THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Opinion No. 2022-UP-397 (Filed November 2, 2022)
Appellate Case No. 2020-001110
Case No. 2019-CP-42-02092

Luther Harris, Donna Harris,
Bobby Leopard and Jerry White, Appellants,

v.

Perry W. Barbour and Southland Transportation, Co., Respondents.

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

Pursuant to SCACR Rule 22 (a) and SCACR Rule 240(i), Appellant Jason Appellant, respectfully petitions this Court for a Rehearing of Opinion No. 2022-UP-397 (Filed November 2, 2022). Appellant respectfully submits the Court overlooked or misapprehended his arguments and evidence. (Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001), Rehearing is warranted when the Court has overlooked or misapprehended an argument.). In support of this Petition for Rehearing, the attention of this Honorable Court is directed to material points of fact and law that were seemingly overlooked in the Appeal.

STATEMENT OF FACTS

The facts are the following which represent a very concise statement of same. On

June 10, 2016, Appellants were traveling southbound on U.S. Interstate 85, when they came to a stop due to traffic which resulted from a motor vehicle accident further south on 85 in the County of Spartanburg, State of South Carolina. Respondent Barbour (Barbour from this point forward), driving a truck owned by Southland, was also traveling southbound on U.S. 85 at that time. Without a warning, Barbour's truck smashed into the rear of Plaintiffs' vehicle. The impact was such that all four (4) occupants were knocked out and found by the trooper in the grass outside the vehicle. As a result of Barbour's negligence, gross negligence and reckless acts, Appellants sustained injuries that necessitated medical attention. They filed this action for damages for the injuries sustained as a result of the wreck. These facts illustrate the recklessness in which Barbour was driving his tractor trailer on behalf of Southland Transportation, Co.

Despite the very violent nature of the wreck, Barbour failed to file an Answer or file a Motion within the requisite thirty (30) days as required by the South Carolina Rules of Civil Procedure. In fact, counsel for his employer had filed the requisite motion. However, counsel had failed to file on behalf of Barbour, indicating an absence of any sort of relationship.

Appellants filed the necessary default documentation on November 25, 2019, for Barbour's failure to respond to the complaint he had been served on October 25, 2019, through the Office of the General Counsel of South Carolina Department of Motor Vehicle (hereinafter referred as SCDMV). Pursuant to § 15-9-370, if a foreign (or a non-resident) driver utilizes the roads of South Carolina, he or she agrees to allow the SCDMV to accept service in his/her stead. Barbour disregarded the default until the insurance carrier's counsel filed a Motion to Dismiss on his behalf on December 23, 2019, fifty-nine (59) days after

having been served. Counsel claimed to have been retained but did not file anything when he filed his pleadings on behalf of Southland on November 8, 2019. He did not file his Motion to Dismiss for Barbour for forty-five (45) days. The assertion he was retained looks even less likely due to Appellants filing another action (based on the fact the lower court's dismissal in the underlying case of this appeal was without prejudice); and the same exact result taking place even with the alleged retention. (Appellate Case No.: 2021-000269).

In Appellate Case No.: 2021-000269, the scenario was very similar to this case. In that case, counsel for the carrier said he was retained on February 11, 2021, one hundred thirty-nine days (139) days after the pleadings were returned to the SCDMV marked "Return to Sender Not Deliverable as Addressed Unable to Forward" on September 25, 2020. Counsel immediately filed responsive pleadings following his notice of February 11th:

> Five (5) days prior to the scheduled damages hearing, Mr. Moore, Esquire filed a Rule 55 (c) SCRCP Motion to Vacate Entry of Default and Motion to Dismiss on February 11, 2021. (R., pp. 32-38 & pp. 45-46). He also belatedly filed an Answer on the same date. (R., pp. 40-43). The goal of these two (2) motions was to deny Appellants their right to be compensated for the injuries sustained at the hands of Respondent. The Court ruled in favor of Respondent's position, which Appellants moved for reconsideration. (R., p. 62-81). The Court denied said reconsideration in its Order, dated March 9, 2021. (R., p. 2-4).

(Final Brief, Appellate Case No.: 2021-000269, p. 4, 3.10).

If counsel had truly been retained by counsel in this action, there would be no reason why Barbour would again disregard the mailing by the Office of General Counsel. Barbour simply did not care enough to seek counsel.

In this appeal, this Honorable Court affirmed the trial court's granting of Respondents' Motions to Dismiss; 1) finding it did not abuse its discretion in not equitably tolling the statute of limitations; 2) failing to find the rules for service of process had been substantially complied with; and 3) failing to extend the time to perfect service. The Court found their ruling regarding

the application of equitable tolling was dispositive. Because the Court made the dispositive finding on the tolling issue, it was their contention there was no need to discuss anything further. Appellant believes that this Court misappreciated the facts and the laws applied in this case. Hence, Appellant files this Petition for Rehearing in response.

