

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Opinion No. 22-UP429 (S.C. Ct. App. Filed December 7, 2022)
Lower Court Case Number: 2020-CP-1100632

Bobby E. Leopard, Donna and Luther Harris,

Petitioners,

v.

Perry W. Barbour,

Respondent.

APPELLATE CASE NO. 2021-000269

**MOTION TO ALLOW FILING OF CONSOLIDATED
PETITION FOR WRITS OF CERTIORARI**

1. On June 7, 2019, Petitioners initiated a complaint for damages (referred to as the "Spartanburg action") against Southland Transportation (referred to as "Southland") and Perry Barbour (referred to as "Barbour") for a motor vehicle accident that occurred on June 10, 2016.

2. Due to lengthy negotiations between Petitioners and Southland's insurance company, Sentry, the Summons and Complaint were not served until October 4, 2019.

3. Summons and Complaints were served by way of Certified U.S. Mail on Friday October 4, 2023, to the addresses utilized by the defendants in the accident report created following the subject wreck. This fact was memorialized by a certificate of service.

4. Unfortunately, the mail left Greenville on Monday, October 7, 2019. Petitioners served the summons and complaint on Southland by mailing copies to the Secretary of State, as required by South Carolina Code Ann. § 15-9-245, and to Mr. RJ Cummings, who is the registered agent of service for Southland Transportation Company in North Carolina. It took two (2) days for the mail to get from the Upstate to Columbia.

5. On the same date, Petitioners attempted to serve Barbour by certified mail at his last known address in Martinsville, Virginia, but the mail was returned undelivered.

They then tried to serve him again at another address in Bassett, Virginia, but this attempt was also unsuccessful.

6. Petitioners then served Barbour a copy of the processes through the South Carolina Department of Motor Vehicle (referred to as "SCDMV"), as allowed by South Carolina Code Ann. § 15-9-370. The SCDMV accepted the service on behalf of Barbour but the notice was also returned undelivered.

7. Because of the inaccurate information provided about the Respondents' addresses, the Summons and Complaint were not delivered within the specified time frame.

8. On November 8, 2019, Respondent Southland, represented by Alan Jones, Esquire, filed an Answer and Motion to Dismiss, arguing that Petitioners failed to properly and timely file their summons and complaint within the required time under Rule 3 of the South Carolina Rules of Civil Procedure (SCRCP). Petitioners opposed the motion.

9. On November 26, 2019, the Spartanburg court found Respondent Barbour in default and issued an Order of Reference to Master-in-Equity.

10. On December 23, 2019, Counsel for Respondent Southland moved to dismiss the case against Respondent Barbour for failure to properly and timely serve the summons and complaint.

11. Petitioners opposed both motions, citing good cause and equity considerations against Respondent Southland's motion, and waiver of affirmative defense for failure to file an answer or any responsive pleadings within 30 days against respondent Barbour's.

12. On January 17, 2020, the Spartanburg Court ruled that the matter was not properly referred to the Master-in-equity after respondent Barbour moved to vacate the order of reference to the Master-in-equity.

13. On March 10, 2020, the court granted Respondents' motion to dismiss based on Rule 12(b)(2), (4), and (5).

14. The Court denied Petitioners' motion for reconsideration in its Order dated July 14, 2022, and Petitioners perfected their appeal on August 3, 2020.

15. While the Spartanburg action appeal was pending, Petitioners filed a Complaint against Respondent Barbour in Cherokee County on August 27, 2020, referred to as the "Cherokee action".

16. On September 15, 2020, Petitioners served the Summons and Complaint on SCDMV.

17. SCDMV accepted service on behalf of Respondent Barbour on September 25, 2020, and mailed the process to his last known address, but the mail was returned to sender.

18. After Respondent Barbour failed to respond to the lawsuit served upon him by and through the SCDMV, Petitioners filed an Affidavit of Default on November 10, 2020.

19. On November 28, 2020, Petitioners moved for an Order of Entry of Default, which the Court granted in its Order dated December 16, 2020.

