IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2008-IA-01049-SCT

AMERICAN STATES INSURANCE COMPANY — APPELLANT

VS.

ELLIS R. ROGILLIO — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF AMITE COUNTY, MISSISSIPPI

BRIEF OF APPELLANT AMERICAN STATES INSURANCE COMPANY

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

AMERICAN STATES INSURANCE COMPANY **APPELLANT**

VS. **NO. 2008-IA-01049-SCT**

ELLIS R. ROGILLIO **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

a. American States Insurance Company, Appellant;

b. W. Wright Hill, Jr., and Jan F. Gadow, Page, Kruger & Holland, P.A., Counsel for Appellant;

c. Ellis R. Rogillio, Appellee;

d. Hollis McGehee, Whittington & McGehee, Counsel for Appellee;

e. Honorable Forrest A. Johnson, trial judge.

This, the 6th day of November, 2008.

W. Wright Hill, Jr.
Jan F. Gadow

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STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that oral argument will significantly aid this Court's decisional process and that oral argument is warranted because the entry of default judgment on the facts presented is effectively a directed verdict in favor of Ellis Rogillio ("Rogillio") not only on coverage, when the policy clearly and unequivocally provides none for Rogillio's claims, but on damages as well. The strength of Appellant's defense on the merits of Appellee's claim, as well as the significant prejudice to the Appellant, warrant oral argument. M.R.A.P. 34 (a) & (b).

STATEMENT OF THE ISSUE

This is an appeal from the trial court's Order denying American States' Motion to Set Aside Clerk's Entry of Default and/or Default Judgment. Despite that the subject insurance policy provides no coverage for the claims stated in Rogillio's Complaint, the trial court entered Default Judgment in favor of Rogillio on the issue of coverage/liability. This Court granted American States' Petition for Interlocutory Appeal, which asserted that a substantial basis exists for a difference of opinion with the trial court's disposition of American States' Motion to Set Aside. The issue now before this Court is whether the trial court erred in denying American States' Motion to Set Aside the Default.

I. STATEMENT OF THE CASE

This is an appeal from the Circuit Court of Amite County, which originated with the Complaint filed by Ellis R. Rogillio ("Rogillio") on March 9, 2007, against American States Insurance Company ("American States") and others. (C.P. 1-11) Rogillio then filed an Application for Entry of Default on July 17, 2007; the Clerk of Court entered the Default on that same date. (C.P. 12, 15) Rogillio's Motion for Entry of Default Judgment was also filed on July 17, 2007 and the trial court entered Default Judgment the following day (on the issue of coverage/liability, but not damages). (C.P. 16-20)

American States filed its Answer and Affirmative Defenses on August 6, 2007 (C.P. 21-25) and its Motion to Set Aside Default Judgment on August 23, 2007. (C.P. 26-36) Following a hearing, the trial court entered an Order denying American States' Motion to Set Aside Default Judgment on May 29, 2008. (C.P. 173; T. 3-28) This Court subsequently granted American States' Petition for Interlocutory Appeal and to Stay Proceedings by Order entered on July 23, 2008. (C.P. 175)

II. STATEMENT OF THE FACTS

At all times relevant to this matter, Ellis Rogillio was an employee of J & N Timber, Inc. (C.P. 151-52) William Netterville owned both J & N Timber, Inc., and another separate and distinct legal entity named Clover Hill, LLC. (C.P. 151-52) On March 20, 2004, Rogillio was involved in a motor vehicle accident which resulted in severe bodily injuries, upon information and belief, as a result of the negligence of an uninsured motorist. (C.P. 3-7) At the time of this accident, Rogillio was in the course and scope of his employment with J & N Timber, Inc., but was driving a 2002 Ford-150

owned by Clover Hill, LLC. (C.P. 152-53) The 2002 Ford-150 was insured by policy number 01CG21189120, a commercial automobile insurance policy issued by American States to Clover Hill, LLC, as the named insured. (C.P. 26, 125-28) The policy provided $25,000.00 per person UM limits. (C.P. 26, 125-28) Rogillio was a permissive user of the 2002 Ford-150 at the time of the subject accident, therefore he was an "insured" pursuant to the American States Clover Hill, LLC policy and entitled to UM benefits under said policy. (C.P. 26, 126) Consequently, shortly after the accident, American States paid the $25,000.00 UM policy limits under the Clover Hill, LLC policy to Rogillio. (C.P. 26-27, 125-28)

