

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2020-001110
Opinion No. 22-UP-397 (SC Ct. App. Filed November 2, 2022)
Lower Court Case Number: 2019-CP-42-02092

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MAY 30 2023
S.C. SUPREME COURT

Luther Harris, Donna Harris and Bobby E. Leopard,

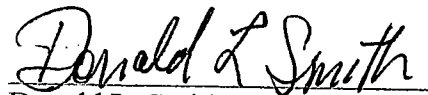
Petitioners,

v.

Perry W. Barbour and Southland Transportation Co.,

Respondents.

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI



Donald L. Smith (SC Bar#6699)

2722 West Whitner Street

Anderson, SC 29626

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attorneydonaldsmith@gmail.com

Attorney for Petitioners

Other Counsel of Record:

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Greenville SC 29602

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Attorneys for Respondents

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SC Court of Appeals

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

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

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

RECORD ON APPEAL

Anderson, South Carolina
Date: February 12, 2021

s/Donald L. Smith
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Greenville, SC 29602
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**FORM 4/ORDER,
DATED JULY 14, 2020
(Denying Appellants' Motion
for Reconsideration)**

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019-CP-42-02092

Luther HARRIS,

Perry W. BARBOUR and SOUTHLAND
TRANSPORTATION Co.,

Plaintiff(s)

Defendant(s)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other SCRPC 56.
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other .

IT IS ORDERED AND ADJUDGED: ☐ formal order to follow; ☒ Statement of Judgment by the Court:

This matter came before this Court on **MOTION** of the plaintiff to **RECONSIDER, ALTER, OR AMEND** its March 10, 2020 **ORDER GRANTING** the defendants' **MOTION** to **DISMISS**, pursuant to *Rule 59(e), SCRPC*.

After consideration of the argument of counsel, memoranda submitted, and the applicable statutory and case law, this Court finds that the plaintiff's **MOTION** should be and **IS** therefore **DENIED**.

J. DERHAM COLE,

Presiding Judge

This judgment was entered on the day of and a copy mailed first class this day of to attorneys of record or to parties (when appearing pro se) as follows:

DONALD L. SMITH, Esq.

DAVID L. MOORE, Esq.

ATTORNEY(S) FOR PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

AMY W. COX, CLERK OF COURT

ELECTRONICALLY FILED - 2020 Jul 14 3:33 PM - SPARTANBURG - COMMON PLEAS - CASE#2019CP4202092



Spartanburg Common Pleas

Case Caption: Luther Harris , plaintiff, et al VS Perry Wendell Barbour , defendant,
et al
Case Number: 2019CP4202092
Type: Order/Form 4

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-07-14 15:30:04 page 2 of 2

**FORM 4/ORDER,
DATED MARCH 10, 2020
(Dismissing Complaint)**

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019-CP-42-02092

Luther **HARRIS**, Donna **HARRIS**, and Bobby E.
LEOPARD

Perry Wendell **BARBOUR** and **SOUTHLAND**
TRANSPORTATION Co.,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: the COURT	Attorney for : ☐ Plaintiff ☐
	Defendant
	or
	☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☒ **ACTION DISMISSED** (CHECK REASON): ☒ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☒ Other SC Code Section 15-3-530
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
- ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order OR **formal order to follow** ☒ Statement of Judgment by the Court:

This matter came before this court on motion of the defendants to dismiss the complaint pursuant to Rules 12(b)(1), (2), (4), and (5), SCRCPP.

This is a civil action for the recovery of compensation for personal injury suffered by the plaintiffs resulting from a motor vehicle collision occurring on June 10, 2016. This action in tort based upon the negligent operation of a motor vehicle proximately causing injury to another is clearly an action which the Court of Common Pleas has subject matter jurisdiction to hear. "Subject matter jurisdiction is the power of a court to hear and determine cases of a general class to which the proceedings in question belong." Posey v. Proper Mold & Engineering, Inc., 378 SC 210 (App. 2008).

The limitations period for bringing this action is three years from the date of the event. S. C. Code Ann. Section 15-3-530(5).

A civil action is deemed commenced when the summons and complaint are filed with the clerk of court and served within the applicable limitations period or, if not served within the applicable limitations period, actual service is accomplished not later than 120 days after filing. Rule 3, SCRCPP.

"Service of process on a foreign corporation not authorized to do business within this State ... is considered to have designated the Secretary of State as its agent upon whom process against it may be served in any action ... arising ... out of or in connection with the doing of any business within this State." S. C. Code Ann. Section 15-9-245.

A nonresident operating a motor vehicle in this State is deemed to have designated the Director of the Department of Motor Vehicles as his agent for service of process in any action against him arising out of a motor vehicle accident in which the nonresident was involved. S. C. Code Ann. Section 15-9-350.

"Service of a summons and complaint upon a defendant ... may be made by ... registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt." Rule 4(d)(8), SCRCP.

The record in this case reflects that the summons and complaint was filed with the clerk on June 7, 2019. Neither of the defendants was served prior to June 10, 2019 and therefore service must be accomplished not later than October 7, 2019 as required by Rule 3(a)(2), SCRCP. The summons and complaint were received by defendant Southland through certified mail on October 10, 2019, as shown by the certified mail return receipt, pursuant to Rule 4(d)(8), SCRCP. The summons and complaint was attempted on defendant Barbour by certified mail to the SCDMV on October 25, 2019 pursuant to S. C. Code Ann. Section 15-9-350.

Based upon consideration of the record, memoranda submitted, argument of counsel, and the applicable rules as well as statutory and case law, this Court finds that the defendants' **MOTION to DISMISS** pursuant to Rule **12(b)(1)**, SCRCP, should be and **IS** therefore **DENIED**.

The defendants' **MOTION to DISMISS** pursuant to Rules **12(b)(2)**, **(4)**, and **(5)**, SCRCP, should be and **IS** therefore **GRANTED** for failure of the plaintiff to commence this action with effective service upon the defendants within the applicable limitations period.

Counsel for defendants is requested to prepare and submit a proposed formal order for the Court's consideration.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil

Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.** **E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

<u>J. DERHAM COLE,</u>	<u>PRESIDING JUDGE</u>	<u>2053</u>	<u>03/03/2020</u>
		Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

DONALD L. SMITH, Esq.

DAVID L. MOORE, Esq.

ATTORNEY FOR THE PLAINTIFFS

ATTORNEY FOR THE DEFENDANTS

AMY W. COX, CLERK OF COURT

Court Reporter: **LINDA MOFFITT**

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Spartanburg Common Pleas

Case Caption: Luther Harris , plaintiff, et al VS Perry Wendell Barbour , defendant,
et al
Case Number: 2019CP4202092
Type: Order/Form 4

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-03-10 15:09:09 page 4 of 4

**FORM 4/ORDER,
DATED JANUARY 17, 2020
(Remanding the Case to Circuit Court)**

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019 CP-42-0292

LUTHER HARRIS, DONNA HARRIS, BOBBY LEOPARD AND
JERRY WHITE

PERRY W. BARBOUR AND SOUTHLAND
TRANSPORTATION CO.,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: COURT

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- X **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) X Statement of Judgment by the Court:

THIS MATTER WAS NOT PROPERTY REFERRED TO THE MASTER-IN-EQUITY PURSUANT TO RULE 53, SCRPC. IN ADDITION, THE PLEADINGS CONTAIN DEMANDS FOR JURY TRIAL WHICH HAVE NOT BEEN WAIVED. THEREFORE, THIS MATTER IS REMANDED TO THE CIRCUIT COURT TO BE PLACED ON THE JURY DOCKET.

ORDER INFORMATION

This order ☐ ends X does not end the case.

Additional Information for the Clerk : CASE IS REMANDED TO CIRCUIT COURT TO BE PLACED ON JURY DOCKET

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest SCRPC Form 4C (12/2016)

Page 1 of 4

Date _____

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ALAN G. JONES, ESQ.
PO BOX 1509
GREENVILLE, SC 29602

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Page 2 of 4

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE
(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.
8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.



Spartanburg Common Pleas

Case Caption: Luther Harris , plaintiff, et al VS Perry Wendell Barbour , defendant,
et al
Case Number: 2019CP4202092
Type: Master/Order/Other

It is So Ordered

s/Judge Gordon G Cooper-3065

Electronically signed on 2020-01-17 10:38:33 page 6 of 6

**ORDER,
DATED NOVEMBER 26, 2019
(Reference to Master in Equity)**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and	)	
Bobby E. Leopard,	)	
Plaintiffs,	)	Case No.: 2019-CP-42-02092
vs.	)	
	)	ORDER OF REFERENCE TO MASTER-IN-EQUITY
Perry Wendell Barbour and	)	PURSUANT TO RULE 53 OF THE SCRP
Southland Transportation Co.	)	
Defendants.	)	

IT APPEARING, that Defendant, Perry Wendell Barbour, has not served an answer, demurrer, or other pleadings as required by the Summons and Complaints; and, therefore, he was found in default pursuant to the South Carolina Rules of Civil Procedure as evidenced by Plaintiffs' Affidavit of Default filed with the Court; and,

IT APPEARS that a hearing to ascertain damages pursuant to Rule 55 of the South Carolina Rules of Civil procedure should be held to determine the amounts owed to Plaintiffs. Plaintiffs request these matters be referred to the Master-In-Equity for default judgments and damages hearings.

THEREFORE, based upon the above facts, the Court finds that:

1. That these matters shall be referred to the Master-In-Equity, to make findings of fact and conclusions of law and to enter those findings of fact and conclusion of law into a final order of the Court. Any appeal from the Judge's Order shall be taken directly to the South Carolina Supreme Court.



Spartanburg Common Pleas

Case Caption: Luther Harris , plaintiff, et al VS Perry Wendell Barbour , defendant,
et al
Case Number: 2019CP4202092
Type: Order/Referred to Master or Special Referee

IT IS SO ORDERED

s/Amy W Cox, Spartanburg County Clerk of
Court by Maribel M Martinez

Electronically signed on 2019-11-26 16:22:12 page 2 of 2

**SUMMONS AND COMPLAINT,
Filed June 7, 2019**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and,	)	Case No.:
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	
vs.	)	SUMMONS
	)	(JURY TRIAL DEMANDED)
Perry Wendell Barbour and	)	
Southland Transportation Co.	)	
	)	
Defendant.	)	
_____	)	

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your **ANSWER** to the said Complaint on the Plaintiff's attorney at 122 N. Main Street, Anderson South Carolina, 29621 within thirty (30) days after the service hereof, exclusive of the day of service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

Anderson, South Carolina
June 7, 2019

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and,	)	Case No.:
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	
vs.	)	COMPLAINT
	)	(JURY TRIAL DEMANDED)
Perry Wendell Barbour and	)	
Southland Transportation Co.	)	
	)	
Defendant.	)	
_____	)	

Luther and Donna Harris, as well as, Bobby Leopard, by and through their undersigned attorney, complaining of the Defendants, allege:

1. That Plaintiffs Luther and Donna Harris were, at all times pertinent to this action, a citizen and resident citizens and residents of the County of Spartanburg, State of South Carolina.
2. That Plaintiff Bobby E. Leopard was, at all times pertinent to this action, a citizen and resident of the County of Spartanburg, State of South Carolina.
3. That based on information and belief, Defendant Perry Wendell Barbour was, at all times pertinent to this action, a resident of the County of Martinsville, State of Virginia. He is employed by Defendant Southland Transportation Co., as a truck driver.
4. That Defendant Southland Transportation Co., by directing its business activities to, and thereby causing Plaintiffs harm in, the County of Anderson, State of South Carolina, is subject to the jurisdiction of this Court. Defendant company provides trucking for the transport of goods.

5. That the substantial acts and omissions alleged herein occur in the County of Spartanburg, South Carolina.

6. That on or about June 10, 2016, Plaintiff Luther Harris and Defendant Barbour were involved in an automobile accident.

7. That Plaintiff was traveling southbound on U.S. Interstate 85, when he came to a stop due to traffic which resulted from a motor vehicle accident further up the road, in the County of Spartanburg, South Carolina.

8. That Defendant Barbour was also traveling southbound on U.S. 85 at that time, in the same lane, though he was behind Plaintiff.

9. That Defendant failed to maintain a proper lookout; and, smashed into the rear of Plaintiff's vehicle with such force that Plaintiffs' Harris and Leopard were ejected through the front wind shield.

10. That Plaintiffs suffered bodily injuries and/or an aggravation of a pre-existing condition which have resulted in pain and suffering, mental anguish, expense of medical and related care and treatment and loss of earnings.

11. That at the time of the collision, Defendant Barbour was acting within the scope of his employment as a truck driver of Defendant Southland Transportation Co., a trucking company.

12. That Defendant Barbour admitted to being at fault for the accident.

13. That Defendant Southland has a duty to hire only competent drivers and to train its drivers in the safe operation of their vehicles.

FOR A FIRST CAUSE OF ACTION: NEGLIGENCE

14. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-13 above.

15. That Defendants owed Plaintiffs a duty of care to operate their tractor trailer in a reasonably safe manner.

16. That Defendants breached their duties to Plaintiffs and other people traveling on the highway in the following ways:

- a) In operating a motor vehicle at a speed that was excessive for the circumstances then and there prevailing;
- b) In failing to maintain a proper lookout;
- c) In failing to maintain proper control of the vehicle;
- d) In failing to bring the vehicle to a stop when it was apparent that failing to do so would result in an accident;
- e) In operating said vehicle in a highly improper manner in view of the circumstances then and there existing;
- f) In not being mentally and physically alert to the impending dangers;
- g) In failing to swerve, or change the course of the vehicle, when it was apparent, or should have been apparent by the exercise of due care, that a catastrophe was inevitable; and
- h) For failing to exercise the reasonable degree of care which a reasonable and prudent person would exercise under the same or similar circumstances.

17. That Defendants' breach of the duty they owed Plaintiffs factually and proximately caused Plaintiffs' damages, including but not limited to actual damages such as hospital/medical expenses, lost income, but also pain and suffering and mental anguish.

18. That Plaintiffs are entitled to recover from Defendants for damages caused by Defendants' negligent, grossly negligent and reckless acts.

FOR A SECOND CAUSE OF ACTION: RECKLESSNESS

19. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-18 above.

20. That the acts and/or omissions of Defendants, including but not limited to failing to maintain a proper lookout and control of his vehicle, constitute a willful, wanton, and reckless disregard for the health and safety of Plaintiffs.

21. That Defendants recklessness factually and proximately caused Plaintiffs' damages, including but not limited to actual damages such as hospital/medical expenses, lost income, but also pain and suffering and mental anguish.

22. That Plaintiffs are entitled to recover from Defendants for damages caused by Defendants' recklessness.

**FOR THIRD CAUSE OF ACTION: RESPONDEAT SUPERIOR
(Against Defendant Southland Transportation Co.)**

23. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-22 above.

24. That the above-described acts of Defendant Barbour, (i.e. recklessly driving the truck, etc.) were committed while he was acting as an agent, servant and/or employee of Defendant Southland Transportation Co. (hereinafter referred as Defendant Southland).

25. That the above-described acts of Defendant Barbour were committed within the scope of his agency and while furthering the interests of Defendant Southland.

26. That as the principal for Defendant Barbour, Defendant Southland is responsible for all of the acts committed by Defendant Barbour within the scope of his agency.

**FOR FOURTH CAUSE OF ACTION:
NEGLIGENT HIRING, SUPERVISION AND RETENTION
(as against Defendant Southland Transportation, Co.)**

27. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-26 above.

28. That at all times material, Defendant Barbour was either directly or through its agents, under the direction, supervision and control of Defendant Southland.

29. That Defendant Southland had a duty to ascertain the competence of its drivers and make sure their drivers are qualified to operate a commercial tractor trailer before hiring them.

30. That Defendant Southland, either directly or through its agent, failed to train or negligently trained its drivers, in particular Defendant Barbour, when Defendant Southland knew or should have known that Defendant Barbour could pose a threat of harm to the public in general and to Plaintiffs in particular.

31. That Despite this knowledge, Defendant Southland, either directly or through its agent, failed to exercise reasonable care in hiring, training, supervising and retaining its drivers in the safe operation of their vehicles.

32. That as a direct and proximate cause of the acts described above, Plaintiffs have not only suffered the injuries described therein, but resulting pain and suffering, physical inconvenience and discomfort, loss of time, loss of income, mental anguish, expenses incurred

due to medical treatment, and loss of enjoyment of life. These losses are permanent and continuing; and, they will have losses in the future.

FOR FIFTH CAUSE OF ACTION: DAMAGES

33. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-32 above.

34. That as a direct and proximate result of the negligence, gross negligence, willfulness, wantonness, and reckless of Defendants, Plaintiffs suffered numerous injuries.

35. That as a direct and proximate result of the negligence, gross negligence, willfulness, wantonness, and reckless of the Defendants, Plaintiff Luther Harris has suffered the following:

a. Physical pain and suffering, including but not limited to:

1. Initial concussion with loss of consciousness of 30 minutes or less
2. Post-concussion syndrome
3. Abnormalities of Gait and Mobility
4. Concussion with Loss of Consciousness of 30 minutes or less
5. Post-Concussion Syndrome
6. Chronic Headache
7. Right Shoulder Pain
8. Right Leg Pain
9. Neck pain or Cervicalgia
10. Lower back pain or Dorsalgia
11. Cervical degenerative disc disease and spondylosis exacerbated by the Motor Vehicle Accident;

12. Lumbar degenerative disc disease and spondylosis exacerbated by Motor Vehicle Accident

13. Post Traumatic Stress Disorder (PTSD)

b. Economic damages, including but not limited to lost income:

i. Future medical expenses in the amount of \$40,000.00, taking into account potential periodic trigger point injections and other medicinal therapies.

ii. Lost wages to be determined.

c. Psychological distress;

d. Loss of enjoyment of life; and,

e. Punitive damages.

36. That as a direct and proximate result of the negligence, gross negligence, willfulness, wantonness, and reckless of the Defendants, Plaintiff Bobby Leopard has suffered the following:

a. Physical pain and suffering, including but not limited to:

1. Initial concussion with loss of consciousness of 30 minutes or less
2. Post-concussion syndrome
3. Chronic Lower Back Pain
4. Knee Pain
5. Neck Pain
6. Ankle Pain
7. Sacroiliitis
8. Cervical Spondylosis with radiculopathy

9. Lumbar spondylosis with radiculopathy and Cervicalgia
10. Central and Peripheral Vertigo
11. Closed Head Injury
11. Chronic Headache
12. Mild Lumbar Levoscoliosis
13. Post Traumatic Syndrome Disorder (PTSD)
14. Central and Peripheral Vertigo
15. Anxiety
16. Depression
17. Traumatic Brain Injury and Memory Impairment

b. Economic damages, including but not limited to lost income:

- i. Future medical expenses in the amount of \$57, 896.00.
- ii. Lost wages to be determined.

c. Psychological distress;

d. Loss of enjoyment of life; and,

e. Punitive damages.

37. That Plaintiff is entitled to recover actual and punitive damages from Defendant in an amount to be determined by this Court.

FOR SIXTH CAUSE OF ACTION: LOSS OF CONSORTIUM

38. Plaintiff re-alleges and incorporates herein all of the allegations contained in paragraphs 1-37 above.

39. That Plaintiff, Donna Harris, is the spouse of Luther Harris.

40. That as a direct and proximate result of the acts of negligence, gross negligence, recklessness, willfulness and wantonness of Defendants described herein, Plaintiff, Donna Harris, has suffered the loss of Luther Harris's companionship, advice, counsel, experience, knowledge, and judgment in managing the affairs of himself and of his wife, in addition to the loss of his ability to earn support for the maintenance, care and protection, of his wife, and all other damages, both actual and punitive, in a sum to be determined by this Court.

