THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning

Appellate Case No. 2020-001660

Crystal Morgan, Respondent,

v.

B&L Foreign Car LLC, Appellant.

INITIAL BRIEF OF APPELLANT

STUDEMEYER LAW FIRM, P.C.
J. Gregory Studemeyer
S.C. Bar #5416
7478 Carlisle Street
P.O. Box 1014
Irmo, S.C. 29063
(803) 393-4399
Attorney for Appellant

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STATEMENT OF THE CASE

On June 16, 2020, Crystal Morgan ("Morgan") brought this action for fraud, constructive fraud, violation of the Unfair Trade Practices Act, and negligent misrepresentation against B&L Foreign Car LLC ("B&L"). On July 10, 2020, B&L sent a letter to the Clerk of Court.

On July 24, 2020, Morgan filed a motion to dismiss and motion to strike [*sic*] motion to stay arbitration with a supporting memorandum. On July 28, 2020, Morgan filed an affidavit of default. On August 4, 2020, B&L filed a motion to set aside entry of default, a supporting affidavit, and a memorandum in support.

On September 29, 2020, the lower court issued an order to strike defendant's letter as an answer and stay arbitration. On October 9, 2020, B&L filed a motion to alter or amend and supporting memorandum. On November 17, 2020, the lower court issued an amended order "striking B&L's letter from the record, denying B&L the right to file a late answer, declaring B&L to be in default, and striking the arbitration clause from B&L's contract."

On December 14, 2020, B&L served notice of appeal.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court. Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 322 (Ct.App.1988). 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. In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App.1997).

A failure to exercise discretion amounts to an abuse of that discretion. Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997). When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred. Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 155, 399 S.E.2d 439, 441 (1990).

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." Masters v. KOL, Inc., 431 S.C. 28, 846 S.E.2d 893 (2020) (citing Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). "[A]n order that favors litigation over arbitration—whether it refuses to stay the litigation in deference to arbitration; refuses to compel arbitration; ... or grants, continues, or modifies an injunction against arbitration—is immediately appealable, even if interlocutory." Towles v. United Healthcare, 338 S.C. 29, 524 S.E.2d 839 (Ct.App.1999) (quoting Stedor Enter., Ltd. v. Armtex, Inc., 947 F.2d 727, 730 (4th Cir.1991)).

FACTS/PROCEDURAL HISTORY

Morgan is a resident of Lexington County. (Complaint, par. 1). B&L is a limited liability company located in Lexington County. (Denby Affidavit, par. 2).

On May 12, 2020, Morgan purchased a 2003 Honda Civic ("the vehicle") from B&L for a total cash price of $7,005, including a closing fee of $125. Morgan made a cash down payment of $979.00 and agreed to make bi-weekly installment payments of $114.41 beginning on May 29, 2020.[1] (Denby Affidavit, Exhibit D). B&L provided a limited warranty for a period of 60 days at no charge. (Denby Affidavit, par. 5 and Exhibit A). Morgan and B&L entered into a

[1] Morgan continued making installment payments until September 1, 2020.

separate arbitration agreement in connection with the transaction. (Denby Affidavit, Exhibit E).

Shortly after taking possession of the vehicle, Morgan reported to B&L that she hit a bump, causing the radio and passenger window to quit working. On June 1, 2020, Morgan brought the vehicle back to B&L for repairs to the turn signals, hazard lights, and temperature gauge. (Denby Affidavit, par. 6 and 7).

On June 10, 2020, the vehicle was towed to B&L. At that time, Morgan reported that the check engine light had been concealed with black tape. B&L removed the tape, performed repairs at no charge, and returned the vehicle to Morgan. (Denby Affidavit, par. 8, 9, and 10). Morgan resumed possession of the vehicle and continued making payments due under her retail installment contract. (Denby Affidavit, par. 11).

On June 16, 2020, Morgan filed a summons and complaint against B&L in the Richland County Court of Common Pleas. In addition to B&L, Morgan identified an unknown individual, Finns, as a citizen and resident of Richland County. (Complaint, par. 2). Therein, Morgan claimed that shortly after B&L performed repairs to the vehicle, the check engine light illuminated again. Morgan asserted claims of fraud, constructive fraud, violation of the Unfair Trade Practices Act, and negligent misrepresentation.