Another American States commercial automobile insurance policy, bearing policy number 01-CC-705786-30, was in effect at the time of the accident. This second American States policy named J & N Timber, Inc., as the named insured, listed six (6) insured vehicles, and included UM coverage of $100,000.00 per person. (C.P. 27, 37-124, 125-28) For purposes of UM coverage, the Declarations Page indicates that this policy provides coverage to "Symbol 7" automobiles; "Symbol 7" automobiles are defined by the policy as "Specifically Described Autos" and further defined as "only those autos described in Item Three of the Declarations for which a premium charge is shown . . . ." (C.P. 38, 46, 50) The "Schedule of Covered Autos" on the Declarations Page, which lists the vehicles insured under this policy, identifies six (6) vehicles, specifically a 2004 Ford F-150, a 2001 Ford Expedition, a 1998 Ford Ranger, a 2004 Ford Pickup, a 2003 Ford Crown Victoria Sedan, and a 2003 Lincoln Towncar Sedan, but not the 2002 Ford-150 truck which Rogillio was operating at the time of the subject

accident. (C.P. 38, 46) The J & N Timber, Inc. policy defines an "insured" for purposes of UM coverage as the named insured (J & N Timber, Inc.) and any guest passenger in or permissive user of a vehicle insured under the subject policy. (C.P. 68)

This J & N Timber, Inc. policy included an attached "Drive Other Car" Endorsement ("DOC Endorsement"), bearing Endorsement No. CA-99-10-10-01, which provided coverage over and above that of the original policy, but only to certain named individuals. (C.P. 71) This DOC Endorsement, with an effective date of January 11, 2004, is specifically entitled "DRIVE OTHER CAR COVERAGE – BROADENED COVERAGE FOR NAMED INDIVIDUALS", and consistent with the original policy, provides that the Named Insured is "J&N Timber, Inc.", and not Ellis Rogillio. (C.P. 71) The DOC Endorsement states that "any auto you hire, borrow, or don't own is a covered 'auto' for Liability Coverage while being used by any individual named in the Schedule . . .", thus extending coverage for not only the Symbol 7 autos listed in the policy, but also to include any other vehicle being used. (C.P. 71) However, such extended coverage only applies to specifically named individuals. The "Schedule" of Named Individuals on the J & N Timber, Inc. policy only includes the names "William B. Netterville and Vicki Netterville", but not "Ellis Rogillio". (C.P. 71)

Nonetheless, Rogillio made a claim for UM benefits under the J & N Timber, Inc. policy. American States first received notice of Rogillio's claim for UM coverage from the J & N Timber, Inc. policy on or about April 10, 2006. (C.P. 126) Thereafter, on or about April 11, 2006, American States contacted Rogillio's counsel to discuss this claim. Over the next several months, American States or its coverage counsel communicated

with Rogillio's counsel, advised Rogillio's counsel of its coverage position, and denied Rogillio's claim for UM benefits under the J & N Timber, Inc. policy. (C.P. 126-28) Rogillio's counsel was at all times aware of American States' denial of coverage for Rogillio's claim. (C.P. 128)

On or about March 14, 2007, Keith Anderson, a representative of American States, received a telephone call from Bryan Berry of Co-Defendant BI-County Insurance Agency, who advised that Rogillio had filed suit against the agency and American States. (C.P. 127) As American States had not yet been served with a copy of the Complaint, Anderson requested that Berry provide him with a courtesy copy. (C.P. 127) After receiving a courtesy copy of Rogillio's Complaint from Berry on or about March 15, 2007, Anderson contacted Rogillio's counsel to discuss the suit. (C.P. 127) It is undisputed that during that conversation, Anderson clearly advised Rogillio's attorney that after Rogillio had served American States, American States would enter an appearance, defend this matter, and contest coverage. (C.P. 127-28)

