

**STATE OF SOUTH CAROLINA**  
**In the Court of Appeals**

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On Appeal from Charleston County  
Court of Common Pleas

The Honorable Roger M Young, Circuit Judge  
The Honorable Daniel F Pieper, Circuit Judge

Case No 2066-CP-10-1577

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Lawton Limehouse, Sr,

RESPONDENT,

v

Paul H Hulsey and The Hulsey  
Litigation Group, LLC,

APPELLANTS

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**FINAL BRIEF OF APPELLANTS**

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## STATEMENT OF THE ISSUES PRESENTED ON APPEAL

### *Lack of Jurisdiction*

I Did the Trial Court err in entering judgment against the Defendants because the case was removed to federal court and the remand is not yet complete under the mandatory provisions of 28 U S C A §1447(c)?

Or as otherwise restated,

Has jurisdiction been revested in the state court where the District Court has not mailed a certified copy of the order of remand to the clerk of the state court as required by 28 U S C A §1447(c)?

### *Unjustified Entry of Default*

II Did the Trial Court err in denying the motion to set aside the entry of default because

A The answer was timely served/filed within 35 days after Defendants were given notice by mail that the order of remand had been filed in the state court? OR, in the alternative,

B If the answer was 24 days late, good cause existed to set aside the entry of default under Rule 55(c), SCRCP, due to the confusion over when the answer was due, the conceded lack of prejudice, and meritorious defenses?

### *Denial of Due Process in Default Damages Trial*

III Did the Trial Court err in conducting a default damages trial that deprived the Defendants of fundamental, due process rights, in that

A The Defendants were denied the right to introduce evidence on the issue of damages?

B The Plaintiff was allowed to introduce new allegations to which the Defendants were not allowed to defend?

C The Trial Court erred in commenting on the evidence in answering a question from the jury?

### *Denial of Due Process in the Award of Punitive Damages*

IV Did the Trial Court err in allowing an award of punitive damages founded on trial error and a denial due process?

A Did the Trial Court err in refusing to allow the Defendants a meaningful opportunity to defend on the Plaintiff's claim for punitive damages?

- B Did the Trial Court err in charging the jury that they had to award punitive damages?
- C Did the Trial Court err in allowing the Plaintiff to present evidence and argument on matters not proper for the jury's consideration in awarding punitive damages?
- D Did the Trial Court err in confirming the award of punitive damages based on facts not in evidence or properly deemed admitted even if the default were proper?

### STATEMENT OF THE CASE

This is a slander action against an attorney and his practice, Paul H. Hulsey and the Hulsey Litigation Group, LLC (collectively referred to as "Hulsey"), brought by Lawton Limehouse, Sr., the disgruntled defendant in an underlying class action filed in federal court by Hulsey on behalf of former Limehouse employees.<sup>1</sup> The slander cause of action is predicated on statements made by Hulsey to the news media during the course of the underlying RICO litigation, which allegedly included statements by Hulsey accusing Limehouse of "creating a perfect racketeering enterprise just like Tony Soprano."

Limehouse filed a summons and complaint in this action on April 19, 2006, which was served on the Defendants on April 21, 2006 (as to Defendant Hulsey) and April 20, 2006 (as to the Defendant LLC) [ROA 32, Complaint]. The Hulsey Defendants filed a notice of removal<sup>2</sup> to federal district court on May 5, 2006, which immediately divested

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<sup>1</sup> Maximino Flores, et al v Lawton Limehouse, Sr, et al, C A No 2 04-1295-23 [ROA 127, Class Action Complaint]

<sup>2</sup> Hulsey removed the case based on the pending RICO action in federal court which would be res judicata/dispositive of the truth of the allegations and a complete defense to the defamation claims [ROA 791, See 12-15-06 Hearing Tr 32]

the state court of jurisdiction over the case<sup>3</sup> [ROA 47, Notice of Removal ] On motion of Limehouse, the District Judge remanded the matter to state court

The federal court order of remand was signed by U S District Court Judge Houck on July 19, 2006, and entered on the docket by the District Court Clerk on July 20, 2006 [ROA 6, 29, Order, Federal Court docket sheet ] A copy of the remand order was filed in the Charleston County Clerk of Court's Office on July 21, 2006, and on July 27, 2006, the Charleston County Clerk of Court mailed a notice as to the filing of the remand order to counsel of record [ROA 26, see Charleston County docket sheet ] Thereafter, on August 22, 2006, Limehouse filed a request for entry of default, along with affidavits of service and affidavits of default, in the Charleston County Clerk of Court s Office [ROA 101-108, Request for entry of default, affidavits of service and default ] Limehouse did not serve the Request for entry of default or the affidavits on Hulsey

The Charleston County of Clerk of Court entered default on August 22, 2006, and on August 24, 2006, the Clerk mailed a Form 4 order to all parties noting the entry of default [ROA 26, 109-110, Charleston County Docket Sheet, Form 4 ] On receiving the notice of entry of default, Hulsey immediately filed an answer<sup>4</sup> and made a motion to set aside default on August 29, 2006 [ROA 111, 121, Answer, motion ]

The motion to set aside the entry of default came for hearing before Judge Pieper, who held that the answer was late and rejected the proposition that there was good cause (or excusable neglect) based on the supposed mistake in counting the due date, even

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<sup>3</sup> Hulsey removed the case to federal court on the grounds that the allegations fell within the jurisdiction of the still pending federal action [ROA 42, Notice of Removal ¶ 11 ]

<sup>4</sup> Although by Hulsey's calculation the answer was not yet due until August 31, 2006

though the parties and the court took different views on what is -- as Judge Pieper himself noted -- a novel question of law [ROA 8, Order, filed February 7, 2007]

The case then came before Judge Young, who presided over jury trial on damages on February 4-6, 2008. The jury returned a verdict of \$2,390,000 in actual damages and \$5,000,000 in punitive damages against the Defendants, and judgment has been entered as of February 7, 2008 [ROA 17, 18, Jury Verdict, Judgment ]

Hulsey made posttrial motions for judgment notwithstanding the jury's verdict, and new trial, and in addition, a Rule 60(b)(4) motion for relief from judgment based on the issue of subject matter jurisdiction and a Rule 60(b)(1) motion for relief from judgment based on excusable neglect calculating the due date for the answer [ROA 236, 240, 248, 259, Motions, filed February 25, 2008 ] Judge Young denied all those motions [ROA 19, Order, May 27, 2008 ] However, it was necessary to make a motion for reconsideration under Rule 59(e), to preserve all issues for appeal, because the order did not explicitly address on the issues Appellants raised in their post-trial motions [ROA 297, Motion to Alter or Amend Judgment, filed June 6, 2008 ] Judge Young denied the motion to alter or amend, [ROA 23, Order, filed September 8, 2008], and Hulsey timely served and filed a Notice of Appeal on October 8, 2008

### **STATEMENT OF THE FACTS**

Limehouse and his son owned and operated an employment staffing agency, L & L Services, LLC, in Charleston County. In 2004, Hulsey filed a class action lawsuit in federal court on behalf of former Limehouse employees, alleging violations of RICO,

Racketeer Influenced and Corrupt Organizations Act, and other federal and state laws<sup>5</sup> Limehouse, his son, and L & L Services were named as defendants. As described by Judge Houck, “the plaintiffs alleged that to obtain cheap labor, the defendants hired unauthorized aliens and then exploited them under the threat of deportation” [ROA 182, Order, 5/11/06 ]

As alleged in Limehouse’s complaint, on or about April 23, 2004, Hulsey “held a press conference or otherwise made false statements about the Plaintiff to certain new agencies including but not limited to a reporter from the [Charleston] “Post & Courier staff,” which statements included

- a) The Plaintiff had engaged in a classic racketeering scheme,
- b) The Plaintiff’s conduct set the community back 150 years,
- c) The Plaintiff engaged in a blatant case of indentured servitude, and
- d) The Plaintiff created a perfect racketeering enterprise just like Tony Soprano

[ROA 37, Complaint ¶ 11 ] As further alleged, these statements were published by the Charleston Post & Courier on April 24, 2004 [ROA 39, Complaint ¶ 18 ]

Limehouse prayed for actual and punitive damages, alleging that he had suffered general damages including embarrassment, humiliation, mental suffering, and special damages including the loss of his business and the legal costs of defending the underlying federal class action [ROA 41, Complaint page 7 ]

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<sup>5</sup> Including the Fair Labor Standards Act and the South Carolina Payment of Wages Act, along with common law causes of action for breach of contract, unjust enrichment and disgorgement of profits, civil conspiracy and an accounting

In the underlying case, Hulsey's plaintiff clients survived the Limehouse defendants' motions to dismiss and for summary judgment, and the case was poised for class action certification [ROA 182, 188, 649, J Houck Order, 5/11/06, Motion for Class Action Certification<sup>6</sup>, Ir 339] Although Judge Houck found that there were issues for trial, the case ultimately settled prior to trial [ROA 644, Ir 334]

## ARGUMENT

**I Jurisdiction has not been revested in the state court because the remand from federal court is not complete under 28 U S C A §1447(c), which mandates that the District Court mail a certified copy of the order of remand to the clerk of the state court**

In removed cases, Section 1446(d) and 1447(c) of Title 28 of the U S Code, read together prescribe the transfer of jurisdiction from state to federal court and the return of jurisdiction to the state court Section 1446(d) states that the state court cannot proceed until the case is remanded

**(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and *the State court shall proceed no further unless and until the case is remanded.* (Emphasis added )**

Section 1447(c) states that the state court may proceed after the federal court clerk mails a certified copy of the order of remand to the clerk of the state court

**(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a) If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal *A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court The***

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<sup>6</sup> Exhibits C & D to Motion to Set Aside Entry of Default

*State court may thereupon proceed with such case.*  
(Emphasis added )

Since Section 1447(c) clearly mandates that the return of jurisdiction be accomplished by the mailing of a certified copy of the order of remand and because there is no certified copy of the order of remand to be found in the file maintained by the Clerk of Court for Charleston County (or any other proof that the district court clerk mailed a certified copy to the state court clerk), jurisdiction has not been re-vested in the state court, and it was without jurisdiction to proceed with the trial. Therefore, the judgment is void and should be vacated as should be the entry of default and all other orders and proceedings in the state court since the case was removed on May 5, 2006.

The South Carolina rules of statutory construction inexorably lead to the conclusion that under Section 1447(c), jurisdiction does not re-vest in the state court until a certified copy of the order of remand has been mailed by the clerk of the federal court. The cardinal rule of statutory construction in South Carolina is to ascertain and effectuate the intention of the legislature. Miller v Aiken, 364 S C 303, 307, 613 S E 2d 364, 366 (2005). “The legislature’s intent should be ascertained primarily from the plain language of the statute.” State v Landis, 362 S C 97, 102, 606 S E 2d 503, 505 (Ct App 2004). Indeed, if “a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.” Miller, 364 S C at 307, 613 S E 2d at 366 (emphasis added).

In the context of determining when the federal court loses its jurisdiction (to reconsider its own remand order), the vast majority of federal courts have held that the mailing of a certified copy of the remand order is the operative event in the return to state

court jurisdiction. For example, as stated in Trans Penn Wax Corp v McCandless, 50 F 3d 217, 227 (3rd Cir 1995)

The general rule is that a district court loses jurisdiction over a case once it has completed the remand by sending a certified copy of the remand order to the state court. See Hunt v Acromed Corp, 961 F 2d 1079, 1081 (3d Cir 1992). This view is premised on both the language of § 1447(c) and (d) and the need to establish a determinable jurisdictional event after which the state court can exercise control over the case without fear of further federal interference. The district court is also barred from reconsidering its decision if the remand was under § 1447(c) and the case thereby falls under the bar of § 1447(d). See e.g., New Orleans Public Serv, Inc v Majoue, 802 F 2d 166, 167 (5th Cir 1986) (per curiam), FDIC v Santiago Plaza, 598 F 2d 634, 636 (1st Cir 1979) (per curiam). But the physical mailing of the certified copy is the key jurisdictional event to divest the district court of jurisdiction, because a remand order is not self-executing. Hunt, 961 F 2d at 1081 (citing Bucy v Nevada Constr Co, 125 F 2d 213 (9th Cir 1942)).

Hunt v Acromed Corp, 961 F 2d 1079, 1081-82 (3rd Cir 1992)<sup>7</sup> quoting from Browning v Navarro, 743 F 2d 1069, 1078 (5th Cir 1984)

The federal court is completely divested of jurisdiction once it mails a certified copy of the order to the clerk of the state court. See 28 U S C § 1447(c), 1A J Moore & B Ringle, Moore's Federal Practice ¶ 0 169[2 - 1], at 697 (2d ed 1983), 14 C Wright, A Miller & E Cooper, *supra* § 3739, at 764-65, see also Bucy v Nevada Construction Co, 125 F 2d 213 (9th Cir 1942) (district court could review and set aside its own erroneous remand order before filing of certified copy of order in state court because remand order is not self-executing), Bankruptcy Rule 9027(e) '[O]nce a district court has decided to remand a case and has so notified the state court, the district judge is without power to take any further action' Federal Deposit Insurance Corp v Santiago Plaza, 598 F 2d 634, 636 (1st Cir 1979)

As the Trial Court noted, the Fourth Circuit has taken the minority view and held that mere entry of the order of remand by the federal district court deprives the federal court of the jurisdiction over any motion/petition to reconsider/rehear the remand. In re Lowe, 102 F 3d 731, 734, 736 (4th Cir 1996) ("Subsection 1447(d) provides only that a

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<sup>7</sup> In that case, the appellate court raised the jurisdictional issue sua sponte

remand “order” may not be reviewed, it does not condition reviewability on any other event. Thus, the plain language of subsection (d) indicates that a court may not reconsider its decision to remand, as soon as it formalizes that decision in an “order.” “We hold that a federal court loses jurisdiction over a case as soon as its order to remand the case is entered. From that point on, it cannot reconsider its ruling even if the district court clerk fails to mail to the state court a certified copy of the remand order”), but see Watson v Charleston Housing Authority, 83 F Supp 2d 709 (S D W Va 2000)(after remand, continuing federal court jurisdiction over collateral matters such as attorneys fee)

*However*, the Trial Court failed to recognize the significance of the fact that the Fourth Circuit has not held that jurisdiction reverts in the state court upon the mere entry of the remand order. In the recent 2007 opinion in Bryan v BellSouth Telecommunications, 492 F 3d 231 (4th Cir 2007), the court discussed the requirements of Section 1447(c), in an appeal that arose under the All Writs and Anti Injunction Acts. The federal court had remanded a claim to state court which proceeded even while the remand order was on appeal to the Fourth Circuit, and when the Fourth Circuit reversed and vacated the remand order, the defendant applied to state court to dismiss the action, but the state refused, thereupon, the defendant filed an action in federal court to enjoin the state proceedings. In footnote 1, the Court stated that