Copies of the summons and complaint were apparently mailed to B&L. (Affidavit of Service). No return receipt was filed with the affidavit of service as required by Rule 4(d)(8), SCRCP.[2] Rather, a USPS product tracking & reporting document, apparently signed by a postal employee, was attached.

On June 24, 2020, B&L's then-manager, Ed Denby ("Denby"), contacted counsel for Morgan by telephone. On June 27, 2020, Denby emailed documents, including an arbitration

[2] "Service pursuant to this paragraph shall not be the basis for the entry of default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant." Rule 4(d)(8), SCRCP.

agreement, to counsel for Morgan. (Plaintiff's Memorandum In Support Of Motion To Dismiss Motion To Strike [*sic*] Motion To Stay Arbitration).

On July 10, 2020, a letter from Denby dated June 29, 2020, was stamped "FILED" by the Clerk of Court. Therein, Denby, identified himself as manager of B&L, acknowledged receipt by B&L of Morgan's complaint, advised that no one by the name of Finns was associated with B&L, advised that Morgan had entered into an arbitration agreement with B&L at the time of sale, attached a copy of the agreement, and advised that B&L wished to exercise its right to arbitration. (Letter dated June 29, 2020).

On July 24, 2020, Morgan filed a motion to dismiss and motion to strike [*sic*] motion to stay arbitration along with plaintiff's memorandum in support of motion to dismiss motion to strike [*sic*] motion to stay arbitration. Attached thereto were copies of various sales documents including the arbitration agreement.

On July 28, 2020, Morgan filed an affidavit of default suggesting that she had served B&L's registered agent by "Certified Mail, Return Receipt Requested [*sic*] Restricted Delivery" and that "there had been no appearance or answer pursuant to Rule 8 of the SCRCP on behalf of the Defendant and they [*sic*] are now in default." (Affidavit of Default, par. 3 and 4).

On August 4, 2020, B&L filed a motion to set aside entry of default with a supporting affidavit from Denby. Attached thereto were copies of various sales documents including the arbitration agreement. On September 2, 2020, B&L filed a memorandum in support of motion to set aside entry of default.

A hearing on Morgan's motion and B&L's motion was conducted on September 8, 2020. Counsel for the parties were instructed to submit proposed orders.

On September 29, 2020, the lower court entered an order to strike defendant's letter as an

answer and stay arbitration. Although difficult to follow, it appears that the lower court concluded that Denby had engaged in the unauthorized practice of law by sending his letter to the Clerk of Court, that his letter should be stricken from the record, that the Federal Arbitration Act did not apply to the sale of the automobile, the arbitration agreement was unenforceable under state law, and that B&L was in default.

On October 9, 2020, B&L filed a motion to alter or amend and memorandum in support. On November 17, 2020, the lower court issued an amended order. Again, although difficult to follow, it appears that the lower court maintained its position that Denby had engaged in the unauthorized practice of law by sending his letter to the Clerk of Court, that his letter should be stricken from the record, that the Federal Arbitration Act did not apply to the sale of an automobile, the arbitration agreement was unenforceable under state law, and that B&L was in default.

ARGUMENTS

I. THE LOWER COURT ABUSED ITS DISCRETION BY DENYING B&L'S RULE 55(c), SCRCP MOTION TO SET ASIDE THE ENTRY OF DEFAULT

> "The Court in addressing Defendant's Motion to Alter or Amend the Court's Order Signed September 25, 2020 regarding Plaintiff's Motion to Strike the Defendant's letter filed with the Court and Dismiss the same as an Answer, Plaintiff's Motion to Strike/ Dismiss the Arbitration Clause from the Contract and/ or Stay Arbitration and the Defendant's Motion to Set Aside the Entry of Default and permit the Defendant to file a late Answer." (Amended Order, p. 1)

Thus begins the amended order. While poor grammar alone does not prove that the lower court failed to exercise discretion, any order that begins with an incomplete sentence nonetheless suggests to the reader that it failed to give its full attention to the matters before it. The incredible number of errors of fact, law, spelling, and grammar contained within the amended order is matched only by the litany of errors within the plaintiff's complaint, motions, and memorandum,

errors that have served to confuse the defendant, defendant's counsel, and, ultimately, the lower court. The unconventional nature of the pleadings caused B&L to be mistaken about its status as the sole defendant and the nature of the proceedings initiated against it, and these errors caused B&L's failure to timely respond to the plaintiff's complaint. Default was entered against B&L, and despite B&L well exceeding the minimal standard of "mere good cause" required for the lower court to grant relief from an entry of default, it failed to exercise discretion in ruling on the motion to set aside entry of default, resulting in an error of law.