On August 2, 2007, counsel for Co-Defendant Mississippi Farm Bureau Mutual Insurance Company contacted American States' counsel and advised that Rogillio had obtained an Entry of Default and Default Judgment against American States. (C.P. 29) American States immediately investigated the matter to determine if it had actually been served and, if so, why it had failed to file an Answer. (C.P. 29) This investigation revealed that Rogillio had obtained service of process upon CT Corporation, American States' registered agent, who subsequently sent a copy of the Summons and Complaint to American States' Home Office in Seattle, Washington; however, the Claims Support

Staff in Seattle, Washington mistakenly placed the Summons and Complaint in the Rogillio - Clover Hill, LLC policy claim file, rather than placing it in the Rogillio - J & N Timber, Inc. policy claim file. (C.P. 29-30, 128) Because there was no evidence of service in the J & N Timber, Inc. policy claim file, when Anderson saw the Complaint in the Clover Hill, LLC policy claim file, he was still under the belief that it was the courtesy copy he had previously received from Berry and not an actual served copy. (C.P. 30, 128) American States immediately filed an Answer and Affirmative Defenses on August 6, 2007, then a Motion to Set Aside Entry of Default and/or Default Judgment on August 23, 2007, asserting simple mistake, inadvertence, and clerical error as good cause for its failure to answer in a timely fashion. (C.P. 21-25, 26-36)

III. SUMMARY OF THE ARGUMENT

This Court has long espoused a three-pronged test for use when determining whether to set aside default judgments, to wit: the nature/legitimacy of defendant's reasons for default, existence of colorable defense to the merits, and the nature/extent of prejudice to plaintiff if the default judgment is set aside. All three prongs of the balancing test used in determining whether to set aside a default judgment pursuant to M.R.C.P. 60(b) weigh in favor of American States. First, the facts in the record reveal that American States did not intentionally ignore the Court's rules or disregarded service of process. Instead, its failure to answer Rogillio's Complaint in a timely fashion was caused by an inadvertent clerical error. Next, and most importantly, the subject policy language clearly does not provide coverage for Rogillio's UM claim; therefore, American States has a complete defense to Rogillio's claim. The trial court erred in overlooking

and wholly negating this valid policy language when it denied American States' Motion to Set Aside. And third, Rogillio will suffer no prejudice whatsoever if this Court sets aside the default judgment, but American States would suffer extreme prejudice if Rogillio is allowed to benefit from a default judgment imposing coverage under a policy which clearly provides none. Moreover, by failing to set aside the default judgment for good cause shown, for accident or mistake, or for other reasons justifying relief, the trial court failed to exercise its discretion within the boundaries provided by Rules 55 and 60, M.R.C.P. This Court must reverse the trial court's Order denying American States Motion to Set Aside Default and render an Order setting aside the default judgment on coverage.

Additionally and alternatively, Rogillio's Entry of Default and Default Judgment are void as a matter of law and must be set aside. The sworn evidence in the record is undisputed that American States appeared and indicated its intent to defend Rogillio's Complaint; therefore, American States was entitled to three (3) days notice of Rogillio's Application for Entry of Default, pursuant to M.R.C.P. 55. Rogillio, however, provided no notice to American States; therefore, the Default is void as a matter of law and this Court must reverse.

IV. LEGAL ARGUMENT

A. THE LOWER COURT ERRED IN OVERLOOKING AND WHOLLY NEGATING VALID AND ENFORCEABLE CONTRACT LANGUAGE IN THE SUBJECT INSURANCE POLICY WHEN IT DENIED, CONTRARY TO MISSISSIPPI LAW, AMERICAN STATES' MOTION TO SET ASIDE CLERK'S ENTRY OF DEFAULT AND/OR DEFAULT JUDGMENT.