41. That all of which injuries and loss caused damage to Plaintiff Donna Harris in an amount to be determined by this Court.

FOR SEVENTH CAUSE OF ACTION: PUNITIVE DAMAGES

42. Plaintiff re-alleges and incorporates herein by reference the allegations contained in paragraphs 1-41 above.

43. That the acts and/or omissions of Defendants, as stated above, were outrageous and were taken with such reckless disregard for the safety, well-being and life of Plaintiffs.

44. That as a direct and proximate result of the willful, wanton and/or reckless acts and/or omissions of Defendants, Plaintiffs suffered physical injuries and/or aggravation of existing condition, mental anguish and/or anxiety.

45. That the conduct of Defendants, as stated above, justifies an award of punitive damages for each and every claim of Plaintiffs set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment against Defendants for actual damages, punitive damages, the costs of this action, attorney fees, and for such other and further relief as the Court may deem just and proper as determined by a jury.

{SIGNATURE TO FOLLOW}

s/Donald L. Smith

Donald L. Smith, (SC Bar#6699)

Attorney for Plaintiff

122 N. Main Street

Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Anderson, South Carolina

June 7, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Luther Harris, Donna Harris and,)
Bobby E. Leopard,)
Plaintiffs,)
vs.)
Perry Wendell Barbour and)
Southland Transportation Co.)
Defendant.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-02092

CERTIFICATE OF SERVICE
(JURY TRIAL DEMANDED)

THE UNDERSIGNED person deposes and says that he served Plaintiffs' Summons and Complaint upon Defendant Southland Transportation Co., by and through South Carolina Secretary of State Mark Hammond, and Defendant Perry Wendell Barbour by placing copies thereof in an envelope, addressed to the parties at the addresses shown below, which envelopes were sealed, certified/returned receipt postage thereon fully prepaid, and deposited in the United States Mail at Anderson, South Carolina, and that there is regular communication by the United States Mail between the place of mailing and the place addressed as follows:

A copy of the Summons and Complaint has been served upon Defendant Southland Transportation Co., by certified/returned receipt, at its last known address.

October 4, 2019

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

MAILED TO:

Honorable Mark Hammond
Secretary of State
SC Secretary of State's Office
1205 Pendleton Street, Suite 525
Columbia, SC 29201

Perry Wendell Barbour
130 Valentine Court
Martinsville VA 241120731

Southland Transportation Co.
7925 Highway 601 North
Boonville, NC 27011

**SOUTHLAND TRANSPORTATION'S
ANSWER,
Filed November 8, 2019**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	Docket No.: 2019-CP-42-02092
LUTHER HARRIS, DONNA HARRIS,	)	
BOBBY LEOPARD, AND JERRY	)	
WHITE,	)	
	)	
Plaintiffs,	)	ANSWER OF DEFENDANT
	)	SOUTHLAND TRANSPORTATION
v.	)	CO.
	)	(Jury Trial Demanded)
PERRY W. BARBOUR AND	)	
SOUTHLAND TRANSPORTATION	)	
CO.,	)	
Defendants.		

Defendant Southland Transportation Co. answers and respectfully shows unto the Court:

FOR A FIRST DEFENSE

1. Except as specifically admitted, qualified, or explained, Defendant denies the allegations and demands strict proof of each allegation.
2. Defendant admits Paragraph 1 upon information and belief.
3. Defendant admits Paragraph 2 upon information and belief.
4. Answering Paragraph 3, Defendant admits that Defendant Barbour was a resident of Martinsville County, Virginia, but denies that Mr. Barbour is currently employed by Southland Transportation.
5. Answering Paragraph 4, Defendant admits that Southland conducts business in South Carolina but denies all remaining allegations.
6. Answering Paragraph 5, Defendant admits only that Plaintiff alleges certain acts that occurred in Spartanburg County, South Carolina. All remaining allegations in Paragraph 5 are denied.
7. Defendant admits Paragraph 6.

8. Defendant is without sufficient information to form a belief as to the truthfulness of the allegations contained in Paragraph 5, and, therefore, denies same and demands strict proof thereof.

9. Defendant admits Paragraph 8.

10. Defendant denies Paragraph 9.

11. Defendant is without sufficient information to form a belief as to the truthfulness of the allegations contained in Paragraph 10, and, therefore, denies same and demands strict proof thereof.

12. Paragraph 11 states a Conclusion of Law as fact, and is therefore denied.

13. Defendant is without sufficient information to form a belief as to the truthfulness of the allegations contained in Paragraph 12, and, therefore, denies same and demands strict proof thereof.

14. Paragraph 13 states a Conclusion of Law as fact, and is therefore denied.

15. Responding to the allegations contained in Paragraph 14, the defenses and paragraphs contained above are realleged and incorporated by reference as if restated herein verbatim.

16. Paragraph 15 states a Conclusion of Law as fact, and is therefore denied.

17. Defendant denies Paragraph 16 and all subparts thereof.

18. Defendant denies Paragraph 17.

19. Defendant denies Paragraph 18.

20. Responding to the allegations contained in Paragraph 19, the defenses and paragraphs contained above are realleged and incorporated by reference as if restated herein verbatim.

21. Defendant denies Paragraph 20.

22. Defendant denies Paragraph 21.

23. Defendant denies Paragraph 22.

24. Responding to the allegations contained in Paragraph 23, the defenses and paragraphs contained above are realleged and incorporated by reference as if restated herein verbatim.

25. Paragraph 24 states a Conclusion of Law as fact, and is therefore denied.

26. Paragraph 25 states a Conclusion of Law as fact, and is therefore denied.

27. Paragraph 26 states a Conclusion of Law as fact, and is therefore denied.

28. Responding to the allegations contained in Paragraph 27, the defenses and paragraphs contained above are realleged and incorporated by reference as if restated herein verbatim.

29. Defendant is without sufficient information to form a belief as to the truthfulness of the allegations contained in Paragraph 28 and, therefore, denies the same and demands strict proof thereof.

30. Paragraph 29 states a Conclusion of Law as fact, and is therefore denied.

31. Defendant denies Paragraph 30.

32. Defendant denies Paragraph 31.

33. Defendant denies Paragraph 32.

34. Responding to the allegations contained in Paragraph 33, the defenses and paragraphs contained above are realleged and incorporated by reference as if restated herein verbatim.

35. Defendant denies Paragraph 34.

36. Defendant denies Paragraph 35 and all subparts thereof.

37. Defendant denies Paragraph 36 and all subparts thereof.

38. Defendant denies Paragraph 37.

39. Responding to the allegations contained in Paragraph 38, the defenses and paragraphs contained above are realleged and incorporated by reference as if restated herein verbatim.

40. Defendant admits paragraph 39 upon information and belief.

41. Defendant denies Paragraph 40.

42. Defendant denies Paragraph 41.

43. Responding to the allegations contained in Paragraph 42, the defenses and paragraphs contained above are realleged and incorporated by reference as if restated herein verbatim.

44. Defendant denies Paragraph 43.

45. Defendant denies Paragraph 44.

46. Defendant denies Paragraph 45.

47. To the extent the Paragraph beginning "WHEREFORE" contains any allegations against Defendant, those allegations are denied.

AS AN ADDITIONAL DEFENSE
(Comparative Negligence)

48. FURTHER ANSWERING, any injury and damage sustained by Plaintiff may have been caused by the negligence or willfulness of Plaintiff, combining, concurring, and contributing with the negligence or willfulness, if any, by others. Because Plaintiff's negligence or willfulness may be greater than the alleged negligence or willfulness of one or more adverse parties, Plaintiff may be barred from recovery.

AS AN ADDITIONAL DEFENSE
(Comparative Negligence)

49. FURTHER ANSWERING, any injury and damage sustained by Plaintiff may have been caused by the negligence or willfulness of Plaintiff, combining, concurring, and contributing with the negligence or willfulness, if any, by others. Therefore, the Court should reduce any recovery awarded to Plaintiff for the alleged injuries and damage based upon the percentage of negligence or willfulness attributed to Plaintiff.

AS AN ADDITIONAL DEFENSE
(Punitive Damages)

50. FURTHER ANSWERING, any award of punitive damages would violate the constitutional safeguards provided by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and under the Due Process Clause of Article I, Section 3 of the South Carolina Constitution because the determination of punitive damages does not bear any reasonable relationship to the amount of actual damages, if any, suffered by or awarded.

AS AN ADDITIONAL DEFENSE
(Statute of Limitations)

51. FURTHER ANSWERING, the applicable statute of limitations (S.C. Code Ann. §§ 15-3-530) bars the claims.

AS AN ADDITIONAL DEFENSE
(Bifurcation of Punitive Damages)

52. FURTHER ANSWERING, Defendant requests trial bifurcation on the issues of actual damages and punitive damages, pursuant to S.C. Code Ann. § 15-32-520. Further, Defendant pleads all defenses, limitations on damages, and other privileges codified at S.C. Code Ann. § 15-32-520 and § 15-32-530.

AS AN ADDITIONAL DEFENSE
(Insufficiency of Process/Insufficiency of Service of Process)

53. FURTHER ANSWERING, Defendant alleges Plaintiff has not properly served the Summons and Complaint for this lawsuit; therefore, Defendant moves pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(4), and 12(b)(5) of the South Carolina Rules of Civil Procedure to dismiss the lawsuit.

AS AN ADDITIONAL DEFENSE
(Failure to State a Claim)

54. FURTHER ANSWERING, Plaintiff has failed to state facts sufficient to constitute a cause of action against Defendant pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

WHEREFORE, having answered, Defendant asks this Court to dismiss the Complaint and to grant such other and further relief as this Court deems just and proper.

Turner Padget Graham & Laney, P.A.

s/Alan G. Jones

Alan G. Jones, Esq.

SC Bar No. 100141

Post Office Box 1509

Greenville, South Carolina 29602

Direct: 864-552-4626

Fax: 864-282-5989

agjones@turnerpadget.com

ATTORNEYS FOR DEFENDANT

Greenville, South Carolina
November 08, 2019

**SOUTHLAND TRANSPORTATION'S
MOTION TO DISMISS,
Filed November 8, 2019**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	Docket No.: 2019-CP-42-02092
LUTHER HARRIS, DONNA HARRIS,	)	
BOBBY LEOPARD, AND JERRY	)	DEFENDANT SOUTHLAND
WHITE,	)	TRANSPORTATION CO.'S NOTICE
	)	OF MOTION AND MOTION TO
Plaintiffs,	)	DISMISS
	)	
v.	)	
	)	
PERRY W. BARBOUR AND	)	
SOUTHLAND TRANSPORTATION	)	
CO.,		
Defendants.		

TO: PLAINTIFFS AND DONALD L. SMITH, ESQ., ATTORNEY FOR PLAINTIFFS

Defendant Southland Transportation Co. ("Southland") hereby moves this Honorable Court for an Order Dismissing all claims against Southland. This motion is based on Rules 12(b)(1), 12(b)(2), 12(b)(4), and 12(b)(5) of the South Carolina Rules of Civil Procedure. Specifically, Plaintiff failed to properly and timely serve Southland with the Summons and Complaint. The basis for the motion is set forth below and will be supplemented with applicable statutory and common law in briefing and/or oral argument.

The accident giving rise to the allegations in the Complaint occurred on June 10, 2016. The Statute of Limitations, pursuant to S.C. Code Ann. § 15-3-530, expired on June 10, 2019. Plaintiffs filed their Complaint on June 7, 2019, just before the statute's expiration. However, "if not served within the statute of

limitations, actual service must be accomplished not later than one hundred twenty days after filing.” Rule 3(a)(2), SCRCPP. Southland was not served within the statute of limitations, thereby triggering the 120-day service requirement found in Rule 3(a)(2). One hundred twenty days after the date of filing, June 7, 2019 was October 5, 2019, a Saturday. Therefore, under Rule 4, SCRCPP, Plaintiffs would need to have served Southland by the end of Monday October 7, 2019.

Plaintiffs attempted service on Southland in two ways: by (1) sending certified mail/returned receipt to Southland Transportation Co. directly at their office in Boonville, NC; and, (2) by sending certified mail/returned receipt to the South Carolina Secretary of State. See Exhibit A. The certified mail to Southland was delivered on October 9, 2019, as shown by the Proof of Service Plaintiffs filed with the Court. See Exhibit B. The Secretary of State’s office accepted service of the Complaint on October 9, 2019 as well, as shown by their letter of October 10, 2019. See Exhibit C.

Based on the above, Plaintiffs failed to properly and timely serve the Summons and Complaint upon Southland. The statute of limitations for this matter has expired. Southland hereby respectfully requests an Order dismissing the case against Southland Transportation with prejudice.

Respectfully submitted,

[SIGNATURE ON FOLLOWING PAGE]

Turner Padget Graham & Laney, P.A.

s/Alan G. Jones

Alan G. Jones, Esq.

SC Bar No. 100141

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Greenville, South Carolina 29602

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agjones@turnerpadget.com

ATTORNEYS FOR DEFENDANT

Greenville, South Carolina
November 08, 2019

**APPELLANTS' REPLY IN OPPOSITION
TO SOUTHLAND TRANSPORTATION'S
MOTION TO DISMISS,
Filed November 26, 2019**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and,	)	Case No.: 2019-CP-42-02092
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	REPLY IN OPPOSITION TO DEFENDANT
vs.	)	SOUTHLAND TRANSPORTATION CO.'S
	)	MOTION TO DISMISS
Perry Wendell Barbour and	)	
Southland Transportation Co.	)	
	)	
Defendant.	)	

Plaintiffs filed a complaint for damages against Defendants Perry Wendell Barbour (hereinafter referred as "Barbour") and Southland Transportation Co. (hereinafter referred as "Southland") in the Circuit Court of Anderson County, State of South Carolina due to a trucking accident, which Plaintiffs assert was a result of Barbour's negligent driving. Southland moved to dismiss the Complaint allegedly due to Insufficiency of Service of Process, as required by the South Carolina Rule of Civil Procedure. Thus, this Reply.

STATEMENT OF FACTS

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

Plaintiffs filed their complaint on June 7, 2019, three (3) days before the running of the three-year statute of limitations for personal injury. S.C. Code §15-3-530(5). Pursuant to South Carolina Rules on Civil Procedure, Plaintiff had 120 days after filing her complaint to serve process on the Defendants, or until October 5, 2019.

On June 7, 2019, Plaintiffs sent a demand letter to Sentry. (Exhibit 1- Plaintiff's Demand Letter). A modified demand letter was sent to Sentry on June 9, 2019. Sentry looked through the demand and found issues. In several instances, Sentry required Plaintiffs to send a copy of Plaintiffs' medical records and bills, allegedly for being illegible. (Exhibit 2- Email Correspondences).

On June 13th and 14th, the carrier for the Defendants contacted counsel due to illegible aspects of the demand. Based on a lack of correspondence, it was believed that the demand was complete, and the carrier was evaluating the individual claims.

On July 23, 2019, counsel left a phone message for the Sentry claims adjuster and inquired about the prospect of getting offers for the claims. The adjuster apologized for the delay in responding to the demand. He said the delay was based on the illegible documents that were addressed in the middle of June; and, the fact that upper management had been "out of the office". Despite the fact the carrier had the demand for greater than five (5) weeks, he "hoped to get an answer out on both individual claims the following week.

Discussion between the adjuster and counsel continued for the next couple of days regarding the facts of the incident. Based on some clarity issues with the facts, counsel said that he would depose the investigating trooper to clear up the understanding of the facts.

The following morning, July 25, 2019, the adjuster asked whether he should have defense counsel file an answer to the Complaint. The reply was that there had been no service; and there had been no offers. The adjuster understood and said he would be in touch the next week.

On August 8, 2019, Plaintiffs received the offers from Sentry. (Exhibit 3- Letter of Sentry, dated August 8, 2019). Contrary to Sentry's declaration that it was following up on its offer to resolve the claims, there was no such prior offer. It was believed that the offers were unacceptable. A discussion between Plaintiffs and counsel confirmed this fact.

When it became apparent that Sentry would not accede to Plaintiffs' demands, Plaintiffs served their previously filed Summons and Complaint. Plaintiffs had to exert efforts to locate the Defendants since both provided the wrong addresses in the Accident Report. Furthermore, Plaintiffs discovered that Southland had long forfeited its standing in South Carolina.

On October 4, 2019, Plaintiffs served their Summons and Complaint to Southland by mailing a copy of the same, both to the Secretary of State, pursuant to South Carolina Code Ann § 15-9-245, and to a Mr. RJ Cummings, who was the registered agent of service for Southland Transportation Company in North Carolina.

On the same date, Plaintiffs served Defendant Barbour by certified mail in his last known address. A copy of the Summons and Complaint has also served on Defendant Barbour, by and through the Office of the General Counsel of South Carolina Department of Motor Vehicle.

Since October 5, 2019 is a Saturday, Plaintiffs believe that they have until October 7, 2019, a Monday, to serve the Defendants. The records indicate that Plaintiffs' Summons and Complaints went out on October 4, 2019, well-within the 120-day period limitation for serving the Complaint.

Furthermore, Rule 4(m) of the FRCP provides that if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

This good cause exception is discussed in the case of Martinez v. United States,

"To establish good cause, the plaintiff generally must exercise reasonable diligence in trying to effect service." *Burns & Russell Co. of Blat. V. Oldcastle, Inc.*, 166 F. Supp..2d 432, 439 n.9 (D.Md 2001). Good cause may be found, for example, where a defendant is evading service; where the plaintiff experienced difficulty in obtaining a defendant's proper address; where court staff misdirected a *pro se* plaintiff as to the appropriate procedure for service; or where a plaintiff was unaware of the defect in service until after the deadline expired." *Hoffman v. Balt. Police Dep't*, 379 F. Supp.2d 778, 786 (D.Md 2005). The common thread in all of these examples is that the interference of some outside factor prevented the otherwise-diligent plaintiff from complying with the rule. See *Burns*, 166 F. Supp.2d at 439n9.

cited in Martinez v. United States, 2013 WL 6858860, (D.Md. Dec. 26, 2013).

In the alternative, Plaintiffs seek this Court's equity and consideration of their attempts to pursue all remedies to arrive at a settlement. Southland's agent, (Sentry) entered the negotiation in bad faith as can be gleaned from its actions. It prolonged the negotiations by failing to respond to Plaintiffs' demand. When the adjuster returned the telephone message on the 24th of July, he did so by email. His excuses for the lapse in time were the illegible parts of the demand which were addressed immediately upon notice on June 14th and 15th respectively; and, that upper management was "out of the office".

Plaintiffs continued to act in good faith, providing Sentry with additional time to evaluate their claims. Sentry's adjuster specifically requested until the "next week", which on July 25th was the week of July 29th through August 2nd. In the end, Sentry forwarded a letter offering Plaintiffs less than their medical bills.

Plaintiffs believe that the period of negotiations, from June 7th to August 8th, should be considered as having equitably tolled the statute of limitations, since Southland's agent has intentionally entered the negotiation process in bad faith. By engaging in deceptive practices, Southland, thru its agent Sentry, caused Plaintiffs to refrain from serving their Complaint as soon as it was filed, in an effort to amicably resolve the claims, thereby not taxing an already overwhelmed court system.

Furthermore, Plaintiffs pray that this Court take into consideration the difficulty in locating Defendants in this case, considering that both Southland and Defendant Barbour provided wrong addresses.

Should this Court hold that equitable tolling is applicable in this case, Plaintiffs' service of processes complied with Rule 3(a)(1) SCRCF.

