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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2020-000815

Dennis Robert Mitton, Respondent,

v.

Danny James, Appellant,

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS[1]

This is an action to recover damages for serious personal injuries Respondent sustained when Appellant's vehicle struck him while he was riding his bicycle on May 16, 2018.

Respondent filed this action on November 15, 2018. (Summons and Complaint; R. p. ___). He served the Appellant the next day, on November 16, 2018. (Affidavit of Service; R. p. ___). As such, Appellant's Answer was due by Monday, December 17, 2018. *See* Rules 6(a) & 12(a), SCRCP.

Appellant's liability insurer, South Carolina Farm Bureau ("SCFB"), assigned the defense of the action to attorney Louis Nettles. (Memo. in Support of Motion for Relief from Entry of Default, p. 2; Tr. of Aug. 27, 2019 hearing, p. 5; R. pp. __). Mr. Nettles advised the Court of his

[1] As in Appellant's brief, Respondent combines the statement of the case and statement of the facts for the sake of clarity and brevity.

representation on December 7, 2018 (Notice of Appearance; R. p. __) but did not file an Answer by the December 16, 2018 deadline.

Also on December 7, 2018, Mr. Nettles attempted to send an email to Respondent's counsel requesting an extension to answer. (Rule 59(e) Motion, Exhibit A; R. p. __). However, he sent it to an obsolete email address, not the one listed on the Summons and Complaint. (Summons; Complaint, p. 4; Tr. of Oct. 2, 2019 hearing, pp. 31-32; Tr. of Mar. 27, 2020 hearing, p. 33; R. pp. __). Respondent's counsel did not receive the email. (Affidavit of Default, ¶ 3; R. p. __). Despite receiving no response to his email, Mr. Nettles failed to follow up on his extension request. (Tr. of Oct. 2, 2019 hearing, pp. 5, 8; R. pp. __).

Prior to Appellant's deadline to Answer, Respondent's counsel attempted to contact Mr. Nettles on several occasions regarding this action, including a letter of December 12, 2018, an email of the same date, and a telephone call (voicemail message) on December 13, 2018. (Memo. in Opposition to Rule 59(e) Motion, Exhibits B-D; Tr. of Mar. 27, 2020 hearing, p. 33; R. pp. __). None of this prompted Mr. Nettles to file an Answer on behalf of Appellant.[2]

Respondent did not immediately move for a default judgment but instead waited to do so until March 27, 2019 (Motion for Order of Default; R. p. __), more than three months after Appellant allowed the deadline to Answer to expire. On the same date, the Circuit Judge issued

[2] With the exception of the Affidavit of Default, all evidence discussed in this paragraph and the previous paragraph was submitted in support of or in response to Appellant's Rule 59(e) Motion. For reasons discussed below, the Circuit Court should not have considered any additional evidence in the context of that motion. Respondent has included this evidence in the record to the extent the Court disagrees and rules it was proper for the Circuit Court to consider additional evidence – in which case the Court should review all such evidence, regardless of its proponent. But, in discussing this evidence, Respondent does not waive his position that it was improperly before the Circuit Court in determining the Rule 59(e) Motion. If the Court agrees with Respondent on this issue, it may disregard these two paragraphs.

an Order finding Appellant was in default and ordering a hearing to be held to determine Respondent's damages. (Order dated Mar. 27, 2019; R. p. __).

In response, Appellant again failed to file an Answer but instead filed a Motion for Relief from Entry of Default on April 4, 2019. (Motion for Relief; R. p. ___). The grounds stated in the motion were that Mr. Nettles thought the case would settle before an Answer was due and:

> Defendant's counsel missed opportunities to alert to the problems with the claim, because of personal obligations. The week the suit papers were sent,[3] Defendant's counsel was in the process of having his younger brother admitted to assisted living due to early onset dementia and was trying to manage his brother's affairs without the assistance of his brother due to the dementia. In addition, Counsel's mother was aging and was hospitalized for almost two weeks in February and passed away at the end of the month.

(Motion for Relief, p. 2; R. p. __).

Thereafter, on April 24, 2019, Respondent noticed the deposition of William Naso, M.D., and provided notice to Mr. Nettles. (Notice of Depo.; R. p. __). Despite receiving this notice, Mr. Nettles still did not file an Answer on behalf of Appellant. Moreover, Mr. Nettles failed to attend the deposition on May 7, 2019. (Naso depo., pp. 1-3; Tr. of Aug. 27, 2019 hearing, pp. 24-25; R. pp. __).

On June 17, 2019, Respondent noticed another deposition, of Mark Reynolds, M.D., and served Mr. Nettles with this Notice of Deposition. (Notice of Depo.; R. p. __). Although Mr. Nettles received this notice,[4] it did not prompt him to file an Answer on behalf of Appellant. Respondent took the deposition as noticed on July 17, 2019 and, once again, Mr. Nettles did not attend. (Reynolds depo., pp. 1-2; Tr. of Aug. 27, 2019 hearing, pp. 24-25; R. pp. __).

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[3] Defendant's insurer provided the suit papers to Mr. Nettles on December 7, 2018, the same day he filed his Notice of Appearance. (Motion for Relief, p. 2; R. p. __).

[4] Appellant, via Mr. Nettles, conceded that both depositions were properly noticed. (Tr. of Aug. 27, 2019 hearing, p. 25; R. p. __).

Thereafter, unbeknownst to Respondent, Appellant met with Mr. Nettles on August 15, 2019 and agreed to accept a payment of $6,100.00 in exchange for providing Mr. Nettles with a general release of "all claims or damages arising out of the handling of the suit against me by Dennis Robert Mitton." (Release; R. p. __). Appellant expressly acknowledged in the release that he was at risk of having a judgment entered against him; moreover, he claimed his "injuries were caused by negligence and recklessness on the part of the Louis D. Nettles." (Release; R. p. __).

On August 27, 2019, the Circuit Court held a hearing on the Motion for Relief from Entry of Default. Appellant's arguments were the same as set forth in his written motion. Appellant's counsel claimed his personal issues caused what he described as a "procedural trap." (Tr. of Aug. 27, 2019 hearing, p. 5-8, 13; R. pp. __). Nevertheless, he acknowledged he "just missed the deadline" and "made an error." (Tr. of Aug. 27, 2019 hearing, pp. 6, 13; R. pp. __). Importantly, he conceded: "It's a case where the liability was clear." (Tr. of Aug. 27, 2019 hearing, p. 6; R. p. __). Neither Appellant nor his attorney disclosed to the Court or Respondent the release Appellant signed in favor of Mr. Nettles.

The Circuit Judge denied the motion and proceeded with the damages hearing. (Tr. of Aug. 27, 2019 hearing, p. 22; R. p. __). At the hearing, Respondent requested a damages award of $5,000,000.00 but Appellant's counsel argued an award of $2,500,000.00 to $3,000,000.00 was appropriate. (Tr. of Aug. 27, 2019 hearing, pp. 52-53; R. pp. __). On August 30, 2019, the Circuit Judge issued a written Order (the "Default Order") formally denying relief from default and entering a money judgment of $4,018,653.37 in favor of Respondent against Appellant. (Default Order; R. p. __). Thus, the judgment amount was between the parties' positions.[5]

[5] Appellant does not argue in his brief that the judgment is excessive.

Thereafter, on September 9, 2019, attorney Murrell Smith filed a Notice of Appearance as counsel for Appellant. (Notice of Appearance; R. p. __).[6] On that date, Appellant also filed a Rule 59(e) Motion to Alter or Amend Judgment ("Rule 59(e) Motion"). (Rule 59(e) Motion; R. p. __).

On September 11, 2019 – almost ten months after being served with the Summons and Complaint and after entry of the Default Order – Appellant (via Mr. Nettles) filed an Answer. (Answer; R. p. __).[7] This was Appellant's first response to the Complaint. Contrary to his attorney's representation to the Court at the August 27, 2019 hearing, Appellant denied in his Answer that he was liable for the collision. (Answer; R. p. __).