1. *American States Has Good Cause for its Default and a Colorable Defense to the Merits of the Claim, while Rogillio will not be Prejudiced if the Default is Set Aside.*

This Court has long supported a three-prong balancing test for courts to consider in determining whether to set aside a default judgment pursuant to M.R.C.P. 60(b). ***Capital One Services, Inc. v. Rawls,*** 904 So. 2d 1010, 1015 (¶ 13) (Miss. 2003) (citing ***Stanford v. Parker***, 822 So. 2d 866, 887-88 (Miss. 2002), ***McCain v. Dauzat***, 791 So. 2d 839, 842 (Miss. 2001)). Courts must consider (1) the nature and legitimacy of the defendant's reasons for default, (2) whether the defendant has a colorable defense to the merits of the claim, and (3) the nature and extent of prejudice which may be suffered by the plaintiff if the judgment is set aside. ***McCain,*** at 843 (¶ 10). Where a defendant shows that he has a meritorious defense, this Court has "encouraged trial courts to vacate default judgments." ***Allstate Ins. Co. v. Green***, 794 So. 2d 170, 174 (Miss. 2001) (quoting ***Bailey v. Ga. Cotton Goods Co.***, 543 So. 2d 180, 182 (Miss. 1989)). *See also* ***Stanford v. Parker***, 822 So.2d at 887-88 (¶ 6). Also, where there is reasonable doubt as to whether the default judgment should be set aside, the doubt falls in favor of setting aside the default judgment and allowing the case to go forward for a decision on the merits. ***McCain***, 791 So.2d at 843 (¶ 10). While the decision to set aside a default judgment is charged to the trial court's discretion[1], this discretion must be exercised in accord with M.R.C.P. 55(c) and 60(b). ***Williams v. Kilgore***, 618 So.2d 51, 55 (Miss. 1992) (citing ***Pointer v. Huffman***, 509 So. 2d 870, 875 (Miss. 1987);

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1 However, since American States would be foreclosed from presenting any evidence of coverage/liability at the lower court ordered trial on damages only, this default judgment is akin to a summary judgment; therefore, this Court may employ a *de novo* standard of review. ***City of Jackson v. Presley,*** 942 So. 2d 777, 781 (¶ 7) (Miss. 2005).

Guar. Nat'l Ins. Co. v. Pittman, 501 So. 2d 377, 388 (Miss. 1987)). The trial court's failure to consider the correct factors constitutes a reversible abuse of discretion. ***State Highway Com'n v. Hyman,*** 592 So. 2d 952, 956 (Miss. 1991). Any error in the trial court's discretion should be in favor of setting aside default judgments and trial courts should give serious consideration to the importance of litigants having a trial on the merits. ***Clark v. City of Pascagoula,*** 507 So. 2d 70, 77 (Miss.1987) (citing ***Bryant, Inc. v. Walters,*** 493 So.2d 933, 937 n.3 (Miss.1986)).

a. Good Cause Exists for American States' Default Because its Failure to Answer on Time was the Result of Simple Negligence and/or Clerical Error Rather than an Utter Disregard for Service of Process or Indifference.

At all times herein, American States acted in good faith. Upon receipt of a courtesy copy of the Complaint which had been served upon Co-Defendant BI-County Insurance Agency on or about March 15, 2007, Anderson of American States contacted Rogillio's counsel to discuss the suit. At that time, it is undisputed that Anderson specifically advised Rogillio's counsel that once Rogillio had served American States, American States intended to assign defense counsel, defend this matter, and continue its denial of coverage to Rogillio. (C.P. 127-28)

As stated in the Affidavit of Keith Anderson, Rogillio did obtain service on CT Corporation, American States' registered agent, and CT Corporation subsequently forwarded that Summons and Complaint to American States' Home Office in Seattle, Washington. However, when the Summons and Complaint were received in that office, the claims support staff mistakenly placed the Summons and Complaint in the wrong claims file, which was a simple mistake given that Rogillio had made two separate UM

claims, arising out of the same accident, against both the American States Clover Hill, LLC policy and the American States J & N Timber, Inc. policy. When Anderson saw the Complaint in the Clover Hill, LLC, claims file, he thought it was just the courtesy copy he had previously received from Berry and was unaware of the need to answer it at that time. (C.P. 125-28)

As in ***International Paper Company v. Basila,*** 460 So.2d 1202, 1204 (Miss. 1984), this is not an instance where the defendant intentionally ignored the Court's rules or disregarded service of process. Instead, failure to recognize that the served copy of the Complaint was in the wrong claims file was an inadvertent clerical error and, given the fact of two UM claims by Rogillio, arising out of the same accident, but on two different American States policies, such a clerical error is easily understandable. This prong weighs in favor of setting aside the default judgment.

b. American States has a Colorable Defense on the Merits of This Claim.

