

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

R. Knox McMahon, Circuit Court Judge

Case No. 2012-2122487

Mariko Marie Clack,

Respondent,

vs.

Eddie Arnold Smith, d/b/a the Lawn Doctor,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
RESPONDENT’S STATEMENT OF THE CASE	1
RESPONDENT’S STATEMENT OF FACTS	4
STANDARD OF REVIEW	7
<u>RESPONDENTS ARGUMENT I</u>	
The Honorable Trial Judge correctly determined that Allstate failed to comply with the provisions of S.C. Code Ann. Sect. 38-77-160, by waiving its right to timely enter an appearance and defend in the name of the “at fault” Defendant (Appellant’s Argument I, II, III, IV-Appellants Brief pp. 1-8)	8
a. Response to Allstate’s Claim there was no “default”	9
b. Allstate was properly served and failed to respond as provided by S.C. Code Sect. 38-77-160, <i>Additional uninsured motorist coverage; underinsured motorist coverage</i>	14
c. Allstate, an excess UIM insurer, is not entitled to rely on the timely “Notice of Appearance” filed by State Farm’s attorneys as the primary UIM insurer and is not authorized to act as the attorney for the individual Defendant Smith.	15
<u>RESPONDENT’S ARGUMENT II</u>	
The Honorable Trial Judge correctly determined that Allstate failed to carry its burden to show “excusable neglect” under Rule 60(b), SCRCPP, the only basis actually stated in its motion to be allowed <i>to vacate any judgment in this matter and allowing the filing of a late Answer</i> or to carry its burden to show “good cause” under Rule 55(c), SCRCPP. (Appellant’s Argument IV)	19
a. Allstate failed its burden to show “excusable neglect” under Rule 60(b), SCRCPP, the only basis actually mentioned in its motion.	19
b. Allstate failed its burden to show “good cause” under Rule 55(c), SCRCPP.	22
CONCLUSION	22

TABLE OF AUTHORITIES

Ammons v. Hood, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986)	7
Askins v. Firedoor Corp. of Florida, 281 S.C. 611, 316 S.E.2d 713 (Ct.App.1984)	8
Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995)	10, 12, 16 17, 18
Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (2009)	8, 9, 19, 20
Citizens' Bank v. Heyward, 135 S.C. 190, 133 S.E. 709 (1925)	16
City of Chester v. Addison, 277 S.C. 179, 284 S.E.2d 579 (1981)	8
Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App 2003)	12, 13, 15
Dixon v. Besco Engineering, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995)	21, 22
Ex Parte Allstate v. Trixier, 339 S.C. 337, 461 S.E.2d 769 (1995)	17, 18
Harbor Island Owner's Ass'n v. Preferred Island Prop., Inc., 369 S.C. 540, 633 S.E.2d 497 (2006)	8
Hill v. Dotts, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001)	16, 17
Ledford v. Pennsylvania Life Insurance Co., 267 S.C. 671, 230 S.E.2d 900 (1976)	15
Louden v. Moragne, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997)	10, 18
Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004)	8
Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1997)	8, 16
Nationwide Mutual Insurance Co. v. Rhoden, 398 S.C. 393, 728 S.E.2d 477 (2012)	16
Perry v. Heirs at law of Gadsen, 357 S.C. 42, 590 S.E.2d 502 (Ct. App. 2003)	8
Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981)	8
Richardson as Personal Representative of the Estate of Dominik Richardson v. P.V. and Harbor Inn, Inc., 383 S.C. 610, 682 S.E.2d 263 (2009)	14, 20, 21
Ricks v. Winrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987)	9, 20
Roche v. Young Bros., Inc. of Florence, 318 S.C. 207 S.E.2d 897 (1995)	14, 15

Summer Place of Myrtle Beach v. Knight, 298 S.C. 241, 379 S.E.2d 724 (Ct. App. 1989)	8
Sundown Operating Co., Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009)	20
Thompson v. Hammond, 299 S.C. 116, 382 S.E.2d 900 (1989)	8
Top Value Homes, Inc. v. Harden, 319 S.C. 302, 460 S.E.2d 427 (Ct. App. 1995)	9
Walsh v. Woods, 371 S.C. 319, 638 S.E.2d 85 (Ct. App.2006)	9
Wham v. Shearson Lehmon Bros.; Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989)	21
Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)	9
Williams v. Vanvolkenberg, 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994)	15
 <u>S.C. STATUTES</u>	
S.C. Code Sect. 38-5-70, Appointment of director as attorney for service of Process	2, 11, 15
S.C. Code 38-5-90, Additional requirements for issuance of certificate or license to foreign or alien insurer; grounds for revocation or suspension of license	18
S.C. Code Sect 38-77-160, Additional uninsured motorist coverage; underinsured motorist coverage	2-7, 10-18, 20
 <u>S.C. STATUTES INCORPORATING TERM “DEFAULT”</u>	
§ 36-2A-516. Effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over	10
§ 36-2A-519. Lessee's damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods	10
§ 36-9-601. Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes	11
§ 36-9-609. Secured party's right to take possession after default	11
§ 36-9-610. Disposition of collateral after default	11

§ 37-5-111. Cure of default	11
<u>OTHER AUTHORITIES</u>	
South Carolina Rules of Civil Procedure 4(d)(3)	14
South Carolina Rules of Civil Procedure 7(b)	8, 9, 19
South Carolina Rules of Civil Procedure 11(b)	12
South Carolina Rules of Civil Procedure 55(c)	15, 19-22
South Carolina Rules of Civil Procedure 59(e)	9, 10, 19
South Carolina Rules of Civil Procedure 60(b)	9, 15, 18-22
South Carolina Rules Governing the Practice of Law-407, Rules of Professional Conduct: Client-Lawyer Relationship	13
Rule 1.16. (d) 0110 Declining Or Terminating Representation	13
Rule 1.2. Scope of Representation and Allocation Of Authority Between Client and Lawyer	14
<u>DEFINITION “DEFAULT”</u>	
Black's Law Dictionary 428 (7th ed. 1999)	11
26a C.J.S. Default	11
Oxford English Dictionary 370-71 (2d ed. 1989)	11
The American Heritage Dictionary of the English Language (4th ed.2000)	10
Webster's Third New International Dictionary Unabridged, (2002)	11
11A Words and Phrases 277 (1971)	11

