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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge
Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2021-000539
Case No. 2020-CP-40-3674

Ammon L. "Treigh" Sullivan, ... Respondent,

v.

Richland County School District One and
South Carolina Department of Education, ... Defendants,

Of which, South Carolina Department of Education, is ..... Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Respondent Ammon L. "Treigh" Sullivan is an employee of Richland County School District One ("RCSD"). In his Complaint, the Respondent alleges that during much of his tenure with RCSD he was denied prior years of educator experience credit, specifically credit for the four years that he was employed by Lexington County School District One as a teacher's aide from 2006 through 2010. The Respondent alleges that he questioned RCSD's determination that he had zero years of educator experience credit when he began his employment in 2010 and at other times thereafter. The Respondent does not allege in his Complaint that he challenged the amount of educator experience credit directly to the Appellant South Carolina Department of Education ("SCDE").

The Respondent has alleged several causes of action against the Defendant RCSD including a claim pursuant to the Wage Payment Act, breach of contract, unjust enrichment, and negligence. In addition, the Respondent has alleged a single cause of action for negligence against the Appellant SCDE. Specifically, the Respondent alleges that SCDE breached its "duty to maintain and accurately report South Carolina teacher's credentials, including, but not limited to, a teacher's applicable years of experience." *See*, Complaint, ¶ 53. The Respondent alleges that this duty of care arises by regulation, specifically S.C. Code Regs. § 43-57.2, which states that an educator may receive "experience credit" by "verify[ing] full-time or

half-time employment" in various categories of educational positions. *See*, Complaint, ¶ 18. Moreover, S.C. Code Regs. § 43-57 provides that "[t]he State Department of Education shall maintain records indicating the work experience for which persons are entitled."

The Respondent's Complaint was filed on August 3, 2020. The Appellant SCDE was served on August 17, 2020; however, it did not file a timely answer or other responsive pleading. The Clerk of Court made an entry of default on October 29, 2020. Thereafter, on November 2, 2020, the Appellant SCDE filed a motion seeking to set aside that entry of default. That motion was denied in summary fashion by Circuit Court Judge L. Casey Manning by Order filed January 13, 2021. In that same Order, Judge Manning referred the case – presumably pursuant to Rule 53(b), SCRCP – "for the purpose of a hearing to determine the Plaintiff's damages to be entered against Defendant South Carolina Department of Education." *See*, Order filed January 13, 2021. A subsequent Rule 59(e) motion was also denied by Judge Manning in summary fashion.

On October 26, 2020, the Respondent filed a motion captioned as a "Motion for Entry of Default against Defendant South Carolina Department of Education." That motion contains a misnomer in the caption given that an entry of default is a ministerial function performed by the Clerk of Court which does not require a motion or court action. *See,* Rule 55(a), SCRCP. *See also*, *Stark Truss Co., Inc. v. Superior*

Construction Corp., 360 S.C. 503, 602 S.E.2d 99, 102 (Ct. App. 2004) (“[e]ntry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party"). In contrast, the entry of a default judgment requires an application or motion to be made and requires an order of the court. Rule 55(b)(1), SCRCP (requiring a "motion or application of the party seeking default"); Rule 55(b)(2), SCRCP ("the party entitled to a judgment by default shall apply to the court therefor"); Rule 55(b)(2), SCRCP (the defaulting party "shall be served with written notice of the motion or application for judgment"). The motion filed by the Respondent October 26, 2020, nonetheless, requests a "default judgment as to Respondent's claims against said Defendant [SCDE]." Judge Manning's Order filed January 13, 2021, did not adjudicate that motion. Instead, that motion was referred to the Master-in-Equity for adjudication.

On April 7, 2021, a hearing was held before Judge Joseph M. Strickland, who is the Richland County Master-in-Equity. During the hearing, Judge Strickland expressed doubt as to whether he was permitted by the Order of Reference to enter a default judgment as opposed to simply holding a damages hearing. Nonetheless, with his final Order on Damages, filed May 11, 2021, Judge Strickland did adjudicate the Respondent's motion for a default judgment. He heard and denied the Appellant SCDE's arguments against the entry of a default judgment, including the argument that Rule 55(e) precludes the entry of a default

judgment against a state agency where the Respondent failed to demonstrate his entitlement to a judgment as a matter of law. Judge Strickland also held a damages hearing where he received testimony from the Respondent. Ultimately, he issued a final Order on Damages, filed May 11, 2021. The Order entered a default judgment in the amount of $37,724.13 in favor of the Respondent and against the Appellant SCDE.