SUMMARY OF ARGUMENTS

I. Respondent Barbour was in default and unable to raise affirmative defenses.

Rule 8 of the South Carolina Rules of Civil Procedure (SCRCP) addresses the pleadings for an action. 8 (b) discusses defenses, and the requirement that a party ***shall*** state in short and plain terms the facts constituting his defenses to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies. 8 (c) talks about affirmative defenses, and the requirement that a party ***shall*** set forth affirmatively the defenses: ...statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. 8 (d) addresses the effect of a failure to deny averments in a pleading to which a responsive pleading is required. When a response is required, a failure to respond acts as an admission to what has been contended in the Complaint, or preceding pleading.

Rule 12 of the SCRCP deals with defenses. 12 (a) says that a Defendant has thirty (30) days from the date of the service of a complaint in which to file an answer. A defendant can file a motion within the same period to dismiss the complaint. 12 (b) says that any defenses should be raised in the answer, or, if the defense is an affirmative defense, it can be done by motion. Insufficiency of process and insufficiency of service of process are two of the affirmative defenses which may be brought by motion. 12 (h)(1) deals with the waiver or preservation of the affirmative defenses. It states:

> (1) A defense of lack of jurisdiction over the person, improper venue,
> (2) ***insufficiency of process, insufficiency of service of process***, or that another

action is pending between the same parties for the same claim ***is waived***
(A) if omitted from a motion in the circumstances described in subdivision (g) or
(B) if it is neither made by motion under this rule nor included in a responsive pleading

Rule 55 (a) of the SCRCP speaks of default and that it is entered with a respondent's failure to answer a pleading, or file the necessary motion, within the requisite thirty (30) day period. 55 (c) states that default can be set aside for good cause shown.

Appellants attempted to serve Respondent by way of the long arm statute to two (2) different addresses. Having failed that, they served him by way of the Office of General Counsel for the SCDMV. The plaintiff has the burden to establish that the court has personal jurisdiction over the defendant. Jensen v. Doe, 292 S.C. 592, 358 S.E.2d 148 (Ct.App. 1987). Based on the fact Respondent had implicitly allowed his service to be consummated by the SCDMV, he was properly served with the summons and complaint. Appellants substantially complied with the rules. "The Court has never required exacting compliance with the rules to effect service of process, but instead looks to whether the plaintiff substantially complied with the rules such that the court has personal jurisdiction over the defendant and the defendant has notice of the proceedings." Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209–10, 456 S.E.2d 897, 899 (1995).

"Rather, inquiry must only be made as to whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction over the defendant and the defendant has notice of the proceedings." Moore, 322 S.C. at 523, 473 S.E.2d at 66; Roche, 318 S.C. at 210, 456 S.E.2d at 899. "When the civil rules on service are followed, there is a presumption of proper service." Roche, 318 S.C. at 211, 456 S.E.2d at 900 (citing 62B Am. Jur. 2d Process 111 (1990)). Since the DMV was standing in the shoes of Respondent, he was served with the

summons and complaint, indicating he had notice of the complaint raised against him.

Barbour did not state in short and plain terms the facts constituting his defenses pursuant to 8 (b) of the SCRCP. Barbour did not set forth affirmatively any defenses to the complained of issues pursuant to 8 (c). The failure to deny any of the offenses complained of by Appellants means they are all admitted pursuant to 8 (d). Barbour did not adhere to any of the requirements of Rule 8.

Barbour did not answer the complaint; or file a necessary motion within the required 30 days, pursuant to Rule 12 (a) of the SCRCP. Barbour did not raise any defenses, including the affirmative defenses of (2) lack of jurisdiction over the person, (4) insufficiency of process, and (5) insufficiency in a responsive pleading or a motion, within 30 days as required by Rule 12 (b). Barbour's failure to set forth affirmatively the aforementioned defenses in an answer or motion within 30 days of service meant ***he waived the defenses*** pursuant to Rule 12 (h)(1), which states:

> (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived.

Barbour's lack of adherence of either Rule 8 or Rule 12 meant he was in default.

Barbour was in default but presented an answer and Motion to Dismiss by way of the attorney for the carrier. There was no explanation as to why he did not follow the South Carolina Rules of Civil Procedure. "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve

the interests of justice." Id. The defaulter in this case never signed for his mail or responded to the mailing forwarded by the SCDMV. Therefore, he never gave the explanation of the default which is a threshold burden of his attempt to have the default vacated. Since he did not meet this burden, he was unable to put forth the affirmative defenses found in Rule 12(b) of the SCRCP. Barbour should not be able to avoid default because it is one of the mechanisms which "serve important social goals, and a party should not be permitted to flout them with impunity." Howell v. Haliburton, 205 S.E.2d 617, 619 (N.C. Ct. App. 1974).