A remand is effective when the district court mails a certified copy of the remand order to the state court, *see* 28 U S C A § 1447(c) (West 2006), or, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered, *see In re Lowe* 102 F 3d 731, 734-36 (4th Cir 1996)

However, the Court also stated that “it is just as clear that the state court regained jurisdiction when the district court remanded Count A to state court. *See* 28 U S C A § 1447(c) (West 2006) (providing that the state court may proceed with a case once the

district court mails a certified copy of the remand order to the state court) ” Id at 241  
While these statements constitute dicta, they do not conflict with the Defendants’  
contention that the plain reading of the statement mandates that the district court mail a  
certified copy of the remand order and only then may the state court proceed

As to the pertinent issue presented here – when/whether jurisdiction is returned to  
the state court – other state courts have held that jurisdiction does not transfer until the  
statutorily mandated mailing of the certified copy of the order of remand State ex rel  
Nixon v Moore, 108 S W 3d 813 (Mo App WD 2003) (vacating as void judgment  
which was entered before the federal court mailed a certified copy of remand order to  
state court), Turner v Healthcare Services Group, Inc., 156 S W 3d 431 (Mo App E D  
2005) (“State court jurisdiction is only restored once a remand order is certified and  
mailed to the state court ”), Quaestor Investments, Inc v State of Chiapas, 997 S W 2d  
226 (Tex Sup Ct J 1016 (1999) (holding that “jurisdiction reverts in the state court  
when the federal district court executes the remand order and mails a certified copy to the  
state court”), Laborers Local No 942 v Lampkin, 956 P 2d 422, 438 (Alaska,1998) (“the  
state court apparently did not have jurisdiction of the case prior to receiving the certified  
copy of the order remanding the case from federal district court” )

Finally, the Defendants proffered to the Trial Court the notice from the Clerk of  
the District Court for the District of South Carolina that was circulated via electronic mail  
in February [ROA 296, Notice <sup>8</sup>] The notice addresses the issue of affixing the seal of  
the court – as may be required by the rules [or statute] – in this new” world of electronic  
filing The new procedure dispenses with the court’s literal process of manually

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<sup>8</sup> Exhibit to Defendants’ Memorandum in Support of Posttrial Motions ]

embossing the seal of the court on documents and substituting a new process (effective February 19, 2008) of utilizing an electronic seal. The notice provides that the electronic seal will also be used when certifying copies of documents filed in the court's record. Accepting that the Clerk of Court has the discretion and authority to utilize an electronic seal, this notice highlights the fact that there is a physical process – whether manually embossing or electronic seal – that the Clerk must utilize to duly “certify” the authenticity of copies of the documents that have been filed with the clerk and can be found in the court's record.

To the extent that it cannot be disputed that the District Court did, in fact, enter an order of remand and that a copy of that order found its way in the file into the Charleston County Clerk's office, no argument of “substantial” compliance can justify allowing an exception to a clear statutory mandate which governs jurisdiction. For example, in State v. Langford, 223 S C 20, 73 S E 2d 854, 860 (1953),<sup>9</sup> the Court included the following quote in its opinion: “An accused may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court.” State v. Brockhaus, 72 Conn [109] 117, 43 A 850. The U S Supreme Court has similarly noted that “form is substance with respect to ascertaining the existence of appellate jurisdiction.” Carroll v. U S, 354 U S 394, 406 (1957).

The law demands strict compliance with legislative mandates as shown in the appellate court opinions which have consistently held that tax sales must be conducted in strict compliance with statutory requirements. For example, the failure to mail a

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<sup>9</sup> Overruled to the extent it might combine the concept of the sufficiency of an indictment and the concept of subject matter jurisdiction. State v. Gentry, 363 S C 93, 610 S E 2d 494 (2005).

redemption notice by restricted delivery mail is grounds to invalidate a tax sale and even actual notice will not excuse a failure to strictly comply with statutory requirements. Johnson v. Arabab, 355 S.C. 64, 584 S.E.2d 113 (2003). Similarly, our appellate courts have insisted on strict compliance with the requirements of the John Doe UM statute, finding that a plaintiff's strict compliance with the affidavit requirement is mandatory and refusing to excuse the mandatory requirement where the plaintiff offers up a "functional equivalent" of an affidavit. Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002). The Court stated that where the statutory language is clear and mandatory, the courts are required to apply the statute according to its literal meaning and procedural requirements must be strictly met. Likewise, our appellate courts also have repeatedly held that strict compliance with the verified claim provision of the Tort Claims Act is mandatory. See e.g., Vines v. Self Mem'l Hosp. 314 S.C. 305, 443 S.E.2d 909, 910 (1994), Rink v. Richland Mem'l Hosp. 310 S.C. 193, 422 S.E.2d 747 (1992). "A claim against a state entity under the Tort Claims Act must be verified to entitle a plaintiff to the three-year statute of limitations. Substantial compliance is not sufficient." Vines, 443 S.E.2d at 910.

The federal statute is clear and strict compliance is mandatory. In view of the undisputable fact that the federal district court did not mail a certified copy of the remand order to the Charleston County Clerk of Court, jurisdiction has not reverted in the state court and the judgment should be vacated and the case remanded to await the final step to complete the return of jurisdiction to the state court.

## **II The Entry of Default should be set aside**

As set forth in the statement of the case above, Limehouse served the summons and complaint on the Defendants on April 21, 2006 (as to Defendant Hulsey) and April

20, 2006 (as to the Defendant LLC) Hulsey filed a notice of removal to federal district court on May 5, 2006, and then Limehouse moved for remand, however, he did not move for entry of default in federal court [See ROA 761, 12/15/06 Hearing Tr 22 ] After proceedings in the federal court, the district judge remanded the matter to state court. The federal court order of remand was signed by Judge Houck on July 19, 2006, and entered on July 20, 2006. A copy (which was not certified) of the order was transmitted to the state court and filed by the Charleston County Clerk of Court on July 21, 2006, however, the Charleston County Clerk of Court did not mail a copy of the Form 4 notice of the remand until July 27, 2006.

Plaintiff filed a request for entry of default judgment on August 21, 2006 (without serving a copy upon Defendants). The Charleston County Clerk of Court entered a default on August 22, 2006 which was mailed to the Defendants on August 24, 2006. Defendants calculated the due date for their answer as 30 days (plus 5 days allowed for service by mail) from the Charleston Court Clerk of Court's mailing of the notice of remand. However, promptly upon receipt of the notice of entry of default (having not been earlier served by Plaintiff with the request for entry of default or affidavit of default), Defendants filed and served their answer on August 29, 2006, along with a motion to set aside entry of default under Rule 55(c).

Judge Pieper held that the answer was late, and despite the fact that Limehouse conceded that there was no prejudice, he denied the motion to set aside the entry of default. On appeal, the denial of the motion to set aside entry of default generally is subject to review for abuse of discretion. Stark Truss Co v Superior Constr Corp, 160 S C 503, 602 S E 2d 89 (2004). However, the question of whether the answer was

untimely presents a question of law as to the proper counting rule, which question is subject to de novo review on appeal Catawba Indian Tribe v State, 372 S C 519, 524, 642 S E 2d 751, 753 (2007) (determining the proper interpretation of a statute [or rule] is a question of law subject to de novo review on appeal)

**A The Answer was not late**

As Judge Pieper recognized and acknowledged, there is no provision in our South Carolina Rules of Civil Procedure that specifies how to calculate when an answer is due when the action has been removed to federal court and then remanded back to state court [ROA 762, J Pieper Order, p 3] The parties disagreed about when the Defendants' answers were due Hulsey maintained that the answer was not due until August 31, 2006 because they had 30 days (plus 5 days allowed for service by mail) to answer which time began running from the Charleston Court Clerk of Court's mailing the notice of the remand (July 27, 2006) Whereas, Limehouse represented in his application for entry of default that that the answer was due 30 days from service of the summons and complaint, which would have made the answer late after May 21/22, 2006 – while the action was in federal court However, the issue of an answer never arose in Federal Court, and most notably, Limehouse never moved for entry of default in federal court

Rejecting the arguments of both parties, Judge Pieper ruled that the time to answer should be tolled during the time that the case was removed to the District Court and it resumed running from the entry of notice of remand in state court According to Judge Pieper's calculation the answer was due August 5, 2006 [ROA 10, Order ]

In so holding, Judge Pieper cites to a 1957 opinion from California for the proposition that time to answer is suspended during removal, and party has unexpired

time to answer or otherwise plead upon remand<sup>10</sup> However, current California rules, West's Ann Cal C C P § 430 90, allows a defendant 30 days (from the day the original court receives the case on remand) to answer on remand from federal court Rule 12 of the Arkansas Rules of Civil Procedure, similarly provides that "When any case is removed to federal court and subsequently remanded, *the plaintiff shall file a certified copy of the order of remand with the clerk of the circuit court*<sup>11</sup> and shall forthwith give written notice of such filing to all parties in accordance with Rule 5 Any adverse party shall have 20 days from the receipt of such notice within which to file an answer or a motion permitted under this rule" (Emphasis added) Texas also has a specific procedural rule for answering after remand, Texas Rule of Civil Procedure 237a, which provides "When any cause is removed to the Federal Court and is afterwards remanded to the state court, *the plaintiff shall file a certified copy of the order of remand with the clerk of the state court*<sup>12</sup> and shall forthwith give written notice of such filing to the attorneys of record for all adverse parties All such adverse parties shall have fifteen days from the receipt of such notice within which to file an answer" (Emphasis added)

In the absence of any comparable Rule in our South Carolina Rules of Civil Procedure or any applicable state case law addressing the issue of how to count the time for answering after remand, the Appellants' interpretation is eminently reasonable and comports with the general policy consideration that our rules, in particularly, Rule 55(c),

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<sup>10</sup> Dauenhauer v Superior Court, 149 Ca 2d 22, 307 P 2d 724 (1957)

<sup>11</sup> The requirement that a certified copy of the order of remand be filed in state court is notable and supports the Appellant's argument regarding §1147(c)

<sup>12</sup> The Texas rule also includes a requirement that a certified copy of the remand order be filed in the states court See footnote 9, supra

are to be “liberally construed to promote justice and dispose of cases on the merits ”  
Melton v Olenik, 379 S C 45, 664 S E 2d 487, 492 (Ct App 2008)

**B There existed good cause to set aside the entry of default under Rule 55(c)**

Rule 55(c) allows the circuit court to set aside an entry of default “for good cause shown” Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits In re Estate of Weeks, 329 S C 251, 495 S E 2d 454 (Ct App 1997)  
“In deciding whether good cause exists, the trial court should consider the following factors (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted ”  
Pilgrim v Miller, 350 S C 637, 640, 567 S E 2d 527, 528 (Ct App 2002) , Stark Truss, 602 S E 2d at 102-103

The Rule 55(c) standard is more lenient than the standard for granting relief from a default judgment under Rule 60(b)(1), SCRCF, which provides that a “court may relieve a party or his legal representative from a final judgment, order, or proceeding for mistake, inadvertence, surprise, or excusable neglect ” SCRCF Ricks v Weinrauch, 293 S C 372, 360 S E 2d 535, 536 (Ct App 1987) (citing H Lightsey, J Flanagan, *South Carolina Civil Procedure*, 82 (2nd Ed 1985))

The factors to be considered in determining whether a default judgment should be set aside under the stricter Rule 60(b)(1) standard, are “[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant ” Hill v Dotts, 345 S C 304, 547 S E 2d 894, 897 (Ct App 2001) (citations omitted)

While Hulsey steadfastly maintains that the answer – if even due yet since jurisdiction has not yet reverted in the state court -- was timely filed, the Defendants submit that good cause existed to set aside the entry of default under Rule 55(c), SCRCP, and Judge Pieper abused his discretion in refusing to grant the motion. In the alternative, Defendants submit that excusable neglect was shown sufficient to merit relief from entry of the default judgment under the Rule 60(b)(1) standard.

The evidence establishes that there was no willful default in failing to timely answer. Rather, Hulsey's supposed mistake in calculating the due date for the answer was based on a reasonable interpretation of the available law. In the alternative, the confusion regarding the due date constitutes good cause and/or excusable neglect, particularly in light of the facts that Judge Pieper acknowledged that this was an issue of first impression and that the Plaintiff's own counsel proffered yet a different variation of how to count the allowable time Defendants had for answering upon remand.

In addition to the honest/reasonable mistake and/or excusable neglect in calculating the due date under these unique circumstances, the record will show that Hulsey promptly answered and moved for relief from the entry of default. The record also shows that there exists a meritorious defense and/or mitigation to the asserted causes of action for defamation, namely, Hulsey did assert and would have proven the truth of the allegations. In addition, Hulsey did assert a good faith litigation privilege which should be presumed from Limehouse's own "well-pleaded" allegations and the article itself, and thus, should be subject to Limehouse's disproof at trial, irrespective of Hulsey's supposed default. Other meritorious defenses alleged in the answer, but which Hulsey was denied the opportunity to present to the jury, include lack of proximate cause

in that Limehouse's illegal operation of his business and prior associated bad publicity were the reason his business failed and the proceedings in the federal RICO action were res judicata as to the truth of the allegations [ROA 111, Answer ]

Finally and foremost, there was no prejudice to Limehouse from the short delay in answering – which Plaintiff's counsel acknowledged at the hearing [ROA 781, 12/15/06 Hearing Tr 22 ], while in striking contrast, Hulsey was severely prejudiced by the imposition of liability by default, and being forced to participate in a fundamentally unfair damages proceeding in which they were denied the right to dispute/challenge Limehouse's one-sided presentation and ultimately subjected to a judgment for an excessive amount of actual damages and punitive damages

**III A new trial should be granted because the unduly restrictive procedure in the default damages hearing deprived the Defendants of their Due Process rights**

As recently as just 30 years ago, the South Carolina Supreme Court had never addressed the question of the procedure to be followed in a default damages hearing In the absence of any applicable statutory provisions, in Howard v Holiday Inns, Inc, 271 S C 238, 241, 246 S E 2d 880, 882 (1978), the Court summarily decided to adopt a default damages procedure that limits defendant's participation to cross-examination and objection to plaintiff's evidence However, the Supreme Court has also stated that "It is generally recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action It is the policy of the law to favor the trial of cases on the merits " Lewis v Congress of Racial Equality and/or C O R E, Inc, 275 S C 556, 560, 274 S E 2d 287, 289 (1981)

Defendants maintain that the limited default hearing procedure adopted by the Court – on its face -- deprives a defendant party of the fundamental due process

component of any real, effective opportunity to be heard on the issues of damages, particularly as to the issue of punitive damages [See ROA 667, Tr 357] Defendants further maintain that even if the prescribed default hearing procedure is constitutional, these Defendants were denied their due process rights in this case because the Trial Court allowed the introduction of improper evidence that has severely prejudiced the Defendants in the award of an unsubstantiated, unjustified, and grossly excessive award of actual and punitive damages