RESPONDENT'S STATEMENT OF THE CASE

On July 13, 2009, the Plaintiff/Respondent Mariko Clack was a passenger in a Ford Explorer operated by Megan Ashley McNeil that was involved in a "t-bone" collision with a vehicle operated by Eddie Arnold Smith, d/b/a The Lawn Doctor, the putative Appellant, who was insured by State Farm Mutual Automobile Insurance Company with minimum limits of liability coverage. The collision caused the Explorer to roll over resulting in serious and permanent injury to Ms. Clack. Mr. McNeil, Megan's father and the owner of the Ford Explorer, was also insured by State Farm Mutual Automobile Insurance Company, hereafter State Farm, with a policy that provided underinsured motorist (UIM) coverage. Respondent Clack was insured by Allstate Insurance Company with a policy that also provided underinsured motorist (UIM) coverage. Allstate Insurance Company, hereafter "Allstate" is the actual party in interest in this appeal.

The Plaintiff/Respondent Clack filed suit against the "at fault" driver Smith on December 3, 2010. (R. pp. 14-20) The summons and complaint were served on Smith and on the South Carolina Dept. of Insurance, the statutory designated agent for service of State Farm as the primary UIM carrier for the McNeil-Ford Explorer vehicle. (R. pp. 21-22) In response to Clack's suit a law firm appeared and on December 22, 2010, and filed an answer on behalf of Smith pursuant to the provisions of his State Farm automobile liability policy. The answer filed by State Farm on behalf of Smith denied liability and alleged the negligence of McNeil, the driver of the Ford Explorer. (R. pp. 25-27) The same law firm also appeared on behalf of State Farm as the UIM carrier for McNeil and filed a "Notice of Appearance" claiming to preserve all rights of State Farm pursuant to its policy of underinsured (UIM) insurance and "all rights which

it may have pursuant to South Carolina Code Section 38-77-160, (1976 as amended)". (R. pp. 23-24)

On Sept. 27, 2011, Respondent Clack filed a Motion For Summary Judgment supported by her affidavit and various materials including the deposition of the "at fault" driver Smith in which he admitted his sole responsibility for the collision. (R. pp. 37-53) On Oct. 26, 2011, the Court granted summary judgment on all issues of liability. (R. pp. 6-11)

Respondent Clack also served the summons and complaint on Allstate as an "excess" UIM carrier. On January 24, 2011, the S.C. Dept of Insurance accepted service of the pleadings on behalf of Allstate pursuant to S.C. Code Ann. Sect. 38-5-70, Appointment of director as attorney for service of process.¹ (R. pp. 29-30) On April 12, 2011, Respondent filed an Affidavit of Default attesting "That UIM carrier Allstate has filed no answer or response - - - as allowed by S.C. Code Sect. 38-77-10" (R. 31) S.C. Code Sect. 38-77-160, Additional uninsured motorist coverage; underinsured motorist coverage²

On November 8, 2011, Allstate filed a "Motion To Vacate Default And Allow Late Answer" stating: *as counsel for the Defendant and Allstate Insurance Company, will move before the Court for an Order vacating any judgment in this matter and allowing the filing of a*

¹ § 38-5-70. Appointment of director as attorney for service of process
Every insurer shall, before being licensed, appoint in writing the director and his successors in office to be its true and lawful attorney upon whom all legal process in any action or proceeding against it must be served - - - any lawful process against it which is served upon this attorney is of the same legal force and validity as if served upon the insurer - - -.

² § 38-77-160. Additional uninsured motorist coverage; underinsured motorist coverage
- - -
No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. *The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and thirty days after service of process on it in which to appear.* - - -. (emphasis added)

late answer. - - - based upon the fact that the Defendant's failure to answer was based on excusable neglect." (R. p. 54-56) The motion was accompanied by an answer that was filed on the same date. The answer denied all liability and alleged an unavoidable accident and also alleged the contributory negligence of Respondent/passenger Ms. Clack which Allstate's answer claimed was imputed from Ms. McNeil, the allegedly negligent Ford Explorer driver. (R. pp. 57-60)

On or about Jan. 30, 2012, a consent "Order Substituting Counsel" was signed by State Farm's attorney and Allstate's attorney that purported to relieve State Farm's attorney "of any obligation and responsibility to serve as counsel for the Defendant" and to appoint Allstate's attorney "to serve as counsel for the Defendant". (R. p. 12-13) The order of substitution did not include a consent by the "at fault" driver Smith agreeing to the substitution or indicate that Smith was ever aware of the alleged substitution of his representation.

On February 2, 2012, the Court heard argument on Allstate's "Motion To Vacate Default And Allow Late Answer" based on its plea of "excusable neglect" and the answer it filed on behalf of Smith alleging various "meritorious defenses" to the complaint. Allstate's argument to the Court sought to set aside both the entry of the affidavit of default of its failure to appear as provided by S.C. Code Sect 38-77-160 and the Court's prior order granting summary judgment as to all issues of liability. (R. pp. 82, ll. 11-15; 83, ll. 2-25) Prior to the hearing the Respondent Clack filed a memorandum in opposition to Allstate's motion that included Smith's deposition and his admissions of sole responsibility for causing the accident and prior order Order Granting Partial Summary Judgment on all issues of liability. (R. pp. 61-76) The Memorandum and attachments also included correspondence to Allstate's adjuster that had been handling the case and notice to the adjuster on Feb. 1, 2011, that service of the summons and complaint had been

made on Allstate by service on the S.C. Dept. of Insurance. (R. pp. 66-74; 86, ll. 7-17; 89, ll. 10-14; 92, ll. 13-25; 3, ll. 1-2)