In South Carolina, an entry of default may be set aside for mere good cause shown. Rule 55(c), SCRCP; see also White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 11, 753 S.E.2d 537, 542 (2014) ("The standard for granting relief from an entry of default under Rule 55(c) is mere good cause."). If a judgement by default has been entered, the court may likewise set it aside in accordance with Rule 60(b). Id. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55(c), requiring a more particularized showing of mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or "other misconduct of an adverse party." Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). Rule 55(c) should be liberally construed to promote justice and dispose of cases on their merits. Dixon v. Besco Eng'g, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995). South Carolina public policy favors the disposition of cases on their merits as opposed to on technicalities. Mictronics, Inc. v. S.C. Dept. of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001).

The decision of whether to set aside an entry of default lies solely within the sound discretion of the judge. Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 101 (Ct. App. 2004). A failure to exercise discretion amounts to an abuse of that discretion.

Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997). When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred. Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 155, 399 S.E.2d 439, 441 (1990).

Because "mere good cause" under Rule 55(c) is a less rigorous standard than the Rule 60(b) requirement of a particularized showing of "mistake, inadvertence, surprise, or excusable neglect," *any* showing of mistake, inadvertence, surprise, or excusable neglect that would satisfy the Rule 60(b) test must thereby satisfy the Rule 55(c) "mere good cause" requirement.

The lower court failed to exercise discretion

In refusing to set aside the entry of default, the lower court asserted that "[t]he Defendant filed an Affidavit of the Defendant's Manager in support of the motion to set aside the Entry of Default, [*sic*] the Affidavit, [*sic*] covers the elements of the timing of the motion and states there is no prejudice to the Plaintiff, which is not true; as well as, [*sic*] concludes that the Defendant has a meritorious defense, but does not actually state what the defense actually may be. However, the Affidavit does not offer any reason for the failure to file an Answer within the time allotted, and offers no good cause as to why setting aside the entry of default would serve the interest [*sic*] of justice for failure to file a timely Answer within 30 days." (Amended Order, p. 3).

Contrary to the suggestion set forth in the amended order that B&L did not offer "any reason" for its failure to file within the time allotted, B&L offered *multiple reasons* for its failure, both in its affidavit and its motion to alter or amend. In its motion to alter or amend, for example, B&L took pains to draw the court's attention to the reasons laid out in the affidavit, writing, "The Affidavit clearly states the Defendant is not accustomed to litigation, believed that it had an

enforceable arbitration agreement with the Plaintiff that would keep disputes out of court, and that it responded promptly to the complaint." (Defendant's Motion to Alter or Amend and Memorandum in Support, p. 5).

The lower court's failure to acknowledge and address these reasons for B&L's failure to answer within the allotted time may stem from a misinterpretation of the holding in McClurg v. Deaton, 395 S.C. 85, 716 S.E.2d 887 (2011). In McClurg, the court suggested that "magic words" may be required to preserve an issue for the purposes of a Rule 60(b) motion, but no such requirement of "magic words" has ever been articulated by an appellate court in South Carolina for the purposes of a Rule 55(c) motion; the explanation of the default need not take any specific form or use any specific language.

The lower court, then, was mistaken in concluding that that "the Defendant simply offered no reason for failing to retain counsel and file a timely answer." (Amended Order, p. 3). Reasons were provided, but the lower court did not engage in even a cursory evaluation of B&L's claims regarding lack of familiarity with litigation, beliefs regarding the arbitration agreement, or prompt response to the complaint in its amended order; in fact, the lower court does not appear to have noticed them at all.

One cannot exercise discretion over matters that one has failed to notice. As noted in Balloon Plantation, when a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred. 303 S.C. at 155, 399 S.E.2d at 441. The lower court failed to exercise discretion, and in so doing, committed an error of law. Because the lower court's decision to deny B&L's motion to set aside was controlled by an error of law, it must be reversed. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).