The Circuit Court held a hearing on the Rule 59(e) Motion on October 2, 2019. Appellant argued the following grounds in support of the motion: (1) Mr. Nettles' "personal issues" given his family members' health problems (Tr. of Oct. 2, 2019 hearing, pp. 6, 9-11; R. pp. __); (2) potential "serious consequences" for Mr. Nettles and the law firm that employed him, as well as Respondent's desire to obtain an assignment to pursue claims Appellant may have against his insurer for bad faith and/or his attorney for malpractice (Tr. of Oct. 2, 2019 hearing, pp. 3, 19-21; R. pp. __); and (3) a request to "temper justice with fairness" in light of the foregoing. (Tr. of Oct. 2, 2019 hearing, p. 4; R. p. __). Specifically, Appellant argued:

> This is just a very uncomfortable situation for us to be in. More importantly, I recognize there's a serious injury to the Respondent, and so we have to deal with that. As well as Mr. Nettles and his law firm and the Folkens Law Firm has also got some – has had some serious consequences as a result of this.
> . . .

[6] Mr. Nettles remained as co-counsel of record for Appellant until relieved by the Court approximately six months later. (Order dated Mar. 30, 2020; R. p. __).

[7] Although the Answer stated it was in response to an Amended Complaint, this was clearly a typographical error. There was no Amended Complaint. Also, based on its numbering, it is apparent the Answer related to the eight numbered paragraphs of the Complaint.

> But now, the net benefit, obviously, is, you know, they filed an execution of judgment against the defendant, presuming they're going to look for some type of assignment to find a bad faith action. Alternatively, they're going to file – try to get some type of assignment to go after the Folkens Law Firm for malpractice….
>
> . . .
>
> You can still come over here to this courthouse, and you can still try a case and get an excess verdict against the defendant. You just don't have any bad faith or potential legal malpractice cases against Louis Nettles and the Folkens Law Firm.
>
> . . .
>
> So then the next step is can we go get an assignment of the malpractice claim and try to talk to the defendant and say that and go and sue Louis and Folkens Law Firm.

(Tr. of Oct. 2, 2019 hearing, pp. 3, 19-21; R. pp. __).[8]

Over Respondent's objection (Tr. of Oct. 2, 2019 hearing, pp. 27-28; Hatfield email dated September 10, 2019; R. pp. __), Appellant sought to support the Rule 59(e) Motion with additional evidence. (Tr. of Oct. 2, 2019 hearing, pp. 5, 8-10; Rule 59(e) Motion, Exhibits A-E; R. pp. __). One of Appellant's supporting exhibits was an affidavit signed by Mr. Nettles on September 9, 2019, in which he failed to disclose the release he had obtained from Appellant almost four weeks earlier, on August 15, 2019. (Rule 59(e) Motion, Ex. C; R. p. __).

On November 19, 2019, the Circuit Court issued an Order (the "Rule 59(e) Order") granting the Rule 59(e) Motion and setting aside the Default Order. (Rule 59(e) Order; R. p. __). The Rule 59(e) Order expressly relied upon the additional evidence submitted by Appellant in support of the motion. (Rule 59(e) Order, p. 5; R. p. __).

Shortly before February 4, 2020, Appellant's counsel Mr. Smith disclosed to Respondent's attorneys the release that Appellant had signed in favor of Mr. Nettles. (Tr. of Mar. 27, 2020 hearing, pp. 6, 35-36; R. pp. __). As a result, on February 4, 2020, Respondent filed a Motion to

[8] Appellant did not disclose the release in favor of Mr. Nettles in his Rule 59(e) Motion or at the hearing. However, there is no evidence to suggest that Mr. Smith – who argued the motion – was aware of the release at that time. On the other hand, Mr. Nettles – who still represented Appellant – did not disclose the release to the Court or counsel.

Vacate Order Dated November 19, 2019 and to Reinstate Order Dated August 30, 2019 ("Motion to Vacate"). (Motion to Vacate; R. p. __). The motion was based upon the newly discovered evidence of Mr. Nettles' misconduct (*i.e.*, execution and non-disclosure of the release), in which Appellant participated.

The Circuit Judge heard the Motion to Vacate on March 27, 2020. (Tr. of Mar. 27, 2020 hearing; R. p. __). On April 21, 2020, he issued an Order (the "Reinstatement Order") granting that motion, vacating the Rule 59(e) Order, and reinstating his August 30, 2019 judgment by default. (Reinstatement Order; R. p. __).

Appellant moved for reconsideration of the Reinstatement Order on May 1, 2020 ("Second Rule 59(e) Motion"). (Second Rule 59(e) Motion; R. p. __). The Circuit Court denied that motion (except a minor clarification) on May 7, 2020. (Order; R. p. __). Appellant then filed a Notice of Appeal to this Court on May 28, 2020 appealing the Reinstatement Order (and the Order denying reconsideration thereof).

During the pendency of Appellant's Second Rule 59(e) Motion, Respondent filed a motion seeking supplemental proceedings to assist in execution of his judgment against Appellant. (Affidavit and Motion; R. p. __). The Circuit Court granted this motion on May 14, 2020 via an Order and Rule to Show Cause that referred matters related to execution of the judgment to a Special Referee. (Order dated May 14, 2020; R. p. __).

Subsequently, on July 27, 2020, Appellant filed a Rule 60(b) Motion for Relief from Default Judgment ("Rule 60(b) Motion") with the Circuit Court. (Rule 60(b) Motion; R. p. __). This motion challenged the factual bases for the Reinstatement Order and relied upon a second affidavit signed by Mr. Nettles which attached multiple documents referenced as Exhibits A, B, and C thereto, which it claimed constituted "newly discovered evidence." (Rule 60(b) Motion,

Ex. 1; R. p. __). Respondent opposed the Rule 60(b) Motion. (Memo. in Opposition to Rule 60(b) Motion; R. p. __).[9]

Then, on July 28, 2020, Appellant filed a Motion to Stay Pending Appeal ("Motion to Stay"). (Motion to Stay; R. p. __). Respondent also opposed this motion. (Memo. in Opposition to Motion to Stay; R. p. __).

The Rule 60(b) Motion and the Motion to Stay came before the Circuit Court for a hearing on August 19, 2020. (Tr. of Aug. 19, 2020 hearing; R. p. __). The Circuit Court ruled from the bench, denying the Rule 60(b) Motion and concluding he lacked jurisdiction over the Motion to Stay in light of the previous Order of Reference. (Tr. of Aug. 19, 2020 hearing, p. 39; R. p. __). He thereafter issued an Order (the "Rule 60(b) Order") formally setting forth his rulings. (Order dated Aug. 25, 2020; R. p. __). Appellant appealed the Rule 60(b) Order via a Notice of Appeal dated September 8, 2020.

On August 31, 2020, the Special Referee conducted a hearing on the Motion to Stay and for the purpose of supplemental proceedings. (Order dated Sept. 18, 2020, p. 1; R. p. __). He issued an Order on September 18, 2020 denying the Motion to Stay. (Order dated Sept. 18, 2020; R. p. __). Appellant did not appeal this Order.

The Special Referee issued another Order dated September 18, 2020 (the "Assignment Order") in which he ordered an assignment to Respondent of Appellant's potential claims against his insurer, SCFB, with any proceeds therefrom to be applied toward satisfaction of Respondent's judgment against Appellant. (Assignment Order; R. p. __). Appellant appealed the Assignment Order via a Notice of Appeal dated October 16, 2020.

[9] One of the grounds in opposition was Appellant's failure to obtain leave from this Court to file the motion. (Memo. in Opposition to Rule 60(b) Motion, p. 3; R. p. __). However, this Court's subsequent Order of August 14, 2020 resolved that procedural defect.