This second factor outweighs the other two and this Court encourages trial courts to vacate default judgments where "'the defendant has shown that he has a meritorious defense.'" ***Allstate Ins. Co. v. Green,*** 794 So. 2d 170, 174 (Miss. 2001) (quoting ***Bailey v. Georgia Cotton Goods Co.,*** 543 So. 2d 180, 182 (Miss.1989)). *See also* ***Clark v. City of Pascagoula***, 507 So.2d 70, 77 (Miss. 1987); ***Shannon vs. Henson***, 499 So.2d 758, 763 (Miss. 1986); ***Bryant, Inc. v. Walters***, 493 So.2d 933, 937 (Miss. 1986). In order to satisfy this credible defense prong, the defendant must show facts,

not conclusions, and must do so by affidavit or other sworn evidence. ***Rush v. North Am. Van Lines, Inc.***, 608 So. 2d 1205, 1210 (Miss. 1992).

American States most definitely has a colorable defense on the merits of Rogillio's claim for UM benefits from the American States J & N Timber, Inc. policy, to wit: *the plain language of the policy provides that Rogillio is not an "insured" for purposes of UM coverage under this policy.* The vehicle which Rogillio was driving at the time of the accident was insured under a separate American States policy issued to Clover Hill, LLC; the UM benefits provided under the Clover Hill, LLC policy have already been paid to Rogillio. Rogillio's Complaint now seeks UM benefits from the J & N Timber, Inc. policy; however, neither the vehicle in question nor Rogillio were insured under the American States policy issued to J & N Timber, Inc.

The J & N Timber, Inc. policy defines an "insured" for purposes of UM coverage as the named insured (J & N Timber, Inc.) and any guest passenger in or permissive user of a vehicle insured under the subject policy. (C.P. 68) For purposes of UM coverage, this policy provides coverage to, specifically, a 2004 Ford F-150, a 2001 Ford Expedition, a 1998 Ford Ranger, a 2004 Ford Pickup, a 2003 Ford Crown Victoria Sedan, and a 2003 Lincoln Towncar Sedan, none of which were involved in the subject accident. (C.P. 46) The 2002 Ford-150 truck which Rogillio was driving was *not* one of the vehicles insured by this policy. In sum, it is undisputed that Rogillio was not a named insured under the J & N Timber, Inc. policy and he was not a guest passenger in or permissive user of any listed vehicle insured under that policy; thus, Rogillio is not an

"insured" for purposes of UM coverage under the American States J & N Timber, Inc. policy.

The DOC Endorsement to this J & N Timber, Inc. policy does nothing to diminish American States' colorable lack-of-coverage defense. Under the original American States J & N Timber, Inc. policy, coverage is provided to persons only while using one of the six specific vehicles insured under that policy. The purpose of the DOC Endorsement is to extend coverage to persons named in the Schedule when they are occupying *any* vehicle, not just the six vehicles listed on the original J & N Timber, Inc. policy. However, only those persons specifically named on the DOC Endorsement are entitled to this extended coverage. The "Schedule" for the subject DOC Endorsement names only "William B. Netterville and Vicki Netterville", not "Ellis Rogillio". (C.P. 71) Because Rogillio is not listed on the DOC Endorsement, he is not an "insured" thereunder.

Rogillio's contention that the DOC Endorsement for the subject American States policy extends coverage to him and that he is an insured under the subject policy for purposes of UM coverage is based on an erroneous conclusion. Prior to filing his complaint, Rogillio requested a copy of the J & N Timber, Inc. policy from American States. American States complied with that request and provided Rogillio with a certified copy of the J & N Timber, Inc. policy with certain documents attached. The first is the fully completed DOC Endorsement form naming the Nettervilles as recipients of the broadened coverage when in any vehicle, which is a valid endorsement to the policy. (C.P. 71) The second document attached to the certified copy of the policy is an

incomplete copy of the DOC Endorsement form, accidentally attached. (C.P. 41) While this second, incomplete form does show an effective date of January 11, 2004 and names J & N Timber, Inc., as the named insured, no persons or entities are listed in the Schedule or in the space provided for "Names of Individuals" to be covered by the endorsement. (C.P. 41) There is also no reference to any attached documents or information which might supplement or complete this form.