Plaintiffs served the Summons and Complaint when it appeared that no settlement can be had. In exercise of due diligence, Plaintiffs mailed the Summons and Complaint within the reglementary period of 120-day. The postal service's (USPS) failure to deliver the court processes on Monday, when Plaintiffs mailed the correspondence on Friday, is beyond Plaintiffs' control.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully requests this Court to apply the doctrine of equitable tolling to the instant case. In the alternative, Plaintiffs seek this Court to rule that Southland's failure to receive the Summons and Complaint was due to circumstances beyond Plaintiff's control. Plaintiffs pray this Court deny Southland's Motion to Dismiss and allow this case to be tried on its merit.

(Signature page to follow)

s/Donald L. Smith

Donald L. Smith (SC Bar#6699)

Attorney for Plaintiff

122 N. Main Street

Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Anderson, South Carolina
November 26, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Luther Harris, Donna Harris and,)
Bobby E. Leopard,)
Plaintiffs,)
vs.)
Perry Wendell Barbour and)
Southland Transportation Co.)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-02092

CERTIFICATE OF SERVICE

THE UNDERSIGNED person deposes and says that he served Plaintiffs' Reply to Defendant Southland Transportation Co.'s Answer to Complaint and Reply in Opposition to Motion to Dismiss, upon Defendant Southland Transportation Co., by and through its counsel of record, Alan G. Jones, Esq., via the e-mail address below through the South Carolina e-filing system:

Alan G. Jones, Esq.
agjones@turnerpadget.com

s/Donald L. Smith
Donald L. Smith (SC Bar#6699)
Attorney for Plaintiff
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Anderson, South Carolina
November 26, 2019.

**APPELLANTS' REPLY TO
SOUTHLAND TRANSPORTATION'S
ANSWER,
Filed November 26, 2019**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and,	)	Case No.: 2019-CP-42-02092
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	
vs.	)	REPLY TO DEFENDANTS' ANSWER
	)	
Perry Wendell Barbour and	)	
Southland Transportation Co.	)	
	)	
Defendant.	)	
	)	

For their reply to Defendant Southland Transportation Co.'s (hereinafter referred as "Southland") Answer to their Complaint, Plaintiffs, by and through her counsel, responds as follows:

Plaintiffs deny each and every one of the five (5) affirmative defenses raised by Southland. Plaintiffs submit that the Answer asserts numerous conclusory affirmative defenses without pleading any facts that form the basis for these defenses. The Answer further asserts numerous boiler-plate defenses that have no bearing on the matter but instead are boiler-plate defenses that Southland blindly asserts without facts. For the following reasons, the Court should deny or strike those portions of Southland's Answer pursuant to Rule 12(f) for failure to comply with the pleading requirements of Rule 8 and/or for having no bearing on the matter.

RESPONSES TO AFFIRMATIVE DEFENSES

1. In response to Southland's First Affirmative Defense of Comparative negligence, Plaintiff asserts that they have not committed any act that contributed to Defendant Barbour crashing Southland's truck into Plaintiffs' vehicle, which led to the latter sustaining injuries. Plaintiffs were stopped in observance of traffic rules and regulations when Defendant Barbour,

without warning, rear-ended Plaintiffs' vehicle. The impact of such collision was such that Plaintiffs were found outside their vehicle right after the accident. Clearly, Defendant Barbour was operating Southland's truck in a reckless manner. Defendant did not plead any fact/s that form the bases for its defense. Since this is merely conclusory statement, and at best boilerplate defense, it has no pleading value.

2. In response to Southland's Second Affirmative Defense of Improper Claim for Punitive Damages and Unconstitutionality of the Claim for Punitive Damages, Plaintiffs assert that they can prove by clear and convincing evidence that the injuries they sustained were as the result of Southland's agent's willful, reckless or wanton conduct.

Plaintiffs believe that Southland's acts taken together, were so gross that it should be punished and deterred from engaging in similar acts in the future.

Furthermore, Southland offered this defense without stating any, facts that would support the affirmative defense for improper and unconstitutional punitive damage. As a result, Defendant's affirmative defense is "insufficient" pursuant to S.C.R.C.P. Rule 12(f) and should be stricken.

3. In response to Southland's Third Affirmative Defense of Statute of Limitations, Plaintiffs state that the applicable statute of limitations for tortious acts is three (3) years. S.C. Code Ann. §15-3-530. The wrongful conduct at issue in the Complaint began in June 10, 2016, when the accident occurred. Plaintiffs filed their Summons and Complaint on June 7, 2019, well within the statute of limitations. Plaintiffs Complaint was not barred by Statute of Limitation.

4. In response to Southland's Fourth Affirmative Defense of Insufficiency of Service of Process, Southland offered this defense without stating any, facts that would support its claim.

Since this is merely conclusory statement, and at best boilerplate defense, it has no pleading value.

5. In response to Southland's Fifth Affirmative Defense of Failure to State a Claim, Plaintiffs alleged the following facts in their Complaint with regards to their claim against Southland, that: (a) on June 10, 2016, Plaintiffs were travelling southbound on U.S. Interstate 85; (b) Plaintiffs came to a stop due to traffic which resulted from a motor vehicle accident further up the County of Spartanburg, South Carolina; (c) Defendant Barbour, an employee of Southland at the time of the accident, was driving a truck owned by Southland; (4) Defendant Barbour was also traveling southbound on U.S. 85 at that time; (d) Without a warning, Defendant Barbour's truck smashed into the rear side of Plaintiffs' vehicle; (e) Immediately after the accident, Plaintiffs were found outside of their truck by the responding officer; (f) Plaintiffs were hospitalized for injuries sustained, including but not limited to bruises on her right hand, left forearm, right knees, left foot and various abrasions; (g) Defendant Barbour operated the truck in reckless manner and failed to maintain proper lookout. Plaintiffs believe that they have sufficiently established their claims for damages having alleged all the elements of negligence in their Complaint.

CONCLUSION

WHEREFORE, having fully replied to Southlands Answer, Plaintiffs respectfully request this Honorable Court deny and/or to strike Southland's affirmative answers and grant the relief requested by Plaintiffs and such other relief as this Court deems reasonable and necessary.

{SIGNATURE TO FOLLOW}

Respectfully submitted by:

s/Donald L. Smith

Donald L. Smith, (SC Bar#6699)

Attorney for Plaintiff

122 N. Main Street

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Anderson, South Carolina
November 26, 2019.

**RESPONDENT PERRY BARBOUR'S
NOTICE OF MOTION AND MOTION
TO DISMISS,
Filed December 23, 2019**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	Docket No.: 2019-CP-42-02092
LUTHER HARRIS, DONNA HARRIS,	)	
BOBBY LEOPARD, AND JERRY	)	DEFENDANT PERRY W.
WHITE,	)	BARBOUR'S NOTICE OF MOTION
	)	AND MOTION TO DISMISS
Plaintiffs,	)	
	)	
v.	)	
	)	
PERRY W. BARBOUR AND	)	
SOUTHLAND TRANSPORTATION	)	
CO.,	)	
Defendants.		

TO: PLAINTIFFS AND DONALD L. SMITH, ESQ., ATTORNEY FOR
PLAINTIFFS

Defendant Perry W. Barbour ("Barbour") hereby moves this Honorable Court for an Order Dismissing all claims against Southland. This motion is based on Rules 12(b)(1), 12(b)(2), 12(b)(4), and 12(b)(5) of the South Carolina Rules of Civil Procedure. Specifically, Plaintiff failed to properly and timely serve Barbour with the Summons and Complaint. The basis for the motion is set forth below and will be supplemented with applicable statutory and common law in briefing and/or oral argument.

The accident giving rise to the allegations in the Complaint occurred on June 10, 2016. The Statute of Limitations, pursuant to S.C. Code Ann. § 15-3-530, expired on June 10, 2019. Plaintiffs filed their Complaint on June 7, 2019, just before the statute's expiration. However, "if not served within the statute of

Plaintiffs, Robert Harris, Donna Harris and, Robert E. Leonard,
 Case No.: 2019-CP-42-02092
 limitations, actual service must be accomplished not later than one hundred twenty days after filing. Rule 3(a)(2), SCRCF. Barbour was not served within the statute of limitations, thereby triggering the 120-day service requirement found in Rule 3(a)(2). One hundred twenty days after the date of filing, June 7, 2019 was October 5, 2019, a Saturday. Therefore, under Rule 4, SCRCF, Plaintiffs would need to have served Barbour by the end of Monday October 7, 2019.

Plaintiffs attempted service on Barbour in two ways: by (1) sending certified mail/returned receipt to Barbour directly at an address in Martinsville, VA, of which there is no record of successful service; and, (2) by sending certified mail/returned receipt to the South Carolina Department of Motor Vehicles, which was received by the DMV on October 25, 2019. See Exhibit A. On November 22, 2019, the DMV wrote in response that the mailing to Barbour was received "Return to Sender Not Deliverable as Addressed Unable to Forward." See Exhibit B.

Plaintiffs did not even attempt service upon Mr. Barbour through the Department of Motor Vehicles prior to the attempt received on October 25, 2019, which was already well after the deadline to serve Barbour.

Based on the above, Plaintiffs failed to properly and timely serve the Summons and Complaint upon Barbour. The statute of limitations for this matter has expired. Barbour hereby respectfully requests an Order dismissing the case against Barbour with prejudice.

Respectfully submitted,

[SIGNATURE ON FOLLOWING PAGE]

Turner Padgett Graham & Laney, P.A.

s/Alan G. Jones

Alan G. Jones, Esq.

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ATTORNEYS FOR DEFENDANT

Greenville, South Carolina
December 23, 2019

**APPELLANTS' REPLY IN OPPOSITION
TO RESPONDENT BARBOUR'S
MOTION TO DISMISS,
Filed January 7, 2020**

Defendant

Plaintiffs filed a complaint for damages against Defendants Perry Wendell Barbour

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG)

SEVENTH JUDICIAL CIRCUIT

Plaintiffs filed a complaint for damages against Defendants Perry Wendell Barbour (hereinafter referred as "Barbour") and Southland Transportation Co. (hereinafter referred as "Southland") in the Circuit Court of Anderson County, State of South Carolina due to a trucking accident, which Plaintiffs assert was a result of Barbour's negligent driving. Barbour moved to dismiss the Complaint allegedly due to Insufficiency of Service of Process, as required by the South Carolina Rule of Civil Procedure. Thus, this Reply.

Case No.: 2019-CP-42-02092

Luther Harris, Donna Harris and, Bobby E. Leopard

Plaintiffs
vs.

PLAINTIFF'S REPLY IN OPPOSITION TO
DEFENDANT BARBOUR'S MOTION TO DISMISS

Perry Wendell Barbour and
Southland Transportation Co.

STATEMENT OF FACTS

On June 10, 2016, Plaintiffs were traveling southbound on U.S. Interstate 85, when they

Defendant.

Plaintiffs filed a complaint for damages against Defendants Perry Wendell Barbour (hereinafter referred as "Barbour") and Southland Transportation Co. (hereinafter referred as "Southland") in the Circuit Court of Anderson County, State of South Carolina due to a trucking accident, which Plaintiffs assert was a result of Barbour's negligent driving. Barbour moved to dismiss the Complaint allegedly due to Insufficiency of Service of Process, as required by the South Carolina Rule of Civil Procedure. Thus, this Reply.

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STATEMENT OF FACTS

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

Plaintiffs filed their complaint on June 7, 2019, three (3) days before the running of the three-year statute of limitations for personal injury. S.C. Code §15-3-530(5). Pursuant to South Carolina Rules on Civil Procedure, Plaintiff had 120 days after filing her complaint to serve process on the Defendants, or until October 5, 2019.

On June 7, 2019, Plaintiffs sent a demand letter to Sentry. (Exhibit 1- Plaintiff's Demand Letter). A modified demand letter was sent to Sentry on June 9, 2019. Sentry looked through the demand and found issues. In several instances, Sentry required Plaintiffs to send a copy of Plaintiffs' medical records and bills, allegedly for being illegible. (Exhibit 2- Email Correspondences).

On June 13th and 14th, the carrier for the Defendants contacted counsel due to illegible aspects of the demand. Based on a lack of correspondence, it was believed that the demand was complete, and the carrier was evaluating the individual claims.

On July 23, 2019, counsel left a phone message for the Sentry claims adjuster and inquired about the prospect of getting offers for the claims. The adjuster apologized for the delay in responding to the demand. He said the delay was based on the illegible documents that were addressed in the middle of June; and, the fact that upper management had been "out of the office". Despite the fact the carrier had the demand for greater than five (5) weeks, he "hoped to get an answer out on both individual claims the following week.

Discussion between the adjuster and counsel continued for the next couple of days regarding the facts of the incident. Based on some clarity issues with the facts, counsel said that he would depose the investigating trooper to clear up the understanding of the facts (if the case was in fact litigated).

The following morning, July 25, 2019, the adjuster asked whether he should have defense counsel file an answer to the Complaint. The reply was that there had been no service; and there had been no offers. The adjuster understood and said he would be in touch the next week.

On August 8, 2019 (or two weeks later), Plaintiffs received the offers from Sentry. (Exhibit 3- Letter of Sentry, dated August 8, 2019). Contrary to Sentry's declaration that it was following up on its offer to resolve the claims, there was no such prior offer. It was believed that the offers were unacceptable. A discussion between Plaintiffs and counsel confirmed this fact.

When it became apparent that Sentry would not accede to Plaintiffs' demands, Plaintiffs served their previously filed Summons and Complaint. Plaintiffs had to exert efforts to locate the Defendants since both provided addresses in the Accident Report that were apparently no longer operational. Additionally, Plaintiffs discovered that Southland had long forfeited its standing in South Carolina.

On October 4, 2019, Plaintiffs served their Summons and Complaint on Southland by mailing a copy of same to the Secretary of State, pursuant to South Carolina Code Ann § 15-9-245; and by mailing a copy to Mr. RJ Cummings, who is the registered agent of service for Southland Transportation Company in North Carolina.

On the same date, Plaintiffs served Barbour by certified mail in his last known address, 130 Valentine Court, Martinsville, VA 24112. Plaintiffs also served Barbour at another address: 272 Mary Hunter Dr., Bassett, VA 24055. Both service by certified mail were returned to sender.

Plaintiff thereafter served a copy of the Summons and Complaint on Barbour, by and through the Office of the General Counsel of South Carolina Department of Motor Vehicle (hereinafter referred as SCDMV). Pursuant to § 15-9-370, if a foreign (or a non-resident) driver

utilizes the roads of South Carolina, he or she agrees to allow the SCDMV to accept service in his/her stead. Thus, Mr. Barbour was served at that juncture. Ironically, when the SCDMV attempted to notice Mr. Barbour that it accepted service on a lawsuit against him, it was returned to sender. (Exhibit 4- Stamped Returned Envelope).

On December 23, 2019, Barbour moved to dismiss the Complaint against him allegedly for failure to properly and timely serve the Summons and Complaint. Thus, this Reply in Opposition.

ARGUMENT

BARBOUR WAS TIMELY AND PROPERLY SERVED.

The motor vehicle collision occurred on June 10, 2016. The statute of limitations for tort cases in South Carolina is three (3) years. (S.C. Code § 15-3-530). The Complaint was filed on June 7, 2019.

Under the law, Plaintiff had to serve the processes within the three (3) year statute of limitations or until June 10, 2019. Under the same statute, if Complaint was filed, but not served within the statute of limitations, Plaintiff has 120 days after the filing of the Complaint to serve the same to the Defendants. In this case, Plaintiffs had until October 5, 2019.

As October 5, 2019 was a Saturday, the law allowed Plaintiffs to serve the Summons and Complaint on October 7, 2019, a Monday.

- (a) Computation.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be

excluded in the computation. A half-holiday shall be considered as other days and not as a holiday.

Rule 6(a) SCRCF

The records indicate that Plaintiffs' Summons and Complaints went out on October 4, 2019, well-within the 120-day period limitation for serving the Complaint. The Summons and Complaint was sent to an address Barbour provided the authorities in the accident report: 130 Valentine Court, Martinsville, VA 24112.

The service by certified mail was returned to sender. Plaintiffs again sent a copy of the processes by certified mail to Barbour at 272 Mary Hunter Dr., Bassett, VA 24055. Again, it was returned to sender. Plaintiffs could not locate Barbour. After two (2) failures, Plaintiffs served him through SCDMV pursuant to §15-9-370, which stands for the fact that foreign and/or non-resident drivers agree to allow the State to accept service for them if they were liable for an accident while driving in this State. Rule 4(e) of the SCRCF provides that:

Whenever a statute or an order of court provides for service of a summons and complaint or of a notice, or an order upon a party not an inhabitant of or found within the State, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

SCDMV accepted service on October 25, 2019. SCDMV attempted to notify Barbour of its acceptance of service, but the envelope came back stamped with "Return to sender" as Plaintiffs had.

Barbour failed to answer the Summons and Complaint within 30 days, nor did he file any motions during the same time. Defense counsel's motion is a nullity since statute of limitations and insufficiency of proper service are affirmative defenses. Barbour did not raise his objections within the thirty (30) day-period upon receipt of the Complaint, as required under Rule 12 SCRCF. As such, these objections are deemed waived.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the service of Summons and Complaint upon Barbour was executed under the law. Plaintiffs pray this Court deny Barbour's Motion to Dismiss and allow this case to be tried on its merit.

s/Donald L. Smith

Donald L. Smith (SC Bar#6699)

Attorney for Plaintiff

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Anderson, South Carolina
January 7, 2020.

**RESPONDENT BARBOUR'S NOTICE
OF MOTION AND MOTION TO
VACATE ORDER OF REFERENCE
AND RETURN CASE TO THE
SPARTANBURG COUNTY COURT OF
COMMON PLEAS/CIRCUIT COURT,
Filed January 8, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	Docket No.: 2019-CP-42-02092
LUTHER HARRIS, DONNA HARRIS,	)	
BOBBY LEOPARD, AND JERRY WHITE,	)	DEFENDANT PERRY W. BARBOUR'S
	)	NOTICE OF MOTION AND MOTION
Plaintiffs,	)	TO VACATE ORDER OF REFERENCE
	)	AND RETURN CASE TO THE
	)	SPARTANBURG COUNTY COURT OF
	)	COMMON PLEAS/CIRCUIT COURT
v.	)	
	)	
PERRY W. BARBOUR AND SOUTHLAND	)	
TRANSPORTATION CO.,	)	
	)	
Defendants.		

TO: PLAINTIFFS AND DONALD L. SMITH, ESQ., ATTORNEY FOR PLAINTIFFS

Defendant Perry W. Barbour ("Barbour") hereby moves this Honorable Court for an Order Vacating the Order of Reference dated November 26, 2019, which Defendants contend was improvidently entered, and returning this case to the Circuit Court in the Spartanburg County Court of Common Pleas. Defendant Barbour further moves that, to the extent the Master-in-Equity determines that any default or entry of default exists, that such default be set aside. This Motion is based on the following:

1. The accident giving rise to the allegations in the Complaint occurred on June 10, 2016. The Statute of Limitations, pursuant to S.C. Code Ann. § 15-3-530, expired on June 10, 2019.

2. Plaintiffs filed their Complaint on June 7, 2019, just before the statute of limitations' expiration.
3. Plaintiffs served Defendant Southland Transportation on October 9, 2019, which was after the 120-day deadline to serve the Defendants.
4. On November 8, 2019, Southland filed a Motion to Dismiss based on Rules 12(b)(1), 12(b)(2), 12(b)(4), and 12(b)(5) of the South Carolina Rules of Civil Procedure because of the untimely service.
5. On November 26, 2019, Plaintiffs filed an "Order of Reference to the Master-in-Equity Pursuant to Rule 53 of the SCRP."
6. In Plaintiffs' Order of Reference, they state in the opening that "Defendant, Perry Wendell Barbour, has not served an answer, demurrer, or other pleadings as required by the Summons and Complaints; and, therefore, he was found in default pursuant to the South Carolina Rules of Civil Procedure as evidenced by Plaintiffs' Affidavit of Default filed with the Court."
7. The statement referenced in Paragraph 6 above is patently incorrect. At the time of the filing of the Order of Reference, Plaintiff had not yet properly served Defendant Barbour. Setting aside the fact that service on Barbour was never even attempted before the 120-day period after the statute had expired, service through the DMV on a non-resident driver whose certified copy of pleadings was returned is effective when the DMV's letter to that effect is filed with the Clerk of Court. S.C. Code § 15-9-380. That filing occurred on November 27, 2019. Barbour could not have been in default on November 26, 2019.
8. Plaintiffs also state Barbour "was found in default" in their November 26, 2019 Order of Reference. In fact, no entry of default has ever been filed or entered into the record to Defendants' knowledge.
9. Further, no Motion for Default Judgment or Motion for Entry of Default has been filed in this case as of the date of this Motion.