On October 20, 2020, this Court consolidated Appellants' appeals of the Reinstatement Order, the Rule 60(b) Order, and the Assignment Order.

STANDARD OF REVIEW

This Court should review the Reinstatement Order and the Rule 60(b) Order under an abuse of discretion standard – that is, were they legally correct and was there any evidence to support them?

> The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

Roberson v. Southern Finance of S.C., 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005).

> "Whether to grant or deny a motion under Rule 60(b)[, SCRCP,] lies within the sound discretion of the judge. Our standard of review, therefore, is limited to determining whether there was an abuse of discretion." *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004) (citation omitted). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009).

May v. May, 428 S.C. 131, 136, 833 S.E.2d 78, 80 (Ct. App. 2019).

> On appeal from an order in which a judge construes his own previously issued order, [an appellate] court has jurisdiction to construe the appealed order, but in this situation due deference and great weight should be given to the opinion of the trial judge who had the advantage of knowing his own intent.

Eddins v. Eddins, 304 S.C. 133, 136, 403 S.E.2d 164, 166 (Ct. App. 1991)

The Court should review whether the Assignment Order was controlled by an error of law, with no particular deference to the Special Referee. *Gordon v. Lancaster*, 425 S.C. 386, 389, 823

S.E.2d 173, 174 (2019), *citing Town of Summerville v City of N. Charleston,* 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ARGUMENT

1. The Circuit Judge properly applied Rule 60(b) to vacate the Rule 59(e) Order; moreover, even without the authority of Rule 60(b), he had the inherent power to vacate that Order to insure his ruling was correct.

Appellant's initial argument is that Rule 60, SCRCP – which is entitled "Relief from Judgment *or Order*" (emphasis added) – applies to final judgments but not to orders that are not judgments.[10] In support, Appellant quotes a portion of the rule that refers to "final judgment, order, or proceeding" (Appellant's Am. Initial Brief, p. 16); however, he fails to mention the title of the rule and disregards Rule 60(b)'s two additional references to "judgment, order, or proceeding" without use of the adjective "final."

No South Carolina case has held that Rule 60(b) is so limited. As noted above, the rule expressly contemplates its application to orders other than judgments; otherwise, there would have been no reason to add the terms "orders" and "proceedings" throughout the rule. S*ee Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act."); *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."), *quoting In re: Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995).[11]

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[10] In his argument, Appellant attacks the procedural vehicle for the Circuit Court's ruling but does not contend the ruling lacked evidentiary support.

[11] Rules of statutory construction apply to the Rules of Civil Procedure. *Maxwell v Genez,* 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003).

While Appellant contends the use of the term "final" before judgment modifies each of the words that follows, that argument is not supported by the cases cited in support nor is it consistent with principles of statutory construction.

Initially, neither of the two cases cited by Appellant holds that "[t]he adjective 'final' modifies the three nouns that follow it." (Appellant's Am. Initial Brief, p. 16). *Mictronics, Inc. v. S.C. Dept. of Revenue,* 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) discussed the application of Rule 60(b) to administrative proceedings via Rule 29(D), SCRALJD. *Id.* at 510-11, 548 S.E.2d at 225-26. In doing so, the Court there simply noted that final orders are reviewable under Rule 60(b) but there was no discussion of interlocutory orders or whether the rule applies to them. Similarly, in *Chewning v. Ford Motor Co.,* 354 S.C. 72, 579 S.E.2d 605 (2003), the Supreme Court considered application of Rule 60(b) to a final judgment but did not address its application to interlocutory orders. One cannot validly deduce from these cases that, because Rule 60(b) applies to final orders, it does not apply to other orders; rather, to make such a deduction, one would commit the logical fallacy of denying the antecedent. *See, e.g., TorPharm, Inc. v. Ranbaxy Pharms.,* 336 F.3d 1322, 1329 (Fed. Cir. 2003) (explaining that "denying the antecedent" is "[a]n invalid argument of the general form: If p, then q. Not p. Therefore, not q." [12]).

In addition, when there is a list of nouns separated by a disjunctive "or" but only one noun adjoins an adjective, the adjective should be interpreted as only modifying the noun to which it is connected. *See Derousse v. State Farm Mut. Auto. Ins. Co.,* 298 S.W.3d 891, 894-95 (Mo. 2009) (*en banc*) (construing statutory language "because of bodily injury, sickness or disease, including death, resulting therefrom" and holding: "[T]his Court finds that the term 'bodily' modifies only 'injury' and not the clause 'sickness or disease, including death.' Because the statute uses a comma

[12] Here, p would be "a final order" and q would be "Rule 60(b) applies."

to separate the phrase 'bodily injury' from the words that follow, the statute provides a series of categories of harm requiring uninsured motorist coverage: (1) bodily injury; (2) sickness; or (3) disease."); *Combs v. Jaguar Energy Services,* 187 F. Supp. 3d 1258, 1262 (D. Colo. 2016) (Respondent argues "the exemption for 'interstate drivers, driver helpers, [and] loaders ... of motor carriers' means that all these classifications of workers are exempt only if their work involves interstate travel. As a matter of statutory construction, this interpretation is erroneous. … Thus here, because the word 'interstate' immediately precedes only the term 'drivers,' in the list of exempted categories of employees, it modifies only that category of employees."); *Block 25 Committee v. City of Walker,* 690 N.W.2d 403, 405 (Minn. 2005) (construing statutory language "within 1,000 feet of a state hospital, training school, reformatory, prison, or other institution" and holding: "Under the rules of grammar, the adjective 'state' could be read to modify only 'hospital,' or could be read to modify the entire list of institutions that follow, including 'other institution.' The statute is therefore ambiguous regarding what institutions fall within its ambit."); *cf. State v Leopard,* 349 S.C. 467, 563 S.E.2d 342 (2002) ("The last clause of the definition does contain a cohabiting requirement. The fact that it is included in one phrase but not in the other implies it should not be read into the other."). This conclusion is particularly true where application of the adjective to subsequent nouns in the list would not make sense – for example, when is a "final order" not a "final judgment" and what would be meant by a "final proceeding"? Clearly, the rule contemplates three distinct things: (1) final judgments: (2) orders; and (3) proceedings.

Lacking support in South Carolina law, Appellant seeks refuge in North Carolina case law. While courts in that state have held that Rules 59 and 60 do not apply to interlocutory orders, *see, e.g., Sink v. Easter,* 288 N.C. 183, 217 S.E.2d 532 (1975), *cited with approval in NationsBank of*

N.C. v. Parsons, 324 S.C. 506, 477 S.E.2d 735 (Ct. App. 1996); *Tetra Tech Tesoro v. JAAAT Tech. Servs.,* 250 N.C. App. 791, 794 S.E.2d 535 (2016), these cases are not persuasive.

First, North Carolina courts have offered little rationale to support this conclusion. The *Sink* case did not rationalize why it held North Carolina's version of Rule 60(b) only applies to final judgments but simply cited *Wiggins v. Bunch,* 280 N.C. 106, 110, 184 S.E.2d 879, 889 (1971) for that proposition. *Wiggins* did not involve the question of whether Rule 60(b) applies to interlocutory orders but addressed whether an appeal divests the trial court of the jurisdiction to entertain a Rule 60(b) motion, so the *Sink* court's reliance on the *Wiggins* case is curious. In any event, neither of those cases analyzed the language of Rule 60(b) to conclude, as Appellant argues, that its use of the term "final" in one instance modifies the rule's use of the term "order" throughout. (Appellant's Am. Initial Brief, p. 16).