Also accidentally attached to the certified copy of the policy, because it is not a part of the policy, is a letter to the "Dear Valued Policyholder" which provides a list of the employees of J & N Timber, Inc., who American States considered when issuing the policy and evaluating its risk. That letter lists the names of all J & N Timber, Inc., employees, including Rogillio. (C.P. 43)

Rogillio argued that this letter is actually an exhibit or attachment to the second, incomplete DOC Endorsement provided with the policy and that it is intended as the Schedule of Named Individuals to be covered under the DOC Endorsement. He argued that because Ellis Rogillio is listed in the letter as a J & N Timber, Inc., employee, he is now a Named Insured on the subject DOC Endorsement and thus the subject American States J & N Timber, Inc. policy and an "insured" for purposes of UM coverage. However, the employees named in the letter are not identified as "Named Insureds" on or under the subject policy, nor are they listed in the Schedule of Persons as individuals to be insured under the DOC Endorsement.

First, this document is clearly not part of a policy or policy application, but a separate and subsequent letter written to the named insured, J&N Timber, Inc., simply

to confirm those persons who would potentially be using a scheduled insured vehicle so that American States could evaluate and assess its risk and the premium to be charged for insuring that risk. For obvious reasons, the number of drivers and their driving records/histories are important to American States' determination of what the risk of exposure is and the premium to be charged for insuring that risk. This document does not contain any title or notation indicating that it is a "Schedule of Named individuals", nor does it contain any other reference or notation tending to show that it is an attachment or exhibit to the DOC Endorsement. (C.P. 43) The DOC Endorsement states at the bottom of the first page that it is page 1 of 2 and at the bottom of the second page that it is page 2 of 2 and there are no notations or references on the DOC Endorsement itself indicating that there are any attached exhibits or documents. (C.P. 41-42) The letter which contains Rogillio's name is a separate and distinct document, not a list of persons to be insured under the DOC Endorsement.

Next, the Affidavit of Lynda Czarnomski, of Safeco's Underwriting Department, states unequivocally that the DOC Endorsement extended coverage only to Mr. and Mrs. Netterville and *not* to Ellis Rogillio. (C.P. 130-31) Czarnomski's Affidavit also clearly provides that the subject form letter is not part of the DOC Endorsement and has nothing whatsoever to do with the DOC Endorsement. (C.P. 130-31) Ms. Czarnomski has attested to the fact that it is a separate and distinct document, a letter sent to the insured simply to confirm the drivers upon whom the risk was assessed. (C.P. 130-31) Ms. Czarnomski's Affidavit confirms that this letter was not the Schedule of Named

Individuals for the DOC Endorsement or the list of persons who were to be provided extended coverage under that Endorsement, and her testimony is undisputed.

Because Rogillio is not one of the listed individuals to be insured under the DOC Endorsement, he is not entitled to broadened coverage while occupying any vehicle, including the one he was occupying on the date of the accident in question. Thus, Rogillio is not entitled to UM coverage under the subject American States J & N Timber, Inc. policy. Most importantly, American States clearly and undeniably has a colorable defense against the merits of Rogillio's claim for UM benefits.

The policy language clearly does not provide coverage for Rogillio's UM claim; therefore, American States has a complete defense to Rogillio's claim. The trial court erred in overlooking and wholly negating this valid policy language when it denied, contrary to Mississippi law, American States' Motion to Set Aside. American States properly relied on facts rather than conclusions and also presented undisputed sworn affidavits to establish its colorable defense to Rogillio's claim. ***Rush***, 608 So. 2d at 1210. American States' complete defense to Rogillio's claim warrants vacating the default judgment. ***Green,*** 794 So. 2d at 174; ***Bailey,*** 543 So. 2d at 182; ***Clark***, 507 So.2d at 77; ***Shannon***, 499 So.2d at 763; ***Bryant,*** 439 So.2d at 937, n.3.

c. Setting Aside the Default Judgment will not Prejudice Rogillio.