10. The Order of Reference mentions an Affidavit of Default being "filed with the Court" as evidence of the default. No such affidavit has been filed as of the date of this Motion.
11. On December 23, 2019, Defendant Barbour filed a Motion to Dismiss based on Rules 12(b)(1), 12(b)(2), 12(b)(4), and 12(b)(5) of the South Carolina Rules of Civil Procedure because of the untimely service.
12. It is the contention of all Defendants that the Order of Reference states incorrect factual pleadings and conclusions of law and therefore cannot provide the basis for a reference to the Master-in-Equity under a default situation as envisioned by Rule 53, SCRPC. There has been no actual default. There has been no motion for default. There has been no affidavit of default.
13. It is further their contention that the Order of Reference was improvidently entered by the Clerk of Court.
14. The record in this case is devoid of any indication that a default against Mr. Barbour was ever proper, and Defendants submit that the Order of Reference provides an incorrect and improper basis for reference of the case to the Master-in-Equity as it inaccurately states the very circumstances purporting to establish a default.

As a result of the above, Defendants respectfully request an Order vacating the Order of Reference and transferring this case back to the Circuit Court in the Court of Common Pleas, Spartanburg County. Defendant Barbour asserts that no default has been entered against him and that no default even could have been properly entered against him at the time of the Order of Reference. Out of an abundance of caution, should a default be considered to have been entered, Defendant Barbour moves that such default be set aside as improvidently entered based on incorrect pleadings submitted to the Clerk in the form of the Order of Reference.

Respectfully submitted,

Turner Padget Graham & Laney, P.A.

s/Alan G. Jones

Alan G. Jones, Esq.

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ATTORNEYS FOR DEFENDANT

Greenville, South Carolina
December 30, 2019

**APPELLANT'S MOTION FOR
ENTRY OF DEFAULT,
Filed January 8, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and,	)	Case No.: 2019-CP-42-02092
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	
vs.	)	MOTION FOR ENTRY OF DEFAULT
	)	
Perry Wendell Barbour and	)	
Southland Transportation Co.	)	
	)	
Defendants.	)	
	)	

NOW COMES Plaintiffs, by and through their undersigned counsel, and move for an order granting an Entry of Default against the Defendant Perry Wendell Barbour. The grounds for such Motion are as follows:

As evidenced by the Affidavit of Service for Defendant Perry Wendell Barbour, served October 25, 2019; and, the Affidavit of Default, filed November 26, 2019, Plaintiffs hereby request for an entry of default against Defendant, Perry Wendell Barbour.

s/Donald Smith
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Anderson, South Carolina
November 26, 2019.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Luther Harris, Donna Harris and,)
 Bobby E. Leopard,)
)
 Plaintiffs,)
 vs.)
)
 Perry Wendell Barbour and)
 Southland Transportation Co.)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-02092

CERTIFICATE OF SERVICE

THE UNDERSIGNED person deposes and says that he served Plaintiffs' Motion for Entry of Default, Affidavit of Default, Order of Reference to Master, Order of Default and this Certificate of Service for the aforementioned on Defendants, by and through their counsel of record, Alan G. Jones, Esquire, via the e-mail address below through the South Carolina e-filing system:

Alan G. Jones, Esquire
agjones@turnerpadget.com

s/Donald L. Smith
 Donald L. Smith (SC Bar#6699)
 Attorney for Plaintiff
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 Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

Anderson, South Carolina
 January 8, 2020.

**AFFIDAVIT OF DEFAULT,
Filed January 8, 2020**

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Luther Harris, Donna Harris and,)
Bobby E. Leopard,)
Plaintiffs,)
vs.)
Perry Wendell Barbour and)
Southland Transportation Co.)
Defendant.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-02092

AFFIDAVIT OF DEFAULT

PERSONALLY appeared before me, Donald L. Smith, who after first being duly sworn, states that he is the attorney for the Plaintiffs in the above entitled action; that although the Defendant, Perry Wendell Barbour, was duly served with a true copy of the Summons and Complaint in the above captioned matter on October 25, 2019, (see Affidavit of Service by Process Server, annexed hereto as Exhibit "A"), and thirty (30) days have passed, and no answer or any other type pleading has been served by or on behalf of the Defendant, Perry Wendell Barbour, and he is in default.

s/Donald L. Smith
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Anderson, South Carolina
November 26, 2019



Common Pleas

Case Caption: Luther Harris , plaintiff, et al VS Perry Wendell Barbour , defendant,
et al
Case Number: 2019CP4202092
Type: Affidavit/Default

IT IS SO ORDERED

s/Amy W Cox, Spartanburg County Clerk of
Court by Maribel M Martinez

Electronically signed on 2020-01-16 16:47:47 page 2 of 2

**ADDENDUM TO APPELANTS' REPLY
IN OPPOSITION TO RESPONDENTS'
MOTION TO DISMISS,
Filed February 25, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and	)	Case No.: 2019-CP-42-02092
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	
vs.	)	ADDENDUM TO PLAINTIFFS' REPLY
	)	IN OPPOSITION TO DEFENDANT BARBOUR'S
Perry Wendell Barbour and	)	MOTION TO DISMISS
Southland Transportation Co.	)	
	)	
Defendant.	)	
_____	)	

Plaintiffs, by and through their undersigned counsel, respectfully submit this Addendum to their Reply in Opposition to Defendant Perry Barbour's, (hereinafter referred to as "Barbour") Motion to Dismiss, and state that:

1. On January 7, 2020, Plaintiffs filed their Reply in Opposition to Barbour's Motion to Dismiss.
2. In their Reply, Plaintiffs asserted that Barbour was properly and timely served by certified mail; first, through an attempt to serve him in his last known address; and secondly, through service upon South Carolina Department of Motor Vehicle (hereinafter referred to as "SCDMV"). (Please refer to the Affidavits attached with this Addendum)
3. Plaintiffs also insisted that Barbour is estopped from raising the statute of limitations and insufficiency of proper service as affirmative defenses because he did not file an Answer, nor any kind of motion, within the thirty (30)-day period upon filing of the Complaint.

4. It should be noted that the counsel for Barbour is the same counsel that represented Southland Transportation Company (hereinafter referred to as "Southland").
5. Based on counsel's failure to file a joint answer on behalf of both Southland and Barbour, Plaintiffs believe that Southland and their counsel do not have standing to bring this motion, due to a lack of retention by Barbour.
6. Defendants were individually served by certified mail at the same time.
7. Southland filed its Answer on November 8, 2019, while Barbour moved to dismiss the Complaint against him on January 8, 2020.
8. It would be an injustice to allow Barbour to raise the issue of timeliness against Plaintiffs when his motion was filed well beyond the prescriptive period for filing responsive pleadings.

CONCLUSION

For the foregoing reasons as well as those addressed in their Reply in Opposition, Plaintiffs respectfully request that this Court deny Barbour's motion to dismiss and allow the action to move forward.

Respectfully submitted by:

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February 24, 2020.

**SECOND ADDENDUM TO
APPELLANTS' REPLY IN
OPPOSITION TO RESPONDENTS'
MOTION TO DISMISS,
Filed February 25, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and	)	Case No.: 2019-CP-42-02092
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	
vs.	)	SECOND ADDENDUM TO PLAINTIFFS'
	)	REPLY IN OPPOSITION TO
Perry Wendell Barbour and	)	DEFENDANTS' MOTIONS TO DISMISS
Southland Transportation Co.	)	
	)	
Defendant.	)	
	)	

Plaintiffs, by and through their undersigned counsel, respectfully submit this Second Addendum to their Reply in Opposition to Defendants' respective Motions to Dismiss, and offer the following:

1. On June 7, 2020, Defendants' tractor trailer rear ended Plaintiffs' pick-up truck causing significant damage to them, physically and mentally.
2. The accident report that was created following the wreck, gave addresses for both the driver of the truck and the owner of the truck. Defendant Perry Wendell Barbour resided at 130 Valentine Court, Martinsville, VA 24112-0731. Southland Transportation Co. resided at 109A W. Atkins St., Dobson NC 27017.
3. Plaintiffs attempted to serve both individuals at their respective addresses without success.
4. Defendants did not contact the Department of Motor Vehicles for the State of South Carolina in order to remedy the inaccurate addresses.
5. As a result of the inaccurate addresses, Plaintiffs were unable to serve the individuals in a timely manner at their "homes" in their foreign state.

6. The Statute of Limitations expired on the attempts to serve each Defendant under the Long-Arm statute.
7. South Carolina created a statute to address tortfeasors who cause personal injury in South Carolina, only to leave the state and put the ability of the victims to seek redress in jeopardy, particularly the ability to reach the Defendants to satisfy any judgments rendered against them,
8. Section 15-3-30 reads as follows: If when a cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the terms of this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside outside of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action. S.C. Code Ann. § 15-3-30 (1976)
9. In the case at hand, both individuals departed from this State and resided elsewhere, leaving no forwarding address with the Department of Motor Vehicles for the State of South Carolina
10. This failure can only be seen as a willful and wanton attempt to escape the liability for their tortious actions.
11. Plaintiffs believe that the Defendants' successful withholding of their actual addresses caused the statute to be an issue, when it would not have been had they kept the State or Plaintiffs aware of their location given the opportunity given by South Carolina for Defendants to take their products on the highways of this State.

12. Plaintiffs believe that *Meyer v. Paschal*, 498 S.E.2d 635 (S.C. 1998) supports Plaintiffs' contention that the Statute of Limitations was tolled for each individual due to their continued departure from this State following the underlying wreck.
13. *Meyer v. Paschal* held that "The period of limitations may be tolled when that information is not known to the plaintiff." The information relating to Defendants' whereabouts had not been provided to the State; and, therefore, it was not provided to Plaintiffs.
14. Defendant Southland Transportation Co.'s place of business is now located at 7925 Highway 601 North Boonville, NC 27011, Defendant Barbour's location is unknown to Plaintiffs.
15. The tolling provision was created to prevent Plaintiffs in this State from being unfairly damaged by foreigners without the chance to recover their damages.
16. Plaintiffs believe that they are the individuals for whom the tolling provision was created; and, Defendants would be provided the opportunity to litigate in an action in this Court, when they did not provide Plaintiffs the same by failing to provide notice of their change of address to the South Carolina Department of Motor Vehicles.

CONCLUSION

For the foregoing reasons as well as those addressed in their Reply in Opposition, Plaintiffs respectfully request that this Court deny Defendants' motions to dismiss and allow the action to move forward.

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Anderson, South Carolina
February 25, 2020.

**APPELLANTS' MOTION TO
RECONSIDER THE ORDER OF
DISMISSAL,
Filed March 20, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and,	)	Case No.: 2019-CP-42-02092
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' MOTION TO RECONSIDER
	)	GRANTING OF DEFENDANTS' MOTIONS
vs.	)	TO DISMISS
	)	
Perry Wendell Barbour and	)	
Southland Transportation Co.	)	
	)	
Defendant.	)	

TO: THE HONORABLE J. DERHAM COLE AND DEFENDANTS, PERRY WENDELL BARBOUR AND SOUTHLAND TRANSPORTATION COMPANY, BY AND THROUGH COUNSEL OF RECORD, DAVID MOORE, ESQUIRE:

The Plaintiffs move this Court to reconsider the Form Order issued on March 10, 2020, granting Defendants' Motion to Dismiss on the following grounds:

As to Defendant Barbour:

1. Per SC Code Ann. Section 15-9-350, Defendant Barbour was served with the Summons and Complaint on October 25, 2019 as a matter of law upon the acceptance of service by the SCDMV on that date. Defendant Barbour failed to answer the complaint within thirty (30) days. Defendant Barbour was in default as a matter of law on November 25, 2019.
2. Rule 12(b) provides that defenses shall be asserted in the responsive pleading (answer), except when the pleader chooses to file a pre-answer motion to assert any affirmative defenses. Defendant Barbour was served, by way of the SCDMV, on October 25, 2019. Defendant Barbour failed to file a pre-answer motion within thirty (30) days. Therefore, he was unable to move for dismissal utilizing any of the affirmative defenses. Specifically, (2) lack of jurisdiction over the person, (4) insufficiency of process and (5)

insufficiency of service of process, were waived. Defendant Barbour's affirmative defenses were waived per Rule 8(c), Rule 12(a), (b), and (h)(1)(B), SCRCPP.

"Thus, under Rule 12(a) and (b), such a defense as insufficiency of process must be made either by responsive pleading or motion within the time period allowed for responding." Beckham v. Durant, 300 S.C. 329, 333; 387 S.E.2d 701, 704 (Ct. App. 1989).

3. Assuming arguendo the Court found that service was not accomplished until such time as the envelope with the pleadings was returned to the SCDMV on November 22, 2019, Defendant Barbour's motion would still fail. Defendant Barbour's Motion to Dismiss was filed on December 23, 2019. Defendant Barbour's responsive pleading, or motion, was due by December 22, 2019.

"Thus, under Rule 12(a) and (b), such a defense as insufficiency of process must be made either by responsive pleading or motion within the time period allowed for responding." Beckham v. Durant, 300 S.C. 329, 333; 387 S.E.2d 701, 704 (Ct. App. 1989).

4. Tolling applies pursuant to SC Code Ann. Section 15-3-30; and, equitable tolling applies based on the totality of the circumstances, Defendant Barbour's unclean hands and Defendant Barbour moving without notice and other arguments asserted by Plaintiffs.

As to Defendant Southland:

1. Defendant Southland was timely served with the Summons and Complaint on October 9, 2019 per SC Code Ann. Section 15-9-245 and on October 10, 2019 per Rule 4(d)(8), SCRCPP, because equitable tolling applies per SC Code 15-3-30 and as a matter of law under the totality of the circumstances including Defendant Southland's unclean hands in

failing to have a South Carolina registered agent as required by law and in failing to update its address with the SC Secretary of State and the SCDMV as well as other arguments asserted by the Plaintiffs.

CONCLUSION

Accordingly, the arguments above, the SCRCF, the laws of this state, and any such further memorandum of authority as may be filed hereafter, Plaintiffs request that this Court reconsider its Form Order dated March 10, 2020; and, deny the motions to dismiss brought before the Court by Defendant Barbour and Defendant Southland.

s/Donald L. Smith

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March 20, 2020

**BRIEF IN OPPOSITION TO
APPELLANTS' MOTION FOR
RECONSIDERATION,
Dated April 6, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	Docket No.: 2019-CP-42-02092
	)	
LUTHER HARRIS, DONNA HARRIS	)	
AND BOBBY E. LEOPARD,	)	
	)	
Plaintiffs,	)	BRIEF IN OPPOSITION TO
	)	PLAINTIFFS' MOTION FOR
v.	)	RECONSIDERATION
	)	
PERRY BARBOUR, AND SOUTHLAND	)	
TRANSPORTATION COMPANY,	)	
	)	
Defendants.	)	
	)	

Plaintiffs, through their attorney, have requested that the Court reconsider its Order dismissing the above action. The relevant facts are undisputed. Plaintiffs were involved in a vehicular accident on June 10, 2016. They have accused the Defendants of causing that accident and causing injuries as a result. Based upon the applicable statute of limitations, they had until June 10, 2019 to file and serve their actions against the Defendants. Plaintiffs did in fact file their Complaint on June 7, 2019. Under Rule 3(a)(2) of the South Carolina Rules of Civil Procedure,, they were to serve their Complaint within 120 days of filing. This time period ended on October 7, 2017, service upon the individual defendant, Perry Wendell Barbour, on October 25, 2019, was accomplished through the South Carolina Department of Motor Vehicles. Southland Transportation was served on October 9, 2019 through the Secretary of State.

Rule 3 of the South Carolina Rules of Civil Procedure controls this matter. A civil action is commenced when the Summons and Complaint are filed if actual service is accomplished within 120 days after filing; even though the applicable statute of limitations has run. In this case, the applicable statute of limitations ran on June 10, 2019. Service was not accomplished by that date on either Defendant. Applying the 120 day extension, service was required to be made by October 7, 2017. If that date was not met, then under Rule 3, the action would not be deemed to have been commenced. If the action had not been commenced, then the lawsuit, for all intents and purposes, would not exist.

Plaintiffs argue that a motion based upon Rule 12 must be timely filed, citing Beckham v. Durant, 300 S.C. 329, 387 S.E. 2d. 701 (Ct. App. 1989). Beckham is not on point, however. The Court of Appeals found that sufficiency of service was met unlike the present case where clearly there was no timely service. The issue of whether the action was properly commenced was neither raised nor addressed. Contrary to the arguments asserted by the Plaintiffs, there must be a case upon which the court may rule as to the sufficiency of process in order for there to be a waiver of an affirmative defense. There can be no default because there is no case in which there can be a default without a commencement of the action.

Plaintiffs also argue that there is a tolling of the statute of limitations under § 15-3-30. Again, before the statute of limitations can become an issue, there must be a viable case. Because there was no commencement of this case, there is no case upon which the statute of limitations might be applied.

Likewise, the doctrine of equitable estoppel is inapplicable since it applies when the statute of limitations has run and the Defendant is estopped from raising it as an affirmative defense because he or she has induced the Plaintiff to delay in timely filing. In the first place, the delay in properly serving was not the product of inducement by the Defendants but simply the result of the Plaintiff's failing to timely undertake a methodology to properly serve the Defendants. Secondly, the failure of the Plaintiffs to timely serve the Defendants would not only serve to make the statute of limitations applicable if there had been a proper filing and service but also caused there to be a lack of commencement of the legal action because service was not accomplished until more than 120 days after filing. The lack of commencement is similar to the absence of personal jurisdiction since under both the court lacks the authority to render a verdict against the Defendant. For these reasons, the actions of the Plaintiffs should be dismissed.

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April 6, 2020

ATTORNEYS FOR DEFENDANT

**RESPONSE TO RESPONDENTS'
OPPOSITION TO APPELLANTS'
MOTION FOR RECONSIDERATION,
Dated April 6, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and,	)	Case No.: 2019-CP-42-02092
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	RESPONSE TO DEFENDANTS' OPPOSITION
	)	TO PLAINTIFFS' MOTION FOR
vs.	)	RECONSIDERATION
	)	
Perry Wendell Barbour and	)	
Southland Transportation Co.	)	
	)	
Defendant.	)	

Plaintiffs, by and through their undersigned counsel, respectfully respond to Defendants' Opposition to their Motion for Reconsideration, filed on April 6, 2020, and allege as follows:

Defendants, in their Opposition to Plaintiffs' Motion for Reconsideration, contend that Plaintiffs failed to serve the Summons and Complaint within the 120 days provided by Rule 3, South Carolina Rules on Civil Procedure (SCRCP), then no action has been commenced. They further aver that "there must be a case upon which the court may rule as to the sufficiency of service of processes in order for there to be a waiver of affirmative defenses". (Brief in Opposition to Plaintiffs' Motion for Reconsideration, p. 2). Plaintiffs believe otherwise.