The defendant was mistaken as to the meaning of the complaint and subsequent pleadings, the effect of its arbitration agreement with the plaintiff, and the purposes of its manager's contacts with opposing counsel

B&L is not accustomed to litigation. The manager B&L employed at the time, Denby, is not accustomed to litigation; Denby's expertise is limited to the operation of car dealerships. Because of this lack of familiarity with litigation, B&L was confused by the pleadings filed by the plaintiff and by Denby's subsequent contacts with opposing counsel. That confusion caused B&L to make a series of good faith mistakes which prevented it from answering the complaint within the allotted time.

The Oxford English Dictionary defines a mistake as a "misconception or misapprehension of the meaning of something; hence, an error in thought or action."[3] It is abundantly clear that B&L was mistaken as to the meaning of the complaint and subsequent pleadings, the effect of its arbitration agreement with the plaintiff, and the purpose of Denby's contacts with opposing counsel.

In Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (1989), the South Carolina Supreme Court recognized that when considering an entry of default, parties that are not accustomed to litigation cannot be held to the same standard as attorneys and insurance companies. In that case, a student brought a personal injury action against her former teacher, and the court held that the school board's negligence in failing to timely notify its attorney or insurance company of the pending action against the teacher was not imputable to the teacher, noting that "[t]he courts of this state have consistently held that the negligence of an attorney or insurance company is

[3] "Mistake," Oxford English Dictionary, Second Edition. (January 5, 2021, 10:00 AM) https://www.oed.com/oed2/00148631;jsessionid=A67CB2BD28EC92B9C5193D3532ED1D91#:~:text=1.,fault%20in%20thought%20or%20action.

imputable to a defaulting litigant . . . [b]efore us, however, is an employer, the school officials of Charleston County, whose business is education[,] not litigation. The duty to act timely in attending the pending litigation was, of course, existent. But the negligence in the failure to act was more excusable, we think, than the cases involving attorneys or insurance companies." *Id.* As a basic matter of fairness, then, parties who are not accustomed to litigation cannot be held to the same level of sophistication as a party who *is* accustomed to litigation.[4]

While the plaintiff filed a summons and complaint on June 16, 2020, it is unclear when B&L actually received them; despite the requirements of Rule 4(g), SCRCP, no return receipt was filed with the affidavit of service.[5] Instead, a USPS product tracking & reporting document, apparently signed by a postal employee rather than an agent of B&L, was attached to the affidavit of service. B&L finally received the summons and complaint no later than June 24, 2020, but instead of marking a turn towards clarity, the receipt of the summons and complaint served only to confuse the defendant.

Even after reviewing the complaint, B&L was unsure that it was the only party that the plaintiff intended to sue. This confusion is only partially attributable to its lack of familiarity with litigation or specialized legal terms; B&L's inability to understand the complaint mostly stems from basic errors contained within the complaint. For example, the second paragraph of

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[4] Perhaps it is for this reason that the state of North Carolina amended its forms for civil summons in 2018 to read as follows: "IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!"
North Carolina Administrative Office of the Courts, Civil Summons (2018).
https://www.nccourts.gov/assets/documents/forms/204.pdf?fA51LXFT608ciR5KywVFKtxMwb6ooNs5

[5] In BB & T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006), the court held that exacting compliance with the rules is not required to effect service of process; rather, a court must inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings. In the present case, the errors involved in the service of process are mentioned solely to demonstrate the conditions under which B&L formed a mistaken belief regarding the complaint, but it is nonetheless likely that the service of process in this case would have difficulty passing the Taylor test for compliance.

the complaint reads as follows: "The Defendant Finns, [*sic*] is upon information and belief, a citizen and resident of the County of Richland, State of South Carolina." (Complaint, par. 2),

B&L is, and always has been, located in Lexington County. B&L does not, and has never, employed a party by the name of "Finns." B&L has never conducted business under the name of "Finns."

Additionally, the complaint is permeated with conflicting language regarding the number of defendants; a single sentence in the ninth paragraph includes a shift from plural "Defendants" to a singular possessive "Defendant's," neither term being the appropriate one for a singular defendant in the context of the sentence. (Complaint, par. 9). To put the matter bluntly, it appears that opposing counsel attempted to create a summons and complaint by copying and pasting various parts of prior complaints into a new document, and the resulting document was as incomprehensible to B&L as a set of hieroglyphics would have been.

Ignoring the Rule 8(a), SCRCP prohibition on claiming a specific sum for punitive damages, the plaintiff demanded "judgment for in excess of Twenty-Five Thousand Dollars ($25,000) Dollars [*sic*], actual and punitive damages." (Complaint, par. 25).