Surely the Court never intended that a defendant's procedural default in failing to timely answer a complaint be utilized by a plaintiff to change the facts. Nor could the Court ever have anticipated that the fact of a defendant's procedural default would be used as a weapon to goad the jury to award punitive damages against the defendant for "failing to follow the rules." Even if, for the sake of argument, the entry of default was proper, Limehouse should have been limited to the allegations of the complaint, or else Hulsey should have been allowed to fully meet the merits of the new allegations beyond the complaint. And, in any event, due process demanded that Hulsey be allowed to fully meet the issue of damages – both actual and punitive

**A The default damages procedure, which restricts a defendant to cross examination and objection to evidence, does not comport with the Due Process requirement of a meaningful opportunity to be heard**

The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v Eldridge, 424 U S 319, 333-34 (1976). Even where a party is in default and liability is deemed admitted, the defaulting party still is entitled to due process which includes notice and an opportunity to be heard on the matter of unliquidated damages. See Bodygear Activewear, Inc v Counter Intelligence Services 946 So 2d 1148, 1150 (Fla App 4

Dist 2006) Defendants submit that limiting a defaulting party to restrictive cross examination<sup>13</sup> and objection to evidence does not constitute a meaningful opportunity to be heard on the issues of damages, even where liability is deemed admitted

Apart from limited/restricted participation in the hearing for determination of actual damages, Defendants also submit, as discussed more fully below, that they were entitled to fully contest the award of punitive damages by presenting evidence of their own See Hunter v Spaulding, 388 S E 2d 630 (N C App 1990) (“error for the judge to submit the punitive damages issue to the jury without first allowing Mr Spaulding an opportunity to present evidence addressed to that issue Conducting the trial in this way deprived Mr Spaulding of his rights to be heard and a trial of the punitive-damages claim and contravened his due process rights”)

The Trial Court’s application of the restrictive default damages procedure allowed Limehouse to present an exaggerated, one-sided story with half-truths and fabrications<sup>14</sup> For example, Limehouse alleged in his complaint that Hulsey called a press conference OR otherwise made false statements to certain news agencies, [ROA 37, Complaint ¶¶ 10, 11] Yet at trial he was allowed to argue to the jury that Hulsey called a press conference [ROA 322, 670, Tr 13, 360] In fact, Limehouse began his opening statement describing his case as “This is a case about a rich, hotshot lawyer that called a

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<sup>13</sup> In this case, the Trial Court’s restriction on cross examination also included a constrictive interpretation of the rules on impeachment which made cross examination virtually powerless

<sup>14</sup> The extent to which the Plaintiff was attempting to utilize the entry of default beyond permissible due process bounds was revealed at the very start of the damages trial when the Plaintiff argued that the default even denied the Defendants the right to seek sequestration of the witnesses [ROA 314, Tr 5]

press conference with the Post & Courier ” [ROA 322, Tr 13/12 13 ] Yet, Hulsey was denied the opportunity to prove that he did not call a press conference, rather, he got a phone call and answered questions from a reporter [See ROA 819, 4/22/08 Hearing Tr 23 ]<sup>15</sup>

Limehouse painted a picture of himself as an honest, trustworthy business man, and a wonderful, devoted family man, but Hulsey was prevented from presenting a probate court order which found that he had mishandled/misappropriated money from this father’s estate [ROA 460, 741, Tr 150-52, Ct Ex 2 ] Limehouse also was allowed to present effusive testimony about his sterling reputation in the community, but Hulsey was not allowed to present any of the extrinsic evidence that would have proven to the jury that Limehouse had violated numerous state and federal laws in the conduct of his business, including

- withholding over \$60,000 in overtime legally due to his employees, violations,
- housing his employees in overcrowded, substandard conditions in violation of local zoning and building code violations,
- failing to carry worker’s compensation insurance as required by state law,
- failing to pay federal taxes,

Similarly, Limehouse testified that he supposedly lost his business within days of the April 24, 2004, Post & Courier article, however, Hulsey was prevented from offering

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<sup>15</sup> Hulsey was also deprived of any opportunity to explain to the jury the nature of class actions and the implication that they already had representative plaintiffs to rebut the accusations by Limehouse that he called the press conference to get more clients [ROA 672, Tr 362 ]

evidence to show that numerous other articles prior to the April 24, 2004 article had destroyed his reputation and his business with reports of the violations listed above, and further reports that he was trafficking in illegal immigrant labor and selling phony green cards and social security cards<sup>16</sup>. And, while Limehouse's accountant was allowed to proffer an opinion that L&L was worth \$1.3 million based on the booked profit for the first four months of 2004 (because L&L had never shown a profit from 1999 – 2003)<sup>17</sup>, Hulsey was not allowed to offer any expert evidence as to the real value of L&L in light of the impact of all violations and bad press which predated the April 24<sup>th</sup> article.

Due process and fundamental justice demands that even where, as here, a defendant is deemed to have admitted liability based on a procedural default, the jury should be provided with the truth of the whole story in order to fairly determine the extent of any injury to the plaintiff and properly award damages within the bounds of the applicable legal standard.

**B The Plaintiff was allowed to introduce new allegations to which the Defendants were not allowed to defend**

Beyond the allegations in the Complaint regarding the press conference and Post and Courier article, Limehouse was allowed to present evidence of other allegations without allowing Hulsey to fully contest the new allegations. This did not comport with current practice and constituted a separate violation of due process.

One of the fundamental principles of default is that upon entry of default, the defendant is deemed to have admitted the well-pleaded allegations of the complaint.

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<sup>16</sup> See ROA 720, Ct. Ex. 1 – news articles ]

<sup>17</sup> [ROA 543-547, Tr. 233-237 ]

The defendant by waiving a contest and suffering a default to be taken against him, admits the truth of the allegations, set out in the plaintiff's declaration or complaint. Hence the default authorizes the entry of any judgment warranted by the facts alleged.

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[A]s the effect of the confession is limited to the material issuable facts well pleaded in the declaration or complaint. Nor does it admit an allegation which constitutes a mere conclusion of law.

Gadsden v Home Fertilizer & Chemical Co., 89 S C 483, 487-88, 72 S E 15, 17 (1911)(quoting Gillian v Gillian, 65 S C 129, 132, 43 S E 386, 387 (1903))

A corollary principal is that the trial judge may not grant relief beyond that which is demanded in the pleadings. Pinckney v Atkins 317 S C 340, 343, 454 S E 2d 339, 341 (Ct App 1995) (citing River Road Co v Energy Master Products, Inc 300 S C 316, 387 S E 2d 694 (Ct App 1989), SCRCP Rule 54(c))

When a defendant is in default, the plaintiff's right to recover is not unlimited and is circumscribed by the complaint he drafted. Wiggins v Todd 296 S C 432, 435, 373 S E 2d 704, 705 - 706 (Ct App 1988). In Lewis, the Supreme Court was so concerned by an excessive default damages award that it raised the issue ex mero motu, declaring

In the case of unliquidated damages a defendant, though in default as to liability, has a right to expect that the judgment of the court, or the verdict of the jury, will be in keeping not only with the allegations of the complaint and the prayer for relief, but also the proof which has been submitted. Even though the evidence used as a basis for procuring the \$250,000.00 judgment here is not before us, this award is patently so grossly out-of-proportion to the delicts alleged in the complaint that this court, as a matter of common law and independent of § 15-27-130, should not allow the same to stand.

Id. See also Jackson v Midlands Human Resources Center, 296 S C 526, 529, 374 S E 2d 505, 506 - 507 (Ct App 1988) ("Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted.")

Defendants submit that the Trial Court allowed the jury to impose actual and punitive damages based on alleged defamatory (and other alleged wrongful) acts introduced into evidence by the Plaintiff that were not pled in the Complaint, and thus not deemed admitted, without allowing the Defendants their due process rights to fully meet and contest the accusation

The allegations of the complaint – which are deemed admitted – are

¶ 9 Hulsey filed a class action against Plaintiff and his companies which alleged improper acts and conduct

¶ 10 On or about April 23, 2004, Hulsey “held a press conference or otherwise made false statements about the Plaintiff to certain news agencies including but not limited to a reporter from the Post & Courier staff ”

¶ 11 During the news conference, Hulsey “made false and defamatory statements”

- a that the Plaintiff engaged in classic racketeering scheme,
- b that the Plaintiff’s conduct set the community back 150 years,
- c that the Plaintiff engaged in a blatant case of indentured servitude,
- d that the Plaintiff created a perfect racketeering enterprise just like Tony Soprano

[ROA 32, Complaint ]

As the Trial Court initially instructed the jury, the Hulsey’s failure to answer constituted an admission that he/they made THESE false statements at THAT press conference (or “otherwise”) and “default” damages – actual and punitive – could not be

awarded on the basis of that single incident of defamation. Limehouse's attorney even admitted that "all this case is about is damage to Mr. Limehouse's reputation as a result of those four statements that I put in the complaint" [ROA 377, Tr 68, lines 22-23]. Plaintiff's counsel further specifically proclaimed that this case is solely about the articles in the Post & Courier [ROA 378, Tr 69, lines 3-4]. However, the Trial Court improperly allowed Limehouse Plaintiff to make additional accusations, without allowing Hulseley to fully defend.

Limehouse was allowed to testify that Hulseley had run the false statements on his Firm web site for the last three years including up to the morning of trial and that the web site violated some unspecified court order, [ROA 367, Tr 58], and to compound this error, the Plaintiff's attorney was allowed to argue in closing that the web site justified punitive damages [ROA 682, Tr 372]. Even though no such allegations were made in the complaint and thus were not deemed admitted, Hulseley was precluded from proving up the content of the web site and allowing the jury to learn the truth about those allegations and the article – perhaps most critically, that Limehouse was never mentioned on the web site [ROA 745, See Ct Ex 3 – printout of website].

### **C The Trial Court improperly commented on the facts**

The prejudice was revealed (and even exacerbated) when the jury specifically asked about the website and whether the link to the article was still there. "Is the link to the April 24, 2004 article still on Mr. Hulseley's web site? If not, when was it removed?" [See ROA 710, 759, Tr 400/17-19, Ct Ex 4 – jury question]. Even though the web site had not been the subject of any of the allegations in the complaint, and despite the fact that Hulseley had been denied the right to present evidence or show the jury the actual web

site [ROA 711, Tr 401/19-22], the Trial Court told the jury that the article was still linked as of Monday of trial [ROA 714, Tr 404/5-7 ]

Beyond the impropriety of allowing Limehouse to reach beyond the complaint without allowing Hulseley to respond, the Trial Court's answer to the jury constituted an improper comment of the facts [See ROA 713, 403 – objection ] Sierra v Skelton, 307 S C 217, 414 S E 2d 169, 174 (Ct App 1992)(“A trial judge should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally *China v City of Sumter*, 51 S C 453, 29 S E 206 (1898)”) Perhaps even more inexplicably, Limehouse was allowed to testify that the link on the web site was a violation of a court order while Hulseley was precluded from introducing the very court order/proceedings from the federal class action which indisputably evidences that there was no prohibition from mentioning the case on the firm website [ROA 815, Federal Court Transcript 8/18/04, tendered at 4-22-08 hearing on posttrial motions, see Tr 19-20 ]

**IV The Award of Punitive Damages is founded on trial error and constitutes a denial due process**

**A The Defendants were entitled to a meaningful opportunity to defend on the Plaintiff's claim for punitive damages**

It is beyond contravention that the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the topic of punitive damages has been a relatively frequent subject of decisions from U S Supreme Court and the South Carolina Appellate Courts over last two decades Pacific Mutual Life Ins v Haslip, 499 U S 1 (1991), BMW of North America, Inc v Gore, 517 U S 559, 568 (1996) (“The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor ”), see also Gamble v Stevenson, 305 S C 104, 406 S E 2d

350 (1991), S C Farm Bureau Mut. Ins v Love Chevrolet, 324 S C 149, 478 S E 2d 57 (1996), Atkinson v Orkin Exterminating Co 361 S C 156, 164, 604 S E 2d 385, 389 (2004)

As a threshold matter, the trial court must assess the culpability of a defendant's conduct to determine whether punitive damages should even be submitted to the jury South Carolina Farm Bureau Mut Ins Co v Love Chevrolet, Inc., 324 S C 149, 478 S E 2d 57, 58 (1996) And, while the jury has broad discretion in awarding punitive damages (or not), any award is subject to review by the trial court

In Gamble, this Court developed an eight- factor (now ten factor) post-verdict review that trial courts are required to conduct to determine if a punitive damages award comports with due process In Gore, the United States Supreme Court has also set forth three gudepots that trial courts must apply to an award of punitive damages to determine whether the award violates due process

Under state and federal constitutional due process standards, the jury and the Trial Court must consider the following factors in awarding/reviewing punitive damages

- (1) the character of the defendant's acts
- (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause,
- (3) defendant's degree of culpability,
- (4) the punishment that should be imposed,
- (5) duration of the conduct,
- (6) defendant's awareness or concealment,
- (7) the existence of similar past conduct,
- (8) likelihood the award will deter the defendant or others from like conduct,
- (9) whether the award is reasonably related to the harm likely to result from such conduct, and
- (10) defendant's wealth or ability to pay

Austin v Specialty Transp Services, Inc., 358 S C 298, 594 S E 2d 867, 875 (Ct App 2004)

Under Gore, 517 U S at 575, the Trial Court must review the constitutionality of a punitive damages award by determining whether the award was reasonable under the following guideposts (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases See also James v Horace Mann Ins Co., 371 S C 187, 638 S E 2d 667, 670 (2006)

In view of the development of constitutional law on punitive damages, Hulsey maintains that, notwithstanding the impact of a procedural default on the question of liability and the assessment of actual damages, due process entitles a defaulting party to fully contest any claim for punitive damages

As to the award of punitive damages in this case, Hulsey further contends that the Trial Court erred in allowing Limehouse to go into matters beyond the bounds of the complaint while restricting Hulsey's ability respond, directing the jury to impose punitive damages based on default without exercising the trial court's obligation to independently make the threshold determination of whether the defendants' conduct rises to the level of culpability to justify imposition of punitive damages, and instructing the jury [ROA 705, Tr 395, lines 11-12], and submitting a verdict form that did not give the jury an option to decline to award any punitive damages

**B The jury should have been given the option of awarding no punitive damages to the Plaintiff**

As a matter of state and federal law, the Trial Court erred in instructing the jury that it had to award punitive damages and submitted a jury verdict form that required the jury to make an award of punitive damages [ROA 705, 707, 17, Tr 395, 397/16-22,

Verdict form ]

“Punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. Moreover, they serve to vindicate a private right by requiring the wrongdoer to pay money to the injured party.” Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867, 874 (Ct. App. 2004). To establish a claim for punitive damages, the plaintiff has the burden of proving such damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135. However, even upon such proof, punitive damages are quintessentially a question of discretion, not right.

