, the Defendant was not given that protection by the special referee's order. Although the assignment may have the effect of a pro tanto release, if the recovery is less than the judgment, nothing prohibits Plaintiff from taking further action against Defendant to execute on the judgment under the terms of the order of reference. Moreover, if Plaintiff's recovery exceeds the judgment amount plus accrued interest, Defendant is not guaranteed to receive that amount—rather, the order requires that he must apply to the court for a determination on how to distribute the excess funds. (Order dated 9/18/2020 at 4; R. __.) Finally,

by forcing an assignment, Defendant lost the ability to prosecute the claims with an attorney of his own choice and to conduct the litigation in the manner he prefers. Thus, contrary to Plaintiff's assertion, Defendant was prejudiced by the special referee's order.

For all these reasons, this Court should reverse the fundamentally flawed assignment order.

B. The special referee erred by purporting to assign speculative and uncertain "choses in action" against Farm Bureau.

Finally, the special referee erred by ordering assignment of claims that Defendant may "***potentially***" have against Farm Bureau relating to its handling of this litigation. Defendant's potential breach of contract or bad faith claims are uncertain at this time. The default judgment is on appeal and, as detailed above, at minimum there are extremely significant legal questions surrounding its propriety. Therefore, whether Defendant has a right to proceed in court to procure the payment of a sum of money against Farm Bureau is unsettled. In fact, the special referee's order ***acknowledged*** this fact. (*See* Order dated 9/18/2020 at 1; R. __ (describing the claims as a "potential asset," noting that that Farm Bureau "could" be liable to Defendant for breach of contract and bad faith, and ordering that all of Defendant's claims against Farm Bureau, "if any" are assigned to Plaintiff).)

South Carolina courts have not expressly examined whether a bad faith claim is ripe where the underlying judgment is on appeal and the outcome is uncertain. However, as Delaware's Supreme Court recently explained, the majority of courts that have considered the issue and "the weight of expert authority on insurance law[] are in accord that a bad-faith failure-to-settle claim accrues when an excess judgment becomes final ***and non-appealable***." *Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1272 (Del. 2016). As the District of Colorado noted, this is because when the "economic injury alleged is the actual imposition of an excess liability judgment on the insured, the harm or damages element of the bad faith tort claim necessarily remains

uncertain and speculative until final judgment on appeal either establishes that exposure or dissolves any liability." *Kuzava v. United Fire & Cas. Co.*, No. 17-CV-02673-CMA-NYW, 2018 WL 3633558, at *4 (D. Colo. July 31, 2018) (quoting *Vanderloop v. Progressive Cas. Ins. Co.*, 769 F. Supp. 1172, 1175 (D. Colo. 1991)).[18]

In *Tucker v. Peerless Ins. Co.*, No. CV 4:13-01809-BHH, 2017 WL 839532 (D.S.C. Mar. 3, 2017), the District Court implicitly recognized that South Carolina law would follow this principle as the court stayed the bad faith action pending resolution of post-trial motions and the appeal of the underlying state case. *Id.* at *2.

South Carolina courts would likely follow the majority rule that a bad faith refusal to settle claim does not accrue until any appeal of the excess judgment is final. Therefore, the special referee's order assigning Defendant's "potential" rights against Farm Bureau was improper and premature. The Court should thus reverse the assignment order.

CONCLUSION

For the reason's stated above, the Court should reserve the lower court, vacate the order and judgment, and remand for further proceedings. Alternatively, the Court should reverse the

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[18] *See also, e.g.*, *Kemp v. Hudgins*, No. 12-2739-JAR-KGG, 2013 WL 4857771, at *4 (D. Kan. Sept. 10, 2013) (staying case because the appeal remained pending in the underlying suit and thus the cause of action for bad faith refusal to settle was "not ripe"); *Chalfonte Condo. Apartment Ass'n, Inc. v. QBE Ins. Corp.*, 734 F. Supp. 2d 1302, 1303-04 (S.D. Fla. 2010) (collecting cases from Florida courts and the Eleventh Circuit supporting that "bad faith claims are not ripe before appellate remedies are exhausted" in the underlying suit and case law weighs in favor of dismissing bad faith claims without prejudice or abatement until that time); *Moore v. Horace Mann Ins. Co.*, No. 6:05-CV-00421, 2006 WL 8439039, at *2 (S.D.W. Va. Jan. 24, 2006) (explaining that although a statutory bad faith claim can be brought at the same time as the underlying tort suit, the case "cannot proceed until after all appeals have been exhausted on the underlying suit"); *but see Perez v. Indian Harbor Ins. Co.*, No. 4:19-CV-07288-YGR, 2020 WL 2322996, at *5-6 (N.D. Cal. May 11, 2020) (noting that unlike California state court judgments, federal judgments are deemed final when entered—even if an appeal is pending—and thus the underlying federal liability judgment ***was*** a final judgment sufficient to state a bad faith claim).

lower court, direct that Defendant's Rule 60(b) motion be granted and the judgment vacated, and remand for further proceedings. The Court should also reverse the lower court's order refusing to rule on Defendant's motion to stay and find that the special referee's order assigning rights to the Plaintiff was without effect. Finally, even if that order was effective, the Court should reverse the special referee's premature order forcing Defendant to assign potential claims against Farm Bureau to Plaintiff.

Respectfully submitted,

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November 16, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-21-03002

Appellate Case No. 2020-000815

Dennis Robert Mitton, ... Respondent,

v.

Danny James, ... Appellant.

PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, do hereby certify that on November 16, 2020, I have served all counsel in this action with a copy of the pleading(s) hereinbelow in accordance with the Supreme Court's May 29, 2020 Administrative Order by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Documents Served: Amended Initial Brief of Appellant
Amended Designation of Matter

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From: Blake Williams
Sent: Monday, November 16, 2020 12:04 PM
To: William P. Hatfield; Bert Utsey
Cc: Mitch Brown; Murrell Smith; 'Shanon Peake'
Subject: Mitton v. James, Appellate Case No. 2020-000815
Attachments: 2020.11.16 Amended Initial Brief of Appellant.pdf; 2020.11.16 Amended Designation of Matter of Appellant.pdf

Good afternoon,

Attached for service please find the Appellant's: (1) Amended Initial Brief of Appellant and (2) Amended Designation of Matter. This is being served on you via email pursuant to subsection (g)(3) of Supreme Court Administrative Order 2020-05-29-02.

Thank you,

NELSON MULLINS

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