At the hearing Allstate's attorney presented an affidavit from Allstate employee Bryan Thompson, a "front line supervisor", attested to by Mr. Thompson on Feb. 1, 2012, the day prior to the motion hearing, stating that Allstate had no record that they had ever received the suit papers from the S.C. Department of Insurance. Mr. Thompson explained "I am not saying Allstate did not receive the papers from the Department of Insurance, but we have looked and have found no record". The affidavit went on to state without any basis that "This is a disputed red light case where liability is in dispute". (R. pp. 98-99)

On June 19, 2012, the Court entered its Order denying Allstate's Motion. The Court concluded that Allstate's failed to show "good cause" or "excusable neglect" or a "meritorious defense" and that granting such motion would cause prejudice to the Plaintiff. (R. pp. 2-3) The Court also addressed Allstate's argument presented at the motion hearing that State Farm's timely appearance as a UIM carrier in accord with the provisions of S.C. Code Ann. Sect. 38-77-160 also preserved Allstate's right to appear without Allstate having to comply with the provisions of the statute. The Court concluded that such claim was unprecedented and without any legal authority or factual justification. (R. p. 2) No motion for reconsideration pursuant to Rule 59, SCRPC was filed by either party.

RESPONDENT'S STATEMENT OF FACTS

The sole basis of Allstate's "Motion To Vacate Default And Allow Late Answer" and to set aside the Court's prior order granting summary judgment as to all issues of liability was "upon the fact that the Defendant's failure to answer was based on excusable neglect" and its accompanying and contemporaneously filed answer alleging the so called "meritorious defenses"

on behalf of the at fault driver Smith. (R. pp. 55-59) At the motion hearing on February 2, 2012, Allstate's attorney argued that even if the court found it was in "default", having failed to comply with SC Code Sect 38-77-160, it's right to proceed as Plaintiff's "excess" UIM carrier and to take over the representation of Smith, apparently without notice or his consent, was preserved based on the answer filed by State Farm's attorneys pursuant to the "duty to defend" provisions of Smith's auto liability policy and State Farm's timely UIM appearance. (R. pp. 82, ll. 11-25; 83, ll. 1-25; 84, ll. 1-25) That novel position and the new grounds for relief were apparently based on Allstate's last minute attempt to "substitute" the representation of Smith with State Farm's attorney. (R. pp. 12-13) That arrangement, without notice to Smith or with his consent, is unexplainable. Respondent Clack had no notice of the "substitution" arrangement between Allstate's attorney and State Farm's attorney when Allstate's motion was called for hearing on February 2, 2012. (R. pp. 77-97)

Allstate first appeared in this case on November 8, 2011, after the court had already issued its Order Granting Partial Summary Judgment as to all liability issues on October 26, 2011, and after the "at fault" driver Smith was deposed on October 21, 2011, at the offices of State Farm's attorneys who were representing him pursuant to the conditions of his liability policy and who also represented State Farm interests as the primary UIM carrier. (R. pp. 6-11)

It is fundamental that Allstate's appearance on November 8, 2011, was solely based on its contractual relationship with the Respondent as her "excess" UIM carrier and pursuant to its statutory right as provided by S.C. Code Ann. Sect. 38-77-160. As previously noted, in support of its motion Allstate filed an answer on behalf of Defendant Smith with whom it had no relationship and made new defense allegations not even contained in the original answer filed by State Farm. (R. pp. 55-59) It is a mystery how Allstate could acquire any "good faith" basis for

these new wildly unsupportable and sham defense claims after the Court had entered its Order Granting Partial Summary Judgment and after Defendant Smith had already admitted his sole negligence and testified at deposition that the accident happened after he was stopped at the stop light at the intersection of Pine St. and Hwy. 302 in the Town of S. Congaree and after looking down pulled forward into the intersection without checking the signal again. He also testified that when he appeared at City Court that he admitted and agreed that he had entered the intersection under a red signal and had always accepted responsibility for the accident. (R. pp. 105, 108) When asked about the basis of the allegations made in the answer filed on his behalf by State Farm that denied liability and alleged the negligence of Ms. McNeil, the Ford Explorer driver, he stated that he did not recall previously seeing the document but was certain that he never claimed that Ms. McNeil caused the accident and that he did not recall ever having spoken with any attorney about the defenses that were raised in his name. (R. pp. 106-107)

The Court's order granting summary judgment and the court record including the Smith deposition were available to Allstate and were also referenced in the Lexington Cty. Clerk's "on line" history of the case when Allstate filed its motion and answer on November 8, 2011. It is a mystery how Allstate presumed to speak for Smith where there is no indication that Allstate's attorneys or representatives had ever spoken with him regarding his representation or ever had any communication with him at all either regarding the fault allegations in the original answer filed by State Farm or the newly invented allegations contained in the Allstate answer. (R. pp. 23; 12-13)

The record indicates that Allstate either ignored or failed to consult the court record and extensive materials it was provided directly from the Plaintiff or through their own investigation or by consultation with State Farm's attorneys regarding the cause of the accident and the extent

of Respondent's severe injuries. (R. pp. 66-76; 106) Instead, Allstate persisted in arguing its unsupported claims even at the hearing of its motion on February 2, 2012, when it presented the Court the affidavit of Allstate employee Thompson that continued the sham allegations and swore without any basis in fact that "This is a disputed red light case where liability is in dispute". (R. pp. 98-99) It is difficult to understand how Allstate could make such a baseless argument to the Court on February 2, 2012. (R. pp. 80, ll. 14-25; 81, ll. 1-4)

The fundamental question presented in this case is whether a UIM carrier can ever waive or "default" its right "to appear and defend" as provided by SC Code Sect. 38-77-160 and whether there are any limits on how far a UIM carrier can go in attacking its own insured in pursuit of its interests. The second issue presented is whether Allstate's motion to vacate "any judgments in this matter" including the Court's prior order granting summary judgment was before the Court and properly denied.