Also, North Carolina refuses to apply Rule 59 to interlocutory orders, *see, e.g., Tetra Tech Tesoro, supra.* – which is contrary to the practice in South Carolina, where Rule 59(e) motions are commonly filed with respect to rulings that are not final judgments. *See, e.g., Morrow v. Fundamental Long-Term Care Holdings,* 412 S.C. 534, 536, 773 S.E.2d 144, 145 (2015) (motion filed regarding order limiting discovery); *Davis v. Parkview Apts.,* 409 S.C. 266, 276, 762 S.E.2d 535, 540 (2014) (motions used to amend order ruling on privilege claims); *Goodwin v. Landquest Development,* 414 S.C. 623, 627, 779 S.E.2d 826, 829 (Ct. App. 2015) (motion seeking rescission of order of reference). Thus, there is good reason for the Court to conclude that the practice in this State is sufficiently different to decline to follow North Carolina authorities.

On the other hand, South Carolina appellate courts have adhered to the general rule that trial judges have the authority to reconsider and change their interlocutory rulings.

> A trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify or otherwise change its findings of fact and conclusions

> of law before entry of judgment or decree. *See*, cases collected at 18 S.C. Dig., *Trial*, Key No. 18 (West 1952 & Supp. 1988); 89 C.J.S., *Trial*, Sections 638-639 (1955 & Supp. 1988).

PPG Industries v. Orangeburg Paint & Decorating Center, 297 S.C. 176, 183, 375 S.E.2d 331, 334-35 (Ct. App. 1988); *accord Johnston v. Bowen*, 313 S.C. 61, 63, 437 S.E.2d 45, 47 (1993) ("The trial court interlocutory orders are amendable.").

While neither *PPG Industries* nor *Johnston* addressed the specific source for the Circuit Court's authority to modify its interlocutory rulings, each reached its holding in the context of a "motion to reconsider," which could have been under Rule 59(e) or Rule 60.

Alternatively, their holdings are likely based upon – or are at least supported by – the common law principle that trial courts possess the inherent power to reconsider, rescind, vacate, modify, amend, or otherwise change an interlocutory order in order to accomplish justice, to avoid perpetuating an error, or to correct a mistake. *See, e.g., Stephens v. Irvin,* 730 N.E.2d 1271, 1277 (Ind. App. 2000); ("A trial court has the inherent power to reconsider, vacate, or modify any previous order so long as the case has not proceeded to final judgment."); *Fayetteville Investors v. Commercial Builders,* 936 F.2d 1462, 1469 (4th Cir. 1991) ("An interlocutory order is subject to reconsideration at any time prior to the entry of a final judgment."); *United States v. Jerry,* 487 F.2d 600, 604 (3d Cir. 1973) ("[T]he power to grant relief from erroneous interlocutory orders, exercised in justice and good conscience, has long been recognized as within the plenary power of courts until entry of final judgment and is not inconsistent with any of the [Rules of Civil Procedure]."); *see also Winter Green at Winter Park H.O.A. v. Ware,* 264 So.3d 1143, 1146 (Fla. App. 2019); *Stevens v. Village of Oak Brook,* 371 Ill. Dec. 614, 625, 990 N.E.2d 802, 813 (2013); *Lombardi v. Masso,* 207 N.J. 517, 534-35, 25 A.2d 1080, 1089-90 (2011); *Nelson v. Homier Distrib. Co.,* 147 N.M. 318, 325-26, 222 P.3d 690, 697-98 (2009); *Cho v. State,* 115 Haw. 373, 383, 168 P.3d 17, 27 (2007); *Hubbard v. State Farm Indem. Co.,* 213 W.Va. 542, 551, 584 S.E.2d

176, 185 (2003); *Mendez v. San Benito/Cameron County Drainage Dist. No. 3,* 45 S.W.3d 746, 754 (Tex. App. 2001); *Peterson v. Lindner,* 765 F.2d 698, 704 (7th Cir. 1985).

Moreover, even if Respondent incorrectly cited Rule 60(b) as the basis for the Motion to Vacate, as Appellant claims – a conclusion Respondent disputes – the Court should not use this as a reason to reverse the Reinstatement Order. In *Elam v. S.C. Dept. of Transp.,* 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court recognized long-standing common-law authority for a judge to reconsider a ruling in order to achieve justice and held (in the context of an appeal from the denial of a Rule 59(e) motion) that a motion for reconsideration is proper even when the moving party mislabels the motion. *Id.* at 22-23, 602 S.E.2d at 779.

Finally, Respondent's Motion to Vacate was not exclusively predicated on Rule 60(b) but was also supported by *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d 605 (2003), a case that authorizes a remedy for fraud upon the court. (Motion to Vacate, p. 1; R. p. __). *Chewning* provides a basis for relief which is independent of Rule 60(b). The Circuit Court relied upon *Chewning* in vacating its Rule 59(e) Order and reinstating the judgment. (Reinstatement Order, p. 6; R. p. __). Thus, particularly when considered with the Circuit Court's authority to modify its own decisions to reach the correct result, there was a basis for the Motion to Vacate and resulting Reinstatement Order despite Appellant's challenge to the use of Rule 60(b).

As a result, in entertaining and granting Respondent's Motion to Vacate, the Circuit Court acted within its authority and jurisdiction regardless of whether it was pursuant to Rule 60(b) and even if Appellant were correct that Rule 60(b) does not apply to interlocutory orders.

2. Appellant failed to preserve for appellate review his argument that the Reinstatement Order should be governed by sanctions standards.

Appellant contends the Reinstatement Order was the equivalent of an order striking his Answer, such that the Court should review that order applying standards applicable to the

imposition of standards. (Appellant's Am. Initial Brief, pp. 19-27). Appellant did not preserve this argument for consideration by this Court.

The present appeal is the first time Appellant has made this argument. He did not include it in his Memorandum in Opposition to Plaintiff's Motion to Vacate. (Memo. in Opposition to Motion to Vacate; R. p. __). He did not argue it at the hearing on the Motion to Vacate. (Tr. of Mar. 27, 2020 hearing, pp. 12-29, 38-44; R. pp. __). Appellant did not even make this argument in his Second Rule 59(e) Motion in response to the Reinstatement Order. (Second Rule 59(e) Motion; R. p. __).

The Reinstatement Order did not characterize its ruling as a sanction, nor did it address any argument that the Circuit Court should apply sanctions standards (because no party made such an argument). (Reinstatement Order; R. p. __).

A party "must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The purpose of this issue preservation rule is to provide the lower court with a fair opportunity to rule on the issues and arguments and to furnish the appellate court with a basis for meaningful appellate review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012).

Moreover, when a judge fails to address or to rule on an argument in an order, the aggrieved party must raise the argument in a Rule 59(e) motion to alter or amend to preserve it for appellate review. *See, e.g., Hancock v. Wal-Mart Stores*, 355 S.C. 168, 171, 584 S.E.2d 398, 399 (Ct. App. 2003).

Here, Appellant did none of these things with respect to his sanctions argument. As such, that argument is not preserved for consideration by this Court. *See, e.g., Smith v. Strickland*, 314

S.C. 192, 196, 442 S.E.2d 207, 209 (Ct. App. 1994) ("The defendants did not present this issue to the trial court for it to address, and the trial court, in fact, did not address it. The issue, therefore, is not preserved for appellate review.").

3. The Reinstatement Order was not the equivalent of an order imposing the sanction of striking Appellant's Answer.

Even if the Court were to regard Appellant's sanctions argument as preserved, it should reject that argument.

a. The Reinstatement Order was based upon Appellant's default that occurred before he filed an untimely Answer.

The Circuit Court entered Appellant's default on March 27, 2019 (Order dated Mar. 27, 2019; R. p. __) and issued the Default Order on August 30, 2019. Both Orders formally found Appellant was in default for failing to file an Answer in response to the Complaint. (Order dated Mar. 27, 2019; Default Order; R. pp. __). Appellant did not file an Answer until September 11, 2019. (Answer; R. p. __).