Prejudice to the plaintiff, the third prong, is found when there is a delay in the proceedings such that memory of witnesses would be affected and the fact that plaintiff is without resolution of his matter for a long period of time. ***Guar. Nat'l Ins. Co. v.***

Pittman, 501 So.2d 377, 388 (Miss. 1987). In the case at bar, memory of witnesses is not an issue because coverage depends on the allegations of the complaint and the clear language of the policy. Regardless of how quickly or slowly this matter is resolved, the J & N Timber, Inc. policy provides no coverage for Rogillio's UM claims. American States respectfully submits that Rogillio will sustain no prejudice at all if the valid policy language is honored and the default judgment is set aside, in accord with Mississippi law. Rogillio has known, at all times, that American States contests coverage in this matter and denies that Rogillio is entitled to any UM coverage under the J & N Timber, Inc. policy.

That Rogillio will be required to prove his case against American States cannot be found prejudicial. The burden of proof in a case is not considered legally cognizable prejudice. *See* ***Bailey***, *supra* 543 So.2d at 183 (trouble of proving a claim "is not what is meant by cognizable prejudice under this prong of the balancing test"). Rogillio will suffer no prejudice in any form whatsoever if this Court sets aside the default judgment against American States. Instead, forcing American States to pay $600,000 under a policy which absolutely provides no coverage would constitute extreme prejudice to American States. Rogillio must not be allowed to benefit from a default judgment by receiving a windfall of coverage under a policy which clearly provides none.

2. The Trial Court did not Exercise its Discretion in Accord with M.R.C.P. 55(c) and 60(b).

M.R.C.P. 55(c) provides that trial courts may set aside a default judgment for good cause shown and in accord with M.R.C.P. 60(b). M.R.C.P. 60(b) (2) and (6) provide that trial courts may relieve a party from a default judgment for reason of accident or mistake or any other reason justifying relief. So, while the trial court has discretion in determining whether to set aside a default judgment, that discretion must be exercised within these bounds. ***Williams v. Kilgore***, 618 So.2d 51, 55 (Miss. 1992) (citing ***Pointer v. Huffman***, 509 So. 2d 870, 875 (Miss. 1987); ***Guar. Nat'l Ins. Co. v. Pittman***, 501 So. 2d 377, 388 (Miss. 1987)).

American States followed the proper procedure in seeking relief from the default judgment pursuant to M.R.C.P. 55 and 60. Good cause (accident or mistake), a complete defense to Rogillio's claims, and lack of prejudice were all established, as set forth previously herein. Although American States has without doubt made the necessary showing to have the default judgment set aside, there is yet another reason justifying relief, to wit: entry of default judgment on the facts presented is effectively a directed verdict in favor of Rogillio not only on coverage, despite that the policy clearly and unequivocally provides no coverage for Rogillio's claims, but on damages as well. The default judgment which the trial court declined to set aside establishes coverage for Rogillio's claims by the American States J & N Timber, Inc. policy. Based on the severity of Rogillio's injury, his damages may well exceed the J & N Timber, Inc. policy limits, which could do away with the necessity for a trial on damages only. Restated, the default judgment as to coverage is outcome determinative and is, in essence, also a

judgment or directed verdict as to damages, *despite that the J & N Timber, Inc. policy provides no coverage at all in the first instance.*

By failing to set aside the default judgment for the good cause shown, for accident or mistake, or for other reasons justifying relief, the trial court failed to exercise its discretion within the boundaries provided by Rules 55 and 60, M.R.C.P. As in ***City of Jackson v. Presley,*** 942 So. 2d 777, 794 (¶ 29) (Miss. 2006), there is no evidence that the trial court considered the M.R.C.P. Comments' suggested factors, the propriety of default judgment is questionable, and there is evidence of American States' intent to defend.

3. Conclusion

The trial court's discretion in this matter is not unfettered, but must be grounded by reference to legally valid standards else this Court should take appropriate corrective action on appeal. ***King v. Sigrist,*** 641 So. 2d 1158, 1161-62 (Miss. 1994). All three prongs of the balancing test weigh in favor of honoring the valid policy language and setting aside the default judgment: American States' default is the result of an inadvertent clerical error rather than indifference or disregard for the rules of court; American States has a colorable defense to the merits of Rogillio's claim in that there is no coverage available under the J & N Timber, Inc. policy for Rogillio's UM claim; and while Rogillio will suffer no prejudice if the default judgment is set aside, American States will suffer prejudice if the default judgment is allowed to stand. ***Rawls,*** 904 So. 2d at 1013 (¶ 13); ***Stanford,*** 822 So. 2d at 887-88; ***McCain***, 791 So. 2d at 843. Particularly given American States' showing of a meritorious defense, the heftiest of the