20. On February 11, 2021, David Moore, Esquire, who represented Respondent Southland in the Spartanburg appellate action, moved to vacate the Entry of Default under Rule 55(c) SCRCF. He also filed an Answer and a Motion to Dismiss on the same date.

21. On February 16, 2021, the Cherokee Court granted Respondent's motion to vacate entry of default based on failure to satisfy the WHAM factors. The court also dismissed the complaint on the basis of statute of limitations.

22. On March 9, 2021, the Cherokee Court denied Petitioners' motion for reconsideration.

23. On March 11, 2021, Petitioners perfected their appeal. On the same date, petitioners moved to consolidate the two related appeals: the Spartanburg action and the Cherokee action, for judicial economy.

24. The Court of Appeals denied the motion to consolidate the related appeals on April 13, 2021, stating the appeals were at different stages.

25. The Court of Appeals rendered an opinion on the Spartanburg action on November 2, 2022, affirming the lower court's decision.

26. On November 18, 2022, Petitioners moved to allow late filing of their Petition for Rehearing in the Spartanburg action.

27. On November 21, 2022, Petitioners submitted their Petition for Rehearing for the Spartanburg appealed case by email and U.S. Mail.

28. On November 22, 2022, the Court of Appeals issued a letter which stated, "Upon reviewing your petition for rehearing, the following deficiency has been noted..." payment had not been received.

29. Since the appellate system has yet to implement the method of payment used in common pleas, it was understood payment had not been attached to the email submission.

30. An inquiry as to the check for the Petition resulted in the understanding the check for the Petition had been created and submitted. It was believed the payment had been in the mail when the deficiency letter was received. The Clerk did not advise the hard copy petition received in the mail did not contain the check.

31. On December 7, 2022, the same appellate panel, issued a Decision which was favorable to Respondent Barbour in the Cherokee case.

32. The Court of Appeals in the Spartanburg case issued a notification to Petitioners on December 12, 2022, indicating that their Petition for Rehearing was not acted upon due to failure to cure a deficiency. On the same date, the Court sent the remittitur to the lower court.

33. Petitioners filed a Motion to Enlarge Time, along with the clocked Petition for Rehearing, and checks for both filings on December 13, 2022.

34. On December 28, 2022, Petitioners filed a Petition for Rehearing in the Cherokee case, which was denied by the Court of Appeals in its Order, dated February 10, 2023.

35. On February 3, 2023, the Court sent a letter indicating they had received the motion for late filing of the petition and since the remittitur had been sent, nothing could be done in furtherance of the appeal.

36. On February 21, 2023 (February 20th was President's Day), Petitioners petitioned for the recall of the remittitur in the Spartanburg case.

37. On March 16, 2023, the Supreme Court granted Petitioners' Motion to File out of Time, holding the matter in abeyance for forty-five (45) days to allow for the Court of Appeals to address the remittitur petition.

38. On March 17, 2023, the Court of Appeals denied Petitioners' Petition to Recall Remittitur.

39. Rule 242 of the South Carolina Appellate Court Rules (SCACR) provides that when the Court of Appeals dismisses an appeal for procedural reasons, the appellant is to go directly to the Petition for Writ of Certiorari

40. Rule 214 of the SCACR deals with the consolidation of appeals and proceedings. Rule 214 SCACR states that "Where there is more than one appeal from the same order, judgment, decision, or decree, or where the same question is involved in two or more appeals in different cases, the Appellate Court may, in its discretion, order the appeal to be consolidated."

41. The Spartanburg and Cherokee cases involve related issues and raise common questions of fact and law. Consolidation will not impede the resolution of this matter.

42. Petitioners contend that there are procedural and substantive grounds that justify review by this court in both cases.

Basis/grounds for Petition for Writ of Certiorari for the Spartanburg action:

The Remittitur was prematurely sent to the lower court and as such prevented Petitioners to have their rehearing in the court of appeals.