While the Circuit Court initially granted Appellant relief from the Default Order under Rule 59(e), its decision to do so had nothing to do with the Answer Appellant filed. Moreover, by subsequently issuing the Reinstatement Order, the Circuit Court vacated the Rule 59(e) Order – including its statement "[t]he Answer filed on September 11, 2019, shall be deemed the Defendant's Answer" (Rule 59(e) Order, p. 7; R. p. __) – and reinstated the Default Order. As such, it confirmed what the Default Order had already found: Appellant was in default prior to August 30, 2019 and lacked sufficient grounds for relief from that default. Appellant's subsequent filing of an Answer (without authorization from the Court) did not and could not change the conduct that led to the finding of default.

b. A late Answer is not a valid pleading under the Rules of Civil Procedure.

An Answer filed late is "not a valid pleading or defense" under the South Carolina Rules of Civil Procedure. *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004). There is no question that Appellant filed his Answer after the Circuit Court had not only entered a default against him but had also issued a default judgment. As such, it was not a valid pleading and should not afford Appellant any greater rights in this matter.

c. The Circuit Court's earlier decision to consider Appellant's Answer timely was the product of fraudulent conduct that misled the Court, from which Appellant should not be allowed to profit once that conduct was exposed.

For the reasons above, it is clear the Reinstatement Order is not the equivalent of the sanction of striking a party's pleading; therefore, the premise for Appellant's argument I.B. fails. Instead, this Court should analyze the Reinstatement Order for what it really is: an order that restores the default judgment based upon Appellant's failure to demonstrate adequate grounds for relief under both Rule 55(c) and Rule 59(e).

The only time the Circuit Court characterized Appellant's Answer as proper was in its Rule 59(e) Order. (Rule 59(e) Order, p. 7; R. p. __). However, as the Reinstatement Order makes clear, this now-vacated conclusion was predicated upon "fraudulent conduct" by Appellant's attorney, Mr. Nettles.[13] (Reinstatement Order, p. 11; R. p. __). It is thus clear that the only reason the Circuit Court briefly accorded validity to an Answer filed almost nine months late was Appellant's misconduct (personally and/or through his attorney and agent, Mr. Nettles).

[13] While Mr. Nettles' misconduct is sufficient to bind Appellant in this context, *see, e.g.*, *Williams v. Vanvolkenberg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994), Appellant is equally blameworthy for misleading the Circuit Court since both he and Mr. Nettles were parties to the release at issue and, despite this knowledge, neither disclosed it to the Court, to opposing counsel, or even to Mr. Smith until after the Circuit Court issued the Rule 59(e) Order.

Once the Rule 59(e) Order was vacated, there was no Answer. This is a different situation than one where a court strikes a valid, timely Answer. Appellant seems to argue that neither the Circuit Court nor this Court has the power to correct an error induced by Appellant's own wrongful conduct. This is obviously not the case. *See Chewning v. Ford Motor Co.*, 354 S.C. 72, 79, 579 S.E.2d 605, 609 (2003) (in cases of fraud on the court, "[t]he public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."), *quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

It is worthwhile to review here the specific conduct that initially defrauded the Circuit Court to illustrate the necessity for insuring it has a mechanism to correct its mistake in reliance thereon. Appellant has failed at every turn to obtain relief from his default except once, through his Rule 59(e) Motion. To pitch that motion, he placed Mr. Nettles' credibility in issue by filing an affidavit and appealing to the Circuit Court regarding his family commitments that he claimed prevented him from filing a timely Answer and regarding possible liability for legal malpractice. As it turned out, Mr. Nettles had reason to believe – even before the Circuit Court denied his Motion for Relief from Entry of Default – that he lacked good cause for relief from default because, before any hearings in this case he went to Appellant and obtained the release at issue in the Motion to Vacate. While this act alone is contemptible, what led to the fraud on the Court was Mr. Nettles' – and indeed Appellant's – misrepresentation by silence in failing to disclose the release at either the August 27, 2019 or October 2, 2019 hearings. Given the attorney-client privilege and confidentiality between Appellant and Mr. Nettles, there was no way for Respondent or the Court to discover the existence of the release unless it was disclosed by one of them.

Once the release became public knowledge, it was apparent that Mr. Nettles' credibility was questionable, that Mr. Nettles himself had sufficient doubts about his explanation of alleged "good cause" that he felt he needed to obtain a release, and that Mr. Nettles believed he was insulated from liability for malpractice despite arguments presented in support of Appellant's Rule 59(e) Motion. These are all bases upon which Respondent could have opposed both the Motion for Relief and the Rule 59(e) Motion but, because of attorney-client confidentiality and Appellant's and Mr. Nettles' non-disclosure, Respondent was prohibited from doing. Clearly, this is the type of egregious conduct that *Chewning* defines as a fraud on the Court "because the fraud prevented a party from fully exhibiting and trying his case" such that there was no "real contest before the court on the subject matter of [Appellant's motions]." *Chewning*, 354 S.C. at 81, 579 S.E.2d at 610, *quoting Hilton Head Ctr. of S.C. v. Public Serv. Comm'n*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). As such, the Circuit Court did not abuse his discretion in vacating his Rule 59(e) Order that had "deemed" Appellant's late Answer as his Answer under the rules.

If this Court were to consider the Answer as timely and proper, it would reward Appellant for his lack of candor toward and fraud upon the Circuit Court. For the same reasons the Circuit Court issued the Reinstatement Order – and the reasons discussed herein why this Court should affirm that Order – this Court should not permit Appellant to profit from his misconduct.

4. The Reinstatement Order properly reinstated the judgment because the Circuit Court should not have granted Appellant relief under Rule 59(e) based upon additional evidence that he failed to offer in support of his Motion for Relief from Entry of Default.

Under Rule 220(c), SCACR, this Court may affirm the Reinstatement Order based upon "any ground(s) appearing in the Record on Appeal." As such, it is proper for Respondent to include in this brief an "argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)." Rule 208(b)(2), SCACR.

> Under [these] rules, a respondent – the "winner" in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.

I'On, LLC v. Town of Mt. Pleasant, 338 S.C. at 419, 526 S.E.2d at 722. The basis for the additional sustaining grounds must appear in the record. *Id.*

The Reinstatement Order vacated the Rule 59(e) Order which, of course, addressed Appellant's motion seeking relief pursuant to Rule 59(e). In that motion, Appellant asked the Circuit Court to consider additional evidence that he failed to present at the hearing on his Motion for Relief from Entry of Default. (Tr. of Oct. 2, 2019 hearing, pp. 5, 8-10; Rule 59(e) Motion, Exhibits A-E; R. pp. __). Respondent timely objected to Appellant's use of this new evidence. (Tr. of Oct. 2, 2019 hearing, pp. 27-28; Hatfield email dated Sept. 10, 2019; R. pp. __). Nevertheless, the Circuit Court expressly relied upon this evidence in issuing the Rule 59(e) Order. (Rule 59(e) Order, p. 5; R. p. __).

Appellate courts in this State have consistently held that a party cannot use a motion under Rule 59(e), SCRCP, as a vehicle to raise issues that he could have presented previously but failed to raise. *See, e.g., First Citizens Bank & Trust Co. v. Taylor*, 431 S.C. 149, 162, 847 S.E.2d 249, 255-56 (Ct. App. 2020), *citing Stevens & Wilkinson of S.C. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014). Therefore, a party may not introduce evidence for the first time in support of a Rule 59(e) motion. *Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009) (court could not consider a document that was submitted "only as an attachment to [the movant's] Rule 59(e) motion").

Consequently, it was error for the Circuit Court to rely upon the additional evidence attached to Appellant's Rule 59(e) Motion. While this error was not a basis for the Reinstatement Order, it is as an additional ground upon which this Court can sustain the Circuit Court's decision

to vacate the Rule 59(e) Order (which relied upon improperly submitted evidence) and to reinstate the judgment.

5. The Circuit Court's refusal to set aside the entry of default was supported by the evidence and was not controlled by an error of law.

Ultimately, once this Court limits its focus to the evidence that was properly before the Circuit Court regarding the reasons Appellant went into default, its inquiry becomes whether the Circuit Judge erred in denying Appellant's Motion for Relief from Entry of Default and in entering the default judgment despite that evidence.