The Appellant thereafter filed a timely appeal to this Court.

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 trial judge." *Stark Truss Co., Inc. v. Superior Construction Corp*., 360 S.C. 503, 602 S.E.2d 99, 101 (Ct. App. 2004). "This decision will not be reversed absent an abuse of that discretion." *Id*. "An abuse of discretion occurs when the [circuit court's] ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565, 566 (1987).

Moreover, in evaluating the allegations of a Complaint for purposes a default judgment, only "well pled facts" are to be treated as true. *See*, *Masters v. Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194, 196 (1984) (defaulting party admits "facts well pleaded in complaint"); *State ex rel. Medlock v. Love Shop, Ltd*, 286 S.C. 486, 334 S.E.2d 528, 530 (Ct. App. 1985) ("entry of an order of default is an admission by the defaulting party of the well-pleaded allegations of the complaint"). In contrast, issues of law -- which are not "well pled facts" -- are for the Court and are reviewed *de novo*. *Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494, 498 (2014). As this Court has previously explained in a related context, "the court is required to presume all well pled facts, not propositions of law, to be true." *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 699 S.E.2d 699, 705 (Ct. App. 2010).

ARGUMENTS

I. The Respondent has not proven his entitlement to a judgment by default against a state agency per the requirements of Rule 55(e), SCRCP.

The trial court entered a default judgment against the Appellant SCDE, which is indisputably a state agency. *See*, S.C. Code Ann. § 1-30-10(A). However, a judgment by default may not be entered against SCDE pursuant to Rule 55(e), SCRCP, which provides that "[n]o judgment by default shall be entered against the State of South Carolina or an officer or agency thereof … unless the claimant establishes his claim to relief by evidence satisfactory to the Court." Rule 55(e), SCRCP. The trial court failed to properly interpret and apply Rule 55(e).

Rule 55(e) was adopted from the Federal Rules of Civil Procedure. There is no appellate opinion that applies Rule 55(e). In its recent decision in *Campbell v. City of North Charleston*, 431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020), the Court of Appeals did not directly address the application of Rule 55(e) because it was not an issue raised on appeal. However, the Court did note in the procedural history of the case that the Circuit Court had found Rule 55(e) to be inapplicable because the defendant was "not a state agency under Rule 55(e)." 848 S.E.2d at 791. *Campbell* is readily distinguishable because the defendant at issue in this case is a state agency.

Given the absence of governing law on a rule of civil procedure, the Supreme Court directs that courts seek guidance from case law interpreting and applying the

equivalent federal rule. In *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991), the Supreme Court states: "Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure." 404 S.E.2d at 201.

The federal equivalent rule is now codified as Rule 55(d), FRCP, although it was formerly Rule 55(e). Using essentially the same operative language of the state rule, the Federal rule states: "A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." Rule 55(d), FRCP. As the District Court in South Carolina has explained, "Rule 55(d) is intended to prevent the entry of default judgments against the United States for mere procedural missteps." *Burr v. United States*, 2010 WL 11674099, *3 (D.S.C. 2010). The District Court cited favorably to *Sun v. United States*, 342 F.Supp.2d 1120 (N.D. Ga. 2004), which ruled that "entry of default judgment against the United States will not be based on a failure to file an answer or responsive pleading." 342 F.Supp.2d at 1124. The District Court also cited to *Arevalo v. United States*, 2008 WL 3874795 (E.D. Pa. 2008), which ruled that Rule 55(d) "is intended to prevent entry of a default judgment against the United States for procedural flaws" and that "judgment cannot be entered against the government based solely on its failure to comply with civil rules." 2008 WL 3874795, *6. *See also*, *Moore v. United Kingdom*, 384 F.3d 1079,

1090, n.16 (9th Cir. 2009) (noting that Rule 55(e) is "interpreted as requiring district courts to reach the merits of a Respondent's claim before entering a default judgment against the government"). Rule 55(d), as previously codified as Rule 55(e), embodies the principle that it is contrary to public policy for a governmental entity to be held in default unless liability of the governmental may be proven on the merits. *See also*, *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996) ("Rule 55(e) rests on the rationale that the taxpayers at large should not be subjected to the cost of a judgment entered as a penalty against a government official which comes as a windfall to the individual litigant"). The Appellant SCDE submits that this federal case law interpreting the equivalent rule in the Federal Rules of Civil Procedure should be controlling.