STANDARD OF REVIEW

The decision as to whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge and the trial judge's findings will not be overturned on appeal absent a clear showing of an abuse of discretion, error of law or lack of evidentiary support. Harbor Island Owner's Ass'n v. Preferred Island Prop., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006); Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989); Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162-163, 375 S.E.2d 321, 322-323 (Ct. App. 1997) citing Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981), Ammons v. Hood, 288 S.C. 278, 341 S.E.2d 816 [297 S.C.163] (Ct. App. 1986) "As a general rule, appellate courts will be bound by [the factual findings of a lower court made in response to motions preliminary to trial] where there has been conflicting evidence or where the

findings are supported by evidence and not clearly wrong or controlled by error of law." City of Chester v. Addison, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981); Askins v. Firedoor Corp. of Florida, 281 S.C. 611, 615, 316 S.E.2d 713, 715 (Ct.App.1984)

A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. The decision of whether to grant or deny a Rule 60(b) motion is within the sound discretion of the trial court. On review, the appellate court is limited to determining whether the trial court abused its discretion in granting or denying such a motion. Perry v. Heirs at law of Gadsen, 357 S.C. 42, 46-47, 590 S.E.2d 502, 504 (Ct. App. 2003).

Except in a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 510-511, 598 S.E.2d 712, 715 (2004). Rule 7(b), SCRCP, provides that a motion, unless made during a hearing or trial in open court, shall be made on application in writing and "shall state with particularity the grounds therefore". Where no amended written motion or oral motion followed by a written motion was made, the motion before the Court is limited to the grounds stated in the original written motion. Summer Place of Myrtle Beach v. Knight, 298 S.C. 241, 243, 379 S.E.2d 724, 725 (Ct. App. 1989). When an issue is raised but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion. Chastain v. Hiltabidle, 381 S.C. 71, 673 S.E.2d 826, 829 (2009)

RESPONDENT'S ARGUMENT I

The Honorable Trial Judge correctly determined that Allstate failed to comply with the provisions of S.C. Code Ann. Sect. 38-77-160 and waived/defaulted its right to timely enter an appearance and defend in the name of the "at fault" Defendant Smith.

(Appellant's Argument I, II, III, IV- Appellants Brief pp. 1-8)

a. Response to Allstate's claim there was no "default". (Appellant 's Brief pp. 4-7, 11, 12)

The Order of the Circuit Judge addressed Allstate's various arguments. "First, Allstate argues that the Answer provided in the name of the Defendant by State Farm Insurance Company, the primary UIM carrier, is sufficient to prevent default as to Allstate. Alternatively, Allstate argues that it had "good cause" for its late Answer and should therefore be relieved from default." (R. pp. 1-2) The Judge's gracious reading of Allstate's motion and assessment of the issues exceeded the actual grounds of the written motion. (R. p. 55) Top Value Homes, Inc. v. Harden, 319 S.C. 302, 460 S.E.2d 427, 429 (Ct. App. 1995); Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987) Allstate presented no subsequent amended motion and neither party motioned pursuant to Rule 59(e) SCRPC. Accordingly, the issues before this Court are limited to the actual decision of the Court below and not the embellished issues and arguments of Allstate that are presented at brief. Chastain v. Hiltabidle, 381 S.C. 508, 513, 673, S.E.2d 826, 829 (2009) citing Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court) and Walsh v. Woods, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion). Appellant's characterization of the motion it filed with the Circuit Court is incorrect. (Appellants Brief, pp. 9-12) The motion clearly states Allstate's counsel moved for an order "vacating any judgment in this matter - - - based upon the fact that Defendant's failure to answer was based upon excusable neglect". That language is literally from Rule 60(b), SCRPC. The present attempt to disavow the grounds of its own motion for its tactical argument on appeal without having filed a Rule 59(e) motion, if Allstate felt there was actually a mistake by the Circuit Judge, is not properly before the Court on appeal.

Appellant's characterization of the Circuit Judge's action as an "erroneous construction of the relief requested" is mistaken. (Appellant's Brief, p. 10)

There was no misunderstanding by the Circuit Judge or Allstate that the answer of the Defendant Smith was timely filed by State Farm's attorneys and had not been withdrawn and that summary judgment as to all issues of liability had been entered based on Smith's deposition testimony admitting his sole responsibility for the collision. The "default" or "waiver" by Allstate is its failure to comply with the provisions of S.C. Code Ann. Sect. 38-77-160, "[t]he insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear". Louden v. Moragne, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997) (citing Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995) construing the plain meaning requirement for service according to S.C. Code Ann. Sect 38-77-160) The Appellant's brief (pp. 4-6) urges the Court to a very different understanding of the Circuit Judge's Order and conclusion to explain its failure to comply with the provisions of SC Code Sect. 38-77-160. (R. p. 19, ll. 1-21) Allstate's argument is based entirely on its construction of the term "default" and attempt to attach the term to the Defendant Smith's representation by State Farm rather than Allstate's failure to comply with the provisions of the UIM statute. As noted above (Respondent's Brief, supra, p. 2), the Plaintiff's Affidavit of Default attested "That UIM carrier Allstate has filed no answer or response - - - as allowed by S.C. Code Sect. 38-77-160". (R. p. 31) The term "default" is broadly defined and certainly includes all forms of civil liability.³ *The American Heritage*

³ § 36-2A-516. Effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over

§ 36-2A-519. Lessee's damages for nondelivery, repudiation, default, and breach of warranty in regard to accepted goods