In an attempt to clarify the complaint and underlying dispute, B&L's then-manager, Denby, contacted opposing counsel on June 24, 2020, and on June 27, 2020. Following his interactions with opposing counsel, Denby wrote a letter to the Clerk of Court on June 29, 2020. The letter informed the Clerk that "Finns" of Richland County was not employed by B&L. Additionally, Denby notified the Clerk that the plaintiff had signed a stand-alone arbitration agreement with B&L, and that it was B&L's belief that by signing the agreement, the plaintiff had committed herself to arbitration in the event of a dispute. B&L, then, believed that the matter was settled as far as the courts were concerned, and its subsequent failure to file a responsive

pleading is only comprehensible in light of this mistake.

Opposing counsel certainly knew of B&L's belief regarding the arbitration agreement through its contact with Denby, and, furthermore, knew that B&L was unrepresented, but, apparently, felt no obligation to correct its mistake. The motion to dismiss and motion to strike [*sic*] motion to stay arbitration filed on July 24, 2020 notes that "The Company has not retained counsel," and the plaintiff's memorandum in support of motion to dismiss [*sic*] motion to strike [*sic*] motion to stay arbitration filed on the same day acknowledges contact between opposing counsel and B&L's "representative" on June 24, 2020, and June 27, 2020.

The South Carolina Rules of Professional Conduct require that "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." Rule 4.3, RPC, Rule 407, SCACR. In the present case, it is clear that B&L misunderstood the role of opposing counsel; even after Denby spoke with opposing counsel, B&L operated under the belief that a binding arbitration agreement was in place and would keep the matter out of court, and, apparently, believed its dealings with opposing counsel were for the purpose of expediting the arbitration process.

By the time that the plaintiff filed her motion to dismiss [*sic*] motion to strike [*sic*] motion to stay arbitration, though, even the facts underlying its claims had been modified, further muddying the waters for B&L. For example, the complaint offers the following account for the plaintiff's alleged detection of automobile issues:

"On or about, [*sic*] May 12, 2020, the Plaintiff purchased a 2003 Honda Civic from the Defendant dealership which she test drove prior to purchase and believed to be in working order, with no significant major mechanical issues at purchase and did not appear to have any warning

lights/ check engine lights on at the time of purchase. Plaintiff drove the vehicle for a few days but noticed a strange glow coming from the dash at night. On or about June 10, 2020, it became clear that the vehicle had been modified with to [*sic*] prevent the 'check engine light' from being visible to the Plaintiff – there was black tape over the light, [*sic*] however, the tape began to peel off at this time. The Plaintiff contacted the Defendant and reported the problem. The following morning the vehicle was totally and completely in-operable [*sic*], [*sic*] after multiple attempts to start the vehicle the Plaintiff finally abandoned her endeavors and had the vehicle towed back to the Defendant's shop." (Complaint, par. 5, 6, and 7).

The plaintiff's memorandum in support of motion to dismiss [*sic*] motion to strike [*sic*] motion to stay arbitration tells a different story:

"The Plaintiff noticed after driving the vehicle for a couple of weeks a strange glow coming from the dash in the evening and realized when she looked closer that there was black tape over the check engine light from the inside of the dashboard that was now peeling off. The check engine light was on and had apparently been on since she purchased the vehicle, [*sic*] however, the Plaintiff up until this point had no difficulty with the vehicle starting. After contacting the Defendant the next morning, the vehicle would not start. The Plaintiff made repeated attempts to start the vehicle and finally contacted the Defendant." (Memorandum, p. 1).

On its own, this second paragraph is problematic. In consecutive sentences, the memorandum states that the plaintiff contacted B&L *before* discovering that the vehicle would not start before claiming that the plaintiff discovered that the vehicle would not start, made repeated attempts to start the vehicle, and *then* "finally" contacted B&L. Not since the Book of Genesis have two contradictory origin stories been told in such close proximity to one another, though equally concerning is the paragraph's assertion that a "strange glow" noticed several

weeks (rather than *days*, as claimed in the complaint) after purchase somehow indicated that the check engine light had been illuminated since the time of purchase.

More importantly, though, the plaintiff's motions and memorandum filed on July 24, 2020, demonstrate the impossible situation in which B&L found itself. The plaintiff knew that B&L was unrepresented and knew that B&L believed the signed arbitration agreement was sufficient to keep the matter out of court, but instead of correcting this mistake, she continued to publish contradictory versions of events that any party would have difficulty understanding, much less answering.