Thus, Rule 55(e), by its very language, places the burden on the Respondent to "establish[] his *claim to relief* by evidence satisfactory to the Court." Rule 55(e), SCRCP. (Emphasis added). The Respondent need not only prove his relief, i.e., damages, but he is also required to demonstrate his "claim to relief," meaning he is required to show that he is entitled to judgment as a matter of law. The Respondent has made no such showing.

SCDE has presented the affidavit of Mary Hipp, the Director of the Office of Educator Services, to demonstrate that the SCDE has numerous meritorious defenses. Hipp explains that her office maintains records of educator experience credit, but that

"all educator experience must be submitted on an Experience Verification Form completed by the employer" and that "[i]t is the educator's responsibility to provide verification of educator experience to obtain credit." *See*, Hipp Aff., ¶ 4. She further attests that with respect to the Respondent, "the first request to add educator experience for the employment as an ISS Monitor was submitted by Lexington County School District One and received on June 26, 2019, … and the experience credit was added to Mr. Sullivan's certificate the following day." *See*, Hipp Aff., ¶ 7. Hipp explained that "[t]here is not indication in the certification record that Mr. Sullivan requested a review of the educator experience credit on file prior to the Lexington County School District One submitting the Experience Verification form in June 2019." *See*, Hipp Aff., ¶ 8. Based on that testimony, there is ample evidence that the Defendant SCDE was not negligent as alleged.

Additionally, at the damages hearing, the Respondent confirmed Mary Hipp's testimony. He testified that prior to June 2019, he had never submitted an Experience Verification Form to SCDE to add educator experience for his four years of employment with Lexington County School District One. (Tr. 56:17-20). He did not request that Human Resources with Lexington County School District One submit an Experience Verification Form until June 2019, because he was not aware of S.C. Code Regs. § 43-57.2. (Tr. 58-59). He learned of that regulation from a friend in 2019. (Tr. 58-59). And, once he learned of the regulation, he understood

that he needed to submit an Experience Verification Form. (Tr. 62). After the Experience Verification Form was submitted, the Respondent agrees that SCDE credited him with the additional years of educator experience within weeks. (Tr. 32).

In short, based on the Respondent's own testimony, he cannot show that SCDE was negligent in failing to document his years of experience or in failing to update his years of experience. SCDE did just that after receiving the Experience Verification Form completed by Lexington County School District One.

Instead, given his testimony, the Respondent's negligence claim is premised solely on his factual allegation – which is not in the Complaint – that he called SCDE and spoke to unidentified persons in 2010, and was not advised of S.C. Code Regs. § 43-57.2. (Tr. 56-58). The Plaintiff concedes that his alleged calls to SCDE occurred only in 2010 (Tr. 60-62), which thus demonstrates that the Plaintiff's claims against SCDE for acts or omission in 2010 are barred by the two-year statute of limitations under the Tort Claims Act. *See*, S.C. Code Ann. § 15-78-110. Moreover, as stated, the Plaintiff's claim is premised solely on the alleged failure by SCDE to advise him as to S.C. Code Regs. § 43-57.2, which is a law. There can be no disputing that regulations are laws. (Tr. 59-60). *See*, *Goodman v. City of Columbia*, 318 S.C. 488, 458 S.E.2d 531, 532 (1995) ("[r]egulations authorized by the legislature have the force of law"). Yet, as this Court has held, "[c]itizens are presumed to know the law and are charged with exercising reasonable care to protect their interests." *American*

Legion Post 18 v. Horry County, 381 S.C. 576, 674 S.E.2d 181, 185 (Ct. App. 2009). Thus, misrepresentations or even silence regarding a matter of law are not actionable as a negligence misrepresentation under South Carolina law. *See, Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869, 875 (2011) ("no action will generally lie for a misrepresentation as to a matter of law"). In other words, the failure to provide advice as to what the law requires is not actionable.[1]

In sum, Rule 55(e) provides that a default judgment cannot be entered against the State or its agencies without a showing that a plaintiff will prevail as a matter of law on the merits. Here, the Respondent has not shown that SCDE is actually liable as a matter of law. In fact, SCDE has demonstrated numerous meritorious defenses, including the absence of an actionable duty of care. Thus, where the Respondent cannot establish his claim to relief, Rule 55(e) requires the no judgment by default may be entered against SCDE. The default judgment should be reversed.