Dictionary of the English Language 475 (4th ed. 2000) (defining “ default” as the “failure to perform a task or fulfill an obligation - - .”); *Webster's Third New International Dictionary Unabridged* 590 (2002) (“ to fail to perform a duty” (def. 2)); 4 *Oxford English Dictionary* 370-71 (2d ed. 1989) (“failure to act; neglect; *spec. in Law*, failure to perform some legal requirement or obligation” (def. 3.a.); Bryan A. Garner, *Black's Law Dictionary* 428 (7th ed. 1999) (“The omission or failure to perform a legal or contractual duty”). Also see 11A Words and Phrases 277 (1971); 26a C.J.S. Default. The Plaintiff’s Affidavit of Default that was entered by the clerk referring to Allstate only addressed Allstate’s failure to file an answer or response as allowed by S.C. Code Sect. 38-77-10. (R. p. 31) The issue in the case is not about the bogus answer filed by Defendant Smith’s State Farm’s attorneys or the order granting summary judgment that was argued and entered before Allstate ever appeared in the case. Allstate is mistaken that it was entitled to notice of the deposition of Defendant Smith or the notice of hearing of the motion for summary judgment at which time Defendant Smith was represented by his State Farm attorneys and Allstate had not made an appearance. (Appellant’s Brief, pp. 3, 12) The issue is whether Allstate’s failure to timely “appear and defend” is excusable based on the grounds stated in its motion and the evidence presented in the untimely and deficient “Thompson Affidavit”. Allstate’s argument that the Circuit Judge allegedly erred in ruling on and denying its motion to

§ 36-9-601. Rights after default; judicial enforcement; consignor or buyer of accounts, chattel paper, payment intangibles, or promissory notes

§ 36-9-609. Secured party's right to take possession after default

§ 36-9-610. Disposition of collateral after default

§ 37-5-111. Cure of default

set aside “prior judgments” including the Order granting summary judgment is further addressed at Respondent’s Brief, pp.19-20.

Allstate’s sophistry as to whether the Circuit Judge was confused or mistaken as to the status of Defendant Smith’s answer as opposed to Allstate’s failure to appear and its “default” is further belied by the fact that within a few days before argument on its motion, Allstate’s attorney and the attorney for State Farm signed a consent “Order Substituting Counsel” by which *IT IS HERBY ORDERED AND DECREED that J. Austin Hood be, and he hereby is relieved of any obligation and responsibility to serve as counsel for the Defendant in the captioned matter; and IT IS FURTHER ORDERED that S. Jahue Moore be, and he hereby is appointed to serve as counsel for the Defendant in the captioned matter.* (R. p. 12-13) Allstate had no confusion as to whether Defendant Smith was adjudged or claimed to be in “default” at any time. Nothing in the statute or authorities cited by Appellant authorize such a procedure. Allstate’s “right” to appear and defend derive solely from the provisions of S.C. Code Sect. 38-77-160 and not from the attempted attorney client relationship orchestrated by Allstate to avoid its default/waiver that ineffectively attempted to pass Smith’s defense and State Farm’s UIM appearance to Allstate, without obtaining the consent of Smith. Rule 11(b), SCRPC, Change of Attorney. The Order Substituting Counsel literally claiming an attorney client relationship between Allstate’s attorney and the Defendant Mr. Smith is mistaken and improper without Smith’s informed consent to such matter and further emphasizes the failure by Allstate to comply with the provisions of S.C. Code Section 38-77-160. The proper role of an attorney representing a UIM insurer was addressed in the case of Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003) where the Court of Appeals, with citation to Broome v. Watts, supra, p. 10, held that an attorney appearing on behalf of the UIM carrier did not have an attorney client relationship with the

Defendant as was attempted by Allstate in this case. (R. Order Substituting Counsel, 1/31/12)

The Crawford Court noted:

In addition to the lack of case law and statutory support for the creation of an attorney-client relationship in this situation, we find there are ethical considerations that would also prohibit it. - - First, if a relationship exists, the attorney has some degree of control over the client and the client, in turn, has some input in the outcome of the litigation. See Rule 1.2(a), RPC, Rule 407, SCACR ("A lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."). Secondly, under the normal situation, a plaintiff's attorney is not permitted to have direct contact with the defendant, but instead, must serve all pleadings and motions upon the defendant's attorney. See Rule 4.2, RPC, Rule 407, SCACR ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."). - - - Moreover, if an attorney-client relationship were permitted in this instance, there exists a problem with dual representation. Specifically, the question becomes whether the UIM carrier's attorney can simultaneously represent the insurance company and a named defendant who has no direct relationship with the UIM carrier and whose interests are separate and distinct". Id. 589 S.E.2d 209. Also see S.C. Rules Of Professional Conduct. IV. Rules Governing the Practice of Law-407, Rules of Professional Conduct: Client Lawyer Relationship. See Rule 1.16(d) Declining or Terminating Representation.

The Crawford Court warned against the very practices engaged in by Allstate and State Farm in this case by their attempt to substitute State Farm's attorney client relationship with Smith without his consent, a matter that was argued to the Court at the Allstate motion hearing.

(R. pp. 89-93)

To avoid the predicament alleged by Southern, it is incumbent upon a UIM carrier's attorney to inform the named defendant of the parameters of his or her representation. Specifically, the attorney should emphasize that he or she directly represents the carrier and treat the named defendant essentially as a witness. We note that this procedure does not leave the named defendant without direct representation. Contractually, the named defendant's liability carrier remains obligated to the insured even after the liability limits have[356 S.C. 401] been paid. See Cobb v. Benjamin, 325 S.C. 573, 584, 482 S.E.2d 589, 594 (Ct.App.1997) (finding the language of section 38-77-160 "giving the UIM carrier the right to assume control of the defense for its own benefit is ... consistent with the recognition that the liability carrier who has paid its limits no longer has the same stake in the outcome, even though the contractual obligation to its insured to defend is ongoing"). Id. 401 S.E.2d 210.

Allstate and State Farm failed to heed the warning of the Court offered in the Crowford case and disregarded both the rights the Defendant Smith and Respondent Clack.

b. Allstate was properly served and failed to respond as provided by S.C. Code Sect. 38-77-160, Additional uninsured motorist coverage; underinsured motorist coverage.