The U.S. Supreme Court held in Smith v. Wade, 361 U.S. 30, 52 (1983), that a finding of recklessness or malice or conscious disregard does not mandate an award of punitive damages. “A key feature of punitive damages— that they are never awarded of right, no matter how egregious the defendant’s conduct. ‘If the plaintiff proves sufficiently serious misconduct on the defendant’s part, the question whether to award punitive damages is left to the jury which may or may not make such an award.’ D. Dobbs, Handbook of the Law of Remedies 204 (1973).” See Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15, 32 (Ct. App. 2000) (master did not abuse discretion in declining to award punitive damages “where an examination of the totality of the evidence in the record does not justify the imposition of punitive damages”), see also Hunter v. Spaulding, 388 S.E.2d 630 (N.C. App. 1990) (“Punitive damages, in contrast, are not recoverable as a matter of right but are always within the discretion of the trier of fact. See Harris v. Queen City Coach Co., 220 N.C. 67, 16 S.E.2d 464, 465 (1941)”).

**C The Plaintiff should not have been allowed to present evidence and argument on matters not proper for the jury's consideration in awarding punitive damages**

Beyond the prejudicial errors of holding Hulsey in default with the consequence of deeming him to have admitted liability and then tying his hands and depriving him of his due process rights to a meaningful opportunity to meet the claim for damages (actual and punitive) damages, Limehouse was allowed to use the fact of this procedural default as a weapon to inflame the jury and inflate the punitive damages award

Logically, the Trial Court necessarily had to explain to the jury about the default/deemed admissions and the procedure for the trial, however, the jury was improperly led to believe/allowed to consider the Defendants' default as wrongful conduct warranting punitive damages. The transcript shows that the Trial Court's explanation and repeated commentary to the jury about the Defendants' default and deemed admissions was unjustified and unfairly prejudiced the Defendants by inferring to the jury that Defendants has done something "wrong" which could be "punished" by an award of punitive damages

In the opening explanation to the jury, the Trial Court repeatedly told the jury that the Defendants failed to answer and the allegations were deemed admitted [ROA 316 318, Tr 7, lines 9-13, Tr 8, lines 4-7, 8, lines 23-24, Tr 9, lines 1-63 ] Then, during closing argument, the Plaintiff's counsel started off by telling the jury that the Defendants didn't play by the rules when they failed to timely answer and concluded his closing with yet another accusation about the Defendants not playing by the rules

Thank you all for listening to use over these past couple of days. You know, when we handle litigation, we handle trials of cases in this court and in state court, we play by certain rules. Everybody in this courtroom is bound by those rules. We're bound by the rules, the defendants are bound by the rules.

Now, the defendant's don't like the rules, but they're the rules, and they've got to abide by them [ROA 668, Tr 358/15-22 ]

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We all got to play by the rules We tried to play by the rules, but I'm not sure about the other side [ROA 687, Tr 377/15-17 ]

Finally, in the instructions to the jury, the Trial Court again repeatedly commented – to the point of dwelling on – the fact that Hulsey did not “timely” answer [ROA 698, 701, Tr 388/17-23, Tr 391/12-14 ] The irony is that despite the good faith dispute amongst counsel and the court over the actual appropriate timing of the answer, Plaintiff's counsel was allowed to insinuate Hulsey overtly and intentionally refused to play the rules and thumbed his nose at the system, which was absolutely untrue Hulsey had already been punished by the process of deeming the allegations admitted Due process cannot countenance the imposition of further punishment by allowing the jury to consider a procedural default as a basis for imposition of punitive damages

The Trial Court also allowed Limehouse to present other evidence and arguments about issues that were not proper for the jury's consideration on punitive damages As discussed above, Limehouse was allowed to prove-up and argue that the web site link to the article showed lack of remorse and a continuing duration of conduct [ROA 682, Tr 372/19-25 ] In another example, the Trial Court allowed Limehouse to present evidence as to supposed harm suffered by others (Plaintiff's family members) who are not parties to this action This included testimony about how the article upset Limehouse's pregnant daughter and sent her into premature labor, and how his grandchildren were suffering because he could not afford to help with their education [ROA 626-627, 637-641, Tr 316-17, 327-331] Philip Morris USA v Williams, 127 S Ct 1057 (2007) (punitive damages cannot be awarded to punish defendant for harms visited on others)

Limehouse was allowed to present testimony that Hulsey had demanded \$6.5 million to settle the underlying RICO case and then eventually settled for \$20,000 which his attorney characterized as "nuisance value," [ROA 643, Tr 333-35], which evidence Limehouse was allowed to use to portray Hulsey as a greedy, "hotshot" attorney, [ROA 384, 450-451, 672, Tr 75, 141-42, 362 ] And despite the fact that the settlement negotiations were not part of the allegations of the complaint (thus not deemed admitted), Hulsey was prohibited from presenting any evidence to clarify the terms of the settlement (i.e. the difference between settling a potential class action versus two/three individual defendants), while Limehouse was allowed to arrogantly proclaim in closing argument that he did not know and did not care what happened to the \$20,000, and even speculated that Hulsey would have "lined his pockets" with a \$6.5 million settlement [ROA 673, Tr 363/7 13 ] And, perhaps most importantly, Hulsey was not allowed to elicit any of the evidence that Hulsey was handling the RICO case pro bono, he did not need any more clients to proceed with the class action because he already had his representative plaintiffs, and finally Hulsey did not receive any fee from that settlement, any and all of which certainly would have refuted the accusation that Hulsey was "greedy " [ROA 651, 819 Tr 341, 4/22/08 Hearing Tr 23 ] Similarly, in the face of the accusation of greed, Hulsey was not allowed to present any evidence of his considerable charitable donations and work for the homeless and hungry [ROA 450-451, Tr 141-142 ]

Finally, the jury was permitted to hear that Defendant Hulsey's net worth was \$81,556,986.51 based on a financial statement from May 6, 2006, [ROA 575, Tr 265,] but Defendants were prohibited from showing that Plaintiff knew, as a result of requests for admission, that the most recent financial statement of June 6, 2007 reflected a net

worth of \$32,802,776.27. Defendants were prohibited from explaining that the majority of Defendant Hulsey's net worth is represented by his indivisible share of his former firm's so-called Tobacco Receivable. This is a structured legal fee owned by Ness Motley, n/k/a Motley Rice. The fee is paid quarterly for the next twenty years and is subject to offsets for administrative expenses and claims of others to the extent that there are contingent liabilities of the former firm. Because the fee is owned by Motley Rice, Defendant Hulsey cannot accelerate his payments. Further, the figure of \$32,802,776.27 represents the present value of Defendant Hulsey's interest in the structured fee which he cannot presently obtain. This fee is not liquid and would not be available to enable Defendant to pay a judgment. The Tobacco industry has no obligation other than to make quarterly payments based on a calculation that takes into consideration a myriad of factors which could reduce the amount. The present value of this twenty year payout is not liquid and not available to the Defendant, either. If it were available, it would be subject to taxes at the highest federal rate, as well as a 7% South Carolina state tax, which in effect would cut it by more than one half.

Thus, the evidence produced by the Plaintiff grossly misstated the true status of Defendant Hulsey's financial worth and ability to pay. Failing to allow Hulsey to explain that the majority of his net worth is not liquid and unavailable for payment of a punitive damages award, as well as being subject to contingent liabilities and uncertainties, was a highly prejudicial, denial of due process.

**D The Trial Court erred in confirming the award of punitive damages based on facts not in evidence or properly deemed admitted even if the default were proper**

Apart from and beyond the denial of due process in the jury's consideration and award of punitive damages, the Trial Court's review under Gamble and Gore was also infected by the procedural violations/defects. While the Trial Court's Gamble review is subject to abuse of discretion review, an appellate court reviews de novo the trial court's application of the Gore guideposts. James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667, 671 (2006). Under the unduly restrictive default damages procedure enforced by the Trial Court, any consideration beyond the allegations renders the Trial Court's consideration on these factors an error of law or, at the least, an abuse of discretion.

As to the question of Hulsey's degree of culpability, the Trial Court found that there was clear and convincing evidence that Hulsey intentionally defamed the Plaintiff by holding a press conference. [ROA 24, 9/8/08 Order]. However, there was no "evidence" presented that Hulsey called a press conference. Rather, as discussed above, Limehouse pled in the alternative and Hulsey was denied the opportunity to present evidence that he did not call the press conference and only answered question posed by a reporter that initiated the call to him.

Even more inexplicably, the Trial Court reached beyond the "admitted" allegations of the complaint and the evidence submitted at trial to make a "finding" as to duration of the conduct. On this point, the Trial Court found that "[T]here was clear and convincing evidence presented at the damages hearing that the allegations made were not spontaneous in that the press conference and the allegations were planned as part of the filing of a lawsuit against the Plaintiff, and that such planning necessarily took place over

a period of weeks if not months ” [ROA 24, 9/8/08 Order, page 2 ] Again, there was no “admission” or evidence of any press conference But more incredibly, there was no evidence of any weeks of months of planning

Finally, as to other “appropriate” factors, the Trial Court stated that he had considered the fact that Hulsey was not able to present mitigating evidence due to the constraints of the default damages hearing [ROA 25, 9/8/08 Order page 8 ] However, that was a token, hollow gesture because in the next sentence, the Trial Court stated that he was “privy to most if not all of the evidence the Defendants wished to present” and he considered the jury’s verdict reasonable in light of that evidence Despite the Trial Court’s bold assertion, the record will show that the Defendants were only able to make generalized arguments with bare proffers from which the Trial Court could not fairly speculate how the jury would have weighed all the evidence the Defendants would have submitted if they had been afforded their due process rights to a meaningful opportunity to be heard and refute/disprove to the Plaintiff’s fabrications and half-truths

## **CONCLUSION**

At the threshold, Hulsey Defendants submit that the state court did not have jurisdiction make an entry of default or proceed to judgment because jurisdiction been not yet revested in the state court because the District Court has not mailed a certified copy of the order of remand to the clerk of the state court as required by 28 U S C A §1447(c)

The Hulsey Defendants further submit that the Trial Court erred in refusing to set aside the entry of default because the answer was not late, or in the alternative, there was

good cause under Rule 55(c) because any miscalculation of the due date was excusable given the absence of any state rule or appellate opinion addressing the issue, and Plaintiff conceded there was no prejudice

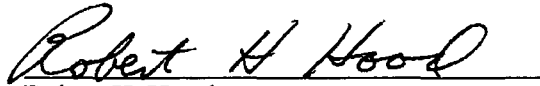
Even if this Court were to find that jurisdiction has reverted in the state court and the Trial Court did not err or abuse its discretion in refusing to set aside the default, the Hulsey Defendants were denied their due process rights in the conduct of the damages trial which did not allow them a meaningful opportunity to meet the issue of damages (both actual and punitive) or defend on allegations beyond the complaint

And, finally, the jury's award of punitive damages as reviewed and confirmed by the Trial Court constituted a violation of due process because the Defendants were not afforded a meaningful opportunity to defend on punitive damages, and the jury was allowed (in fact, required) to award punitive damages based on improper arguments, "admissions" beyond the complaint, and speculation not even in evidence

For these reasons, the Appellants respectfully request that the Court reverse the judgment and remand the case to await compliance with Section 1447(c) necessary to revert jurisdiction in the state court, and allow the Defendants to defend the claims against them on the merits in a trial that comports with the due process requirements of the State and Federal Constitutions

Respectfully submitted,

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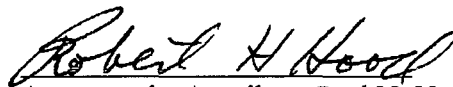
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April 8, 2009

#### CERTIFICATION

I certify that this Final Brief of Appellant, Paul H Hulseley and The Hulseley Litigation Group complies with Rule 211(b), SCACR



Attorneys for Appellant, Paul H Hulseley and  
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STATE OF SOUTH CAROLINA  
In the Court of Appeals

On Appeal from Charleston County  
Court of Common Pleas

The Honorable Roger M Young, Circuit Judge  
The Honorable Daniel F Pieper, Circuit Judge

Case No 06-CP 10 1577

Lawton Limehouse, Sr ,

RESPONDENT,

v

Paul H Hulsey and The Hulsey  
Litigation Group, LLC,

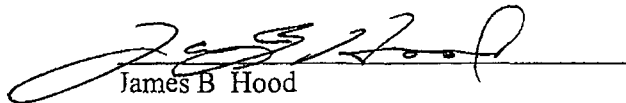
APPELLANTS - PETITIONERS

Certificate of Service

I do certify that on this \_\_\_ day of April 2009, a copy of the Final Brief of Appellants and Final Reply Brief of Appellants was served on Respondent by mail to his Counsel of Record at

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeal

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Roger M. Young, Circuit Judge  
The Honorable Daniel F. Pieper, Circuit Judge

Case No. 06-CP-10-1577

Lawton Limehouse, Sr.