The defendant made a showing of "mere good cause" that required the lower court to set aside the entry of default

B&L was thus mistaken about essential facts of the case and elements of the proceedings, and it made these mistakes clear in its affidavit and its motion to alter or amend and memorandum in support. Therefore, contrary to the suggestion in the amended order that "[t]he Defendant has to meet a minimum [*sic*] burden to be relieved from an Entry of Default, [*sic*] however, the Defendant has offered no good cause," B&L has made a showing of mistake that would likely satisfy the heightened requirements of Rule 60(b), which, by necessity, would mean that it has made a showing of good cause under Rule 55(c).

In Sundown, the court held that a party seeking to show "mere good cause" is required to "provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice, and once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted; the trial court need not make specific findings of fact for each factor if there is sufficient

evidentiary support on the record for the finding of the lack of good cause." 383 S.C. at 607-8, 681 S.E.2d at 888.

The plaintiff filed an affidavit of default on July 28, 2020. B&L filed a motion to set aside entry of default with a detailed supporting affidavit on August 4, 2020. While no bright line rule for timeliness has been established for the purposes of "the timing of the motion for relief," a motion for relief filed a single week after the entry of default must fit within the court's definition of a prompt response.

As the court noted in Mictronics, South Carolina public policy favors the disposition of cases on their merits as opposed to on technicalities. 345 S.C. at 511, 548 S.E.2d at 226. B&L proffered a meritorious defense, and it would be unjust to deny it the opportunity to present that defense in court because of good faith mistakes that were fueled by the plaintiff's pleadings and opposing counsel's conduct.

Furthermore, B&L has demonstrated that the plaintiff will suffer no prejudice if the entry of default is set aside. The basis of the plaintiff's case was that the "check engine light" was flashing on her vehicle. This flashing light led to no death, bodily injury, or even property damage. The plaintiff has claimed no emotional damages.

The vehicle apparently remained in operable condition even after the complaint was filed; the plaintiff continued to make biweekly payments due under her retail installment contract for several weeks after the complaint was filed, and she maintains possession of the vehicle. With no prejudice to the plaintiff that would result from setting aside the entry of default, the interests of justice require that B&L be allowed to present a defense.

Because the court's refusal to set aside the entry of default is not supported by the evidence, it must be reversed. Williams, 312 S.C. at 375, 440 S.E.2d at 409.

II. THE LOWER COURT ERRED IN CONCLUDING THAT THE ARBITRATION AGREEMENT BETWEEN THE PARTIES WAS GOVERNED BY STATE LAW AND UNCONSCIONABLE

The lower court committed several errors of law and fact in its evaluation of the Arbitration Agreement signed by B&L and the plaintiff, errors that likely contributed to its refusal to set aside the entry of default. The underlying transaction involves interstate commerce, and the Arbitration Agreement was fair in its terms, was conspicuous, and was supported by valuable consideration.

The court granted the plaintiff's motion to stay arbitration, in part, on the basis that "there is no indication that the contract is a transaction involving interstate commerce." (Amended Order, p. 1). The holding that the sale of a Japanese brand automobile built in the state of Ohio by B&L *Foreign* Car LLC is not a transaction involving interstate commerce is an error of law and in direct conflict with York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 79, 749 S.E.2d 139 (Ct. App. 2013)(citing Stout v. J.D. Byrider, 228 F.3d 709, 715 (6th Cir. 2000)), which held that contracts for the purchase and/or financing of an automobile involve interstate commerce. The holding in York echoes the South Carolina Supreme Court's conclusion in Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007. Lest these decisions be argued as antiquated, the sale and financing of an automobile was recognized yet again to constitute interstate commerce in 2020 in Masters. 431 S.C. at 41, 846 S.E.2d at 900 n6.

It is exceedingly clear that the underlying transaction in this case, the sale and financing of an automobile, involves interstate commerce, and therefore the transaction was not governed by state law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (stating that unless the parties agreed to the contrary, the FAA applies to any transaction involving interstate commerce, regardless of whether the parties contemplated an interstate

transaction).

The lower court granted the plaintiff's motion to stay arbitration, in part, on the basis that the arbitration agreement contained oppressive, one-sided terms. This is an error of law. In South Carolina, there is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. Simpson, 373 S.C. at 24, 644 S.E.2d at 668.