Plaintiffs assert that Rule 12 of SCRCP on Defenses and Objection is meant to address deficiencies in pleadings. The Rule provides that some of these affirmative defenses must be raised in a motion, otherwise, they are deemed waived. (Rule 12 (h) SCRCP). In this case, Defendant Barbour filed a Motion to Dismiss based on the insufficiency of service of process and statute of limitations. (Defendant Barbour's Motion to Dismiss, December 23, 2019, p. 2).

A Motion to Dismiss, under Rule 12(b) must be made before answering, and within the time period for answering, the Complaint. Based on the service date of October 25, 2019,

Defendant Barbour's responsive pleading/Motion to Dismiss must have been filed by November 25, 2019. The December 23rd filing, therefore, was untimely, resulting in a waiver of defenses Rules 12(b)(2), (4), and (5), SCRCF, relied upon by the Court in its decision. "Thus, under Rule 12(a) and (b), such a defense as insufficiency of process must be made either by responsive pleading or motion within the time period allowed for responding." *Beckham v. Durant*, 300 S.C. 329, 333; 387 S.E.2d 701, 704 (Ct. App. 1989).

Plaintiffs argue that Defendant Barbour waived the affirmative defenses of statute of limitations and insufficiency of service of process when he failed to file his motion within the period set forth by law, thereby making the insufficiency of service, and the associated statute of limitations, moot. The Court in *Unison Insurance v. Hawkins*, 342 S.C. 537 (2000) granted relief to Plaintiff despite the failure to timely serve a defendant.

In *Unison*, Respondent Bruce Hawkins was involved in a collision involving a vehicle insured by Appellant Unison Insurance. The accident occurred on October 8, 1994. Unison was forced to pay the insured's losses under the uninsured motorist provision. Thereafter, Unison filed a claim against Bruce Hawkins and his parents on October 3, 1997, for violation of the South Carolina Motor Vehicle Financial Responsibility Act. Unison served the Hawkinses on October 4, 1997, four (4) days before the statute of limitations expired.

At the time of service, Bruce was no longer residing with his parents. In their Answer, the Hawkinses raised Unison's failure to serve Bruce with the Complaint within the three (3)-year statute of limitations. The Hawkinses moved for summary judgment which the trial court granted. On appeal, Unison asserted the trial court erred in finding that Bruce was not served within the statute of limitations period because he waived the right to contest the sufficiency of service of process by failing to properly challenge service under Rule 12(b)(5).

The Court of Appeals in *Unisun* ruled that the Watkinses waived their right to assert affirmative defenses when they failed to properly object to the sufficiency of service of process. *Unison*, supra., citing *O'Brien v. R.J. O'Brien & Assocs.*, 998 F.2d 1394 (7th Cir. 1993). Furthermore, the Court deemed that Hawkinses' statute of limitations claim was inextricably tied to the attempt to serve the process, the doctrine laid down in the case of Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993), applies.

In Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993), our supreme court held that 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. See also James F. Flanagan, *South Carolina Civil Procedure* 100 (2d ed. 1996) ("The ... waiver provision affects not only the motion itself but any argument based on the alleged defect.").

Cited in *Unisun*, supra.

In *Unisun*, as well as the case at bar, Plaintiffs filed their respective complaints within the statute of limitations. In both cases, Plaintiffs attempted to serve Defendants with a Summons and Complaint but failed due to said Defendants' changes of address. In *Unisun*, the Court found Defendants' Answer raising the affirmative defense of insufficiency of service of process as deficient for failing to list the defects in the service of process with specificity. As such, the Court deemed Defendant Watkinses as having waived the affirmative defenses for failure to provide specificity in their motion.

In the case at bar, Plaintiffs insist that Defendant Barbour was in default for failing to answer within thirty (30) days. Likewise, his failure to file his motion regarding affirmative defenses within thirty (30) days was waived. It was clear in the case of Unisun, that the Court considered and ruled upon the waiver of the affirmative defenses despite non-service of the processes on Bruce Hawkins.

CONCLUSION

For these reasons, Plaintiffs, through their undersigned counsel, respectfully request that this Court reconsider its Order; and, grant Plaintiffs any and all relief to which they may be entitled.

Respectfully submitted,

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April 10, 2020.

**SUPPLEMENT BRIEF IN
OPPOSITION TO APPELLANTS'
MOTION FOR RECONSIDERATION,
Dated May 6, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	Civil Action No. 2019-CP-42-2092
LUTHER HARRIS, DONNA HARRIS,	)	
AND BOBBY E. LEOPARD,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	SUPPLEMENT BRIEF IN OPPOSITION TO
	)	PLAINTIFFS' MOTION FOR
PERRY WENDALL BARBOUR AND	)	RECONSIDERATION
SOUTHLAND TRANSPORTATION	)	
COMPANY,	)	
	)	
Defendants.	)	
	)	

In their Motion for Reconsideration of the Court's Order of March 10, 2020 dismissing the above action, the Plaintiffs have contended that the Court failed to consider their argument that the Defendants had waived any basis for dismissal under Rule 12 of the *South Carolina Rules of Civil Procedure*.

In order to properly address this contention, a review of the pertinent facts is necessary. The facts are largely undisputed. Plaintiffs were involved in a vehicular accident on June 10, 2016 and have asserted that the Defendants were at fault in causing that accident. Applying the three (3) year Statute of Limitations set forth in Section 15-3-530, the Plaintiffs were required to commence their action against the Defendants by June 10, 2019. Pursuant to Rule 3 of the *South Carolina Rules of Civil Procedure*, a civil action is commenced when a Summons and Complaint is filed with the Clerk of Court and thereafter served, within the Statute of Limitations, or, if not served within the Statute of Limitations, within One hundred twenty (120) days of filing. See Rule 3(a), SCRCF. The Plaintiffs did in fact file their Summons and Complaint on June 7, 2019, which was within the applicable Statute of Limitations. However, they failed to properly

serve the Summons and Complaint within the Statute of Limitations or within the allotted One Hundred Twenty (120) days after filing. In order to comply with the One Hundred twenty (120) day rule, the Plaintiffs would have had to serve the Defendants on or before October 7, 2019. Service upon Perry Wendall Barbour was accomplished through the South Carolina of Motor Vehicles on October 25, 2019 based upon Section 15-9-350. Service upon Southland Transportation was accomplished on October 9, 2019 through the Secretary of State pursuant to *Section 15-9-248*.

Notwithstanding their failure to comply with Rule 3(a)(2), which requires service within One Hundred Twenty (120) days after filing if service is not accomplished within the applicable Statute of Limitations, Plaintiffs have argued that the Defendants have waived this defense by not timely asserting it either by motion or pleading. It should be noted that the Plaintiffs attempted service upon Perry Barbour through Certified Mail pursuant to Rule 4(d) (8) and through substituted service upon the Department of Motor Vehicles, pursuant to Section 15-9-350. Service under Rule 4(d) (8) cannot serve as a basis for default judgment unless the return receipt is properly signed, which in this case it was not. Service under Section 15-9-350, requires not only service upon the Department of Motor Vehicles but also service upon the Defendant, at first by Certified Mail, or, if there is no signed receipt, subsequently by regular mail at the last known address. Pursuant to Section 15-9-380, if a Defendant fails to send the Certified Mail Receipt, either the Plaintiff or the Department of Motor Vehicles is required to mail the pleadings to the last known address of the Defendant. The Plaintiff or the Department of Motor Vehicles is also required to file an Affidavit of Mailing with the Clerk of Court. When this Affidavit of Mailing is filed with the Clerk of Court, it has the same effect and force as if process was personally asserted upon the Defendant. An Affidavit regarding service upon Perry

Barbour was filed sometime after December 22, 2019, when the Department of Motor Vehicles received a return of its certified letter to Perry Barbour from the U. S. Post Office as being undeliverable. Plaintiffs contend that Perry Barbour was therefore required to file an Answer or Motion to Dismiss within thirty (30) days or by December 22, 2019. In taking this position, however, the Plaintiffs have ignored Rule 6 of the *South Carolina Rule of Civil Procedure*. Pursuant to this Rule, when service is made upon a party through Statutory Substitute Service, such as Section 15-9-350, there will be an additional five (5) days to respond. Accordingly, an Answer or Motion was to be filed by December 27. The Motion to Dismiss, in this case, was filed on December 23. As a result, there was no default with regard to the Defendant Perry Barbour.

With regard to the Defendant Southland Transportation Company, it was served on October 9, 2019, pursuant to Section 15-9-245, allowing substitute service upon the Secretary of State. This is also clearly beyond the One Hundred Twenty (120) day period for proper service. Moreover, there could be no default in filing a Motion to Dismiss since the Motion and Answer was filed on November 8, 2019, within the required thirty (30) day period. The Plaintiffs argue that the Defendant was guilty of unclean hands and equitably estopped from raising any issue regarding the timely service of the Complaint. However, this argument fails since the delay in proper service was the result of unsuccessful negotiation with the Defendant's insurer rather than any fraudulent or false representation by that insurer upon which the Plaintiffs relied in delaying the service.

The Plaintiffs' opposition to the Order Granting Dismissal should be rejected for a second reason. Pursuant to Rule 3 of the *South Carolina Rules of Civil Procedure*, a civil action is commenced when the Summons and Complaint are filed with the Clerk of Court and, if not

completed within the Statute of Limitations, service is accomplished not less than One Hundred Twenty (120) days after filing. Based upon the above argument, service was clearly not accomplished within One Hundred Twenty (120) days after filing for either Defendant. As a result, the action was never properly commenced. Until an action is commenced pursuant to Rule 3, there is no proceeding pending. Schabek v. Nationwide Mut. Ins. Co., 303 SC 26, 397 S.E. 2d 786 (Ct. App. 1990). If there is no pending proceeding, there is no case which can be held in default. Moreover, where a Complaint has been filed but not served, personal jurisdiction over a Defendant is not acquired, Brown v. Evatt, 322 SC 189, 470 S.E. 2d 848 (1996), and therefore the Court lacks the power to enter a personal judgment. Flanagan, J. F., South Carolina Civil Procedure (2d. ed. (at 7)). Since under Rule 3, service is permitted only for a period of One Hundred twenty (120) days after filing, and, since the Plaintiffs failed to accomplish service within that One Hundred twenty (120) day period, there has been no actual service. As a result, dismissal would also be warranted under Rule 12(2), (4), and (5).

For the above reasons, Plaintiffs' Motion for Reconsideration should be denied and their action dismissed.

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May 6, 2020

ATTORNEYS FOR DEFENDANT

**APPELLANTS' MEMORANDUM IN
SUPPORT OF APPELLANTS' MOTION
FOR RECONSIDERATION,
Dated May 6, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and,	)	Case No.: 2019-CP-42-02092
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' MEMORANDUM
	)	IN SUPPORT OF THEIR MOTION FOR
	)	RECONSIDERATION
vs.	)	
	)	
Perry Wendell Barbour and	)	
Southland Transportation Co.	)	
	)	
<u>Defendant.</u>	)	

Plaintiffs, by and through their counsel of record, submit this memorandum of points and authorities, and state that:

STATEMENT OF FACTS

On June 10, 2016, Plaintiffs were stop for traffic traveling southbound on U.S. Interstate 85, when they came to a stop due to traffic in the County of Spartanburg, State of South Carolina. Defendant Barbour, driving a truck owned by Defendant Southland, smashed into the rear of Plaintiffs' vehicle. Plaintiffs filed this negligence action for damages for the injuries they sustained as a result of the wreck.

Plaintiffs filed their complaint on June 7, 2019, three (3) days before the running of the three-year statute of limitations for personal injury. S.C. Code §15-3-530(5). Pursuant to South Carolina Rules on Civil Procedure (SCRCP), Plaintiffs had 120 days after filing the Summons and Complaint to timely serve process on the Defendants, or until October 5, 2019. As explained below Defendants conduct caused the excusable delay in Plaintiffs' timely serving them with Summons and Complaint. After the 120 days for timely service, Plaintiffs served Defendant Barbour through the Office of the General Counsel of South Carolina Department of

Motor Vehicle (hereinafter referred as SCDMV), who legally accepted service on Defendant Barbour's behalf on October 25, 2019. Pursuant to § 15-9-370, if a foreign (or a non-resident) driver, such as Defendant Barbour, utilizes the roads of South Carolina, he agrees to allow the SCDMV to accept service in his stead. Even though he was served after the three (3) years statute of limitations had run, Defendant Barbour failed to file any answer or responsive pleadings within 30 days of the acceptance of service (November 25, 2019). According to the SCRCF, Barbour's action was required, and the aforementioned failure left him in default, and without affirmative defenses. On December 23, 2019, Defendant Barbour untimely moved to dismiss the Summons and Complaint against him for failure to properly serve the Summons and Complaint within the statute of limitations.

Regarding Plaintiffs' attempts to timely serve the Defendants, Plaintiffs used diligence and made several efforts to timely serve the Defendants. On June 7, 2019, Plaintiffs sent a demand letter to Sentry, the Defendants' insurance carrier. (Exhibit 1-Plaintiff's Demand Letter). A modified demand letter was sent to Sentry on June 9, 2019. Sentry reviewed the demand and found a couple of instances where the copies were illegible. On June 13th and 14th, Sentry contacted counsel due to illegible aspects of the demand. Plaintiffs quickly complied with any issue surrounding the ability of Sentry to evaluate the claims in hopes of resolution prior to engaging in litigation. (Exhibit 2-Email Correspondence). Based on a lack of correspondence from that point forward, it was believed that the demand was complete, and the carrier was evaluating the individual claims.

On July 23, 2019, counsel left a phone message for the Sentry claims adjuster about the prospect of getting offers for the claims. The adjuster apologized for the delay in responding to the demand. He said the delay was based on the illegible documents (which were addressed in

the middle of June), and the fact that upper management had been “out of the office”. Despite the fact the carrier had the demand for greater than five (5) weeks, he “hoped to get an answer out on both individual claims the following week.”

Discussion between the adjuster and counsel continued for the next couple of days regarding the facts of the incident. Based on some clarity issues with the facts, counsel said that he would depose the investigating trooper to clear up the understanding of the facts (if the case was in fact litigated). The following morning, July 25, 2019, the adjuster asked whether he should have defense counsel file an answer to the Complaint. Plaintiffs counsel assured the adjuster that the lawsuit was not being served while they negotiated for settlement-there had been no service, and there had been no offers. The adjuster understood and said he would be in touch the next week.

Two weeks later on August 8, 2019, Plaintiffs received the offers from Sentry. (Exhibit 3-Letter of Sentry, dated August 8, 2019). Contrary to Sentry’s declaration that it was following up on its offer to resolve the claims, there was no such prior offer. The offers were unacceptable to Plaintiffs.

When it became apparent that Sentry would not accede to Plaintiffs’ demands, Plaintiffs served their previously filed Summons and Complaint. Plaintiffs had to exert efforts to locate the Defendants since both provided addresses in the Accident Report that were apparently no longer operational. Additionally, Plaintiffs discovered that Southland had forfeited its standing in South Carolina.

On Friday October 4, 2019, Plaintiffs served their Summons and Complaint on Defendant Southland by mailing a copy of same to the Secretary of State, pursuant to South Carolina Code Ann § 15-9-245; and by mailing a copy to Mr. R.J. Cummings, who is the registered agent of

service for Southland Transportation Company in North Carolina. On the same date, Plaintiffs served Barbour, by certified mail, at the address given at the time of the wreck: 130 Valentine Court, Martinsville, VA 24112 and at last known address known to Plaintiffs' process server: 272 Mary Hunter Dr., Bassett, VA 24055. Both attempts at service were returned to sender. As noted above, Defendant Barbour was eventually served on October 25, 2019 through SCDMV's acceptance of service on his behalf.

Defendant Southland timely filed its Motion to Dismiss on November 8, 2019. Defendant Barbour untimely filed his Motion to Dismiss on December 23, 2019, essentially claiming that Plaintiffs Summons and Complaint must be dismissed for failure of it to be served within 120 days of filing. The motions were heard together, and the Court ordered dismissal of Plaintiffs' case. Plaintiffs timely filed this Motion to Reconsider.

ARGUMENTS

A. THE LAW IS WELL-SETTLED THAT AFFIRMATIVE DEFENSES ARE WAIVED WHEN NOT RAISED IN A TIMELY MANNER.

Whenever a defendant has an affirmative defense available to it, the law is well-settled that failure to timely raise the objections under Rule 12(b)(2) through (5), in either a responsive pleading or by Rule 12(b) motion, will waive the rights associated therewith. (Rule 12(h), SCRCPP).

The accident occurred on June 10, 2016. Plaintiffs filed their Complaint on June 7, 2019. A copy of the Summons and Complaint was served by certified mail on October 4, 2019 to Defendant Barbour in the address he offered to law enforcement at the time of the motor vehicle wreck: 130 Valentine Court, Martinsville, VA 24112, and the address last known to Plaintiffs: 272 Mary Hunter Dr., Bassett, VA 24055. Both service attempts were returned to sender. Plaintiff thereafter served Defendant Barbour a copy of the processes, through the Office of the

General Counsel of South Carolina Department of Motor Vehicle (hereinafter referred as SCDMV), who accepted service on October 25, 2019.

Defendant Southland Transport, which filed its Answer and Motion to Dismiss on November 8, 2019, moved for dismissal, alleging insufficiency of service of process and statute of limitations. It is unknown whether Defendant Barbour was ever located. However, defense counsel for Southland Transportation filed a Motion to Dismiss on Barbour's behalf on December 23, 2019 for relief based on the same grounds. (Defendant Barbour's Motion to Dismiss, December 23, 2019, p. 2).

It is uncontested that Defendant Barbour was properly served on October 25, 2019. Defendant Barbour's counsel's movement for dismissal on December 23rd, fifty-nine (59) days following service of the Summons and Complaint upon him, was untimely. Pursuant to Rule 12, SCRCF, he had an obligation to raise affirmative defenses/objections, if any he had, within the thirty (30) day period following service of same upon him, or by November 25, 2019.

S.C. Code § 15-9-350¹ specifically provides that the Director of SCDMV shall be the "true and lawful attorney of a non-resident driver", and as such his acceptance of any summons or legal processes have "the same legal force and validity" as if served on the non-resident driver personally. S.C. Code § 15-9-370, states that service of legal processes to the SCDMV Director is sufficient service upon the non-resident driver, provided certain conditions are met.

¹ SC Code § 15-9-350 (2013) The acceptance by a nonresident of the rights and privileges conferred by the laws in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways, the streets of any incorporated municipality or the public roads of this State or anywhere within this State, or the operation by such nonresident of a motor vehicle on any such public highways, streets or public roads or anywhere within the State other than as so permitted or regulated shall be deemed equivalent to the appointment by such nonresident of the Director of the Department of Motor Vehicles or of his successor in office to be his true and lawful attorney upon whom may be served all summons or other lawful process in any action or proceeding against him growing out of any accident or collision in which such nonresident may be involved by reason of the operation by him, for him or under his control or direction, express or implied, of a motor vehicle on such public highways, streets or public roads or anywhere within this State. Such acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally.

S.C. Code § 15-9-370² and S.C. Code § 15-9-380³ control the manner of service. In this case, since all the conditions laid down by S.C. Code § 15-9-370 and S.C. Code § 15-9-380 were met, the Director's acceptance of service is considered Barbour's service. Defendant Barbour's Motion to Dismiss was filed twenty-nine (29) days too late, after the close of the prescription period, which began on the date the Director of SCDMV accepted the processes.

South Carolina courts have long held that "in order to establish that service has been properly effected, the plaintiff need only show compliance with the civil rules on service of process." McCall v. IKON, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005); Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996). When these rules are followed, there is a presumption of proper service. Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995). Plaintiffs showed compliance with the rules, and therefore service was presumptively proper.