II. The Respondent's negligence claim fails to state a cause of action against the Appellant SCDE, and based on Supreme Court precedent, the rendering of a default judgment thereon is without authority of law.

In addition, and as a corollary to the requirements of Rule 55(e), SCRCP, the Respondent cannot demonstrate that his Fifth Cause of Action even states a cause of

[1] In *Quail Hill, LLC v. Richland County*, 387 S.C. 223, 692 S.E.2d 499, 508 (2010), the Supreme Court determined that the plaintiff's negligence claim "should be treated as solely one for negligent misrepresentation." The same is true here.

action upon which relief may be granted against the Defendant SCDE. South Carolina law provides that "if a complaint fails to state a cause of action, then rendering of a default judgment thereon is without authority of law and therefore reversible error." *Masters v. Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194, 196 (1984). "An objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a default." *Id*. *See also, Mutual Savings & Loan Assn. v. McKenzie*, 274 S.C. 630, 266 S.E.2d 423 (1980).

As discussed above, in his Complaint, the Respondent alleges only a negligence cause of action against the Appellant SCDE. The Respondent alleges that the SCDE breached its "duty to maintain and accurately report South Carolina teacher's credentials, including, but not limited to, a teacher's applicable years of experience." *See*, Complaint, ¶ 53. The Respondent alleges that this duty of care arises by regulation, specifically S.C. Code Regs. § 43-57.2, which states that an educator may receive "experience credit" by "verify[ing] full-time or half-time employment" in various categories of educational positions. *See*, Complaint, ¶ 18. Moreover, S.C. Code Regs. § 43-57 provides that "[t]he State Department of Education shall maintain records indicating the work experience for which persons are entitled." SCDE argues that the regulations on which the Respondent bases the duty of care give rise only to a "public duty," and as a result, the Respondent has failed to state facts sufficient to constitute a cause of action. In other words, SCDE

submits that S.C. Code Regs. § 43-57 does not give rise to a private right of action based upon application of the public duty rule.

This premise is well supported in the case law. The Supreme Court has recognized that "statutes which create or define the duties of a public office have the essential purpose of providing for the structure and operation of government or for securing the general welfare and safety of the public. Such statutes create no duty of care towards individual members of the general public." *Arthurs v. Aiken County*, 346 S.C. 97, 551 S.E.2d 579, 582 (2001). *See also*, *Platt v. CSX Transportation, Inc.*, 379 S.C. 249, 665 S.E.2d 631 (Ct. App. 2008). A plaintiff, therefore, has no right of action against a public officer or entity for breach of a duty owing to the public only, even though such plaintiff may have been injured by the breach of that public duty. *Summers v. Harrison Const.*, 298 S.C. 451, 381 S.E.2d 493 (Ct. App. 1989). "The public duty rule is a negative defense which denies an essential element of the plaintiff's cause of action: the existence of a duty of care to the individual plaintiff." *Arthurs*, 551 S.E.2d at 582. In other words, the public duty rule "is a rule of statutory construction, that is, a means of determining whether the legislative body that enacted the statute or ordinance intended to create a private cause of action for its breach." *Id.*

Additionally, the Appellant SCDE submits that, even if S.C. Code Regs. § 43-57 gives rise to a private right of action against SCDE, the Respondent still cannot

recover for simple negligence as has been alleged. In other words, even if the Respondent's allegations of negligence are deemed true because of the default, that does not allow for the Respondent to state a claim and recover damages. As discussed, the Respondent alleges that the Defendant SCDE is liable for failing to document four years of "educator experience credit" for the Respondent from 2006 to 2010 as part of the educator certification process. That claim falls within the scope of S.C. Code Ann. § 15-78-60(12), which exempts from liability "licensing powers or functions including, but not limited to, the … failure or refusal to issue … any … certificate, approval, … or similar authority except when the power or function is exercised in a grossly negligent manner." Accordingly, the SCDE can only be liable for gross negligence, but the Respondent has sued only for simple negligence. Thus, a claim for simple negligence, which is what has been pled, is not even actionable and, under the rationale of the Supreme Court in *Masters*, does not support the judgment by default that the Respondent entered in the trial court.