(Appellant's Brief, pp. 8, 9)

The essence of Allstate's motion and argument to the Circuit Judge was that its failure to timely appear as provided by the statute should be excused and the proper statutory service of the summons and complaint be disregarded based on the February 1, 2012, affidavit of Allstate employee Bryan Thompson, a "front line process expert". (Appellate Brief, p. 8) In opposition, the record before the Circuit Court also included the evidence and admissions that an Allstate adjuster monitoring the case since 2009 had actual notice on or about Feb. 1, 2011, that Allstate had been served with the summons and complaint by service on the S.C. Dept. of Insurance. (R. pp. 84, ll. 10-18; 86, ll. 7-17) The Circuit Judge correctly determined that Allstate was properly served with the summons and complaint on January 24, 2011, as provided S.C. Code Ann. Sect. 38-5-70, and failed to timely respond and appear as provided by S.C. Code Ann. Sect. 38-77-160. The untimely Thompson affidavit simply stated that Allstate had "no record" of receiving the summons and complaint but "I am not saying Allstate did not receive the papers from the Department of Insurance, but we have looked and have found no record". (R. pp. 98-99; 29-30) In opposition to this "can't find the papers" affidavit is the regularity of the statutory service process that was followed and the information directly provided to Allstate's adjuster from Nov. 7, 2009-Feb. 1, 2011. (R. pp. 61-64) As explained in Richardson v. P.V., Inc., 383, S.C. 610, 615, 682 S.E.2d 263, 266, 267 (2009) citing Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995), Rule 4(d)(3), SCRPC provides that service upon a corporation may be made "by delivering a copy of the summons and complaint to an officer,

managing or general, or to any other agent authorized by appointment or by law to receive service of process.” In this case Allstate has appointed the Director of the South Carolina Department of Insurance as its attorney for service of process. S.C. Code Ann. Sect. 38-5-70. There is absolutely no evidence or issue presented by Allstate that suggests that the Director and Department did not perform its function as attorney for service of process. A Plaintiff need only show compliance with the rules. When the rules are followed it is presumed service was proper. Roche v. Young Bros., Inc., supra., 318 S.C. at 211, 456 S.E.2d at 900. Even assuming there had been some delay in the procedure followed at the Department of Insurance, the Affidavit Of Default was not filed until April 12, 2011, 78 days after service was accomplished. Allstate’s unsupported inference of an error by its “attorney for service” at the Department of Insurance is unfounded and in any event Allstate well understands it is bound to the Director’s acceptance of service making its “can’t find the papers” affidavit irrelevant. Roche v. Young Brothers, Inc., supra. (Losing a summons and complaint within the corporation is not a ground to set aside a default judgment) A “mistake” of an attorney is not a “mistake, inadvertence and excusable neglect” within the meaning of Rule 55 and Rule 60, SCRPC. Mitchell Supply Company vs. Gaffney 297 S.C. 160, 162, 375 S.E.2d 321, 324, citing Ledford v. Pennsylvania Life Insurance Co., 267 S.C. 671, 230 S.E.2d 900 (1976) Also see: Williams v. Vanvolkenberg, 312 S.C. 373, 440 S.E.2d 408, 409 (Ct. App. 1994) (negligence of attorney imputed to the defendant).

c. Allstate, an excess UIM insurer, is not entitled to rely on the timely “Notice of Appearance” filed by State Farm’s attorneys as the primary UIM insurer and Allstate is not authorized to act as the attorney for the individual Defendant Smith. (Appellant’s Brief, pp. 5-8)

The UIM statute, S.C. Code Ann. Sect 38-77-160, provides that Allstate, an “excess” UIM insurer, has “the right to appear and defend” in the name of the underinsured motorist in an action and to protect its interests if it is properly served as strictly provided by the statute.

Presumably the remaining provisions of the statute also apply to Allstate and specifically the preceding sentences from the same paragraph of the statute including “The insurer has a right to appear and defend in the name of the underinsured motorist in any action which may affect its liability **and has thirty days after service of process on it in which to appear**”. (emphasis added) Sect 38-77-160. The pertinent language is unambiguous. As recently stated by Justice Toal in Nationwide Mutual Insurance Co. v. Rhoden, 398 S.C. 393, ___, 728 S.E.2d 477, 484 (2012) (Note 4) “If legislative intent is clear as reflected in the statutory language, any public policy as promulgated by this Court must give way because ” [t]he primary source of the declaration of the public policy of the state is the General Assembly [, and] the courts assume this prerogative only in the absence of legislative declaration.” Citizens' Bank v. Heyward, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925).” It is axiomatic that any “right” may be waived in a civil or criminal proceeding and that default is the consequence of not timely exercising the “right” that was provided Allstate, a sophisticated insurer, by the statute. As stated in Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) “It is always a matter of regret that a party should not have his day in court. However, - - - [where] the appellant was duly served with the summons and complaint - - -, [i]t was his duty to answer the complaint, - - - [Therefore,] [h]e must suffer the consequences of his failure to answer.”

The reported cases in this state involving UIM insurers typically insist on strict application of the statute. In Broome v. Watts, supra, p. 10, USAA, the UIM carrier of the Broomes, filed a timely Notice of Appearance and Motion for Intervention following initiation of suit against Defendant Watts. The “Notice of Appearance” filed by USAA in Broome “reserving any and all rights and objections and defenses” closely resembles the Notice of Appearance filed by State Farm in this case “STATE FARM - - - specifically preserves and does not waive

any rights pursuant to its policy - - - [and]- - - which it may have pursuant to S.C. Code Section 38-77-160 (1976 as amended)” (R. p. 23) The notice of appearance in Broome and by State Farm in this case are typical of intervention documents filed by UIM insurers in similar actions. In this case however Allstate filed no such “Notice of Appearance” and instead on November 8, 2011, filed a new answer on behalf of Smith containing its “new allegations” and claiming to actually represent Defendant Smith.