Respondent

Paul H. Hulsey and  
The Hulsey Litigation Group,  
LLC

Appellant

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## STATEMENT OF THE CASE

The Respondent, Lawton Limehouse, Sr , ( Limehouse”) filed this action in the Court of Common Pleas for Charleston County on April 19, 2006 seeking recovery against the Appellants, Paul H Hulsey and the Hulsey Litigation Group, LLC, collectively (“Hulsey”) pursuant to a cause of action for defamation (R pp 35-41,Complaint) The Appellant, Paul H Hulsey, was served with the Summons and Complaint on April 21, 2006 (R p 103,Affidavit of Service) The Appellant, The Hulsey Litigation Group, LLC was served with the Summons and Complaint on April 20, 2006 (R p 104,Affidavit of Service) Hulsey filed a Notice of Removal to Federal District Court on May 5, 2006 (R pp 42-84, Notice of Removal) Limehouse filed a Motion to Remand to State Court on June 2, 2006, on the basis that the Limehouse’s Complaint alleged a cause of action for common law defamation which does not arise under federal law or involve a substantial question of federal law (R pp 88-93,Plaintiff’s Motion to Remand and Memorandum in Support of Plaintiff’s Motion to Remand)

The federal court, by Order of Judge C Weston Houck, dated July 19, 2006, remanded the case to the state court on the basis that federal question jurisdiction was not present Judge Houck’s remand order is dated July 19, 2006 and was entered in the clerk s office for the federal court on July 20, 2006 (R p 6,filed Order of Remand) The clerk of the federal court electronically filed the order of remand in the clerk’s office of the state court on July 21, 2006 (R pp 1-5 filed copy of order of remand to state court together with federal court s docket report)

On July 27, 2006, the Charleston County Clerk of Court mailed a notice of filing of the remand order to all counsel of record (R p 7,clerk’s notice of entry of remand order dated July

27, 2006)

On August 22, 2006, Limehouse filed a Request for Entry of Default along with the Affidavits of Services and Affidavits of Default in the Charleston County Clerk of Court's office (R pp 101-106, Requests for Entry of Default, Affidavit of Service and Affidavit of Default)

The Charleston County Clerk of Court entered defaults against Hulsey on August 22, 2006 (R pp 107-108, clerk's entry of defaults) On August 24, 2006, the clerk mailed the notices of entry of default to all counsel of record (R pp 109-110, Clerk's notice of entries of default dated August 22, 2006)

On August 29, 2006, Hulsey filed a Motion to Set Aside Entry of Default pursuant to Rule 55(c) SCRPC (R pp 123-228, Motion to Set Aside Entry of Default and Exhibits )

The Motion to Set Aside Entry of Default came before Judge Danny Pieper on December 15, 2006 for hearing By Order filed February 7, 2007, Judge Pieper denied Hulsey's motion to set aside default and allow untimely answer and ordered that Hulsey should be given notice of any unliquidated damages hearing (R pp 8-16, Order of Judge Danny Pieper filed February 7, 2007)

The case came before Judge Roger M Young who presided over a jury trial on damages on February 4-6, 2008 The jury returned a verdict of \$2,390,000 00 in actual damages and \$5,000,000 00 in punitive damages against Hulsey The judgement was entered on February 7, 2008 (R pp 17 -18, Jury Verdict/Judgment)

Hulsey then filed post-trial motions Hulsey moved to dismiss for lack of subject matter jurisdiction, moved for relief from judgment based on mistake and/or neglect, moved for new trial absolute, and moved for a new trial on punitive damages (R pp 236-263, motions filed

February 15, 2008) By Order filed May 23, 2008, Judge Young denied Hulsey's post-trial motions (R pp 19-25, Order filed May 27, 2008)

Hulsey then filed a Motion to Alter or Amend Judgment dated June 6, 2008 (R pp 297-308, Motion to Alter or Amend Judgment filed June 6, 2008) By Order filed September 8, 2008, Judge Roger M Young, granted Hulsey's Motion to Alter or Amend as to the enumeration of the Court's post-trial review of the jury's award of punitive damages and denied Hulsey's Motion to Alter or Amend as to the remaining issues raised (R pp 23-25, Order of Judge Roger M Young's filed September 8, 2008)

#### **STATEMENT OF THE FACTS**

This is an appeal from the following orders (1) Judge Danny Pieper's Order denying Defendants' Motion to Set Aside Default filed February 7, 2007, (2) the judgement entered on the jury's verdict on February 7, 2008, (3) Judge Roger M Young, Sr 's Order denying Defendants' post-trial motions filed May 23, 2008, and (4) Judge Roger M Young, Sr 's Order Denying Defendants' Motion to Alter or Amend except as to the enumeration of the Court's post-trial review of the jury's award of punitive damages

As alleged in the Complaint, this case arose from false and defamatory statements made by Hulsey at a press conference or made to a reporter with the Charleston Post and Courier. The statements included

- A That the Plaintiff engaged in a classic racketeering scheme,
- B That the Plaintiff's conduct set the community 150 years,
- C That the Plaintiff engaged in a blatant case of indentured servitude,
- D That the Plaintiff created a perfect racketeering enterprise just like Tony Saparano

(R p 37,Complaint, paragraph 11)

Limehouse and his son owned and operated an employment staffing agency, L&L Services, LLC in Charleston County Limehouse had worked and devoted his full time and efforts to establish the staffing agency since 1999 (R p 36,Complaint paragraphs 6 and 8)

Paul H Hulsey is a licensed practicing attorney, with Appellant, The Hulsey Litigation Group, LLC, which has its principal place of business in Charleston County, South Carolina (R p 32, Complaint, paragraph 2)

In 2004, Hulsey filed a class action lawsuit on behalf of certain individuals against Limehouse and L&L Services, LLC, which lawsuit alleged improper action and conduct on the part of Limehouse and L&L Services, LLC (R p 37,Complaint paragraph 9)

The Statements made by Hulsey to the Post and Courier reporter were made within the intent of bolstering the class action lawsuit which Hulsey filed against Limehouse with the intent to attract individuals who would become members of the class action suit so that Hulsey could potentially earn large sums of money as legal fees (R pp 38-39,Complaint paragraph 16)

The statements made by Hulsey were published in the Post and Courier on April 24, 2004 According to the testimony of the Director of Circulation for the Post and Courier, 99,147 newspapers were sold on April 24, 2004 and the newspaper was read by 237,952 people (R p 607, Line 6 to p 608, Line 23) The newspaper article that was published by the Post and Courier on April 24, 2004 came out on Saturday At the time the newspaper publication came out Limehouse s staffing agency employed approximately 200 people, had 15 vans, a line of credit with the bank, and the business was running well (R p 355,Lines 13-23) On the following Monday morning Limehouse s customers started calling and cancelling Limehouse's

employees By 10 00a m on the Monday following the publication, Limehouse was out of business (R p 357, Lines 11-25)

According to the testimony of Limehouse's expert, Limehouse's business, L&L Services, LLC, was valued at \$1,371,170 00 as of April 24, 2004 when the newspaper article was published Limehouse owned a fifty (50%) interest in L&L Services, LLC and therefore Limehouse's damages for the loss of the business totaled \$685,585 00 (R p 358, Lines 14-22) Limehouse testified that when the newspaper was published Limehouse was humiliated and embarrassed (R p 360, Lines 18-21) He was depressed and could not sleep, and lost 15 lbs (R p 362, lines 2-14) After the newspaper was published, Limehouse, was unable to find a job in the area and took a job in Georgia which was 300 miles from his home (R p 362, line 15 to p 363 Lines 21) Limehouse was paid nothing for working in 2004 other than his expenses Limehouse earned \$5,000 00 in 2005 and 8,000 00 in 2006 He earned \$18,000 00 in 2007 (R p 365, Lines 1-10) After the publication Limehouse had to borrow money from a number of individuals including his son-in-law to be able to take care of himself and his family (R p 366, Lines 8-18)

According to the testimony of Limehouse's banker, following the newspaper publication, Limehouse lost his business and had to liquidate his business assets and personal assets to pay down the debt that Limehouse owed to the bank (R p 493, Lines 14-25)

According to testimony of Berndette Dewitt, employed with Bank of America, the Appellant, Paul H Hulsey, filed a financial statement with the Bank of America on May 17, 2006 Paul H Hulsey's financial statement indicated that he had a net worth of \$81,556,986 51 (R p 574, Line 17 to p 577, Line 12)

Limehouse prayed for actual and punitive damages alleging that he had suffered damages including embarrassment, humiliation, mental suffering and special damages including the loss of the business (R p 41 Complaint, paragraphs 26 and 27)

### ARGUMENT

#### **I        Jurisdiction was revested in the state court as soon as the order of remand was entered in the federal court**

Hulsey alleges that jurisdiction did not re-vest in state court because the district court clerk failed to send a certified copy of the remand order to the state clerk of court. The Fourth Circuit has held, however, that when the federal district court's remand order is entered in federal court that the federal court is divested of jurisdiction even though no certified copy of the order of remand was mailed to the state court.

In In re Lowe, 102 F 3rd 731, (4<sup>th</sup> Cir 1996) the remand order was entered on the district court docket and the district court clerk sent a copy of the order to the state court, however, "the copy that the state court received lacked the blue backing stating that it was "certified" "

In holding the Federal Court loses its jurisdiction over a case as soon as an order to remand the case is entered, the Court In In re Lowe stated

"Logic also indicates that it should be the action of the court (entering an order of remand) rather than the action of a clerk (mailing a certified copy of the order) that should determine the vesting of jurisdiction. Citing Van Ryn v Korean Air Lines, 640 F Supp 284, 284 (C D Cal 1985). To hold otherwise would impermissibly elevate substance over form. One party should not arbitrarily receive a second opportunity to make its arguments due to a clerical error. In sum, the plain language of the statute, the policy behind it, and logic all support the conclusion that § 1447 divests a district court of jurisdiction upon the entry of its remand order."

The Fourth Circuit in Bryan v Bellsouth Communications, Inc 492 F 3rd 231, 242(4th

Cir 2007) stated that

‘a remand is effective when the district court mails a certified copy of the remand order to the state court, see 28 U S C A §1447(c) (West 2006), or, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered ”Citing re Lowe, 102 F 3d 731, 734-36 (4<sup>th</sup> Cir 1996)

In this case, Judge Houck remanded the case to state court because federal question jurisdiction was not present Judge Young was correct in holding that the mere entry of the order of remand by the federal district court deprived the federal court of jurisdiction

In this case, Judge Weston Houck’s order of remand was entered in district court on July 20, 2006 (R p 6, filed order of remand dated July 19, 2006) The clerk of the district court then electronically filed the order of remand with the clerk of the state court on July 21, 2006 (R p 1, state court clerk’s filed copy of the order of remand )

By Order of Chief Judge of the United States District Court, Joseph F Anderson, Jr , dated February 18, 2005 the district court established an electronic case filing system (ECF) effective February 28, 2005 (R pp 861-862, Order of Chief Judge Joseph F Anderson, Jr , dated February 18, 2005) Judge Anderson’s order also states that

‘the United States District Court of the District of South Carolina shall establish an ECF system by adoption of the ECF policies and procedures ”

(R pp 861-862, Order of Judge Anderson dated February 18, 2005)

The ECF policies and procedures of the District Court of South Carolina which were in effect at the time the remand order was entered states“when a document is filed electronically, the electronic record constitutes the official record The filed document is binding as the official record (ROA 871, ECF policies and procedures of the District Court of South Carolina, paragraph 6 2)

Hulseys argument concerning subject matter of jurisdiction makes no sense They request this Court to find that neither the federal court or state court had jurisdiction over Limehouse s case even though the case was properly filed and served in Charleston County

**II The Entry of Default should not be set aside as Judge Pieper’s ruling is not without evidentiary support or controlled by some error of law**

The South Carolina Court of Appeals in Williams v Vanvolkenburg, 312 S C 373, 374 440 S E 2d 408, 409 (S C App 1994) stated that

“A court may set aside an entry of default for good cause shown ” Rule 55(c) SCRCP Whether good cause is established is within the discretion of the court Winn v Shearson Leaman Brothers Inc 298 S C 462, 381 S E 2d 499 (Ct App 1989) This Court will not disturb a discretionary ruling on an appeal unless it appears the ruling is without evidentiary support or controlled by some error of law Stanton v Town of Pawley’s Island, 309 S C 126, 420 S E 2d 502 (1992) ”

It is not whether this Court believes good cause existed to set aside the default, but whether Judge Pieper’s determination is supported by the evidence and not controlled by an error of law

Judge Pieper found that “there was no good reason presented by the defendants for their failure to file a timely answer other than attorney confusion about the deadline for when an answer was due ” Judge Pieper’s finding is not without evidentiary support (R p 14,order filed February 7, 2007)

During argument before Judge Pieper, Hulsey presented no good reason for failing to file the answers timely In fact, he argued that he was not late in filing an answer (R p 766, Lines 19-24, Transcript of Motion hearing) Hulsey in their written motion argued that the defendants were not in default and still had time to answer the complaint as of the date the plaintiff moved

for default (R p 124, Motion to Set Aside Entry of Default filed August 29, 2006)

Hulseys' answer was clearly late. Hulseys filed their answer on August 29, 2006 in response to the clerk's notice to him that default had been entered (R pp 111-119, defendants' answer R pp 109-110, Clerk's notice of entry of default dated August 29, 2006). Paul H Hulseys' answer was 101 days late and the Appellant, The Hulseys Litigation Group, LLC Answer was 100 days late. The Appellant, Paul H Hulseys was served with the Summons and Complaint on April 21, 2006 (R p 103, Affidavit of Service of Paul H Hulseys). His Answer was due on May 21, 2006. The Appellant, The Hulseys Litigation Group, LLC was served with the Summons and Complaint on April 20, 2006 (R p 104, Affidavit of Service of The Hulseys Litigation Group, LLC). The Hulseys Litigation Group, LLC's Answer was due on May 20, 2006.

The filing of a notice of removal does not toll the time for answering. Rule 81(c), FRCP states as follows:

- (1) Applicability. These rules apply to a civil action after it is removed from a state court.
- (2) Further Pleading. After removal, repleading is unnecessary unless the court orders it.

A Defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:

- a. 20 days after receiving-through service or otherwise a copy of the initial pleading stating the claim for relief,
- b. 20 days after being served with the summons for an initial pleading on file at the time of service, or
- c. 5 days after the notice of removal is filed.

Pursuant to Rule 81(c), FRCP, the defendants' answers were due within 20 days after being served with the Summons and Complaint. The time for answering is not stayed by the filing of a notice of removal. In fact, the time for answering is shortened under the Federal Rules

of Civil Procedure (Rule 81(c) FRCP)

In State v. Columbia Ry., Gas & Electric Co. 112 S.C. 528, 100 S.E. 355, 357 (S.C. 1919) our Court stated that

“when the federal court remanded the case it was the duty of the state court to proceed as though no removal had been attempted.”

**III The default damages procedure followed by the trial court and adopted by the South Carolina Supreme Court which restricts a defaulting defendant to cross-examination of witnesses and objecting to evidence comports with due process requirements**

In Howard v. Holiday Inn, Inc. 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978) the South Carolina Supreme Court determined the procedure to be followed in a default damages hearing. The Supreme Court stated that

“The question of right, if any, a defaulting Defendant has to participate in the proceeding relative to the question of assessing damages has never been judicially resolved in this state. There are three possible approaches. We could (1) allow damages to be determined in an Ex parte proceeding, denying the defendant any right to participate, (2) allow damages to be ascertained after a full adversary contest, including the right of the defendant to produce evidence in rebuttal or in mitigation, or (3) allow damages to be ascertained with defense counsel’s participation limited to cross-examination and objection to plaintiff’s evidence. We hold that this third approach is the proper one and approve it for use in the courts of this state.”

Although the approach in Howard has been clarified and expanded upon in subsequent appellate court’s decisions, it has not been reversed or modified and is the law of this state relative to assessing damages against a defaulting defendant.

In Ammons v. Hood 288 S.C. 278, 341 S.E.2d 816 (S.C. App. 1986), the South Carolina Court of Appeals in addressing an allegation by the Appellant that the trial court erred in

restricting his cross-examination during the damages hearing to the issue of damages stated

‘in a default action, the default judgment settles the issue of liability. The hearing is held solely to determine what damages should be awarded. The trial judge properly allowed Hood to cross-examine the witnesses regarding damages and Hood is entitled to no more.’ Citing Howard v. Holiday Inn, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)

In Doe v. S.B.M. 327 S.C. 352, 488 S.E.2d 878 (S.C. App. 1997) the South Carolina Court of Appeals citing Howard and Ammons affirmed the trial judge’s ruling that the Defendant could only cross-examine witnesses as to damages and not as to the cause of the damages.