Because the Circuit Court's denial of Appellant's Motion for Relief from Entry of Default is governed by a "clear … abuse of discretion" standard, *White Oak Manor v. Lexington Ins. Co*., 407 S.C. 1, 10, 753 S.E.2d 537, 542 (2014), to prevail on this appeal Appellant must demonstrate to the Court that the denial of his motion was "without evidentiary support or controlled by some error of law." *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). Importantly, an appellate court "cannot substitute its judgment for that of the trial judge absent a clear showing of abuse of discretion." *Beckham v. Durant*, 300 S.C. 329, 333, 387 S.E.2d 701, 704 (Ct. App. 1989).

A party cannot demonstrate good cause simply based on the negligence of his attorney in failing to respond to a lawsuit. *Williams*, 312 S.C. at 375, 440 S.E.2d at 409. This is because the attorney's negligence is imputed to the defaulting party. *Id.; see also Limehouse v. Hulsey*, 397 S.C. 49, 71, 723 S.E.2d 211, 223 (Ct. App. 2011), *rev'd on other grounds*, 404 S.C. 93, 744 S.E.2d 566 (2013). It short, it makes no difference that Mr. Nettles, rather than Appellant himself, failed to file a timely Answer.

Here, the Circuit Court correctly ruled that Appellant had failed to satisfy his burden under Rule 55(c), SCRCP. Specifically, the Circuit Court's ruling was:

> No matter that counsel asserts personal obligations as the reason for missing the deadline to timely answer the Plaintiff's Complaint or confirm that an extension was granted, counsel's negligence in failing to do so is imputed to his client. The law is clear that an attorney's negligence in failing to answer is imputable to the Defendant. Therefore, the fact that defense counsel was attending to a sick brother or that his mother passed away in February 2019, more than two months after the responsive pleadings were due, is not sufficient to justify setting aside the entry of default.
>
> It is clear from Defendant's motion that his attorney received the suit papers on or about December 7, 2018, which was more than nine days before an answer or other responsive pleadings were due. Defense counsel had ample opportunity to timely file an answer or confirm that his request for an extension of time had been granted. Defense counsel did neither.
>
> Defense counsel's neglect in filing a Notice of Appearance as opposed to an answer or having in place a docketing system so that responsive pleadings can be timely filed does not satisfy the "good cause" requirement.

(Default Order, pp. 2-3; R. pp. __) (citation omitted).[14]

Not only was there a factual basis ("evidentiary support") for these findings, Appellant offered no contradictory evidence prior to entry of the default judgment. Appellant's submissions[15] to the Circuit Court prior to its issuance of the Default Order consisted only of the following information related to the alleged "good cause":

- SCFB received copies of the Summons and Complaint in this action on December 7, 2018 and forwarded them to Mr. Nettles on the same day. (Memo. in Support of Motion for Relief from Default, p. 3; Tr. of Aug. 27, 2019 hearing, p. 5; R. pp. __).
- Mr. Nettles "immediately filed a notice of appearance." (Memo. in Support of Motion for Relief from Default, p. 3; Tr. of Aug. 27, 2019 hearing, p. 5; R. pp. __). Appellant did not submit a copy of a Notice of Appearance in opposition to the default. The Court's electronic case filing (ECF) notes an appearance by Mr. Nettles on December

[14] When he reinstated this Order, the Circuit Judge confirmed his conclusion that "the 'personal issues' relied upon as 'good cause' were not the reasons for Nettles' failure to file a timely answer." (Reinstatement Order, p. 9; R. p. __).

[15] Other than a copy of SCFB's letter to Respondent's attorney (Memo. in Support of Motion for Relief from Default, Ex. 1; R. p. __), Appellant submitted no affidavits, testimony, or documentary evidence at this stage of the case but instead relied upon Mr. Nettles' statements in his memoranda and arguments at the hearing.

7, 2018 (ECF – Notice of Appearance; R. p. __) but contains no written Notice of Appearance.

- Mr. Nettles "immediately" requested an extension via email. (Memo. in Support of Motion for Relief from Default, p. 3; Tr. of Aug. 27, 2019 hearing, p. 6; R. pp. __). Appellant did not submit a copy of the email to the Court in support of his Motion for Relief.

- Respondent's counsel did not respond to Mr. Nettles' email. (Memo. in Support of Motion for Relief from Default, p. 3; Tr. of Aug. 27, 2019 hearing, p. 6; R. pp. __).

- The week of December 7, 2018, Mr. Nettles "was in the process of having his younger brother admitted to assisted living due to early onset dementia and was trying to manage his brother's affairs without the assistance of his brother due to the dementia." (Memo. in Support of Motion for Relief from Default, p. 3; Tr. of Aug. 27, 2019 hearing, pp. 5-6; R. pp. __).

- In the ensuing weeks, Mr. Nettles "just missed the deadline." (Tr. of Aug. 27, 2019 hearing, p. 6; R. p. __).

- Mr. Nettles' mother was elderly, became ill, was hospitalized for almost two weeks in February 2019, and passed away at the end of that month. (Memo. in Support of Motion for Relief from Default, p. 4; Tr. of Aug. 27, 2019 hearing, p. 6; R. pp. __).

To obtain relief from the entry of default, Appellant was required to show "good cause." *Wham v. Shearson Lehman Bros.,* 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

> This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide *an explanation for the default* and give reasons why vacation of the default entry would serve the interests of justice.

Sundown Operating Co. v. Intedge Indus., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) (emphasis added). As is clear from the name of the standard and its requirement of explaining why the default occurred, there has to be a causal connection between the explanation and the default in order to be considered "good cause."

Appellant essentially offered four explanations for his default: (1) his defense was being handled by Mr. Nettles, who failed to file an Answer (which, as discussed above, is a legally deficient explanation); (2) Mr. Nettles "just missed the deadline" (which is also inadequate as a matter of law); (3) Mr. Nettles' obligations to his brother; and/or (4) Mr. Nettles' mother's issues.

Mr. Nettles only claimed he was assisting his brother the week of December 7, 2018, which was a Friday. There is no further explanation why this would have caused him to be unable to file an Answer (or make additional efforts to obtain an extension) the following week, or at least by the December 17, 2018 deadline to respond. In short, Appellant failed to demonstrate that this explanation was causally related to the default, which certainly cannot constitute "good cause." *See Ammons v. Hood*, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986) (trial court did not abuse its discretion by denying relief based on defendant's argument he was extremely busy and suffered from "business-related stress" but acknowledged he had some knowledge of business matters).

Likewise, Appellant failed to demonstrate why Mr. Nettles' mother's illness and hospitalization some two months after the deadline to respond to the Complaint had any causal relationship to Appellant's default. The Circuit Court therefore correctly concluded this was also an inadequate explanation to satisfy the "good cause" standard.

Even if Appellant could establish good cause for his default, the Court would still have to consider whether he could establish a meritorious defense if the relief were granted.[16] *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 145, 719 S.E.2d 703, 706 (Ct. App. 2011). Here, the Circuit Court did not abuse its discretion in denying Appellant's Motion for Relief because Appellant failed to present a meritorious defense. *See McClurg v. Deaton*, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011) ("[N]ot only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense."). Appellant concedes he has no

[16] Appellant suggests Respondent cannot raise this issue because he did not appeal the Circuit Court's now-vacated findings on this topic. (Appellant's Am. Initial Brief, p. 39). However, there was no basis for Respondent to appeal a finding that had been vacated. Moreover, Respondent has the right to raise this issue as an additional sustaining ground under Rule 208(b)(2), SCACR.

defense to liability for causing the subject collision (Tr. of Aug. 27, 2019 hearing, p. 6; R. p. __) but asserts he raised a meritorious defense contesting damages (Appellant's Am. Initial Brief, p. 39); however, he failed to present any affidavits or other supporting evidence to contest Respondent's damages.[17] *McClurg*, 380 S.C. at 575, 671 S.E.2d at 94 (the moving party must introduce "evidence of record, by affidavit or otherwise" to support a claim of meritorious defense); *see also h v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) (stating a movant must present a defense that raises a question of law worth discussing or that raises a real controversy arising from conflicting or doubtful evidence); *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991) (a party seeking relief from a default judgment "has the burden of presenting evidence proving the facts essential to entitle him to relief.").