The Court of Appeals rendered its decision/opinion on the Spartanburg appeal on November 2, 2022. On November 18, 2022, Petitioners filed a motion to allow late filing of petition for Rehearing, and the petition for rehearing on November 21, 2022. For this, Petitioners submitted a check amounting to \$50.00 as filing fee. On November 22, 2022, the Court of Appeals issued a letter of deficiency to respondents stating, “the required filing fee has not been submitted.” Due to the vagueness of the wording of the deficiency letter and having submitted a check for \$50, Petitioners did not realize the deficiency pertained to the petition. It was not until Petitioners received the December 12, 2022, letter they discovered that payment had never been received by the court for the petition. On the same day, December 12, 2022, the Court of Appeals sent the remittitur to the lower court; and Petitioners were made aware of the absence of the payment for the petition.

Petitioners will show that the remittitur was sent prematurely. Under the amended Rule 221(b) of SCACR, “If a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the petition by the court. Where a petition for rehearing has been denied, the court of appeals shall not send the remitted tour to the lower court or administrative Tribunal until the time to petition for a writ of certiorari under rule 226(c) has expired.” In this case the Court of Appeals, sent the remittitur on the same day they disposed of petition for rehearing. Petitioners’ Petition for Rehearing had been clocked on November 21, 2022. The Remittitur was sent on December 12, 2022.

Petitioners will also show that in affirming the lower court dismissal of the complaint the Court of Appeals contradicted a previous ruling of the South Carolina Supreme Court in the case of Unisun Insurance v. Hawkins, 342 S.C. 537 (S.C. 2000). *Unisun* affirmed that a violation of Rule 12(h)(1) is fatal to affirmative defenses by citing the case of *Garner v. Houck*, where the Court held a party who fails to properly raise the defense of insufficient service of process under rule 12 waives any issues or defenses regarding service, including a statute of limitations defense. Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993).

Petitioners would argue that the Court of Appeals undermined its well-established principle of disposing cases on its merit by not extending the time to perfect service of process upon respondents even after Petitioners showed good cause and invoked the Appellate Court’s discretion.

Petitioners invoked the principle of Equitable tolling in their failure to serve the summons and complaint, and had shown that due to circumstances beyond their control, Petitioners were prevented serving the processes within the required time. Petitioners disagree A court of appeals ruling that the principle of equitable tolling only applies to filing of summons and complaint and not to the service of processes.

Petitioners would argue in a joint writ that Barbour did not provide the cause of the failure to answer or move the Court within thirty (30) days of service-let alone illustrate good cause.

Basis/grounds for filing Petition for Writ of Certiorari for the Cherokee action

For the Cherokee appeal, Petitioners will argue that the Court of Appeals erred in affirming the lower court's application of the wrong standard in vacating the entry of default against respondent Barbour.

Petitioners will argue that in affirming the lower court's decision that Petitioners failed to establish the Wham factors, the Court of Appeals contradicted several case laws. Furthermore, similar to the Spartanburg action on appeal, Petitioners will argue that respondent Barbour is precluded from raising affirmative defenses. That the Court of Appeals allowed him to do so by affirming the lower court decision, is a direct violation of laws.

Petitioners will also raise the failure of the Court of Appeals to acknowledge that equitable estoppel should be applied in this instant case to preclude the application of the statute of limitations. Furthermore, in not considering the unclean hand doctrine against Respondent, the Court of Appeals has in effect applied different standards of responsibility to the prejudice of herein Petitioners.

CONCLUSION

For the foregoing reasons, Petitioners respectfully move that this Honorable Court rule that the remittitur in the Spartanburg action be recalled based on mistake or inadvertence (not stating with clarity the reason for the deficiency) of the Court. Furthermore, because consolidation of these two related appealed cases will promote efficiency and judicial economy, and will not prejudice any party, Petitioners respectfully request this Honorable Court to enter an order allowing Petitioners to file a consolidated petition for writ of certiorari. Finally, Petitioners further pray that the caption of the consolidated Petition for Writ of Certiorari be as follows: Bobby E. Leopard, Donna Harris and Luther Harris v. Southland Transportation and Perry Barbour.

Respectfully submitted by:

s/Donald L. Smith

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April 12, 2023.