In Roche v. Young Brothers, Inc. of Florence 332 S.C. 75, 81-2, 504 S.E.2d 311-314 (S.C. 1998) Our Supreme Court, citing Howard stated

“It is well settled that by suffering a default, the defaulting party is deemed to have admitted to the truth of the plaintiff’s allegations and to have conceded liability.”

The court went on to state that

“Though a defaulting party may be entitled to notice of the damages hearing, that party is limited to cross-examining witnesses and objecting to evidence.”

The Court again cited Howard and also cited Ammons.

Although Hulsey cites Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc. 275 S.C. 556, 561-274 S.E.2d 287, 289 and 290 (S.C. 1981) for the proposition that “this court should closely scrutinize default judgments to prevent harsh results and drastic action” and further for the proposition that the law favors trial of cases on the merits, the Lewis decision can be distinguished. In Lewis the defaulting Defendant did not participate in the damages hearing. In Lewis the Supreme Court states that

participation by the defending party will give to the judge and/or jury a broader understanding of the amount which should be awarded and will tend to insure a more fair verdict and judgment. When a defaulting party is not given an opportunity to participate at the damages hearing, the trial should closely scrutinize the award to prevent harsh, unwarranted results.”

In vacating the default judgment the Court stated that

“defense counsel shall be notified of the hearing and shall be entitled to cross-examine plaintiff’s witnesses and object to evidence, as permitted in Howard v. Holiday, Inn, Inc ’s supra ”

Hulsey was notified of the damages hearing before the jury. The case was scheduled for a day certain trial. Hulsey was afforded the opportunity to cross-examine the witnesses and to object to Limehouse’s evidence.

In this case, Limehouse properly demanded a trial by jury pursuant to Rule 38(b) SCRPC. Limehouse’s demand for a trial by jury was endorsed upon his pleading. Pursuant to Rule 55(b)(2) SCRPC “the court shall accord a right of trial by jury to the parties if a proper demand therefore has been made pursuant to Rule 38.”

Hulsey was afforded due process when properly served with the Summons and Complaint. The Summons clearly notified Hulsey that the Answer must be served within thirty (30) days after the service of the Complaint or judgment by default would be rendered against the Defendant for the relief demanded in the Complaint. The Summons complies with Rule 4(b) SCRPC. The Plaintiff cannot make Hulsey answer the Complaint. Hulsey was at least 100 days late in serving and filing the Answer.

In his brief, Hulsey complains that he was not allowed to offer evidence during the damages hearing, however, he does not allege that he was not allowed to cross-examine the witnesses concerning damages or to object to Limehouse’s evidence.

**A Limehouse was not allowed to introduce new allegations to which the Defendants were not allowed to defend**

Hulsey alleges that the trial court allowed the jury to impose actual and punitive damages based upon facts introduced into evidence by Limehouse that were not prayed for in the Complaint. Specifically, Hulsey alleges that Limehouse was allowed to testify that Hulsey had run the defamatory Post and Courier article on his website for the last three (3) years. Limehouse did testify, without objection, that Hulsey's law firm had continued to provide a link on its website to the Post and Courier article published in April 24, 2004, relative to this lawsuit. (R p 367, Lines 2-18) Limehouse contends that the testimony was proper and relevant to the issue of punitive damages. As set forth in Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (S.C. 1991), and in accordance with Judge Young's jury charge (R p 704, Line 16), the duration of the Defendant's conduct is a factor that the jury may consider in awarding punitive damages. The fact that Hulsey continued to provide a link to the defamatory Post and Courier article on his website for over three (3) years was clearly relevant on the issue of punitive damages.

Hulsey, did not object to Limehouse's testimony concerning Hulsey's website, and therefore Hulsey has waived that issue on appeal.

In Doe v. S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 881-81 (S.C. App. 1997) the South Carolina Court of Appeals held that the failure to object to certain evidence at a default damages hearing waived those issues on appeal. The court stated as follows:

"Objections not raised in the trial court cannot be relied on in the appellate court. Wilson v. Clary, 212 S.C. 250, 47 S.E.2d 618 (1948). The duty is on the litigant to make a timely objection in order to preserve the right of review. Parks v. Morris Homes Corp., 245 S.C. 461, 141 S.E.2d 129 (1965). A contemporaneous objection is required to properly preserve an error for appellate review. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994). The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object. Cogdill v. Watson, 289 S.C. 531, 347, S.E.2d 126 (Ct.

App 1986) (citing McCreight v Mac Dougall, 248, S C 222, 149 S E 2d 620 (Ct App 1994) [\*881] (failure to object at trial waives right to object on appeal)

As a general rule, an issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review. Issues not raised in the trial court will not be considered on appeal. State v Hudgins, 319 S C 233, 460 S E 2d, 388 (1995), cert. denied, 516 U S 1096, 116 S Ct 821, 133 L Ed2d 688 (1996). Matters not argued to or ruled on by the trial court are not preserved for review. Food Mart v South Carolina Dep't of Health and Envtl Control, 322 S C 232, 471 S E 2d 688 (1996). See also Hendrix v Eastern Distribution, Inc 320 S C 219, 464 S E 2d 112 (1995) ( issue not preserved for review should not have been addressed by Court of Appeals and opinion was vacated to extent it addressed issue that was not preserved), State v Sullivan, 310 S C 311, 426 S E 2d 766 (1993) (to [\*357] preserve an issue for appellate review, appellant must object at his first opportunity)

[5] Our review of the trial record reveals S B M did not object to any issue relating to damages except his request to cross-examine Doe regarding the loss of employment by Doe. S B M 's failure to object at trial waives any right to raise issues on through three on appeal ”

#### **B The trial court did not improperly comment on the facts**

During deliberations the jury sent a note to Judge Young that said Is the link to the April 24, 2004 article still on Mr Hulsey's website? If not, when was it removed? (R p 710, Lines 17-20) In response Judge Young stated that “There was testimony on Monday that the article was still linked as of Monday ” (R p 404, Lines 5-7 ) Judge Young did not comment on the facts

In State v Plyer 275 S C 291, 298, 270 S E 2d 126, 129 (S C 1980) the South Carolina Supreme Court stated that

“the trial judge in his discretion, may permit the jury upon their request to review, in the defendant's presence, testimony after beginning their deliberations. The extent of such review is in the discretion of the trial judge to be exercised in light of the jury's request. The Court is not required to submit evidence to the jury for review beyond that specifically request but may, in its discretion, have the jury review other evidence relating to the same factual issue so as not to give undue prominence to evidence requested ”

Judge Young could have answered the question by allowing the jury to rehear Limehouse's testimony. If he had the jury would have gotten the same answer. Limehouse

testified on Monday of the trial that the Post and Courier's article had been on Hulsey's website for three (3) years and that it was there that morning (R p 367, Lines 2-18) Judge Young's answer to the question was appropriate and not a comment on the facts

**IV The award of punitive damages is not founded on trial error and does not constitute a denial of due process**

**A The Defendants were not entitled to fully contest the claim for punitive damages**

It appears that Hulsey alleges that the approach to assessing damages against the defaulting defendant is different in South Carolina when the plaintiff seeks punitive damages as opposed to actual damages. There is, however, no distinction under South Carolina law

In Roche v. Young Brothers, Inc., of Florence 332 S.C. 75, 504 S.E.2d 311 (S.C. 1998) the special referee awarded \$25,000.00 in actual damages and \$75,000.00 in punitive damages at a default damages hearing. In ruling upon Young Brothers' challenge to the Special Referee's Order our Supreme Court stated that

"Though a defaulting party may be entitled to notice of a damages hearing, that party is limited to cross-examining witnesses and objecting to evidence. Citing Howard v. Holiday Inns, Inc. 271 S.C. 238, 246 S.E.2d 880 (S.C. 1978)

Our Supreme Court made no distinction in the approach to assessing damages when punitive damages are sought by a plaintiff. In Roche, our Supreme Court found that the evidence supported the referee's judgment for actual and punitive damages.

Hulsey also contends that the trial court erred in directing the jury to impose punitive damages based on default without exercising the trial court's obligation to make a threshold determination of whether the Defendants' conduct rises to the level of culpability to justify the

punitive damages

First, the trial judge did not direct the jury to impose punitive damages based on the default. The trial judge instructed the jury that ‘punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that the defendants’ actions were willful, wanton and malicious, or a reckless disregard for the plaintiff’s rights’ ” (R p 703, Lines 16-19 )

The trial judge made it clear to the jury that there were two (2) possible verdicts. The trial judge instructed the jury as follows

“So you have two possible verdicts here, and, again, there is no significance to the order, but the first possible verdict says, we, the jury, find for the plaintiff, against the defendants, in the amount of blank actual damages. If the jury unanimously finds that, whatever the award is, which, and, must be at least nominal damages, Mr Foreman, you check that first block, write the dollar amount in beside where it says blank actual damages. Then you may consider an award of punitive damages. If the jury unanimously finds that the Plaintiff has met the higher burden of clear and convincing evidence and is entitled to an award of ---- the plaintiff has met the higher burden of proof, then the plaintiff is entitled to a verdict for damages, verdict of punitive damages, you check that block where it says we, jury, find for the plaintiff, against the defendants, in the amount of blank punitive damages ” (R p 661, Line 23 to p 664, Line 8)

Secondly, the trial judge made the threshold determination concerning punitive damages at the directed verdict stage of the trial. Judge Young denied Hulsey’s motion for a directed verdict as to punitive damages (R pp 626, Line 11 to p 627, Line 22)

Hulsey also alleges that the trial court allowed Limehouse to present evidence of harm suffered by Limehouse’s family members who are not parties to the action. Hulsey refers to testimony from Limehouse’s wife about Limehouse’s pregnant daughter going into premature labor after she read the subject newspaper article. Mrs Limehouse testified that Limehouse could not enjoy the birth of his granddaughter. She testified that when the baby was born that day instead of being a joyful, happy time there was sadness. That the pain that he was

experiencing was unbearable (R p 626, Line 11 to p 627, Line 22) Hulsey also points to testimony from Limehouse's daughter when she stated that the subject article was devastating on her father She also testified that Limehouse had been depressed, humiliated and that although she had never seen him cry that he cried about the article She also testified that Limehouse had always been self sufficient, he worked to provide for his family and his community, but he has been brought down to having to ask his daughter to give him money to pay his car insurance and so he can buy his wife a Christmas present or an anniversary gift She testified that the defamation had been devastating (R p 367, Line 10 to p 639 Line 18)

In Holtzcheiter v Thomson Newspapers, Inc 332 S C 502, 506 S E 2d 497 (S C 1998)

the court stated that in a defamation case

“actual injury means not only out-of pocket losses, but includes injury to reputation, mental suffering and anguish and personal humiliation” citing Gertz v Robert Welch, Inc 418 U S 323, 94, S Ct 2997, 41 L Ed 2d 789 (1974)

The South Carolina Court of Appeals in Hawkins v Pathology Associates of Greenville P A 330 S C 92, 111, 498 S E 2d 395, 406 (S C App 1998) sustained a jury award of 3 5 million in a survival action against a pathology lab which allegedly negligently failed to properly report results of the patients post-partum Pap smears where she had ninety-five (95%) percent chance of survival In discussing the amount of the verdict the court stated

‘she endured the mental anguish of spending the last several months of her life unable to care for her two small children For seven months she knew that she was terminally ill and that her children would have to grow up without their mother The evidence further demonstrated her consternation over the loss of a normal relationship with her husband We find the jury verdict to be reasonably reflective of the pain, physical and mental suffering and lack of quality of life Mrs Hawkins endured during her fight with cancer We find no abuse of discretion ’

The defamatory statements in the Post and Courier caused Limehouse great mental

suffering Limehouse endured mental anguish in watching his daughter go into premature labor after reading the newspaper article Limehouse's inability to provide for his family and to have to borrow money from his daughter due to the loss of his business was embarrassing and humiliating

"The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal " Jamison v Ford Motor Co, 373 S C 248, 268, 644 S E 2d 755, 765 (S C App 2007)

Hulsey also complains that Limehouse was allowed to present testimony that Hulsey demanded 6.5 million to settle the underlying RICO case and then eventually settled for \$20,000.00 which his attorney characterized as nuisance value Limehouse did present this testimony, however, Hulsey did not object to the testimony at trial (R p 643, Lines 17 to p 646, Line 23) When Hulsey failed to object to this testimony he waived his right to challenge this issue on appeal Doe, supra

Hulsey next complains that the jury was permitted to hear that Hulsey's net worth was \$81,556,686.51 based on his financial statement dated May 17, 2006 "One of the factors to be considered in determining the amount of punitive damages is the Defendants ability to pay" Gamble v Stevens 305 S C 104, 406 S E 2d 350 (S C 1991) During the trial, Limehouse offered the testimony of Berndette Dewitt, who was a Banking Manager and Assistant Vice President with Bank of America Ms Dewitt testified that Mr Hulsey submitted a financial statement dated May 17, 2006 incident to obtaining a loan and the financial statement showed a net worth of \$81,556,986.51 (R p 576, Line 21 to p 577, Line 12) He now complains that the

financial statement which he gave to Bank of America is not accurate and his net worth is only \$32,802,776.27. He has now reduced his tobacco receivable to present value but that is not what he represented to Bank of America when he applied for a loan. If Mr. Hulsey's net worth was misstated it was due to his own misrepresentation concerning his net worth when he applied for a loan with Bank of America.

The trial court did not err in confirming the award of punitive damages under Gamble. Hulsey alleges that the trial court erred in finding that there was clear and convincing evidence presented at the damages hearing, that Hulsey intentionally defamed the Plaintiff by holding a press conference (R. p. 24, Order of Judge Young filed 9/8/08). Limehouse alleged in his Complaint that "on or about April 23, 2004, the Defendant held a press conference or otherwise made false statements about the Plaintiff to certain news agency including but not limited to a reporter from the Post and Courier staff. The Post and Courier is widely distributed newspaper in Charleston County and throughout other areas of the State of South Carolina (R. p. 37, Complaint, paragraph 10). Limehouse also alleged in his Complaint that during the press conference or during the Defendant, Hulsey's meeting with members of the news media including a reporter from the Post and Courier, the Defendant, Paul H. Hulsey, made false and defamatory statements about the Plaintiff with the knowledge and intent that said statements be published by the Post and Courier newspaper as well as by other media located in the Charleston County area." (R. p. 37, Complaint, paragraph 11). The trial judge's finding that Hulsey intentionally defamed Limehouse is supported by the record.