Rule 55(c), much like Rule 15, should be liberally construed to promote justice and dispose of cases on their merits. Dixon v. Besco Eng'g, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995). If there was a case that needed the merits of the matter to be decided by a jury, it is this one. Appellants deserve the same consideration as Barbour. After all Barbour nearly caused the demise of four (4) people; ignored attempts to be held accountable; and stands to be free of any obligation for his reprehensible actions. The Court has the opportunity to bring equity to this matter. Not allowing equity on both sides creates a very unjust result.

II. Appellants substantially complied with the rules of service of process.

Appellants had the ability to serve Respondent Southland by the long arm statute. Since Respondent Southland had forfeited its standing in South Carolina, Appellants also had the right to effect service of its processes to the South Carolina Secretary of State, pursuant to S.C. Code Ann. §15-9-245. Appellants utilized by processes to serve Southland.

Both services were made by certified mail/returned receipt and posted on October 4, 2019. However, the Post Office did not forward the mail until October 7, 2019. The certified mails were received by Respondent Southland and the Office of the Secretary of State on October 9, 2019, two (2) days beyond the 120-day period for service of processes (i.e. October 7,

2019 was the last day of the 120-day reglementary period). Had the Post Office actually forwarded the mailings on Friday, October 4, 2019, when they were deposited, the Secretary of State would have received the Summons and Complaint on Monday, October 7, 2019 and it would have been timely.

South Carolina courts have expressed a strong preference for deciding cases on its merits and noted the rules of procedure are intended to allow the courts to reach the merits as opposed to disposition on technical niceties. In *Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc.,* the Court held Fourth Circuit Court held:

> When the process gives the defendant actual notice of the pendency of the action, the rules, in general, are entitled to a liberal construction. When there is actual notice, every technical violation of the rule or failure of strict compliance may not invalidate the service of process. But the rules are there to be followed, and plain requirements for the means of effecting service of processes may not be ignored.

Armco, Inc. v. Penrod-Stauffer Bldg. Sys. Inc., 733 F.2d 1087, 1089 (4th Cir. 1984).

III. Appellants should have been afforded an extension of time to perfect service.

Appellants were injured when a tractor trailer travelling on I-85 southbound, did not recognize traffic had come to a stop. Appellants were on their way to work when the tractor trailer struck them in the rear of the pick-up truck in which they were riding. They were knocked unconscious by the significance of the impact. By the time the trooper arrived at the scene, all of the occupants in the pick-up truck had been laid out in a line on the side of the road, presumably by people near them in traffic.

They struck by a semi which left had not begun to stop until it was too late. There was no explanation given as to why Barbour was not aware traffic had ground to a halt. He was ticketed with too fast for conditions and returned to Virginia, never to be heard from again. He

did not participate in his defense. He did not sign for the certified mailings made by Appellants. He did accept the mailing by the SCDMV. He washed his hands of the nearly catastrophic demolition vehicle in front of him. His disregard for the people who suffered due to his lack of reasonable care can only be characterized as inhumane.

The Supreme Court, in the case of *Henderson v. United States,* concluded Rule 4(m) grants the courts the discretion to enlarge the 120-day period for service "even if there is no good cause shown." Henderson v. United States, 517 U.S. 654 (1996), quoting the Advisory Committee's Notes on the 1993 Amendments to Federal Rules Civil Procedure 4, 28 U.S.C. App., p. 654. The Fourth Circuit necessarily would adopt the interpretation of Rule 4(m) held by the Supreme Court and the other circuit courts. Vantage, Inc. v. Vantage Travel Service, Inc., C.A. No. 6:08-2765-HMH (D.S.C. Mar. 20, 2009).

Appellants demonstrated reasonable efforts to effect service on both Respondents. The certificate of mailing indicates the materials were deposited in the mail on Friday October 4, 2019. The secretary of state accepted the mail on Wednesday October 9th. Upon further review, the mail had not left Anderson until Monday October 7th. But for the Post Office not mailing the letters on Friday, the service would have been perfected. The service relates to notice of potential defendants in a litigious matter. Since the carrier, who had a copy of the filed Summons and Complaint, and had already broached topic of their defense counsel, notice had been given. Respondents would not be prejudiced by an extension of time for service.