III. The Appellant SCDE established that good cause exists for setting aside the entry of default.

Rule 55(a), SCRCP, provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." "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 Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885, 888 (2009). 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 Respondent if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E.2d 499, 501-502 (Ct. App. 1989). Rule 55(c) is "liberally construed to promote justice and dispose of cases on the merits." *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E.2d 636, 638 (Ct. App. 1995).

The Appellant SCDE made a compelling showing of "good cause" to set aside the entry of default. SCDE presented the affidavit of Cathy Hazelwood, who is the Deputy Superintendent of Legal Affairs, who explains that the failure of SCDE to timely answer was inadvertent and resulted from the extraordinary circumstances encountered by SCDE personnel primarily due to the ongoing COVID-19 pandemic. As Hazelwood specifically attests:

> During this period of time -- from August through October 2020, the Division for Legal Affairs has been operating under less than normal circumstances due to the COVID-19 pandemic and the increased workload and stress that the pandemic has brought. Both myself and my legal assistant have been working primarily remotely, which has not allowed for the same level of communication and interaction on administrative matters

> that we are accustomed to. That has contributed, in my opinion, to the error that occurred with the handling of the Summons and Complaint in this case. In addition, the implementation of the CARES Act and developing protocols for and approving the re-opening of schools in August and September, among many other issues, have resulted in our focus being on these novel and unusual challenges rather than the typical administrative matters that are more routine during pre-pandemic times. These challenges have also contributed, in my opinion, to the error that occurred with the handling of the Summons and Complaint in this case.

See, Hazelwood Aff., ¶ 7. Based on this testimony and the Court's general awareness of the extraordinary circumstances presented during the pandemic, these unprecedented factual circumstances support a finding of "good cause" under Rule 55(c). *See*, *Oppenheimer v. City of Madiera*, 2020 WL 5106710, *4 (S.D. Ohio 2000) (finding "the default is a result of unprecedented circumstances rising from the COVID-19 pandemic").

Additionally, an assessment of the three *Wham* factors further demonstrates that SCDE has shown "good cause." The Order of Entry of Default was filed on October 29, 2020. According to Cathy Hazelwood, SCDE learned of the default on that same date and immediately forwarded the pleadings to the undersigned counsel. This Motion to Set Aside Entry of Default with supporting affidavits was filed within two business days. *See*, Hazelwood Aff., ¶¶ 6, 8.

As discussed at length above, SCDE has also demonstrated multiple meritorious defenses. To recap, based on the testimony of Mary Hipp, SCDE

never received an Experience Verification Form from the Respondent or from Lexington County School District One until June 2019, and SCDE promptly acted on that information and the experience credit was added to the Respondent's certificate at that time. That was also conceded by the Respondents at the damages hearing. Thus, that evidence arguably does not support a finding that SCDE was negligent in failing to document or maintain records of the educator experience credit which had never been submitted or verified by the Respondent or his prior employer. In addition, the allegations in the Complaint also show that the SCDE has a meritorious statute of limitations defense. The Respondent is complaining of alleged omissions occurring more than two years prior to the filing of his Complaint. The Respondent also alleges in his Complaint that he knew he was not getting sufficient educator experience credit in 2010, but he took no action to challenge that or seek a correction at that time. *See*, Complaint, ¶¶ 8-11. Finally, any alleged failure to advise the Respondent about the existence of S.C. Code Regs. § 43-57.2 is not actionable as a negligence misrepresentation under South Carolina law. *See, Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869, 875 (2011)

As for the third *Wham* factor, there is no legal prejudice to the Respondent by setting aside the entry of default. At the time of the hearing on the Motion to Set Aside Entry of Default, the case was still in its early stages. No substantial

discovery had yet to take place in the case.

Thus, based on the foregoing analysis under Rule 55(c), including consideration of the three *Wham* factors, the Appellant SCDE demonstrated "good cause" as required under Rule 55(c), SCRCP, to set aside the entry of default. The trial court abused its discretion in denying such relief under these unprecedented circumstances.