Hulsey also alleges that the trial judge erred in finding that the allegations were not spontaneous and that the press conference was planned as part of filing a lawsuit against the

Plaintiff (R p 24, Order of Judge Young filed 9/8/08)

Limehouse in his Complaint alleged “that the statements made by the Defendant, Paul H Hulsey, as aforesaid were made with the intent of bolstering the class action lawsuit which he filed against the Plaintiff and Plaintiff’s company and also with the intent to attract individuals who would become members of the class action suit so the defendants could potentially earn large sums of money as legal fees ” (R pp 38-39, Complaint, paragraph 16)

In addition, Limehouse testified that the article ran on Hulsey’s website and had been on the website for three (3) years and was on the website as of Monday morning of the trial (R p 367, Line 2-20) The trial court’s finding that Hulsey’s conduct took place over a period of weeks if not months is supported by the record

Lastly, Hulsey alleges that the trial court erred in finding that he was “privy to most if not all the evidence the Defendants wished to present ’ (R p 25, Order of Judge Young filed 9/8/08) At the trial of this case, Hulsey attempted to present evidence and made numerous arguments to the trial judge concerning what he wanted and intended to show The trial judge’s findings is supported by the record

### CONCLUSION

There is nothing novel, exceptional or extraordinary concerning this case Judge Pieper denied the Defendants’ Motion to Set Aside Default on the basis that the Defendants failed to show good cause The defendants argued that there Answer was not late when, in fact, the Defendants were at least 100 days late in filing an Answer

Likewise there was nothing novel, exceptional or extraordinary concerning the trial to assess damages The trial judge followed the dictates of Howard and allowed Hulsey to cross-

examine witnesses and object to evidence

Limehouse respectfully requests that this Court affirm the Order of Judge Piper filed February 7, 2007, the judgment entered on the jury's verdict on February 7, 2008, the Order of Judge Roger M Young filed May 27, 2008 Denying the Defendants' Post-Trial Motions, and the Order of Judge Roger M Young filed September 8, 2008 Denying the Defendants' Motion to Alter or Amend Judgment

Respectfully Submitted by,

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This 9<sup>th</sup> day of April, 2009

THE STATE OF SOUTH CAROLINA  
In the Court of Appeal

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Roger M Young, Circuit Judge  
The Honorable Daniel F Pieper, Circuit Judge

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Case No 06-CP 10-1577

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Paul H Hulsey and  
The Hulsey Litigation Group,  
LLC

Appellant

Lawton Limehouse, Sr

Respondent

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CERTIFICATE OF COUNSEL

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The undersigned certified that this Final Brief complies with Rule 211 (b), SCACR

April 9<sup>th</sup>, 2009  
Mt Pleasant, SC

  
\_\_\_\_\_  
Frank M Cisa

**STATE OF SOUTH CAROLINA  
In the Court of Appeals**

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On Appeal from Charleston County  
Court of Common Pleas

The Honorable Roger M Young, Circuit Judge  
The Honorable Daniel F Pieper, Circuit Judge

Case No 2066-CP-10-1577

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Lawton Limehouse, Sr,

RESPONDENT,

v

Paul H Hulsey and The Hulsey  
Litigation Group, LLC,

APPELLANTS

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**FINAL REPLY BRIEF OF APPELLANTS**

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## Argument in Reply

### **I Under the clear, express terms of the federal statute, 28 U S C A § 1447(c), jurisdiction does not revert in the state court until the District Court mails a certified copy of the order of remand to the clerk of the state court**

The federal removal statute, 28 U S C A § 1446(d) explicitly states that when a notice of removal is filed, the state court is divested of jurisdiction and cannot proceed until the case is remanded. Section 1447(c) also unambiguously decrees that the state court can only proceed once a certified copy of the order of remand is mailed to the state court clerk. "A certified copy of the order of remand shall be mailed by the clerk to the clerk of the state court. The state court may thereupon proceed with such case."

The Plaintiff Limehouse claims that the electronic filing of the remand order satisfies this requirement. However, the ECF policy adopted by the District Court for the District of South Carolina, as cited by the Plaintiff, only provides that the electronic record is the official record. The Hulsey Defendants have never disputed the fact that the order received by the state court was official. Rather, the jurisdictional challenge is based on the indisputable fact that the document was not "certified" (or mailed) as required by the statute.

The ECF policy, as cited by the Plaintiff, does not address the certification issue. However, the issue of certification is addressed in the notice from the Clerk of the District Court for the District of South Carolina that was circulated via electronic mail in February 2008. The new procedure dispenses with the court's literal process of manually embossing the seal of the court on documents and substitutes a new process (effective February 19, 2008) of utilizing an electronic seal. Since the remand order was issued in 2006, it is readily apparent that the process of "certifying" the order with a physical seal

was still in place, but not utilized on the order as found in the office of the Charleston County Clerk of Court

Beyond attempting to get around the fact that the remand order was not certified as required by Section 1447(c), the Plaintiff also refuses to acknowledge the clear, unambiguous language of the federal statute, and instead, seeks to “cure” the defect in jurisdiction by relying upon the Fourth Circuit’s holding in In re Lowe, 102 F 3d 731, 734, 736 (4th Cir 1996). However, the Plaintiff’s and the Trial Court’s reliance on In re Lowe is misplaced because it fails to appreciate the critical distinction between when the federal court loses jurisdiction to reconsider its remand order and when the state court is revested with jurisdiction to proceed with the litigation.

The narrow question before the court in In re Lowe was whether the federal district court had jurisdiction to reconsider its order remanding the case to state court. Concluding that the provision of subsection 1447(d) prohibiting review of a remand order by appeal or “otherwise” also precluded the district court from reconsidering its own order, the Fourth Circuit held that “[A] federal court loses jurisdiction over a case as soon as its order to remand the case is entered. From that point on, it cannot reconsider its ruling even if the district court clerk fails to mail to the state court a certified copy of the remand order.” *Id.* at 736. In rejecting the defendant’s argument that the federal district court did not lose jurisdiction until it sends a certified copy of its order to the state court, the Fourth Circuit did not speak to the issue, presented here, of the necessity of sending a certified order to re-vest the state court with jurisdiction to proceed with the litigation. And, to the extent that the Fourth Circuit did discuss the issue of elevating substance over form, the Court was concerned with allowing the defendant to seek review of the remand

order - in contravention of Section 1447(d) - because of any error by the clerk's office, concluding "In sum, the plain language of the statute, the policy behind it, and logic all support the conclusion that Section 1447 divests a district court of jurisdiction upon the entry of its remand order " *Id*

Here, there is no question presented under Section 1447(d) nor any issue as to when the federal district court lost its jurisdiction. Rather, the question is when the state court is revested with jurisdiction. The plain language of Section 1447(c) only supports one conclusion - that the state court may proceed thereupon - when a certified copy of the order of remand is mailed by the clerk to the clerk of the state court. And, in fact, this conclusion is supported by the more recent 2007 opinion of the Fourth Circuit in Bryan v. BellSouth Telecommunications, 492 F.3d 231, 241 n.1 (4th Cir. 2007), where the court indicates, in dicta by citing to Section 1447(c), that the state court regains jurisdiction when the district court mails a certified copy of the remand order to the state court. In addition, various other opinions, as cited and discussed in the Defendants/Appellants' opening brief, specifically address the requirement of compliance with Section 1447(c) as a predicate to revesting jurisdiction in the state court.

Beyond refusing to recognize the distinction between the Section 1447(c) issue presented here, in contrast to the Section 1447(d) issue of divesting the federal district court of jurisdiction, the Plaintiff also fails to address the extensive precedent in state and federal law that refuses to accept substantial compliance arguments and routinely demands strict compliance with legislative mandates, particularly those that delineate jurisdiction. Instead, the Plaintiff simply argues that the Hulse Defendants' challenge to jurisdiction makes no sense.

The federal statute is clear in mandating that the district court mail a certified copy of the remand order and limiting the state court's power until that is accomplished. It is not the prerogative of the Plaintiff to pronounce that the statutory mandate is nonsense. The statute says what it says, and it means what it says. The state court could not proceed until the federal district court mails a certified copy of the remand order to the Charleston County Clerk of Court. In the absence of compliance with that statutory mandate, jurisdiction has not reverted in the state court and the judgment should be vacated and the case remanded to await the final step to complete the return of jurisdiction to the state court.

**II The Trial Court was in error legally and factually in refusing to set aside the entry of default**

**A Rule 55, SCRPC, changed the procedures for default judgments**

The South Carolina Rules of Civil Procedure first became effective on July 1, 1985. Rule 55 governs default. The case upon which Plaintiff relies, Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978), pre-dated Rule 55, SCRPC. The cases decided after Howard<sup>1</sup> simply cite to Howard but fail to consider the significant changes to the default process made by the passage of Rule 55. In fact, no appellate case has examined the post-Rule procedure set forth in Rule 55 and its departure from the pre-Rule procedure used in the Howard case.

Rule 55(b)(2) states that if the party against whom default judgment is sought has appeared in the action, as here

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<sup>1</sup>Ammons v Hood, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986), Doe v S.B.M., 327 S.C. 352, 488 S.E.2d 878 (Ct. App. 1997), and Roche v Young Brothers, Inc. of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998)

the party **must** be served with written notice of the motion or application for judgment at least 3 days prior to the hearing on such application<sup>2</sup>

(emphasis added) The Court of Appeals has explained the effect of an appearance on the request for default judgment

Rule 55(b) (2), entitled "All Other Cases," provides, in pertinent part, that a party who has "appeared" in the action is entitled to notice and a hearing before judgment by default may be entered<sup>3</sup>

Stark Truss Co , Inc v Superior Const Corp, 360 S C 503, 510-511, 602 S E 2d 99, 103 (Ct App 2004)

Under Rule 55, an entry of default signed by the clerk is **not** the same as an entry of default judgment. An entry of default is simply a ministerial act that the clerk is required to perform upon receipt of an affidavit by the moving party, and is an interlocutory step taken in anticipation of the default judgment<sup>4</sup>. Stark Truss, supra, 10A Wright, Miller & Kane, Federal Practice and Procedure Civil 3d, §2682. Under Rule 55, SCRPC, the clerk has no authority to enter a default judgment, regardless of whether the defaulting party has appeared or not, the clerk can only enter a default upon the calendar or file book. Rule 55(a), SCRPC

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<sup>2</sup>This was never done

<sup>3</sup>The Trial Court treated the ministerial act of entry of default as default judgment

<sup>4</sup>Under the Federal Rules of Civil Procedure, a party must obtain an entry of default prior to seeking a default judgment. 10A Wright, Miller & Kane, Federal Practice and Procedure Civil 3d, § 2682. In South Carolina, it is unclear whether or not the entry of default is mandatory. See, 25 S C Juris Rules of Civil Procedure § 55.2 (Whether default was actually entered on the calendar is not of consequence since the entry of default is a purely ministerial act which the clerk is required to perform once the default is made to appear by affidavit.)

In order to obtain a *default judgment*, not just an entry of default, the party seeking a default judgment must make a motion or application to the court. The party seeking default must give the party in default at least three days notice of a hearing to be conducted on the matter as provided in Rule 55(b)(2).<sup>5</sup>

In this case, Hulsey Defendants were entitled to notice and hearing before default judgment was entered. The Hulsey Defendants initially made an appearance in the action by filing removal to the federal court. Filing for removal to federal court constitutes a special appearance. Flint v Coffin, 176 F. 872 (4<sup>th</sup> Cir. 1910). Defendants further appeared by filing an answer on August 29, 2006. South Carolina case law states that the filing of a late answer constitutes an appearance that triggers the notice provisions of Rule 55(b)(2). Stark Truss Co, supra (answer filed after motion for default judgment filed constituted appearance). Dymon, Inc v Hyman, 305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991) (citing, with favor, other states' cases that held the filing of answer after the entry of default but prior to application for default judgment constitutes appearance). Under state law, Defendants clearly made an appearance in the action that required the Plaintiff to file a motion for default judgment and provide Defendants with at least three days' notice of a hearing, none of which was done. The Trial Court's action in skipping the step in which the plaintiff moves to seek a default judgment is in error.

Instead of filing a motion for default judgment and providing the Defendants with notice, Plaintiff simply sought an entry of default and thereafter the Trial Court treated it

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<sup>5</sup>Under Rule 55(b)(2) a court can conduct any hearing "to establish the truth of any averment by evidence or to make an investigation of any other matter."

as a default judgment. Defendants filed a motion to set aside that entry of default pursuant to Rule 55(c), SCRCP. In determining whether there is good cause set aside an entry of default, the court must consider (1) the timing of the motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). The standard to set aside an entry of default is “broader, more liberal” than the standard for setting aside a default judgment under Rule 60(b), SCRCP. The reason for such a liberal construction is that “[p]ublic policy favors the disposition of cases on their merits rather than on technicalities.” Micronics, Inc. v. South Carolina Department of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). South Carolina law is in line with federal law, which also disfavors defaults and generally resolves any doubts in favor of the defaulting party. 10A Wright, Miller & Kane, Federal Practice and Procedure Civil 3d, § 2681.<sup>6</sup>

Although the Trial Court here purported to consider the criteria for relief from entry of default under Rule 55(c), the Trial Court actually used the more stringent standards set forth in Rule 60(b), SCRCP.

The criteria for obtaining relief from a default judgment requires a showing of mistake, excusable neglect, newly discovered evidence, or misconduct of a party. Rule 60(b), SCRCP. As a practical matter, these factors are relevant under both rules.

[ROA 14, Order, p. 7] The use of the improper standard requires that the Trial Court’s order be set aside.

Here, the order refusing to grant [defendant] relief from an entry of default is controlled by an error of law and therefore must be vacated. In deciding

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<sup>6</sup>Wright, Miller & Kane also note that default is especially disfavored in actions involving material issues of fact or where substantial amounts of money are involved. *Id.*

the question of whether to grant the motion by [defendant] for relief from the entry of default, the master did not employ the "good cause" standard. Instead, the master erroneously applied the more rigorous standard of "excusable neglect," a standard used under Rule 60(b). *Id.* He did this even though he recognized the "good cause" standard was applicable.

Wham v. Shearson Lehman Bros., Inc., 381 S.E.2d at 501

Furthermore, the Order of Judge Pieper denied "the motion to set aside default and allow for an untimely answer" but failed to actually enter a default judgment or to require Respondent to file the motion for default judgment. Instead, the Order simply states that "defendants should be given notice of any unliquidated damages hearing as provided by the South Carolina Rules of Civil Procedure" [ROA 16, Order, p. 9]. Under the requirements of Rule 55(b), upon the Trial Court's denial of the motion to set aside the entry of default, Defendants were entitled to notice and a hearing on both the entry of default judgment and damages.

Rule 55 states that

If, in order to enable the court to enter judgment or to carry it in to effect, it is necessary to take an account or to determine the amount of damages **or to establish the truth of any averment by evidence or to make an investigation of any other matter**, the court may conduct such hearing or order such references as it deems necessary and proper.

Rule 55(b)(2), SCRCF(emphasis added). However, the trial that took place on February 4-6, 2008 only involved damages.