three prongs, the trial court should have vacated the default judgment. ***Green***, 794 So. 2d at 174; ***Bailey***, 543 So. 2d at 182; ***Stanford***, 822 So.2d at 887-88 (¶ 6). Most importantly, *the trial court's Order does not indicate any consideration of these factors, which constitutes an abuse of discretion is reversible by this Court.* ***Hyman,*** 592 So. 2d at 956. *See also* ***McCain***, 791 So.2d at 843; ***Clark,*** 507 So. 2d at 77; ***Bryant,*** 493 S0.2d at 937 n.3. Alternatively, a *de novo* review will also result in a finding that the default judgment should be set aside. ***Presley,*** 942 So. 2d at 781 (¶ 7). The trial court erred in wholly negating the valid policy language when it denied American States' Motion to Set Aside Entry of Default and/or Default Judgment and this Court should reverse.

B. The Default Judgment is Void and Should be Set Aside Because Rogillio Failed to Provide American States with Notice of his Motion for Default Judgment.

M.R.C.P. 55(b) provides that "[i]f the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) *shall* be served with written notice of the application for judgment at least three days prior the hearing of such application . . . ." M.R.C.P. 55(b) (emphasis added). The rule, by using the word "shall", mandates that such notice be given, and Rogillio's failure to do so requires that the Default be set aside.

The comments to Rule 55 provide that if a Defendant indicates his intent to defend, he is entitled to at least three (3) days written notice of the Application to the Court for the Entry of a Default Judgment. The purpose of this notice "is simple: It is

intended to protect those parties who, although delaying in a formal sense by failing to file pleadings within the thirty day period, has otherwise indicated to the moving party a clear purpose to defend the suit." M.R.C.P. 55, Comment. Default judgment must be reversed where defendant entered an appearance, yet received no notice of hearing as required by M.R.C.P. 55(b). ***Williams v. Chase Manhattan Bank,*** 834 So. 2d 718, 720-21 (¶ 11) (Miss. App. 2003).

It is undisputed that after Rogillio had filed his suit, Keith Anderson of American States contacted Rogillio's counsel and advised him that he had obtained a courtesy copy of the Complaint, that American States would assign defense counsel in this matter once it had been served, and that they would file an Answer and Affirmative Defenses and continue to deny coverage of Rogillio's claim. (C.P. 127) It is undisputed that Anderson of American States clearly "appeared" in this action and indicated American States' intent to defend Rogillio's suit and to contest coverage for Rogillio's claim for UM coverage. *See* ***Holmes v. Holmes,*** 628 So. 2d 1361, 1363-64 (Miss. 1993) ("appearance" for purposes of M.R.C.P. 55(b) found where defendant manifests clear intent to defend). Rogillio knew, even prior to filing suit, that American States contested and denied coverage in this matter. (C.P. 127-28)

Because it is an undisputed fact that American States appeared and indicated its intent to defend Rogillio's Complaint once service was completed, American States was entitled to three (3) days notice of Rogillio's Application for Entry of Default, pursuant to M.R.C.P. 55; however, it is undisputed that Rogillio provided no such notice. As a result of his failure to provide the requisite notice and due process, Rogillio's Entry of Default

and Default Judgment are void as a matter of law and must be set aside. ***Overbey v. Murray,*** 569 So. 2d 303, 306 (Miss. 1990). The trial court's failure to do so is error and this Court should reverse.

V. CONCLUSION

The trial court erred in its denial of American States' Motion to Set Aside, contrary to Mississippi law. For all of the above and foregoing reasons, American States is entitled to have the clerk's entry of default and default judgment set aside. This Court should reverse the trial court's denial of American States' Motion to set aside and render an Order setting aside the default judgment on coverage.

RESPECTFULLY SUBMITTED this the 6th day of November, 2008.

AMERICAN STATES INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellant, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

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DATED: This the 6th day of November, 2008.

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JAN F. GADOW