Where the terms of the agreement are not one-sided, but, instead, promote a neutral and unbiased arbitral forum, courts will find a valid agreement. Id. at 25, 644 S.E.2d at 668-9. In this case, both parties had a right to invoke the agreement, and both agreed that disputes that arose out of or related to the purchase and financing of the car were to be decided by neutral, binding arbitration.

The court granted the plaintiff's motion to stay arbitration, in part, on the basis that the agreement was not conspicuous, writing, "The Defendants [*sic*] claimed arbitration clause was not typed in capitol [*sic*] letter [*sic*] on the first page of the contract and underlined but was buried in the contract among pages and pages of documents that the Plaintiff signed and initialed." (Amended Order, p. 6).

The stand-alone arbitration agreement signed by B&L and the plaintiff begins with the following text printed in large, bold font:

> **By signing this Arbitration Agreement, I understand and agree that for Claims arising out of or relating to the Transactions described below,**
>
> - **I am giving up my right to go to court;**
> - **I am giving up or limiting my rights that might be available in a judicial proceeding such as the right to compel testimony and the right to appeal the decision on such Claims;**
> - **I am giving up my rights to join as a class representative or class member in any Class Action or Class Arbitration that I may have against you.**[6]

[6] Because this was a contract involving interstate commerce, the Federal Arbitration Act preempts state law on the

This large, bold text, the substance of the agreement, is confined to the top half of a single page. This text is separated from the definitions of the included terms by a thick header labelled "Definitions." The terms of the arbitration agreement are clear, and because the agreement exists as a stand-alone document, the court's finding that the agreement was "not typed in capitol [*sic*] letter [*sic*] on the first page of the contract," while technically correct, is misleading. An arbitration agreement cannot be more conspicuous than a stand-alone agreement that summarizes the key terms in large, bold font on the front page of the agreement.

Finally, the court seems to have hedged its bets on p. 4 of the amended order, writing, "In the event the Defendant's arbitration agreement is not a clause but in fact a stand alone [*sic*] arbitration agreement, the arbitration agreement is unenforceable as a matter of law as the agreement lacks valuable consideration." (Amended Order, p. 4).

The arbitration agreement was signed contemporaneously with the purchase of the vehicle. In the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together. Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991).

Therefore, the stand-alone arbitration agreement signed by plaintiff and defendant is prima facie valid, and the court's conclusions that the arbitration agreement is unconscionable and governed by state law must be reversed.

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manner in which the language of the agreement must be displayed. Soil Remediation Co. v. Nu-Way Environmental, Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). The parties agreed that the transaction involved interstate commerce in their signed arbitration agreement and agreed that the Federal Arbitration Act governed their arbitration agreement.

III. THE LOWER COURT ERRED IN CONCLUDING THAT THE DEFENDANT ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW BY SENDING A LETTER TO THE CLERK OF COURT

A letter written by a layperson on behalf of an LLC does not constitute the unauthorized practice of law.

Under the South Carolina Constitution, the Supreme Court has the duty to regulate the practice of law in South Carolina. S.C. Const. art. V, § 4; In re Unauthorized Practice of Law Rules, 309 S.C. 304, 422 S.E.2d 123 (1992). Its duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers or for protecting their economic interests; instead, it is to protect the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law. Linder v. Insurance Claims Consultants, Inc., 348 S.C. 477, 560 S.E.2d 612 (2007). The protection of the public is the "paramount concern" of the courts when considering unauthorized practice of law claims. State v. Buyers Service Co., Inc., 292 S.C. 426, 434, 357 S.E.2d 15, 19 (1987).

Despite its clear mandate to regulate the practice of law, however, the Court has refrained from adopting a comprehensive definition of the practice of law, stating that "[i]t is neither practical nor wise" to attempt to formulate such a definition. Unauthorized Practice of Law Rules, 309 S.C. at 305, 422 S.E.2d at 124. "Because of this ambiguity, what is, and what is not, the unauthorized practice of law is best decided in the context of an actual case or controversy." Id. However, "[t]he generally understood definition of the practice of law embraces the preparation of pleadings[7], and other papers incident to actions and special proceedings, and the

[7] It is perplexing that the plaintiff would file an affidavit of default suggesting that "there has been no appearance or answer pursuant to Rule 8 of the SCRCP on behalf of the Defendant" and simultaneously suggest that the defendant has engaged in the unauthorized practice of law.

management of such actions and proceedings on behalf of clients before judges and courts." Brown v. Coe, 365 S.C. 137, 616 S.E.2d 705 (2005).