Because Appellant failed to provide evidence of a meritorious defense to this action, this Court should find he failed to meet his burden to obtain relief from default and should affirm the judgment entered by the Circuit Court.

6. The Circuit Court correctly denied Appellant's Rule 60(b) Motion.

Appellant's Rule 60(b) Motion attempted – by submitting and relying upon a second affidavit from Mr. Nettles (Rule 60(b) Motion, Ex. 1; R. p. __)[18] – to have the Circuit Court revisit its factual findings related to Appellant's efforts to obtain relief from default.

In its Rule 60(b) Order denying Appellant's motion, the Circuit Court correctly set forth Appellant's burden under Rule 60(b)(2), SCRCP, to present sufficient "newly discovered"

[17] Appellant's argument on this topic is suspect in any event because our appellate courts have never resolved the question "whether a meritorious defense as to damages alone and not as to liability is an adequate basis for the grant of Rule 60 relief." *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011).

[18] Appellant had previously filed an affidavit by Mr. Nettles in support of his Rule 59(e) Motion seeking relief from the Default Order. (Rule 59(e) Motion, Ex. C; R. p. __).

evidence that: (1) would probably change the result if the matter was reheard; (2) was discovered after the hearing resulting in the judgment; (3) could not have been discovered before the hearing; (4) is material; and (5) is not merely cumulative. (Rule 60(b) Order, pp. 2-3; R. pp. __).

As the Circuit Court correctly summarized, "[r]elief under the rule depends upon the post-trial discovery of previously unknown, outcome-changing facts the moving party could not have, with due diligence, unearthed before [the hearing]." (Rule 60(b) Order, p. 3; R. p. __) (*quoting Morin v. Innegrity, LLC*, 424 S.C. 559, 578, 819 S.E.2d 131, 141 (Ct. App. 2018)).

The Circuit Court properly applied the Rule 60(b)(2) standards in denying Appellant's motion. First and foremost, it correctly concluded that Appellant could not satisfy his burden by relying upon Mr. Nettles' second affidavit and its attached exhibits because those contained information known to, available to, within exclusive control of, and/or readily discoverable via due diligence by Appellant and his attorney/agent Mr. Nettles before the hearing on Respondent's Motion to Vacate. As such, the proffered evidence was not "newly discovered" evidence. *See, e.g., Southeastern Housing Found. v. Smith*, 380 S.C. 621, 637, 670 S.E.2d 680, 688 (Ct App. 2008); *Lanier v. Lanier,* 364 S.C. 211, 218, 612 S.E.2d 456, 459 (Ct. App. 2005).

Additionally, Appellant offered no reasonable explanation for neglecting to offer that evidence prior the Reinstatement Order. The nature of the evidence was such that there truly could be no reason for this other than his simple failure to meet his burden for obtaining relief from default. The Circuit Court properly denied Appellant yet another "bite at the apple" on that issue.

Finally, the proffered evidence was cumulative. In *Lanier v. Lanier,* 364 S.C. at 217, 612 S.E.2d at 459, this Court recited the Rule 60(b)(2) standards and cited several cases in support. One of those cases, *Lloyd v. Gill,* 406 F.2d 585 (5th Cir. 1969), addressed the "cumulative" aspect of the standards and noted that evidence offered in support of the motion must be compared to the

evidence at the previous hearing and must be rejected if it is "cumulative, corroborative or contradictory" of that evidence. *Id.* at 587.

Because the allegedly new evidence of Mr. Nettles' family obligations related to facts that were in issue at the previous hearings on Appellant's Motion for Relief from Entry of Default, Appellant's Rule 59(e) Motion, and Respondent's Motion to Vacate, the Circuit Court correctly found it was outside the scope of Rule 60(b)(2). Similarly, the allegedly new evidence regarding Mr. Nettles' unilateral rescission of Appellant's release was cumulative of a fact that Appellant had conceded at the hearing on the Motion to Vacate, where his attorney admitted the release was invalid and unenforceable (Tr. of Mar. 27, 2020 hearing, p. 26; R. p. __), a conclusion with which the Circuit Court concurred. (Tr. of Aug. 19, 2020 hearing, pp. 12-13; R. pp. __). The Circuit Court was thus also correct in concluding this evidence failed to meet the requirements of Rule 60(b)(2).

In addition, the Circuit Court properly concluded Appellant's Rule 60(b) Motion was untimely. (Rule 60(b) Order, p. 5; R. p. __). A motion under Rule 60(b)(2) must be filed "within a reasonable time, and … not more than one year after the judgment, order or proceeding was entered or taken." Rule 60(b), SCRCP.

The Circuit Court entered Appellant's default on March 27, 2019. (Order of Default; R. p. __). In response, Appellant interjected the issues of Mr. Nettles' family obligations when he filed his Motion for Relief from Entry of Default on April 4, 2019. There, he asserted: "The week the suit papers were sent, Defendant's counsel was in the process of having his younger brother admitted to assisted living due to early onset dementia and was trying to manage his brother's affairs without the assistance of his brother due to the dementia. In addition, Counsel's mother

was aging and was hospitalized for almost two weeks in February and passed away at the end of the month." (Motion for Relief from Entry of Default, p. 2; R. p. __).

Appellant filed his Rule 60(b) Motion – including the additional evidence upon which he sought to rely – on July 27, 2020. (Rule 60(b) Motion; R. p. __). This was well over a year after the finding of default that Appellant sought to challenge with evidence of Mr. Nettles' family obligations and was therefore untimely on that basis. In addition, while the Rule 60(b) Motion was filed slightly less than one year after the Default Order of August 30, 2019, the Circuit Court's conclusion that it was not filed within a reasonable time when compared to that order was not an abuse of discretion considering that the Default Order addressed and ruled upon the factual arguments raised in Appellant's Motion for Relief from Entry of Default dated April 4, 2019.

7. The Circuit Judge properly declined to rule on Appellant's Motion to Stay.

Following entry of the judgment, the Circuit Judge referred this matter to a Special Referee to conduct supplemental proceedings "for the purpose of carrying Plaintiff's Judgment into effect, and for such other relief as may be deemed proper" and granted to the Special Referee "full authority to enter a final order disposing of all issues before him." (Order and Rule to Show Cause, p. 1; R. p. __). Appellant's Motion to Stay sought to stay execution of the judgment, including supplemental proceedings. (Motion to Stay, p. 3; Tr. of Aug. 19, 2020 hearing, pp. 29-30; R. p. __). The Circuit Judge construed its Order referring the case to include a reference of "all matters related to the execution of the judgment, including the Motion to Stay." (Rule 60(b) Order, p. 2; R. p. __).

Appellant argues the Circuit Judge abused his discretion by misinterpreting the scope of his previous Order. However, not only did the Circuit Judge have the authority to construe his own Order, he also had the power to refer resolution of the Motion to Stay to the Special Referee. *See* Rule 53(b), SCRCP. So, either the original Order of reference was broad enough to encompass

the Motion to Stay within the matters referred or the Rule 60(b) Order should be considered as a subsequent reference of the Motion to Stay. Either ruling was within the authority and discretion of the Circuit Judge. *See Eddins v. Eddins,* 304 S.C. 133, 136, 403 S.E.2d 164, 166 (Ct. App. 1991) ("On appeal from an order in which a judge construes his own previously issued order, this court has jurisdiction to construe the appealed order, but in this situation due deference and great weight should be given to the opinion of the trial judge who had the advantage of knowing his own intent."). There was no abuse of discretion.[19]

8. Appellant does not have the right to appeal the Assignment Order.

The Court should reject Appellant's appeal of the Assignment Order (*see* Appellant's Am. Initial Brief, pp. 42-48) on the grounds that he has no right to appeal rulings related to enforcement of the judgment and he is not aggrieved by that Order.