The carrier had ample opportunity to review the losses sustained by Appellants. As a courtesy, Appellants gave them the opportunity. Despite the courtesy, the carrier did not respond for six weeks. Seemingly, Appellants willingness to help Respondents avoid litigation would be met with a similar courtesy. Appellants only seek to have their case heard by a jury of their

peers. Respondents would not be prejudiced by a finding of truth based on the facts of the case. Allowing Respondent Barbour to escape default, while allowing Appellants to escape their difficulty would allow them both to have a determination of the merits. This is consistent with South Carolina public policy favoring the disposition of cases on their merits as opposed to technicalities. Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001).

IV. Equitable tolling was required by South Carolina's wish to have cases addressed on their merits, as opposed to technicalities.

There have been situations where the statute of limitations has been equitably tolled based on the circumstances relating to conduct outside of the plaintiff's control. The case of Hooper v. Ebenezer Sr. Services, 386 S.C. 108 (S.C. 2009), is one of those instances.

The Court in Hooper discussed the application of the doctrine of equitable tolling "in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits". *Ibid.* It further provided, while the doctrine "typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control", "tolling has been applied in a variety of contexts and has developed differing parameters for its application". *Ibid. at 116.* The Court in Hooper ruled as follow:

> Thus, under the unique circumstances of this case, we conclude it is appropriate to equitably toll the statute of limitations for the time Hooper spent in pursuit of Ebenezer's nonexistent agent.
>
> Finally, we note that public policy and the interests of justice weigh heavily in favor of allowing Hooper's claim to proceed. The statute of limitations' purpose of protecting defendants from stale claims must give way to the public's interest in being able to rely on public records required by law.

Ibid. at 119.

In this case, both parties were to be served by certified mailing. The mailings were done

on October 4th and would have been at the mailing destination on October 7th, had the U.S. Postal Service mailed the parcels out on the 4th. Instead, the mailings reached their target on October 9th. According to Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir.2000), a Plaintiff should be able to demonstrate: "1) extraordinary circumstances, 2) beyond his control or external to his own conduct, 3) that prevented him from filing on time.", in order to be eligible for equitable tolling Frankly, given the damages sustained by the Appellants, "it would be unconscionable to enforce the limitation period against the party and gross injustice would result." Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003).

Barbour was allowed to use the affirmative defenses found in Rule 12 (b) despite not appearing. Southland's insurance carrier was allowed to take eight weeks to respond to Appellants' demands. Appellants would have served them on time but for the U.S. Post Office not sending the mail out on the day it was deposited in the mail. Appellant would have drove the filing to Columbia if there any thought the mail would not be delivered. Appellants simply want equity to prevail. Equity in this matter would be to allow the parties to litigate the case in earnest.

CONCLUSION

For the foregoing reasons, the trial court's Order of dismissal should be reversed and the remand the case for further proceedings. In the alternative, Appellants pray they be granted an extension of time to refile and serve the Complaint.

s/Donald L. Smith
Donald L. Smith (SC Bar #: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attomeydonaldsmith@gmail.com
Attorney for Appellants

Anderson, South Carolina
November 21, 2022.

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FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Case No. 2019-CP-42-02092
Appellate Case No. 2020-001110

Luther Harris, Donna Harris,
Bobby Leopard and Jerry White, Appellants,

v.

Perry W. Barbour and Southland Transportation, Co., Respondents.

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I am serving a Petition for Rehearing and Proof of Service, upon the Honorable Jenny Abbott-Kitchings, Clerk of Court of South Carolina Court of Appeals, and serving a copy of the same upon Respondents, by and through Mr. David L. Moore, Esquire, by email via the following addresses:

Ms. Jenny Abbott-Kitchings ctappfilings@sccourts.org
Mr. David L. Moore, Esquire DMoore@turnerpadget.com

s/Donald L. Smith
Donald L. Smith, (Bar No.: 6699)
2722 W. Whitner Street
Anderson, SC 29626
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

Anderson, South Carolina
November 21, 2022.

FORM 8
LETTER TO THE COURT OF APPEALS CLERK
PETITION FOR REHEARING AND PROOF OF SERVICE

November 21, 2022

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

RE: Luther Harris, Donna Harris and Bobby Leopard vs.
Perry Wendell Barbour and Southland Transportation Co.
C.A. No.: 2019-CP4202092
Appellate Case No. 2020-001110

Dear Ms. Kitchings:

Please find attached the following documents for filing in the above-captioned case:

1. Motion to File Out of Time; and
2. Proof of Service.

Sincerely,

s/Donald L. Smith
Donald L. Smith, (Bar No. 6699)
Attorney for Appellant
2722 W. Whitner Street
Anderson, SC 29626
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

cc:

Mr. David L. Moore, Jr., Esquire

Attorney Office of Donald Smith
2722 W. Whitner St.
Anderson SC 29626

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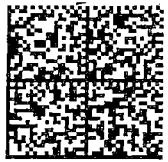

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The Honorable Jenny Abbott Kitchings
Clerk of Court
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