In this case, the lower court ordered a June 29, 2020 letter written by B&L's then-manager, Denby, and addressed to the Richland County Clerk of Court to be stricken as improper because it concluded that the letter constituted the unauthorized practice of law.

Denby's letter contains absolutely no admissions or denials of any substantive allegation. The only allegation that is denied in the letter is related to the inclusion of "Finns" as a defendant in the complaint. (Complaint, par. 2). The letter was not intended to be, and does not satisfy any of the requirements of, a responsive pleading, and B&L maintains that the letter did not constitute an answer for the purposes of Rule 12(b), SCRCP. The letter was simply the attempt of a layperson to inform the Clerk of Court of an empirical fact: the plaintiff signed an arbitration agreement. No specialized legal knowledge is required to observe a signature on a page, and, therefore, disclosing that observation to another party cannot be held to constitute the practice of law.

The letter does not present any argument to the court. The letter includes no attempt to manage actions or schedule proceedings; to the contrary, it plainly states B&L's belief that no actions or proceedings were necessary! The unfortunate decision by the Clerk of Court to mark the letter as "filed" has no bearing on its contents, and nothing contained in the letter falls within the penumbra of activities described as "unauthorized practice of law" in prior South Carolina case law. See e.g. State v. Despain, 319 S.C. 317, 460 S.E.2d 576 (1995); In re Duncan, 83 S.C. 186, 65 S.E. 210 (1909).

Additionally, because the court's mandate to govern the practice of law is tied to protection of the public, it is important to acknowledge that the only party that has been harmed

in this matter by the alleged "unauthorized practice of law" is B&L. The court's finding that B&L engaged in the unauthorized practice of law, though incorrect, likely contributed to its refusal to set aside entry of default.

If the court's error is not remedied, it will have a chilling effect on the willingness of citizens to communicate with public officials for fear of being accused of the unauthorized practice of law. Additionally, if the court holds that a letter written by a layperson and concerning an ongoing case constitutes the unauthorized practice of law when addressed to the Clerk of Court, the regulation of correspondence in this state will have to be dramatically changed. In effect, the court would be introducing a new rule: that any correspondence with the Clerk of Court by employees of parties to a case constitutes the unauthorized practice of law when the case is mentioned. As a matter of policy, and as a matter of common sense, such a change is neither necessary nor advisable.

CONCLUSION

For the reasons stated above, the lower court's refusal to set aside the entry of default pursuant to Rule 55(c), SCRCP, conclusion that the arbitration agreement was governed by state law and was unenforceable, and conclusion that B&L engaged in the unauthorized practice of law must be reversed.

Signature on following page.

Respectfully submitted,

STUDEMEYER LAW FIRM, P.C.

J. Gregory Studemeyer
SC Bar #5416
7478 Carlisle Street
P.O. Box 1014
Irmo, S.C. 29063
(803) 393-4399
Attorney for Appellant

January 8, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning

Appellate Case No. 2020-001660

Crystal Morgan, Respondent,

v.

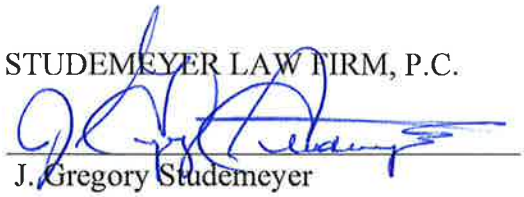
B&L Foreign Car LLC, Appellant.

PROOF OF SERVICE

I certify that I have served copies of the Initial Brief Of Appellant and Designation Of Matter To Be Included In The Record On Appeal on Crystal Morgan by depositing them in the United States Mail, postage prepaid, on January 8, 2021, addressed to her attorney of record, Pamela R. Mullis, Post Office Box 7757, Columbia, South Carolina 29202

January 8, 2021

STUDEMEYER LAW FIRM, P.C.



J. Gregory Studemeyer
S.C. Bar #5416
7478 Carlisle Street
P.O. Box 1014
Irmo, S.C. 29063
(803) 393-4399
Attorney for Appellant