Once a court enters a default judgment, the defendant has no right to appeal that judgment, *see, e.g., Winesett v. Winesett,* 287 S.C. 332, 333-34, 338 S.E.2d 340, 341 (1985), but may only appeal a denial of a motion seeking relief from the judgment. *Stearns Bank Nat. Assoc. v. Glenwood Falls, LP,* 375 S.C. 423, 426, 653 S.E.2d 274, 276 (2007). The reasons for this rule include the fact that the defaulting party lacks the status in court necessary to permit such an appeal. *Winesett,* 287 S.C. at 333, 338 S.E.2d at 341, *citing Washington v. Hesse,* 56 S.C. 28, 29, 33 S.E. 787, 787 (1899). It therefore follows that a defaulting party also lacks standing to challenge rulings related to the *enforcement* of a non-appealable default judgment; otherwise, he would be allowed to circumvent the direct appeal prohibition and to thwart the judgment creditor's right to collect on a properly issued default judgment.

[19] Appellant did not seek this Court's review of the Special Referee's denial of the Motion to Stay under Rule 241(d)(2), SCACR, so it is difficult to understand how he claims prejudice from the Circuit Judge's decision not to hear the motion.

Here, Appellant had no right to appeal the default judgment against him. Similarly, the Court should hold that he has no right to appeal an order that enforces the judgment.

Additionally, the Court should find that Appellant was not aggrieved by the Assignment Order and thus has no right (*i.e.*, lacks standing) to appeal on that basis as well. "Only a party aggrieved by an order … may appeal." Rule 201(b), SCACR; *accord* S.C. CODE ANN. § 18-1-30 (2014). To be aggrieved a party must demonstrate that an appealed order causes him substantial injury by imposing a burden or obligation or denying him a personal or property right. *Shaw v. City of Charleston*, 351 S.C. 32, 36-37, 567 S.E.2d 530, 532 (Ct. App. 2002).

The Assignment Order does none of those things to Appellant. To the contrary, if Respondent successfully pursues recovery on the assigned claim against SCFB, Appellant will benefit because the judgment against him will be reduced or satisfied. Moreover, Appellant could also benefit by receiving a portion of Respondent's successful recovery on that claim if it exceeds the judgment amount. (Assignment Order, p. 4; R. p. __).

On the other hand, Appellant's attempt to reverse the Assignment Order is actually against his interests inasmuch as any success in that effort would greatly impair his ability to satisfy the judgment, which continues to accrue interest at the statutory rate while Appellant contests the assignment.

As such, Appellant lacks standing to pursue his appeal from the Assignment Order.

9. <u>The Special Referee properly assigned Appellant's claim against SCFB.</u>

Even if the Court were to entertain Appellant's appeal of the Assignment Order, it should find that the Special Referee did not err in assigning Appellant's rights against SCFB.

SCFB insured Appellant for the motor vehicle collision that resulted in the present lawsuit and judgment. The judgment exceeds the amount of liability coverage provided by SCFB to

Appellant pursuant to the contract of insurance between those parties. As such, if SCFB failed to act reasonably to protect Appellant from the excess judgment, it could be liable to Appellant in damages for breach of contract and in tort for breach of the duty of good faith and fair dealing. *See, e.g., Sentry Select Ins. Co. v. Maybank Law Firm*, 826 S.C. 154, 826 S.E.2d 270 (2019), *citing Tyger River Pine Co. v. Maryland Cas. Co.*, 163 S.C. 229, 234-35, 161 S.E. 491, 493-94 (1931). These claims are, of course, commonly referred to as claims pursuant to the "*Tyger River* doctrine."

In supplemental proceedings, the Court has the power to apply a defendant's property, including choses in action, toward satisfaction of the judgment. *Katzburg v. Katzburg*, 410 S.C. 184, 764 S.E.2d 3 (Ct. App. 2014) ("In addition to their discovery functions, supplementary proceedings 'furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution, such as choses in action.'"), *quoting Lynn v. International Brotherhood of Firemen & Oilers*, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955); *accord Johnson v. Service Mgmt.*, 319 S.C. 165, 459 S.E.2d 900, 902 (Ct. App. 1995), *aff'd* 324 S.C. 198, 478 S.E.2d 63 (1996) (after conducting supplemental proceedings a court may order defendant's non-exempt property, including choses in action, to be applied toward satisfaction of the judgment).

With the exception of his *Tyger River* doctrine claims against SCFB, Appellant acknowledges he has no other assets with which to satisfy the judgment. (Second Affidavit of Louis Nettles, Ex. A; R. p. __). Via the Assignment Order, the Special Referee applied Appellant's claims against SCFB toward satisfaction of the judgment by assigning them to Respondent. An assignment was a proper way (if not, practically, the only way) to accomplish that result with respect to a chose in action.

This Court has generally explained assignments as follows:

> An assignment is the act of transferring to another all or part of one's property, interest, or rights. *Black's Law Dictionary* 119 (6th ed. 1992). It includes transfers of all kinds of

> property, including negotiable instruments. *Id.* The assignment of an account involves the transfer to the assignee the right to have money, when collected, applied to the payment of his debt. *Id.* The interest in the property assigned can be present, future, or contingent; it may represent contract rights to money, property, or performance, *or rights to causes of action*. 5 S.C. Jur. *Assignments* § 2 (2006).
>
> . . .
>
> South Carolina jurisprudence has long recognized that *a chose in action can be validly assigned in either law or equity*. *Slater Corp. v. S.C. Tax Comm'n*, 280 S.C. 584, 587, 314 S.E.2d 31, 33 (Ct. App. 1984) (citing *Forrest v. Warrington*, 2 S.C.Eq. (2 Des.) 254 (1804)); *see also* [5] S.C. Jur. *Assignments* § 19 (2006) ("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.").

Moore v. Weinberg, 373 S.C. 209, 219-20, 644 S.E.2d 740, 745 (Ct. App. 2007) (emphasis added), *aff'd* 383 S.C. 583, 681 S.E.2d 875 (2009).

Appellant's *Tyger River* doctrine claims against SCFB are choses in action that are assignable. In *Schneider v. Allstate Ins. Co.*, 487 F. Supp. 239 (D.S.C. 1980), the United States District Court considered the question of "whether an action in tort against an insurance company for negligent, willful, or bad faith failure to settle within policy limits is assignable under the law of South Carolina." *Id.* at 241. In concluding that the claim was assignable, Judge Blatt found that the right of action against the insurer under the *Tyger River* doctrine was a chose in action both *ex contractu* and *ex delicto*. *Id.* at 243.

The South Carolina Supreme Court has acknowledged that a cause of action under the *Tyger River* doctrine is a chose in action that can be assigned via supplemental proceedings to a judgment creditor, provided the rights assigned are no greater than those of the judgment debtor and are subject to all of the insurer's rights and defenses under the insurance contract. *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 343-45, 745 S.E.2d 90, 93-94 (2013); *accord* C. Anastopoulo, *A New Twist on Remedies: Judicial Assignment of Bad Faith Claims*, 50 Ind. L. Rev. 727, 747-50 (2017) (discussing assignability of bad faith claims in various states).

Because Appellant's potential claims against SCFB under the *Tyger River* doctrine were properly assignable causes of action/choses in action and because the Special Referee had the authority to order application of these claims toward satisfaction of the judgment against Appellant, the Special Referee did not err in ordering an assignment of those claims. Therefore, this Court should affirm the Assignment Order.

CONCLUSION

For the reasons discussed above, the Court of Appeals should affirm the judgment and all appealed rulings of the Circuit Court.

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