Defendant contends that Plaintiffs failed to serve the Summons and Complaint within the 120 days provided by Rule 3 SCRCF, and as such no action was commenced. He insists that "there must be a case upon which the court may rule as to the sufficiency of service of processes

² SC Code § 15-9-370 (2013) Service of process upon the Director of the Department of Motor Vehicles, as agent of a: (a) nonresident driver under the provisions of Section 15-9-350; (b) resident driver who subsequently becomes a nonresident; (c) nonresident motor carrier under the provisions of Section 15-9-360; or (d) nonresident unregulated motor carriers engaged in transporting persons, hauling farm or dairy products, hauling any other perishable products or haulers of lumber or logs, shall be made by leaving a copy thereof, with an appropriate fee, in the hands of the Director of the Department of Motor Vehicles or his office and such service shall be sufficient service upon the nonresident if notice of the service and a copy of the process are forthwith sent by certified mail by the plaintiff or the Director of the Department of Motor Vehicles to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with the summons, complaint, and other papers in the cause. The Director of the Department of Motor Vehicles shall keep a record of all processes which shall show the day and hour of service upon him. When the certified return receipt shall be returned to the Director of the Department of Motor Vehicles, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff.

³ SC Code § 15-9-380 (2013) If the defendant in any such cause shall fail or refuse to accept and receipt for certified mail containing the notice of service and copy of the process and it shall be returned to the plaintiff or the Department of Motor Vehicles, the original envelope as returned shall be retained and the notice and copy of the summons shall be sent by open mail and the envelope and affidavit of mailing with sufficient postage of such open letter shall be filed with the clerk of court in which such action is pending and upon the filing thereof shall have the same force and legal effect as if such process has been personally served upon such defendant.

in order for there to be a waiver of affirmative defenses.” (Brief in Opposition to Plaintiffs’ Motion for Reconsideration, p.2). Defendant Barbour’s position ignores his failure to timely file a Motion to Dismiss, or raise such defenses as insufficiency of process and statute of limitations in an Answer within 30 days of being served with the Summons and Complaint. Courts of various jurisdictions have ruled upon this issue.

Effectuation of service is a precondition to a lawsuit, while waiver of insufficient service is the forfeiture of defense to that service. *Jenkins v. City of Topeka*, 136 F.3d 1274, 1275-76 (10th Cir. 1998). By failing to raise the defense of insufficient of service of process either in a pre-answer motion, or if no such motion is made, then in an answer, a defendant waives that defense and submits to the personal jurisdiction of the court, unless at the time of the service of the answer, the defendant did not know the defense was available. *Pusey v. Dallas Corporation*, 938 F.2d 498, 501 (4th Cir. 1991).

Leach v. BB & T Corp., 232 F.R.D. 545 (N.D.W. Va. 2005).

In Pusey v. Dallas Corp., 938 F.2d 498, 500 (4th Cir.1990), William Pusey filed a complaint for negligence, strict liability, breach of warranty and loss of consortium against Dallas Corporation. Due to a mistake in the identity of the registered agent for Dallas Corporation, the process was returned unexecuted on October 3, 1998. On January 26, 1989, Pusey requested for the re-issuance of the summons for service upon foreign corporation Dallas Corporation. The clerk received this request on February 3, 1989, over 120-days after the filing of the Complaint. A new process was served on Dallas on March 1, 1989, which included the complaint stamped filed on September 3, 1988 and February 3, 1989. Dallas Corporation filed no pre-answer motion under Rule 12 but served an answer that raised the statute of limitations defense. Dallas Corporation made no objection to the service of process. Ten months after filing its Answer, Dallas moved for summary judgment on the grounds of statute of limitations. Pusey contended that the action was timely filed on September 30, 1988 and that Dallas Corporation had waived any objections to the timeliness of the service of process by not raising the defense

either in a pre-answer motion or its answer. The District Court dismissed Pusey's case finding the service was not made within the 120-days. On appeal, the Fourth Circuit Court of Appeals ruled:

The action was commenced when the Puseys filed their original complaint on September 30, 1998. Fed. R. Civ. P.3. Upon the expiration of 120 days from that date without service of process having been effected, the action was subject to dismissal without prejudice, either on motion of the defendant or on the court's own "initiative," Fed. R. Civ. P. 4(j), unless by its conduct Dallas could, and had, waived any right on its part or power on the court's part to have the action dismissed.

Pusey, supra.

The same principle was applied by the Courts in the case of Unisun Insurance v. Hawkins, 342 S.C. 537 (2000). In Unison, Respondent Bruce Hawkins was involved in a collision involving a vehicle insured by Appellant Unison Insurance. The accident occurred on October 8, 1994. Unison was forced to pay the insured's losses under the uninsured motorist provision. Thereafter, Unison filed a claim against Bruce Hawkins and his parents on October 3, 1997, for violation of the South Carolina Motor Vehicle Financial Responsibility Act. Unison served the Hawkinses on October 4, 1997, four (4) days before the statute of limitations expired. At the time of service, Bruce was no longer residing with his parents. In their Answer, the Hawkinses raised Unison's failure to serve Bruce with the Complaint within the three (3)-year statute of limitations. The Hawkinses moved for summary judgment which the trial court granted. On appeal, Unisun asserted the trial court erred in finding that Bruce was not served within the statute of limitations period because he waived the right to contest the sufficiency of service of process by failing to properly challenge service under Rule 12(b)(5).

The Court of Appeals in Unisun ruled that the Watkinses waived their right to assert affirmative defenses when they failed to properly object to the sufficiency of service of process.

Unison, supra., citing *O'Brien v. R.J. O'Brien & Assocs.*, 998 F.2d 1394 (7th Cir. 1993).

Furthermore, the Court deemed that the statute of limitations claim was inextricably tied to the attempt to serve the process, the doctrine laid down in the case of *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993), applies.

In *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993), our supreme court held that 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. *See also* James F. Flanagan, *South Carolina Civil Procedure* 100 (2d ed. 1996) ("The ... waiver provision affects not only the motion itself but any argument based on the alleged defect.").

Cited in *Unisun*, supra.

In *Unisun* and *Pusey*, as well as the case at bar, Plaintiffs filed the Summons and Complaints within the statute of limitations. In all three cases, Plaintiffs attempted to serve Defendants with Summons and Complaint but failed, either due to Defendants' change of address (as in *Unison* and present case), or due to a mistake (as in *Pusey*). While the service of process was effective in both *Unison* and *Pusey*, the processes were not received by the intended defendants. In both cases, the Court held that due to defendants' failure to object to the insufficiency of process in a timely manner, then defendants could not successfully dismiss the case as they have waived such defense.

The ruling in *Pusey* sums up the principle in this matter: failure to serve process within the 120-day period does not automatically cause the dismissal of an action. The defendant must object and raise the affirmative defense of insufficiency of process in a responsive pleading or motion, in a timely manner. Defendant Barbour did not file an Answer nor his Motion to Dismiss within the 30-day period allowed to file a responsive pleading. Thus, he is deemed to

have waived the right to dismiss the action based on the affirmative defense of insufficiency of service of process and statute of limitations.

“... a defendant’s unexcused failure to raise the untimeliness of a service defense by motion or answer must be held to deprive the court of that power, since a waiver of this defense constitutes a submission to personal jurisdiction of the court.” (citing *Pardazi*, 896 F.3e at 1316-17 & n.2)); see also *id.* At 501 n.4 (“[A] party’s waiver operates not only to cut off his right to raise the defense, but the court’s power to invoke it.” Citing *Pardazi*, 896 F.2d at 1316 n.2)).

Tate v. Smith, 1:14cv125 (M.D.N.C. Aug. 23, 2016)

B. COURTS HAVE ALLOWED PLAINTIFFS TO SERVE PROCESSES BEYOND THE 120-DAY TIME PERIOD, PROVIDED PLAINTIFFS SHOW GOOD CAUSE FOR THE DELAY IN SERVICE.

In various jurisdictions, courts have applied a less-stringent approach on the 120-day time period to serve processes. Summons and Complaints filed or served beyond the statutory period have survived upon a showing of good faith and reasonable efforts of service on the part of the plaintiffs.

In this particular case, Plaintiffs had diligently performed all the acts that led to the service of the processes to herein Defendants. Plaintiffs have been diligent and given reasonable efforts in effecting service upon Defendant Barbour, even going beyond the duty by serving him three times. Due diligence and reasonable efforts have been recognized by courts as “good cause” to permit an extension of time to serve process beyond the 120-days requirement.

“Good cause generally requires the Plaintiff to demonstrate that she exercised ‘reasonable diligence in trying to effect service.’ *Gbane v. Capital One, NA*, No. PX-16-701, 2016 WL 3541281, at *1 (D. Md. June 29, 2016)(quoting *Jones v. Sears and Roebuck*, No. DKC-15-3092, 2016-WL 1696557, at *2 (D. Md. Apr. 28, 2016)). Thus, the Court may find good cause “where the plaintiff has taken some affirmative action to effectuate service of process upon defendant or ha[s] been prohibited, through no fault of his own, from taking such an affirmative action.” *Tenenbaum v. PNC Bank Nat’l Ass’n*, No. DKC-10-2215, 2011 WL 2038550, at *4 (D. Md. May 24, 2011) (quoting *Vincent v. Reynolds Mem’l Hosp., Inc.*, 141 F.R.D. 436, 437 (N.D. W. Va. 1992)).

Shilling v. Thomas, Case No.: PWG-16-2696 (D. Md. Mar. 16, 2017).

Defendant Barbour was not prejudiced by the delay in service of the Summons and Complaint, since he was represented by the same counsel as Defendant Southland, his employer, as such, he has actual notice of the facts and circumstances of the case, as well as the causes of action against him.

Under Rule 12(b)(5) of the Federal Rules of Civil Procedure, a defendant may move to dismiss for insufficient service of process. Fed. R. Civ. P. 12(b)(5). If service is contested, the plaintiff "bears the burden of establishing its validity," pursuant to Rule 4. *O'Meara v. Waters*, 464 F.Supp. 2d 474, 476 (D. Md. 2006); Fed. R. Civ. P.4. "Generally, when service of process gives the defendant actual notice of the pending action, the courts may construe Rule 4 liberally to effectuate service of process and uphold the jurisdiction of the court." *Id.* (Citing *Karlsson v. Rabinowitz*, 318 F.2d 666, 668 (4th Cir. 1963)).

Martynuska v. Nat'l Payment Relief, LLC, Civil Action No. RDB-14-0265 (D. Md. Aug. 22, 2014).

Plaintiffs maintain that whatever delay in the delivery of the certified mail containing the processes should not be attributed to them. The negligence of the postal office in failing to deliver and/or forward the certified mail on the day it was posted and dropped to the Post Office should not prejudice the Plaintiffs to the extent that they will be deprived of the opportunity to be heard in court.

The plaintiff's failure to properly serve the defendant was based on the mistake of the process server. In addition, the defendant has not shown prejudice resulting from granting the plaintiff an extension of time to serve the defendant. The plaintiff has offered a good faith and reasonable basis for failing to timely serve the defendant and dismissing the case would be an unfair result based on the lack of prejudice to the defendant. The Court holds that good cause exists to extend the time for service.

Brown v. Marriott International, Inc., Civil Action No. 2:04-2378-CWH (D.S.C. Mar. 7, 2007).

Further, tolling should apply as discussed below.

C. ATTENDANT CIRCUMSTANCES TOLL THE STATUTE OF LIMITATIONS.

The accident occurred on June 10, 2016. Plaintiffs filed the instant case on June 7, 2019. They entered into negotiations with Defendant Southland's representative, Sentry Insurance (hereinafter referred as "Sentry"), on June 9, 2019. After a protracted negotiation, where Sentry delayed its response for various reasons, the two parties failed to reach an agreement. When the negotiations failed, Plaintiffs served the Defendants copies of the Summons and Complaint. Defendant Southland Transportation's license to operate a business in South Carolina had been forfeited. Defendant Barbour's address at the time of the wreck was 130 Valentine Court, Martinsville, Virginia 24112. Both Defendants are considered out-of-state Defendants. As a result of the inaccurate addresses they gave, Plaintiffs were unable to serve the individuals in a timely manner at their place of residence in a foreign state.

South Carolina created a statute to address tortfeasors who cause personal injury in South Carolina, only to leave the state and put the ability of the victims to seek redress in jeopardy, particularly the ability to reach the Defendants to satisfy any judgments rendered against them. Plaintiffs believe that this statute is applicable in the instant case. S.C. Code Ann. § 15-3-30 provides:

If when a cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the terms of this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside outside of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

S.C. Code Ann. § 15-3-30 (1976)

In the case at hand, both individuals departed from this State and resided elsewhere, leaving no forwarding address with the SCDMV, and yet continued going about their business of transporting and going to and from South Carolina. This failure can only be seen as a willful and wanton attempt to escape the liability for their tortious actions. Plaintiffs believe Defendants' successful withholding of their actual addresses caused the statute of limitations to be an issue. But for the invalid addresses, Plaintiffs would have timely served them. Plaintiffs have a right to seek the damages incurred as a result of South Carolina's gracious allowance of foreign drivers to traverse this State's highways.

Meyer v. Paschal, 498 S.E.2d 635 (S.C. 1998) supports Plaintiffs contention that the Statute of Limitations was tolled for each individual due to their continued departure from this State following the underlying wreck. Meyer v. Paschal held that "the period of limitations may be tolled when that information is not known to the plaintiff." The information relating to Defendants' whereabouts had not been provided to the State; and, therefore, not provided to Plaintiffs. Defendant Barbour's location continues to be unknown to Plaintiffs.

The tolling provision was created to prevent Plaintiffs in this State from being unfairly damaged by foreigners without the chance to recover their damages. Plaintiffs believe that they are the individuals for whom the tolling provision was created. The doctrine of equitable tolling should be applied in this case and can be summarized as:

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant the application of the doctrine.

Equitable tolling has been deemed available where—

- Extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
- The plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.
- The plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.

It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

Pelzer v. State, (SC: Ct. App., 2008).

Taking into consideration the facts and circumstances of this case, Plaintiffs submit that equitable tolling should be applied. First, Plaintiffs had been diligent in pursuit of an amicable resolution by undertaking negotiations with Defendants. Defendants had been provided a demand for the purpose of settlement on June 7, 2019, wherein requests were made for the purpose of clarifications in same. After June 14, 2019, Defendants made no further requests relating to the demand, implying it was ready for evaluation. On July 25, 2019, the parties communicated once more regarding a potential offer to the demands made. Defendants indicated that an offer would be made the following week. An offer was finally received on August 8, 2019. The offer was not reasonable. Ultimately, Plaintiffs advised counsel to pursue litigation.

Second, Plaintiffs had diligently performed all the acts that led to the service of the processes to herein Defendants. Plaintiffs should not be punished for the failure of the Post

Office to forward the certified mail containing the processes on the day they were mailed. The negligence of the government entity is beyond Plaintiff's control.

Third, as previously discussed, the tolling provision, S.C. Code Ann. § 15-3-30 and the doctrine laid down in Meyer v. Paschal, are applicable in this instant case.

CONCLUSION

For the above and foregoing reasons, Plaintiffs pray this Court to reconsider its Order, dated March 10, 2020, deny the Defendants' Motions to Dismiss, and to allow this case to proceed.

Anderson, South Carolina
May 6, 2020

s/Donald L. Smith

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**APPELLANTS' REPLY TO
RESPONDENTS' SUPPLEMENT
IN SUPPORT OF THEIR OPPOSITION
TO THE MOTION FOR
RECONSIDERATION,
Dated May 7, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Luther Harris, Donna Harris and,	)	Case No.: 2019-CP-42-02092
Bobby E. Leopard,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' REPLY TO DEFENDANTS'
	)	SUPPLEMENTAL BRIEF IN SUPPORT OF
vs.	)	THEIR OPPOSITION TO PLAINTIFFS'
	)	MOTION FOR RECONSIDERATION
Perry Wendell Barbour and	)	
Southland Transportation Co.	)	
	)	
Defendant.	)	

Plaintiffs, by and through their counsel of record, submit this reply to Defendants' supplemental brief in opposition to their motion to reconsider. They offer the following in reference to the case law offered by Defendants which was taken out of context. Plaintiffs have offered the cases for the Court's perusal. Plaintiffs have also offered the actual quotes from the cases which Defendants used to form their arguments.

ARGUMENT

Clarence and Helen Chabek had a closely-held corporation named Custom Stamping. Custom Stamping had a policy which covered a warehouse. The warehouse was destroyed in a hailstorm. Nationwide denied the claim made by Custom Stamping, despite the fact it was the named insured. The Chabeks sued Nationwide for acting in bad faith in denying the claim. Chabek v. Nationwide Mut. Ins. Co., 303 SC 26, 397 S.E. 2d. 786 (Ct. App. 1990).¹ (Exhibit 1).

The Chabeks filed for, and received, a hearing to argue the issue of amending the complaint in order to seek a reformation of the policy. They later determined that they wished to

¹ In Defendants' brief Chabek is spelled Schabek.

reform the policy. At said hearing on January 23, 1989, the Chabeks told the Court they would be filing a separate action to reform the policy, the Court in turn referred the case to the Master.

The Chabeks filed the action requesting reformation of the policy on February 2, 1989. The trial with the Master took place on February 20, 1989. The Master issued an Order on March 23, 1989, reforming the policy. Nationwide took issue with the reformation of the policy and appealed. The Court stated the following:

In South Carolina, "[a] civil action is commenced by *filing* and serving a summons and complaint." S.C.R.CIV. P. 3(a). Until an action is commenced, there is no proceeding pending and, thus, nothing to refer.

(Chabek, p. 27).

The Defendants offered the following from the above-referenced quote:

Until an action is commenced pursuant to Rule 3, there is no proceeding pending."

Unlike the Chabeks, Plaintiffs in this matter actually *filed* the action prior to filing the motion for entry of default. The Circuit Court in *Chabek*, referred a case to the Master that had yet to be filed. Thus, reformation of the policy could not be in front of the Master because it was never in front of the Circuit Court.

In *Brown v. Evatt* Brown filed a petition for writ of habeas corpus. He based his filing on the fact he believed he was held in maximum security for too long. In the writ, Brown sought \$800,000.00 in actual damages and \$800,000.00 in punitive damages for said time. *Brown v. Evatt*, 322 SC 189, 470 S.E. 2d 848 (1996). (Exhibit 2).

The only relief afforded in a habeas corpus action is injunctive. Brown's filing was not for the purpose of release from custody. Brown's filing was strictly for damages. The filing and service of a Summons and Complaint would have been the proper mechanism for that pursuit.

The lower court dismissed the case based on a lack of subject matter jurisdiction.

The Court of Appeals affirmed the dismissal of the case of the case. However, since the lower court in fact had the ability to rule on a writ for habeas corpus, its logic was erroneous.

The Court deduced the dismissal was warranted but for the lack of personal jurisdiction.

Brown admits that he *never* served and *filed* a summons and complaint in this matter. Therefore, original jurisdiction was not properly instituted and the circuit court did not have personal jurisdiction over Respondent.

The Defendants offered the following from the above-referenced quote:

If there is no pending proceeding, there is no case which can be held in default. Moreover, where a Complaint has been filed but not served, personal jurisdiction over a Defendant is not acquired

Like Chabek, Brown had not *filed* an action for which relief could be granted so there was no pending proceeding. On the other hand, Plaintiffs did file an action for which relief could be granted. Since the Circuit Court had jurisdiction in the case at hand, it was Defendants' duty to seek the relief found in the affirmative defenses they pled. Unfortunately, their filing on December 23, 2019 was fifty-nine (59) days after they had been served. Their failure to move or plead within thirty (30) or thirty-five (35) days (due to service by substitution), waived their right to seek the assistance of the Court to address any imperfections in service.