IV. The entry of a default judgment is premature based upon the *Frow* doctrine.

In the alternative, the Appellant SCDE argued in the trial court that the application of the *Frow* doctrine did not allow for the entry of a default judgment against the SCDE until the case is fully adjudicated against the Defendant RCSD. The trial court erred in rejecting without any analysis that precedent from the United States Supreme Court.

In *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552 (1872), the Supreme Court established a rule that when one of multiple defendants who is alleged to be jointly liable is in default, judgment should not be entered against that defaulting defendant until the case has been fully adjudicated against all other defendants. The purpose behind this policy is that "[w]hen co-defendants are similarly situated, inconsistent judgments will result if one defendant defends and prevails on the merits and the other suffers a default judgment." *Angelo Iafrate Construction,*

LLC v. Potashnick Construction, Inc., 370 F.3d 715, 722 (8th Cir. 2004), *citing Frow*, 82 U.S. at 554. "To avoid such inconsistent results, a judgment on the merits for the answering party should accrue to the benefit of the defaulting party." *Id.*

Many courts have held, based on *Frow*, that when a plaintiff alleges joint liability against multiple defendants, an entry of default as to some of the defendants is appropriate, but a *default judgment* should not be entered until the case has been decided with regard to all of the defendants. *See e.g., Hunt v. Inter–Globe Energy, Inc*., 770 F.2d 145, 147 (10th Cir. 1985); *Mori Seiki USA, Inc. v. McIntyre*, 2008 WL 577274 at *2 (N.D. Tex. 2008); *Raleigh Cycle Co. of America v. Edward Risha*, 1987 WL 11889, at *1 (S.D. Tex. 1987) ("Where one of multiple defendants is in default, as a general rule, a decree of default may be entered, but a judgment is withheld pending a decision on the merits as to the other defendants"); *Exquisite Form Industries, Inc. v. Exquisite Fabrics of London*, 378 F.Supp. 403, 416 (S.D.N.Y. 1974) ("When a default is entered against one defendant in a multi-defendant case, the preferred practice is for the court to withhold granting a default judgment until the trial of the action on the merits against the remaining defendants"). For example, the Third Circuit has stated:

> We believe that *Frow* stands for the proposition that if at trial facts are proved that exonerate certain defendants and that as a matter of logic preclude the liability of another defendant, the Respondent should be collaterally

> estopped from obtaining a judgment against the latter defendants, even though it failed to participate in the proceeding in which the exculpatory facts were proved.

Farzetta v. Turner & Newall, Ltd., 797 F.2d 151, 154 (3d Cir. 1986).

In the present case, the Respondent has sued SCDE and RCSD for the same damages, and he makes the same or similar allegations of negligence asserting that the Defendants' actions denied him the educator experience credit for the four years that he was employed by Lexington County School District One from 2006 through 2010. This is precisely the type of case where the *Frow* doctrine is applicable. Thus, no judgment should have been entered against the Appellant SCDE until the liability of all the Defendants is fully adjudicated. Based on this additional error of law, the default judgment should be reversed and the action should be remanded.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Education respectfully requests that the Court reverse the default judgment entered in favor of the Respondent Ammon L. "Treigh" Sullivan and remand with instructions that the default be set aside and the South Carolina Department of Education be allowed to file an answer and defend the Respondent's negligence claim on its merits. In the alternative, under the Frow doctrine, the default judgment should be reversed and the action should be remanded for further proceedings consistent therewith.

Respectfully submitted,

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December 20, 2021

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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Ammon L. "Treigh" Sullivan, ... Respondent,

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Of which, South Carolina Department of Education, is ..... Appellant.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant, does hereby certify that service of the **Initial Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** was made upon all counsel of record by email only at the below email address this the 20th day of December 2021, as follows:

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s/ Andrew F. Lindemann

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December 20, 2021

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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RE: Ammon L. "Treigh" Sullivan v. Richland County School District One and South Carolina Department of Education
Appellate Case Number: 2021-000539
Civil Action Number: 2020-CP-40-3674
Our File Number: 79.20406

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, please find enclosed for filing the **Initial Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. In accordance with Section (d)(1) of this same order, I am hereby serving copies on all counsel of record by email only.

If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Ryan K. Hicks, Esquire *(w/ Enclosures, Via Email Only)*