In his initial remarks to the jury, Judge Young stated that Defendants had "admitted the allegations of the complaint[.]" [ROA 316, Tr. p. 7, l. 12]. Clearly, Judge Young assumed that Judge Pieper had entered a declaratory judgment. As a result, Judge Young followed the procedure set forth in Judge Pieper's order and conducted a damages

hearing only, applying the old Howard procedure, instead of conducting a hearing on the entry of a default judgment and damages under Rule 55(b)(2), which permits the court to “establish the truth of any averment by evidence or to make an investigation of any other matter ” Since the proper procedure and required notice were not provided to Defendants, default judgment must be voided Stark Truss Co., Inc v Superior Const Corp., 360 S C at 511-512, 602 S E 2d 103 ( ‘Because no notice was given and no hearing was held, the default judgment was void) Dymon, Inc v Hyman, 305 S C at 172, 406 S E 2d at 389 (same)

However, even if this Court finds that notice was not required (or that notice was properly given as required by Judge Pieper’s order dated February 6, 2007),<sup>7</sup> the trial on damages was unduly restrictive and not in compliance with the parameters of Rule 55 As noted earlier, Rule 55 states that

If, in order to enable the court to enter judgment or to carry it in to effect, it is necessary to take an account or to determine the amount of damages **or to establish the truth of any averment by evidence or to make an investigation of any other matter**, the court may conduct such hearing or order such references as it deems necessary and proper

Rule 55(b)(2), SCRCF(emphasis added) Thus, Rule 55 specifically acknowledges that at a hearing on a default judgment, the court can consider the truth of the allegations and any other evidence, in addition to damages

The Trial Court (and Plaintiff in this appeal) claim that the trial was proper according to procedure discussed in Howard v Holiday Inns, Inc., supra However, that

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<sup>7</sup>Judge Pieper’s order denied Defendants’ motion to set aside the entry of default and further ordered that “the defendants should be given notice of any unliquidated damages hearing as provided by the South Carolina Rules of Civil Procedure ”

case was decided years before the passage of the South Carolina Rules of Civil Procedure, and no appellate court in South Carolina has analyzed Howard in comparison to the later issued procedure set forth in Rule 55, SCRPC. The other cases cited, Ammons v Hood, supra, Doe v S B M, supra, and Roche v Young Brothers, supra, simply cite Howard, but fail to consider the procedure set forth in Rule 55(b)(2).

Generally, the federal and state case law across the country fail to specify the extent to which a defaulting party may cross-examine, impeach, or introduce evidence in a post-default hearing. Most entries of default are set aside under the good cause standard of Rule 55(c), and thus the courts do not have conduct any further on default proceedings. However, when a party makes a motion for default (as required by Rule 55(b)(2))

a court may conduct a hearing to determine whether to enter a judgment by default. The hearing is not considered a trial, but is in the nature of an inquiry before the judge.

10A Wright Miller & Kane Federal Practice and Procedure § 2688 (2008) (footnotes omitted). In addition,

it may not be necessary to present testimony to obtain a judgment on the liability issue, although liability is not deemed established simply because of the default and the court, in its discretion, may require some proof of the facts that must be established in order to determine liability.” *Id* (footnotes omitted).

*Id* (footnotes omitted). Clearly, under Rule 55(b)(2), SCRPC, Defendants have not admitted facts not pleaded in Plaintiff’s Complaint and were entitled to submit evidence challenging any such allegations that arose at trial.

**B The entry of default should be set aside because the answer was not late, or in the alternative, the confusion about the time to answer coupled with the admitted lack of prejudice constitutes good cause to set aside the entry of default**

The Charleston County Clerk of Court mailed a notice of the filing of the district court's remand order to the Defendants on July 27, 2006. The Hulsey Defendants calculated the due date for their answer as 30 days (plus 5 days allowed for service by mail) from the Charleston County Clerk of Court's mailing of the notice of remand. However, when they received the notice of entry of default (having not been earlier served by Plaintiff with the request for entry of default or affidavit of default), the Hulsey Defendants promptly filed and served their answer on August 29, 2006, along with a motion to set aside entry of default under Rule 55(c).

Judge Pieper ruled that the time to answer was tolled during the time that the case was removed to the District Court and it resumed running from the entry of notice of remand in state court. According to Judge Pieper's calculation the answer was due August 5, 2006, and thus untimely, and he refused to set aside the entry of default despite the legitimate confusion over calculating the due date and the Plaintiff's admission that he was not prejudiced by the delay.

On appeal, the Plaintiff ignores Judge Pieper's ruling on the timing for the answer, and maintains that under a federal rule, Rule 81(c) Fed. R. Civ. P., the time to answer was not stayed by the removal and that the Defendants were already in default when the case was on removal to federal court. However, such argument is inconsistent and opportunistic to the extent that the Plaintiff never moved for entry of default in the federal court for resolution by Judge Houck. Moreover, the Plaintiff never disputes his admission that he was not prejudiced by the delay [ROA 781, 12/15/06 Hearing Tr. 22].

While the Hulsey Defendants maintain that the answer was timely, the record shows that if it was late, the refusal to set aside the entry of default was an abuse of discretion in view of the legitimate confusion over the novel issue regarding calculation of the due date and the Plaintiff's admission that there was no prejudice. In consideration of all these circumstances, there is good cause to provide the Hulsey Defendants with equal access to the legal process to defend against the accusations made against them and otherwise present the jury with the evidence to find the truth under the law – not the fictional account that the Plaintiff was allowed to present to the jury with half-truths and invective hyperbole.

### **III The unduly restrictive procedure utilized in the default damages hearing deprived the Hulsey Defendants of their Due Process rights**

As a threshold argument, the Defendants contend that the limited, constrictive default hearing procedure applied by the Trial Court, under Howard v. Holiday Inn, and its progeny, deprives a defendant party of the fundamental due process component of any real, effective opportunity to be heard on the issues of damages, particularly as to the issue of punitive damages. And, even if the procedure in place under current state law precedent met due process requirements, it was never intended to allow a plaintiff to use a defendant's procedural default in failing to timely answer a complaint to change the facts or exceed the allegations of the complaint, nor can it legitimately be used by a plaintiff as a weapon to ramp up an award of punitive damages.

Apart from the procedural aspects of the Howard v. Holiday Inn line of cases, the law still is well settled that a default only admits the allegations of the complaint, Gadsden v. Home Fertilizer & Chemical Co., 89 S C 483, 72 S E 15 (1911), and that a trial judge cannot comment on the facts, Sieria v. Skelton, 307 S C 217, 414 S E 2d 169,

174 (Ct App 1992) Yet, in this case, the Trial Court allowed the Plaintiff to go beyond the complaint and testify that Defendant Hulsey had run the “false” statements on his Firm web site for the last three years including up to the morning of trial and that the web site violated some unspecified court order While the Plaintiff was allowed to put up such impermissible evidence, the Hulsey Defendants were provided no opportunity to establish that there was no such federal court order prohibiting the Hulsey Defendants from mentioning the RICO case on the Firm web site And, the Hulsey Defendants also were precluded from proving up the content of the web site and allowing the jury to learn the truth about those allegations and the article – perhaps most critically, that Plaintiff Limehouse was never mentioned on the web site<sup>8</sup> The Trial Court further compounded that error when it commented on the facts by directly answering the jury’s question about whether the links to the Post & Courier article was still on the Hulsey Firm web site [See ROA 710, 759, Tr 400/17-19, Ct Ex 4 – jury question ]

Due process and fundamental justice demand that even where, as here, a defendant is deemed to have admitted liability based on a procedural default, the jury should be provided with the truth of the whole story in order to fairly determine the extent of any injury to the plaintiff and properly award damages within the bounds of the applicable legal standard The Trial Court’s application of the restrictive default damages procedure allowed the Plaintiff to present an exaggerated, one-sided story with half-truths and fabrications which resulted in the award of an unsubstantiated, unjustified, and

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<sup>8</sup> While Plaintiff claims that this issue was not preserved, the record will show that the Defendants objected to the Plaintiff going beyond the complaint [ROA 370-373, 380, Tr 62-64, 71], and that the Defendants also attempted to introduce the web site but were denied the opportunity to tell the jury the truth about that point [ROA 383, 573 745, R 74, 263, Ct Ex 3 ]

grossly excessive award of actual and punitive damages For these reasons, the judgment should be vacated and the case remanded for a new trial to afford the Defendants a fully effective opportunity to be heard

**IV The award of punitive damages is founded on trial error and constitutes a denial of due process**

While still maintaining that the restrictive damage hearing process afforded under Howard v Holiday Inn does not comport with fundamental due process requirements, the Hulsey Defendants further insist that due process entitled them to be allowed to fully defend on the Plaintiff's claim for punitive damages Plaintiff cites to Roche v Young Brothers, as support for the application of the restrictive default damages hearing process to punitive damages claims, however, that opinion did not address any constitutional challenge or support his outrageous contention that a defendant somehow waives his right to due process because they fail to timely answer

Moreover, the Plaintiff overlooks or refuses to recognize that there has been extensive development in constitutional law regarding punitive damages in the years since the decision in Roche was rendered, as recounted in detail in the Appellants' opening brief Our state procedural rules establish default as a procedural mechanism, but they do not, and cannot as a matter of fundamental fairness and due process, authorize the Plaintiff to use a procedural default to punish an allegedly tardy defendant The Hulsey Defendants maintain that, notwithstanding the impact of a procedural default on the question of liability and the assessment of actual damages, due process entitles a defaulting party to fully contest any claim for punitive damages

In this case, the Hulsey Defendants were denied the right to fully contest the punitive damages while at the same time the Plaintiff was allowed to use the fact of this

procedural default as a weapon to inflame the jury and inflate the punitive damages award. From the Trial Court's repeated comments about the Hulsey Defendants' failure to timely answer to the Plaintiff's overt -- and false -- insinuations that Defendants overtly and intentionally refused to play the rules and thumbed their nose at the legal system only served to unfairly prejudice the Defendants. This effectively punished the Defendants twice for supposedly miscalculating the due date to answer -- once by deeming the allegations true without allowing them to defend and then further punishing them through the imposition of punitive damages.

The punitive damages award also was infected by the introduction of evidence and arguments about issues that were not proper for the jury's consideration on punitive damages. As discussed above, Plaintiff was allowed to prove-up and argue that the web site link to the article showed lack of remorse and a continuing duration of conduct. As discussed in the opening brief, Plaintiff also was allowed to present evidence as to supposed harm suffered by others (Plaintiff's family members) who are not parties to this action. Plaintiff was allowed to portray Defendant Hulsey as a greedy, "hotshot" attorney with testimony that Hulsey had demanded \$6.5 million to settle the underlying RICO case and then eventually settled for \$20,000, which Plaintiff's attorney characterized as "nuisance value" even though the settlement negotiations were not part of the allegations of the complaint (thus not deemed admitted), and Defendants were prohibited from presenting any evidence to clarify the terms of the settlement (i.e. the difference between settling a potential class action versus two/three individual plaintiffs). Also in connection with the misinformation about the settlement, the Plaintiff was even allowed to add fuel to the fire about the Defendant Hulsey's alleged "greediness" with speculation that he

would have “lined his pockets” with a \$65 million settlement, while at the same time, the Defendant Hulsey was prevented from eliciting any of the incontrovertible evidence that he had handled the RICO case pro bono, he did not need any more clients to proceed with the class action because he already had his representative plaintiffs, and finally Hulsey did not receive any fee from that settlement

Another example is found in the fact that even though Plaintiff alleged in his complaint that Defendant Hulsey called a press conference OR otherwise made false statements to certain news agencies, [ROA 37, Complaint ¶¶ 10, 11], at trial, Plaintiff was allowed to argue to the jury that Defendant Hulsey called a press conference to convince the jury that he was a “rich hotshot lawyer,” [ROA 322, 670, Tr 13, 360], and the Defendants were prevented from proving that the Defendant Hulsey only answered questions when contacted by a single news reporter by phone

Last, but by no means least, the jury was presented with incomplete, inaccurate evidence that grossly misstated the Defendant Hulsey’s net worth, while the Defendant was prevented from even introducing information from requests for admission and other information to clarify the nature and “worth” of the largest component of his net worth (his indivisible share of his former firm’s so-called Tobacco Receivable) The jury was not allowed to know that the structured legal fee is owned by Motley Rice, and the present value of this twenty-year payout is not liquid and not available to the Defendant Hulsey

## CONCLUSION

As discussed above and more fully in the Appellants’ opening brief, the state court did not have jurisdiction to make an entry of default or proceed to judgment

because jurisdiction has not yet revested in the state court since the district court has not mailed a certified copy of the order of remand to the clerk of the state court as required by 28 U S C A §1447(c)

If jurisdiction was revested despite noncompliance with the statutory mandate, the Trial Court erred in refusing to set aside the entry of default because the answer was not late, or in the alternative, there was good cause under Rule 55(c) because any miscalculation of the due date was excusable given the absence of any state rule or appellate opinion addressing the issue, and Plaintiff conceded there was no prejudice

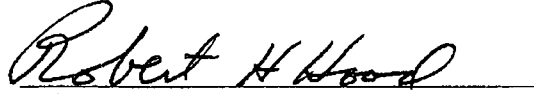
In either circumstance, the Hulsey Defendants were denied their due process rights in the conduct of the damages trial which did not allow them a meaningful opportunity to meet the issue of damages (both actual and punitive) or defend on allegations beyond the complaint

And, finally, the jury's award of punitive damages as reviewed and confirmed by the Trial Court constituted a violation of due process because the Defendants were not afforded a meaningful opportunity to defend on punitive damages, and the jury was allowed (in fact, required) to award punitive damages based on improper arguments, "admissions" beyond the complaint, and speculation not even in evidence

For these reasons, the Appellants respectfully request that the Court reverse the judgment and remand the case to await compliance with Section 1447(c) necessary to re-vest jurisdiction in the state court, and allow the Defendants to defend the claims against them on the merits in a trial that comports with the due process requirements of the State and Federal Constitutions

Respectfully submitted,

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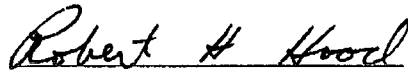
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April 8, 2009

**CERTIFICATION**

I certify that this Final Reply Brief of Appellant, Paul H Hulsey and The Hulsey Litigation Group complies with Rule 211(b), SCACR



Attorneys for Appellant, Paul H Hulsey and  
The Hulsey Litigation Group

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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On Appeal from Charleston County  
Court of Common Pleas

The Honorable Roger M Young, Circuit Judge  
The Honorable Daniel F Pieper, Circuit Judge

Case No 06-CP-10 1577

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Lawton Limehouse, Sr ,

RESPONDENT,

v

Paul H Hulsey and The Hulsey  
Litigation Group, LLC,

APPELLANTS - PETITIONERS

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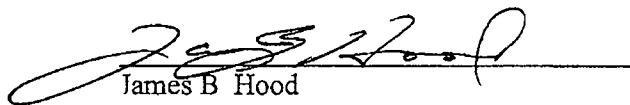
Certificate of Service

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I do certify that on this \_\_ day of April 2009, a copy of the Final Brief of Appellants and Final Reply Brief of Appellants was served on Respondent by mail to his Counsel of Record at

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