CONCLUSION

For the above and foregoing reasons, Plaintiffs may continue their pursuit of damages.

s/Donald L. Smith

Donald L. Smith (Bar No. 6699)

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Anderson, South Carolina
May 7, 2020

**TRANSCRIPT OF HEARING ON
MOTION TO DISMISS,
Dated February 28, 2020**

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3
4 Luther Harris, Donna Harris,)
5 Bobby Leopard and Jerry)
6 White,) TRANSCRIPT OF RECORD
7) 2019-CP-42-02092
8 Plaintiffs,)
9 -vs-)
10 Perry W. Barbour and)
11 Southland Transportation)
12 Co.,)
13 Defendants.) February 28, 2020
14) Spartanburg, South Carolina
15

16 B E F O R E:

17 HONORABLE J. DERHAM COLE, JUDGE
18
19

20 A P P E A R A N C E S:

21 DONALD LOREN SMITH, ESQUIRE
22 Attorney for the Plaintiffs

23 DAVID L. MOORE, JR., ESQUIRE
24 Attorney for the Defendants
25

Linda D. Moffitt
Circuit Court Reporter

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Motion -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 THE COURT: Harris vs. Barbour and Southland, the
2 defendant's motion.

3 MR. MOORE: Yes, sir.

4 THE COURT: Okay.

5 MR. MOORE: David Moore. I'm here on behalf of Perry
6 Barbour and Southland Transportation who are the defendants
7 in this case. And we filed a motion to dismiss.

8 This -- Mr. Barbour was a trucker who worked for
9 Southland Transportation, and he was involved in a
10 vehicular accident back on June 10 of 2016. And the
11 plaintiffs were allegedly injured in that accident, so they
12 brought suit.

13 Now, the accident, as I indicated, took place on June
14 10 of 2016, so they would have had until June 10 of 2019
15 under our 3-year statute of limitations to file suit, and
16 they met that. They filed suit by June 7, 2019.

17 Now, under Rule 3 they're given an additional 120 days
18 from the time of filing in which to serve, and that's the
19 issue that we have here today, as to whether service was
20 properly and timely made in this particular matter.

21 And there are two defendants here, so I'm going to
22 address each of them separately.

23 With regard to Mr. Barbour, the additional -- actually
24 for both defendants the additional 120 days is going to
25 run. I think the key date here is October 7 of 2019. The

1 120 days actually runs on weekends, so you take it over to
2 the next Monday.

3 They tried to serve Mr. Barbour by certified mail.

4 Now, under Rule 4 when you do that he's got to accept
5 it. Otherwise, the service is no good. He never accepted
6 that certified-mail service, so that attempt was
7 unsuccessful.

8 They then tried to serve him by going through the
9 department of motor vehicles. By statute that's a
10 substitute service which they can do because he was not a
11 resident of South Carolina but was using the South Carolina
12 highways when this accident occurred.

13 However, that was not done and wasn't received by
14 D.M.V. until October 25 of 2019, well beyond the deadline
15 there, which is October 7 of 2019. So that substitute
16 service also is untimely.

17 And our position is with regard to the individual
18 defendant, Mr. Barbour, there simply has been no
19 appropriate service on him within the statute of
20 limitations as set forth by the 3-year statute and dealt
21 with by Rule 3 with the 120 days.

22 With regard to the company, Southland Transportation,
23 we have the same situation. Of course they have to be
24 served by October 7 of 2019.

25 They tried to do it by certified mail, and, again, it

1 depends on not when it's mailed but when it's received.
2 And by the proof of service that we got, number one, it was
3 delivered on October 9, 2019. So again it is outside the
4 time period for the 120 days.

5 They also tried to go through the secretary of state,
6 and that was not received, again, until October 9 of 2019,
7 again, outside the period of time for the 120 days. So,
8 again, our position is that there was no proper service.

9 Now, under Rule 3 when you don't have -- when you
10 don't reach that 120-day period there's actually no
11 commencement of the lawsuit, so that in this situation
12 they've not complied with Rule 3 where you have to file and
13 serve. They filed, but they didn't serve properly on a
14 timely basis. So there is no commencement of this
15 particular action. And, obviously, the statute of
16 limitations will come into play with regard to it if they
17 were able to, once again, file and serve at this point in
18 time.

19 So our position is this matter ought to be dismissed
20 as to both defendants because they were not timely served
21 in this particular case pursuant to the 120-day rule.

22 THE COURT: Mr. Smith.

23 MR. SMITH: May it please the Court.

24 Your Honor, the action was filed prior to the statute
25 of limitations, and the plaintiffs in this matter attempted

1 to resolve the issues with the adjuster from the insurance
2 company. The state mandates mediation illustrating a wish
3 for the state or by the state to clear as much from the
4 docket as possible.

5 The plaintiffs did that in good faith. We sent a
6 letter to -- demand letter June 16th or before that right
7 after we filed suit, and then there was issues relating to
8 legibility or something to that effect. Everything was
9 fine by June the 16th.

10 On July 23rd I called the adjuster and finally got in
11 touch with him, and apparently people had been off and this
12 and that.

13 And he told me on July 25th that he would have
14 something the following week. Well, he didn't respond with
15 an offer until August 8th, which is nearly two weeks.
16 Actually, it is two weeks from the time I spoke to him.

17 We didn't demand -- or an offer that was small, to say
18 the least. My clients said, no, they didn't want to do
19 that, and so then we were set to serve the matter.

20 On October 4th, which is a Friday, we sent the
21 documentation out and found out that the mailing actually
22 didn't occur until October 7th, and that's why the
23 secretary of state received the trucking company's
24 pleadings on the 9th as opposed to the 7th. We couldn't do
25 anything about that since we put it in the mailbox

1 October 4th.

2 We're asking that this estoppel come into play here.
3 The insurance company for the defendants clearly was
4 playing games, and that's not the mediation clause where
5 mediation is necessary. It talks about good faith and so
6 forth. Clearly the insurance company was not dealing in
7 good faith, and they should be estopped from arguing
8 something at this point because of their unclean hands.

9 The -- also Meyer vs. Paschal stands for the idea that
10 if the defendant leaves for more than a year that the
11 statute is tolled, and based on the fact that both
12 defendants in this matter have different addresses from
13 where -- they were ultimately served, although Barbour has
14 never been found, that in turn would toll the limitations
15 clearly for at least two days.

16 Going to the Barbour, the individual, we attempted to
17 serve him but it was futile. He moved. We've tried to
18 skip trace and everything. However, we couldn't do it.

19 So we served him through the department of motor
20 vehicles pursuant to 15-9-250 which states that upon
21 receipt he's been served. And that happened October 25th,
22 and the reason that happened October 25th is because of the
23 difficulty in finding an individual giving a different
24 address at the time of the accident and seemingly who had
25 been required to update that with D.M.V. for purposes of

1 situations such as these.

2 In addition, the late filing and service on the
3 department of motor vehicles that in turn was -- required
4 affirmative defense. Barbour did not respond.

5 In fact, his paperwork or the pleadings that were sent
6 by the D.M.V. to him were returned, and so the statute as
7 the defense, required affirmative defense, that wasn't
8 accomplished and that, we believe that he was properly
9 served. And based on the failure to answer tells that, in
10 fact, they couldn't defend that in that way.

11 15-3-30 again comes into play. He had a different
12 address. He didn't keep up to date with the D.M.V., and
13 that hinders the damaged parties from seeking redress. And
14 that was what was the main focus of 15-3-30 and based on
15 the fact that Mr. Barbour left, and beyond a year, maybe
16 never, established residency here, the statute would be
17 tolled, and therefore that would come into, within the
18 statute of limitations as well.

19 MR. MOORE: Judge, I didn't hear anything in that
20 argument that indicated that they had met the time limit on
21 120-day rule. So, again, I would resubmit that.

22 In answering his arguments he's, number one, arguing
23 equitable estoppel with regard to the insurance company
24 simply because they weren't able to settle within that
25 120-day period.

1 That's not bad faith. That's just a failure of
2 negotiations, which is sometimes why you go to litigation
3 to try to resolve these matters.

4 Certainly the fact that he's negotiating and he's
5 running out of time behooves them at that point in time to
6 go ahead and make service appropriate.

7 The statute which they ultimately tried to comply with
8 is 15-9-350 where they served the D.M.V. It's easily done,
9 and they had more -- they had 120 days to do that and they
10 failed to do it on a timely basis.

11 His argument about, well, they're out of state doesn't
12 apply in this situation because we don't have someone who
13 lived here in this state and then left.

14 This guy just was not a resident of the state so the
15 statute -- there is a specific statute with regard to that
16 which indicates that when you've got somebody outside of
17 the state who's using the highways you can serve the D.M.V.
18 It's easily accomplished. It just was not done in this
19 particular situation.

20 So I don't think you can argue equitable estoppel in
21 this case because there's no misrepresentation by the
22 insurance company or anyone on behalf of either one of
23 these defendants, is what you have to have for equitable
24 estoppel. So he doesn't have any right to rely upon any
25 misrepresentations.

1 He just didn't get the settlement that he wanted to
2 get during that 120-day period. That's not a situation for
3 estoppel.

4 with regard to his argument about affirmative defense,
5 Rule 12 specifically provides that you can raise this
6 motion as we have done in this situation, a motion to
7 dismiss for improper service or untimely service, and if
8 there's a ruling against that, then that also -- that rule
9 also provides for 15 days to then file your answer.

10 We filed the motion in lieu of having to file the
11 answer at this particular point in time, and, obviously,
12 our argument here if we're unsuccessful, then we have 15
13 days to answer at that point in time.

14 But his argument, well, that's an affirmative defense
15 and they're in default, it doesn't fly in this situation
16 simply because Rule 12 does allow us to do this.

17 So in response to his arguments, number one, it is
18 very clear they didn't comply with the 120-day rule, and he
19 hasn't argued otherwise.

20 Secondly, there is no equitable estoppel because there
21 was just simply negotiations which failed.

22 Thirdly, the argument about affirmative defense
23 through an answer doesn't apply in this situation since we
24 had filed this motion under Rule 12, which we are allowed
25 to do.

1 THE COURT: I'll review it and issue an order. Thank
2 you.

3 MR. MOORE: Thank you.

4 MR. SMITH: Thank you.

5 END OF REQUESTED TRANSCRIPT OF RECORD
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 28th day of February 2020.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

August 16, 2020

s/Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

**NOTICE OF APPEAL,
Filed August 3, 2020**

**FORM 1
NOTICE OF APPEAL**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Case No. 2019-CP-42-02092

RECEIVED

Aug 11 2020

SC Court of Appeals

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

NOTICE OF APPEAL

The undersigned counsel respectfully appeals Judge J. Derham Cole's challenged Form
4/Orders, dated March 10, 2020 and July 14, 2020, respectively.

Submitted by:

s/Donald L. Smith

Donald L. Smith (Bar No.:6699)

122 N. Main Street

Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Attorney for Appellants

Anderson, South Carolina
July 31, 2020

Other Counsel of Record

Mr. David L. Moore, Jr., Esquire
Turner Padgett Graham & Laney, PA
Post Office Box 1509
Greenville, SC 29602

**FORM 7
PROOF OF SERVICE**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Case No. 2019-CP-42-02092

RECEIVED

Aug 11 2020

SC Court of Appeals

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I certify that I have served a copy of Appellant's Notice of Appeal, Challenged Orders, Transcript Request for Court Reporter, and Proof of Service, upon The Honorable Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals, The Honorable Amy W. Cox, Spartanburg County Clerk of Court; the Respondents, by and through their counsel of record, Mr. Alan G. Jones, Esquire; the Office of Court Administration; and, Court Reporter, Ms. Linda Moffitt, via the Attorney Information System in the addresses as follows:

Ms. Jenny Abbott-Kitchings

ctappfilings@sccourts.org

Ms. Amy Cox

acox@spartanburgcounty.org

Mr. David L. Moore, Esquire

DMoore@turnerpadget.com

South Carolina Office of Court Administration

transcripts@sccourts.org

Ms. Linda Moffitt

lmoffitt@sccourts.org

The above-mentioned documents have been served on July 31, 2020.

Anderson, South Carolina
July 31, 2020

s/Donald L. Smith

Donald L. Smith, (Bar No.: 6699)

122 N. Main Street

Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Attorney for Appellants

FORM 8
LETTER TO THE COURT OF APPEALS CLERK OF COURT
FILING NOTICE OF APPEAL

July 31, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

Aug 11 2020

SC Court of Appeals

RE: Luther Harris, Donna Harris, Bobby Leopard and Jerry White
vs. Perry W. Barbour and Southland Transportation Co.
Case No. 2019-CP-42-02092

Dear Ms. Kitchings:

Please find enclosed the following documents for filing:

1. Notice of Appeal;
2. Copies of Judge J. Derham Cole challenged Form 4/Orders:
 - a. Form 4/Order, dated March 10, 2020, granting Defendants' Motion to Dismiss;
 - b. Form 4/Order, dated July 14, 2020, denying Plaintiff's Motion for Reconsideration. and,
3. Proof of Service of the same.

A check amounting to Two Hundred Fifty Dollars (\$250.00) as filing fee will be sent via US Postal Service on July 31, 2020.

Sincerely,

s/Donald L. Smith

Donald L. Smith (Bar No.: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

cc: Hon. Amy W. Cox, Spartanburg County Clerk of Court
Mr. David L. Moore, Jr., Esquire
Office of Court Administration
Ms. Linda Moffitt, Court Reporter

EXHIBITS

APPELLANTS' EXHIBITS

**PROOF OF SERVICE UPON
SOUTHLAND TRANSPORTATION'S
REGISTERED AGENT,
October 9, 2019**

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature  ☐ Agent ☐ Addressee	
1. Article Addressed to: SOUTHLAND TRANSPORTATION COMPANY By and thru its Registered Agent of Service R.J. Cummings 112 River Road Boonville, SC 27011		B. Received by (Printed Name) <u>B. Cummings</u> C. Date of Delivery <u>10/9/19</u>	
		D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☒ No	
		3. Service Type ☒ Certified Mail ☐ Priority Mail Express ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ Collect on Delivery	
2. Article Number (Transfer from service label)		4. Restricted Delivery? (Extra Fee) ☐ Yes	
PS Form 3811, July 2013		Domestic Return Receipt	
7014 2870 0001 7928 6035		ARLIS L. LEONARD	

**PROOF OF SERVICE UPON
SOUTHLAND TRANSPORTATION
THROUGH SC SECRETARY OF STATE,
October 9, 2019**

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
☒ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ☒ Print your name and address on the reverse so that we can return the card to you. ☒ Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature <i>x Allyson Green</i> ☐ Agent ☒ Addressee	
1. Article Addressed to: SC Secretary of State's Off. ATTN: Service of Process Division 1205 Pendleton Street, Suite 525 Columbia, SC 29201		B. Received by (Printed Name) Allyson Green C. Date of Delivery 10/9/2019	
		D. Is delivery address different from item 1? ☐ Yes ☒ No If YES, enter delivery address below:	
		3. Service Type ☒ Certified Mail® ☐ Priority Mail Express™ ☒ Registered ☒ Return Receipt for Merchandise ☐ Insured Mail ☐ Collect on Delivery	
		4. Restricted Delivery? (Extra Fee) ☐ Yes	
2. Article Number (Transfer from service label)		7014 2870 0001 7928 6028	
PS Form 3811, July 2013		Domestic Return Receipt <i>HARRIS & LEONARD</i>	

**CERTIFIED LETTER FROM
SCDMV TO PERRY BARBOUR
October 25, 2019**



**S. C. DEPARTMENT OF
MOTOR VEHICLES**

OFFICE OF GENERAL COUNSEL

P.O. Box 1498, Blythewood, S.C. 29016; (803) 896-9900, Fax: (803) 896-9901

October 25, 2019

USPS Tracking # 7005 0390 0004 4634 3314

Perry Wendell Barbour
130 Valentine Court
Martinsville, VA 24112

Re: *Luther Harris, Donna Harris and Bobby Leopard v. Perry Wendell Barbour and
Southland Transportation Co.*
Case No.: 2019-CP-42-02092, DMV 19-510

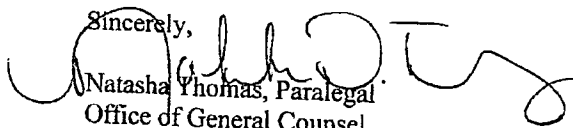
Dear Mr. Barbour:

In accordance with the provisions of Section 15-9-350 of the Code of Laws of South Carolina (1976), this office has received the enclosed **Summons and Complaint** in the above-referenced action. Under South Carolina law, this has the same legal effect as if you had been served with these documents personally.

Section 15-9-350 of the 1976 Code of Laws of South Carolina, as amended, provides that:

"The acceptance by a nonresident of the rights and privileges conferred by the laws in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways, the streets of any incorporated municipality or the public roads of this State or anywhere within this State, or the operation by such nonresident of a motor vehicle on any such public highways, streets, or public roads or anywhere within this State other than as so permitted or regulated shall be deemed equivalent to the appointment by such nonresident of the Director of the Department of Motor Vehicles or of his successor in office to be his true and lawful attorney upon whom may be served all summons or other lawful process in any action or proceeding against him growing out of any accident or collision in which such nonresident may be involved by reason of the operation by him, for him or under his control or direction, express or implied, of a motor vehicle on such public highways, Streets, or public roads or anywhere within this State. Such acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally."

Sincerely,



Natasha Thomas, Paralegal
Office of General Counsel

For: Director, South Carolina Department of Motor Vehicles

Enclosure

cc: Donald L. Smith, Esquire
122 N. Main Street
Anderson, SC 29261

**ENVELOPE FROM SCDMV,
MARKED RETURN TO SENDER
November 21, 2020**

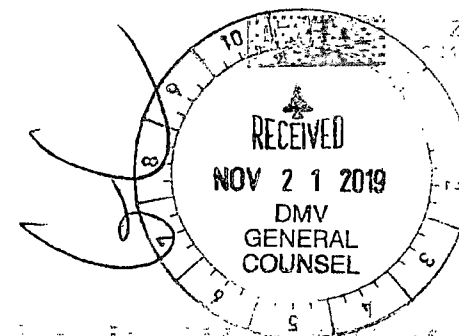


P.O. Box 1498
Blythewood, S.C. 29016

Form 103-A

Forwarding Service Requested

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\$5000

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1950年10月1日，中华人民共和国成立，标志着中国历史进入了一个新的纪元。在这一天，中国人民终于结束了长达百年的屈辱历史，实现了国家的独立和民族的解放。这一天被定为中国的国庆节，是全国人民欢庆的日子。

601 730151-0098 # 8154-00012/072-43

100-336124-1

CERTIFICATE OF SERVICE

October 25, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Luther Harris, Donna Harris and,)
Bobby E. Leopard,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour and)
Southland Transportation Co.)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-02092

CERTIFICATE OF SERVICE

THE UNDERSIGNED person deposes and says that he served the acceptance of service by the South Carolina Department of Motor Vehicles (SCDMV) on behalf of Defendant Perry Wendell Barbour, the envelope used by the SCDMV to forward the Summons to Defendant Barbour and the Summons that was effectively served on Defendant Barbour, upon the Clerk of Court for Spartanburg County by U.S. Mail at the address shown below with postage sufficient for the mailing; and, upon Defendant Southland Transportation Co., by and through its counsel of record, Alan G. Jones, Esquire, via the e-mail address below through the South Carolina e-filing system:

Alan G. Jones, Esq.
agjones@turnerpadget.com

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

Clerk of Court
180 Magnolia Street
Spartanburg SC 29306

Anderson, South Carolina
November 26, 2019.