In the Broome case, the plaintiffs and liability carrier Nationwide and defendant Watts entered into a settlement agreement in which Nationwide agreed to pay its liability limits to the plaintiffs in exchange for a covenant not to execute against its insured Watts or Nationwide but provided it would proceed with the action to determine their damages in a non-jury trial. After Nationwide paid its liability limits to the plaintiffs, UIM insurer USAA, which had timely entered its Notice of Appearance, assumed the defense of the action and demanded a jury trial. A jury verdict was finally rendered and USAA was granted a set-off for the liability policy limits paid by Nationwide. The plaintiffs appealed both the set off and the decision to allow USAA to demand a jury trial. The Broome Court held that because USAA had timely exercised its rights according to the provisions of the UIM statute it was entitled to a setoff and had timely exercised its right to demand a jury trial that followed from its right to take over the defense after making a timely appearance. The Court held that the UIM insurer’s compliance with the statute “allows the UIM carrier to defend “in the name of the underinsured motorist.” Although the UIM carrier “steps into the shoes” of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist”. 319 S.C. at 341, 461 S.E.2d at 48. The Broome Court’s plain meaning interpretation of S.C. Code Ann. Sect. 38-77-160 was followed in Ex Parte Allstate v. Trixier, 339 S.C. 202, 528 S.E.2d 769 (Ct App. 2000). There the Court held that

the Plaintiff's attempt to serve the UIM carrier by delivering the summons and complaint to the Dept of Insurance after a verdict was issued and while post trial motions were being considered did not comply with the strict requirements of Sect. 38-77-160 and that the late service did not provide the UIM carrier the opportunity "to protect itself during the early stages of a lawsuit". See Louden v. Moragne, supra, p. 10. Broome, Ex Parte Allstate and Louden all speak to the UIM carrier's opportunity to defend following compliance with the provisions of the statute and do not support the proposition urged by Allstate in this case that it has a conjunctive right emanating from State Farm's timely compliance with the UIM statute and no duty of its own to comply with the statute and enter a timely appearance and to assert its own "right" to protect itself as an excess UIM carrier. Appellant has presented no authority in support of its argument to the Circuit Judge and this Court that supports a contractual right or statutory procedure by which the timely UIM notice and appearance by State Farm could be passed off to "excess" UIM carrier Allstate without complying with the statutory requirement to timely enter an appearance. The notion that Allstate does not have to comply with the statute and should be excused from complying with the statutory procedure also flies in the face of its agreement to abide by the laws and statutes of the State of South Carolina as a condition of its license. S.C. Code Ann. Sect. 38-5-90.⁴

⁴ § 38-5-90. Additional requirements for issuance of certificate or license to foreign or alien insurer; grounds for revocation or suspension of license

(c) The insurer pays all taxes and performs all duties required by law.

- - -

(f) The insurer has employed one or more persons with adequate experience and training to manage properly its business and affairs relating to its policies in South Carolina.

RESPONDENT'S ARGUMENT II

The Honorable Trial Judge correctly determined that Allstate failed to carry its burden to show “excusable neglect” under Rule 60(b), SCRCP, the only basis actually stated in its motion to vacate any judgment in this matter and allowing the filing of a late answer or to carry its burden to show “good cause” under Rule 55(c), SCRCP. (Appellant’s Argument IV, Appellants Brief pp. 8-13)

a. Allstate failed its burden to show “excusable neglect” under Rule 60(b), SCRCP, the only basis actually mentioned in its motion. (Appellant’s Brief, pp. 9-12)

Allstate’s argument in support of the alleged right to ape on State Farm’s appearance was never presented in its Rule 60(b) “excusable neglect” motion, the only motion filed with the Circuit Court. Rule 7(b), SCRCP, provides that a motion, unless made during a hearing or trial in open court, shall be made on application in writing and “shall state with particularity the grounds therefore”. When an issue is raised but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion. (See Respondent’s Brief, supra. p. 9) Despite Allstate’s failure to make a proper motion to include the grounds by which it now contends that it was entitled to appear without complying with the statutory requirement, the Court addressed the matter in its order by concluding “Allstate does not present, nor can this Court find, any case or reason why Allstate should be allowed to attach itself to and subsequently benefit from the procedural diligence of a wholly separate company” (R. p.2)

Appellant’s argument here that claims the Circuit Judge misconstrued its motion and should not have considered and denied the motion to vacate “any judgments in this matter” apparently depends on Allstate’s new argument that it apparently abandoned that aspect of the motion. (Appellant’s Brief pp. 9-13) That “new argument” was not addressed to the Circuit Judge in a Rule 59(e) motion following his order and it is not properly presented on appeal.

Hiltabidle, supra, 381 S.C. 513, 673 S.E.2d 829. As explained by the Circuit Judge “Allstate’s motion implicates both the entry of default governed by Rule 55(c) and the Court’s order of summary judgment on issues of liability, governed by Rule 60(b)”. (R. p. 3) The Circuit Judge properly denied Allstate’s motion to set aside the Order Granting Partial Summary Judgment.

In addressing Allstate’s motion and argument the Circuit Judge weighed the factors for showing “excusable neglect” under Rule 60(b) and gratuitously also considered Allstate’s deficient motion as if it had properly been made for “good cause” under Rule 55(c). The Court’s Order noted that the same factors act independently under Rule 60(b) and as factors for considering good cause under Rule 55(c) but that “The standard for granting relief - - - under Rule 60(b) is more rigorous than the good cause standard established by Rule 55(c).” id. citing Ricks v. Winrauch, 293 S.C.372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987))” (R. Order, 06/20/12, p. 3) Richardson as Personal Representative of the Estate of Dominik Richardson v. P.V. and Harbor Inn, Inc., supra, 383 S.C. 616, 682 S.E. 2d 266 citing Sundown Operating Co., Inc. v. Intedge Indus., Inc., 681 S.E.2d 885 (S.C.2009).(The standard for granting relief from an entry of default is good cause under Rule 55(c), SCRPC, while the standard is more rigorous for granting relief from a default judgment under Rule 60(b), SCRPC). The factors considered by the Circuit Judge included the timing of Allstate’s motion for relief, the reason for failure to act, whether the defendant has a meritorious defense and the degree of prejudice to the plaintiff if relief is granted. (R. pp. 1-3) The evidence presented by Allstate in support of its motion was limited to the irrelevant Thompson affidavit and Allstate’s new answer setting forth its unfounded claims of a meritorious defense.

The Circuit Judge thereafter determined Allstate had not presented “excusable neglect” under the standard of Rule 60(b)(1) or “good cause” under the standard of Rule 55(c) to set aside

its waiver/default of its statutory right to appear and take over the defense of the case. (R. pp. 1-3) The Circuit Judge also correctly held that Allstate's Motion and Answer came more than nine months after service was made and that Allstate took no action until after summary judgment was granted, and that the only explanation offered was the "Thomson Affidavit" that the Court correctly concluded "Critically, Allstate does not claim it did not receive the proper documents from the Department of Insurance, but only that it has found no record of receipt." (R. pp. 3; 98-99) Furthermore, the evidence presented in opposition to Allstate's motion included direct notice to Allstate's adjuster that suit was filed, that State Farm had paid its coverage limits and that Allstate had been served. (R. pp. 61-64) The Circuit Judge also correctly determined that Allstate had failed to present a meritorious defense. As noted previously, (supra pp. 6-7) when Allstate appeared in the case on November 8, 2011, and filed its motion and accompanying answer and much later the affidavit of its employee Thompson denying liability and asserting various affirmative defenses, it was on notice that such statements were a sham, that the "at fault" driver Smith had admitted his sole responsibility for the accident and that the Court had granted summary court on all issues of liability. The Circuit Judge also correctly determined that granting Allstate's Motion to set aside summary judgment and appear and argue its sham defenses would work substantial prejudice to Respondent Clack.

Finally, the so called "Wham" factors do not indicate Allstate is entitled to relief from its waiver of right to appear. Wham v. Shearson Lehman Brothers, Inc., 298 S.C. 462, 381 S.E.2d 94 (2011) As noted by the Court in Richardson as Personal Representative of the Estate of Dominik Richardson v. P.V. and Harbor Inn, Inc., supra, at 383 S.C. 613, 682 S.E. 2d 266 [the Wham factors include the delay in time before filing the default, the existence of a meritorious defense and prejudiced if the entry of default is lifted.] Dixon v. Besco Engineering, Inc., 320

Wham factors include the delay in time before filing the default, the existence of a meritorious defense and prejudiced if the entry of default is lifted.] Dixon v. Besco Engineering, Inc., 320 S.C. 174, 463 S.E.2d 636, 639 (Ct. App. 1995) (“Wham” does not require the trial judge to make specific findings for each factor if there is sufficient evidentiary support on the record) The Court considered and addressed each of the “Wham” factors in its Order.

b. Allstate failed its burden to show “good cause” under Rule 55(c), SCRPC. (Appellant’s Brief pp. 8-9)

Allstate also argued its “good cause” grounds to the Court despite the fact its motion did not raise that ground or move to amend its motion to include such grounds. (See Respondents Brief, p. 10) Despite Allstate’s failure to make a proper motion under Rule 55(c), SCRPC, the Court addressed the matter in its order as if the motion had been made, presumably because of the overlapping factors to be considered under Rule 60(b) and Rule 55(c). Based on the Circuit Judge’s consideration and determination of the factors mentioned above, the Judge properly determined that Allstate had failed to show “good cause” to be allowed to appear and proceed as provided by S.C. Code Sect 38-77-160. (R. p. 3)

CONCLUSION

- (1) The summons and complaint were timely and properly served on the Director of the South Carolina Department of Insurance, the statutory designated attorney for service of Allstate Insurance Company.
- (2) Allstate’s motion was made more than nine months after service of the summons and complaint and more than two years after it had notice and specific details of the Plaintiff’s claim and the extent of Ms. Clack’s injuries and expected UIM involvement.

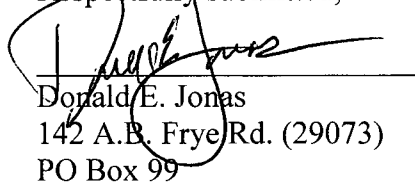
(4) Allstate presented no authority or reason why it should be allowed to attach itself to and benefit from the timely Notice of Appearance filed by State Farm, the primary UIM insurer.

(5) The Circuit Judge properly determined that Allstate had not presented “excusable neglect” under the standard of Rule 60(b)(1), SCRPC or “good cause” under the standard of Rule 55(c), SCRPC to set aside its waiver/default of its statutory right to appear and take over the defense of the case.

For these reasons, Respondent respectfully requests that the Court affirm the Circuit Judge’s decision and remand the case for trial and further proceedings.

April 1, 2013

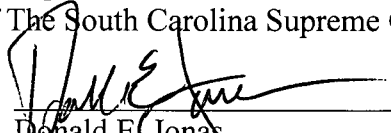
Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Respondent's Final Brief complies with Rule 211(b), S.C.A.R. and the August 13, 2007 Order of The South Carolina Supreme Court.



Donald E. Jonas
ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

R. Knox McMahon, Circuit Court Judge

Case No. 2012-2122487
(2010 CP 32-05211)

Mariko Marie Clack,

Respondent,

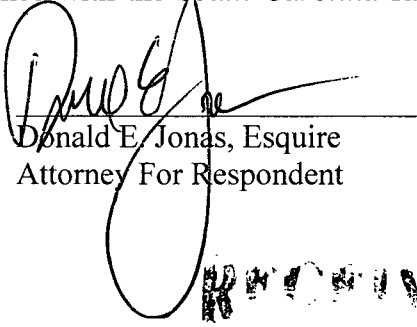
vs.

Eddie Arnold Smith, d/b/a the Lawn Doctor,

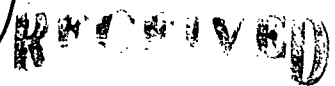
Appellant.

PROOF OF SERVICE

I certify that I have served one copy of the Respondent's Final Brief on the Appellant's Attorney as shown below, by delivery of said documents to the attorney for the Respondent at the address listed below on April 1, 2013, all in accordance with the *South Carolina Rules of Civil Procedure*.


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APR 02 2013

SC Court of Appeals