**EMAIL CORRESPONDENCE BETWEEN
COUNSEL FOR APPELLANTS
AND SENTRY INSURANCE,
June 7, 2019**

Demand Package for Harris and Leopard

Inbox



Kayleigh Turner <kayleighs0991@gmail.com>

Fri, Jun
7, 10:57
AM

to joshua.neidermann, me, Kirsten

Mr. Neidermann,

As discussed on the phone this morning, here is the Demand Package for our clients Luther Harris and Bobby Leopard.

Thank you for your time and consideration to this matter.

 **HARRIS AND LEOPARD-AA-EXECUTED DEMAND PACKAGE P...**

2 Attachments



Don Smith <attorneydonaldsmith@gmail.com>

Fri, Jun
7, 9:14
PM

to Kayleigh, Neidermann, Kirsten

Mr. Neiderman:

Please find attached Mr. Leopard's medical costs to this date.

Sincerely,
Don

Attachments area



Don Smith <attorneydonaldsmith@gmail.com>

Sun, Jun
9, 11:43
PM

to Kayleigh, Neidermann, Kirsten

Mr. Neiderman:

Please find attached, my modified demand letter. I look forward to discussing the possible amicable resolution of these claims prior to service of the complaints, and the litigation that will follow.

Sincerely,
Don Smith

Attachments area

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Thu, Jun
13, 9:37
AM

to Kayleigh, me

Hi Kayleigh,

We are reviewing Leopard's injury demand and noticed pages 238 and 239 are not legible. Can you please resubmit these pages so they are legible. See attached.

Thank you.

Josh Neidermann



Kayleigh Turner <kayleighs0991@gmail.com>

Jun 13,
2019,
10:12 AM

to Neidermann, me

Mr. Neidermann,

I believe this is what you were needing sir.

If you need anything else, please let me know.

Attachments area



Don Smith <attorneydonaldsmith@gmail.com>

Jun 13,
2019,
10:24 AM

to Kayleigh, Neidermann

Mr. Neiderman:

It was at 67%. I changed it to 125%.

Sincerely,
Don

Attachments area

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Jun 13,
2019,
10:27 AM

to me, Kayleigh

Much appreciated, thank you.



Don Smith <attorneydonaldsmith@gmail.com>

Jun 13,
2019,
10:29 AM

to Neidermann, Kayleigh

You're welcome.

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Jun 14,
2019,
8:49 AM

to me, Kayleigh

Good morning Mr. Smith,

I apologize for having to reach out again but I have another bill for Mr. Leopard that is not legible. Could you please send a new copy.

Attachments area



Don Smith <attorneydonaldsmith@gmail.com>

Jun 14,
2019,
10:32 AM

to Neidermann, Kayleigh

Kayleigh will get you. Do not be concerned about such requests. I want you to have a clear picture.

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Jul 24,
2019,
9:25 AM

to me, Kayleigh

Good morning Mr. Smith,

I received your voicemail on your clients Harris and Leopard. We are just finishing up the reviews of both demands. I do apologize, we had the issues with the unreadable records and people out of the office (upper management) on our end. I'm hoping to have an answer out to you by early next week for both.

Please let me know if you have any questions prior to my call next week.

Thank you,

Josh Neidermann

Transportation Claims Specialist



Don Smith <attorneydonaldsmith@gmail.com>

Jul 24,
2019,
11:10 AM

to Neidermann, Kayleigh

Thank you, sir. I look forward to your response.

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Jul 24,
2019,
6:13 PM

to me, Kayleigh

Good afternoon Mr. Smith,

Can you confirm if either of your clients are currently treating for injuries? I know there are futures for Bobby Leopard. If either of them are still currently treating, can you tell me what they are treating for.

Much appreciated.



Don Smith <attorneydonaldsmith@gmail.com>

Jul 24,
2019,
7:29 PM

to Neidermann, Kayleigh

Bobby continues to treat, as he will for the rest of his life.

Luther had a prior lumbar surgery, which was exacerbated; and, he injured his neck, though I don't believe he is necessarily a surgical candidate. He has recently suffered a heart issue which, given the stress caused by both the physical and mental injuries of the crash, seems like a portentously almost. He hasn't taken pain medication during this process. He is afraid of becoming dependent on the opiates. His latest trip to the orthopaedist resulted in a prescription for injections. Give his fear of needles and medication, it appears he is destined to live out his life with pain that is not relieved. I do not believe he is treating at this time.

**RE: Re: Demand Package for Harris and Leopard Sentry
claim 61A171897**

Inbox

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Thu, Jul
25, 8:37
AM

to me, Kayleigh

Good morning Mr. Smith,

Thank you for the fast reply, much appreciated. I have one more quick question. Both Bobby and Luther stated they were ejected from the vehicle after the collision. One of the doctors reports state that they were thrown through the front windshield. I've reviewed the vehicle damage photos after the accident and the front windshield is completely intact with no damage. Can you please tell me how they were ejected? Through the back or side windows?

Thanks again and have a good day,

Josh Neidermann

Transportation Claims Specialist

Office - (715)346-9723

Office - (800)473-6879 ext. 3469723

Fax - (800)999-4642

Email - Joshua.Neidermann@Sentry.com



Don Smith <attorneydonaldsmith@gmail.com>

Thu, Jul
25, 11:10
AM

to Neidermann

I will get back to you upon their response. However, could you send me any photos that you may have relating to the accident? Obviously, I will get them in discovery if we are unable to amicably resolve the case.

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Thu, Jul
25, 11:18
AM

to me

Mr. Smith,

I will wait to hear from you. I attached photos of the truck.

Thanks again,

3 Attachments



Don Smith <attorneydonaldsmith@gmail.com>

Thu, Jul
25, 11:21
AM

to Neidermann

Thank you so much. They have been telling me that from the beginning. I don't know why they would say that other than the fact they had gravel and grass in their mouths. Maybe, they were pulled from the vehicle and dragged to safety. We shall soon know.

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Thu, Jul
25, 11:30
AM

to me

I was wondering as well and wanted to ask. Thanks for checking on this.



Don Smith <attorneydonaldsmith@gmail.com>

Thu, Jul
25, 11:52
AM

to Neidermann

I just spoke to Luther's wife (with Luther in the background). She said they never said that. However, both were knocked out and found by the trooper outside the vehicle. Both side windows were open. I thank you for pointing out the windshield fact! I did not know this.

Bobby was on the passenger side. He may have been thrown out the window. Logic tells me that they were knocked out; people came to scene smelling the gasoline in the back of their truck; and, dragged their asses away before the tank blew up. I'll tell you more when Bobby gets back to me. Neither of them will be able to tell us how they got where because they weren't awake until the hospital, I believe.

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Jul 25,
2019,
11:59 AM

to me

That's what I thought as well but most of the medical records state over and over that they were ejected from the vehicle. I went through the records page by page. Interestingly one of the records stated that Luther remembered the officer helping him out of the truck. The records also state that they were restrained passengers or the driver which I wouldn't think they'd be ejected if they had their seatbelts on. I was pretty confused reading through the records.

I will wait to hear from you when you speak to Mr. Leopard.

Again, I appreciate you taking the time out to find this information.

Josh Neidermann

Transportation Claims Specialist

Office - (715)346-9723

Office - (800)473-6879 ext. 3469723

Fax - (800)999-4642

Email - Joshua.Neidermann@Sentry.com

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Jul 25,
2019,
2:20 PM

to me

Mr. Smith,

Would it be an inconvenience to obtain and provide me the prior lumbar surgery and medical records for Luther Harris? I can provide a medical authorization form if needed.



Don Smith <attorneydonaldsmith@gmail.com>

Jul 25,
2019,
9:18 PM

to Neidermann

He said the same thing. I'll take the trooper's depo first. Hopefully, that will get us off on the right track,

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Jul 26,
2019,
8:47 AM

to me

Good morning Mr. Smith,

Would you like us to have defense go ahead and file an answer to the complaint?

Don Smith <attorneydonaldsmith@gmail.com>

Jul 26,
2019,
1:49 PM

to Neidermann

First, there has been no service. Second, there have been no offers.

Neidermann Joshua <Joshua.Neidermann@sentry.com>

Jul 26,
2019,
1:56 PM

to me

Ok, I wasn't sure because you mentioned taking depos. Ok thanks. I will be in touch next week.

Have a good weekend.

Josh Neidermann

**LETTER DEMAND PACKAGE TO
SENTRY INSURANCE
June 7, 2019**

ATTORNEY OFFICE OF DONALD SMITH

122 N. Main St.
Anderson SC 29621
attorneydonaldsmith@gmail.com

Donald L. Smith, Esquire

Telephone: (864) 642-9284
Facsimile: (864) 642-9285

June 7, 2019

Sentry Insurance
Attention: Josh Neidermann
P.O. Box 8026
Stevens Point WI 54481

RE: Our Clients: Bobby Leopard and Luther Harris
Your Insured: Southland Transportation Company, Perry Barbour
Date of Loss: 06/10/2016
Policy Number: CT751437003
Claim Number: 61A171877

Dear Mr. Neidermann:

Regarding the above-referenced matter, we now present the following demand in an effort to amicably resolve the claims of our clients, Bobby Leopard and Luther Harris, arising from an automobile accident which occurred on or about June 10, 2016.

My clients, Luther Harris and Bobby Leopard were lawfully stopped on Interstate 85. The traffic came to a halt due to a motor vehicle accident further up the road in the County of Spartanburg, SC. As both gentlemen chatted with the other occupants of the vehicle, they both caught a glimpse of the impending wreck. The next time both of them would open their eyes, they would be outside of their truck. They were both ejected through the front windshield and were found unconscious on the berm-complete with gravel in their mouths. The trooper shared with their loved ones that he believed when he initially saw them that they were dead.

Due to your insured's callous disregard of the duty to the public to operate his killing machine with the utmost due care and diligence, four (4) men nearly lost their lives. It is my understanding and belief that he was traveling at 77 mph at the time of the collision. That fact is illustrative of the fact that he must have been texting, or simply nodded off. A recreation of this event would be worth everything it would cost for the sheer devastation of the impact.

The wreck has left them with permanent scarring-both physically and mentally. The mere thought of watching the semi bearing down on them is a thought that makes me shutter thinking about it. Mr. Harris saw what I'm sure he believed to be his death arriving in the form of the semi-truck when he glanced at the rearview mirror. Mr. Leopard saw his life flash before his

eyes as he looked back toward the passengers in the backseat. Their PTSD is overwhelming. We provide the following demand in hopes of resolving this matter. We will be filing suit within the week.

DEMAND REPORT

The following demand reports outlines my clients' injuries and treatment in a format that can be easily cross-referenced with the attached medical records.

Liability

Liability	Clear
Comparative Negligence	0%

Aggravating Liability Factors

1. Failure by Mr. Barbour to maintain control of the vehicle.
2. Failure by Mr. Barbour to maintain a proper lookout.
3. Failure by Mr. Barbour to exercise the reasonable degree of care which a reasonable and prudent person would exercise.
4. Failure by Mr. Barbour to focus on the road and impending dangers.
5. Failure by Mr. Barbour to take evasive measures when it became apparent that not doing so would result in a collision.

Bobby Leopard

Demonstrable Injuries

Diagnoses	Diagnosing Physician	First Date Noted
• Cervicalgia • Pain in Right Ankle and Foot Joints • Head Injury	Spartanburg Regional Emergency	06/10/2016
• Mild Lumbar Levoscoliosis • Mild Degenerative Changes with Small Osteophyte Formation • Back pain	Jason Blasenak, MD	06/27/2016
• Constant Headaches and dizziness • Antalgic gait (Abnormal Gait) • Decreased Core Trunk Strength	Physical Therapy, Inc.	07/25/2016
• Concussion with loss of consciousness • Post-Concussion Syndrome	Arthur Smith, MD	11/28/2016

• Cognitive Communication Deficit • Cervical Spondylosis with radiculopathy • Lumbar Spondylosis with radiculopathy and cervicalgia • Vertigo of Central Origin • Paroxysmal Benign Vertigo Bilaterally		
• Arthropathy of Cervical Spine • Facet Arthritis of Cervical Region • Sacroiliitis	Allan Richmond (onsite supervising doctor)	10/30/2017
• Central and Peripheral Vertigo • Closed Head Injury	Glenn Scott, MD	05/16/2018
• Subtle disc space narrowing and bony spiral encroachment at L5-S1 level	Raul Ceballos, MD	01/21/2019
• Mild Lumbar Levoscoliosis • Post-Traumatic Stress Disorder • Anxiety • Traumatic Brain Injury • Chronic Pain • Memory Loss/Impairment	Pat Mullen, MD	03/01/2019

Economic Damages:

Mr. Bobby Leopard's medical specials are as follows:

Med Group of the Carolina:	\$	470.00
Spartanburg Regional:	\$	11,835.64
Spartanburg EMS:	\$	804.00
Mary Black – Gaffney:	\$	83.74
Omni Healthcare:	\$	12,383.00
Palmetto State Medical:	(\$	19,823.00)
• Emergency MD:	\$	910.00
• Smith Neuro:	\$	13,760.00
• INMED:	\$	5,153.00
• Physical Therapy Inc.:	\$	2,037.26
IWP-medicinal care	\$	4,072.95
TOTAL MEDICAL SPECIALS	\$	51,707.61

Mr. Leopard incurred travel expenses in the amount of \$300.00 with transportation to and from his doctor and rehabilitation appointments.

Loss of Enjoyment of Life:

Mr. Leopard was stopped when he was suddenly struck from behind. The impact from the collision ejected him from the vehicle. He presently experiences severe anxiety when traveling, fearing that he may be struck by an erratic driver again. In addition, he constantly deals with substantial pain.

Permanent Impairments:

Mr. Leopard will have to deal with a number of permanent impairments directly related to this catastrophic event. His life expectancy is forty (40) years. For the remainder of his existence, he will have to deal with lumbar pain with L4-5 radiculopathy by EMS-nerve conduction studies. He will also have to live with cervicgia with chronic hyperextension strain. His closed head injury will cause him pain and the difficulty dealing with people for his future. His central and peripheral vertigo will make ambulating difficult at times. His Post Traumatic Stress Disorder will make travel a painful event for the duration of his life.

PROJECTED FUTURE COSTS:

Mr. Leopard's injuries will require a vast array of treatment from this point forward. It is unfortunate but the severity of said injuries have made him dependent on medicinal therapy to make it through the day. It has also been opined that a spinal stimulator will likely be necessary in an effort to reduce the use of opioids and maximize the reduction of pain. As a result of the obvious need for extensive medical expenses, Ms. Deborah L. Caskey, Certified Life Care Planner, was asked to evaluate Mr. Leopard's projected future charges. Ms. Caskey arrived at an average of \$18,413.00 per year in expenditures. The total given his forty (40) year life expectancy is \$772,425.73.

It should be noted that the numbers provided do not take into account the aforementioned spinal cord stimulator. That would be an initial outlay of roughly \$40,000.00. The yearly cost would be \$19,553.25. The total given his (40) year life expectancy is \$786,236.18.

Mr. Leopard has returned to his work grading land on heavy equipment. The pain that he deals with on a regular basis is addressed with the use of Oxycontin and Oxycodone. It is only a matter of time before the stimulator must be implanted to deal with the pain. Mr. Leopard's treatment for his injuries will cost over \$1,000,000.00.

Punitive Damages:

The investigating officer charged Mr. Barbour with Driving Too Fast for Conditions and being at fault for the accident. The recklessness with which Mr. Barbour drove his vehicle cannot be measured. It is clear that he was not paying attention. In fact, it is clear that he had not looked at the road in quite some time. It is believed that discovery will produce evidence of Mr. Barbour using some technology such as text, email, messenger, etc., to occupy his focus and concentration when there should have been nothing but driving the killing machine in as safe of a

manner as humanly possible. Should this matter come before a jury, we feel confident that Mr. Leopard will be awarded significant compensation due to the fact that he was injured as a result of the criminal recklessness exhibited by your insured.

Summary:

The injuries sustained by Bobby Leopard are serious; and, they are numerous. At the time of the wreck, he was thirty-six (36) years old. He has worked on heavy equipment for many years. He had no physical limitations prior to this incredible collision. He now faces a heavy burden simply trying to exist every day as a result of the violent, reckless damage inflicted by the semi of the insured. The facts surrounding this event will have a significant impact on a jury in the Upstate. Everyone's fear of semis will be brought to the forefront. It is our belief that the punitive damage possibilities are endless. The undersigned previously made a demand in passing of One Million (\$1,000,000.00) dollars. That amount was clearly shortsighted.

Mr. Leopard has become part of the opioid epidemic as a result of the conduct of the insured's driver for which no words are sufficient to explain. The pain, vertigo, PTSD, radiculopathy, etc., that he will live with for at least forty (40) years, are unimaginable. However, he must continue to not only exist, but also work, to support his children. Taking into account the pain and suffering resulting from injuries he sustained and their effect on his life; the cost of care for the duration of his life; the permanency of his poor health condition; the overwhelming Post Traumatic Stress; and, the punitive damages related to a semi striking his large pick-up truck with such force that he was ejected through the windshield, he recognizes that he is deserving of a significant amount of money. As full compensation for all injuries and damages suffered personally by Mr. Leopard, we demand the sum of **TWO MILLION 00/100 DOLLARS (\$2,000,000.00)**.

Luther Harris

Demonstrable Injuries

<u>Diagnoses</u>	<u>Diagnosing Physician</u>	<u>First Date Noted</u>
• Upper Thoracic Scoliosis	Christian Montagano, MD	06/10/2016
• Lt. Muscle Strain of Forearm	Joe McKowen, PT	05/03/2016
• Extensive Atherosclerotic Vascular Disease • Bilateral Carotid Bifurcation Calsifications	Jason Blasenak, MD	06/24/2016
• Decreased Core Trunk Strength	Physical Therapy Inc.	07/25/2016
• Abnormalities of Gait and Mobility • Concussion with loss of consciousness of 30 minutes or less • Post-Concussion Syndrome	Arthur L. Smith, MD.	10/05/2016

• Chronic Headache • Vertigo of Central origin, bilateral • Right Shoulder Pain • Right leg Pain • Cervicalgia • Dorsalgia or Lower Back Pain		
• Cervical Degenerative disc Disease and Spondylosis exacerbated by the motor vehicle accident (to the point he has mid radiculopathy in right arm) • Lumbar Degenerative disc disease and spondylosis exacerbated by the motor vehicle accident • Not at MMI, but if no treatment, 43% to the cervical spine and 8% to the lumbar spine.	Daniel Cordas, MD	11/13/2017
• Multi-level mild Degenerative disease • Disc Bulge with protrusions at L3-4, L4-5 and asymmetric disc bulge at L5-S1	Martin J. Ruocco, MD	11/21/2018
• Mild Lumbar Levoscoliosis • Post-Traumatic Stress Disorder • Anxiety • Traumatic Brain Injury • Chronic Pain • Memory Loss/Impairment	Pat Mullen, MD	03/01/2019

Economic Damages:

Mr. Luther Harris' medical specials are as follows:

Med Group of the Carolina:	\$	470.00
Spartanburg Regional:	\$	9,034.25
Spartanburg EMS:	\$	771.60
Mary Black – Gaffney:	\$	2,934.08
Palmetto State Medical:	(\$	16,282.92)
• Emergency MD:	\$	715.00
• Smith Neuro:	\$	6,388.60
• INMED:	\$	3,532.00
• Innervision:	\$	3,333.00
• Physicians Therapy Inc.:	\$	2,156.38
• Sweetgrass Pharmacy:	\$	157.00

TOTAL MEDICAL SPECIALS	\$	29,492.85

This amount is not yet complete.

Permanent Impairments:

Without further medical treatment for Mr. Harris he would be left with permanent damage to his spine. Dr. Daniel Cordas, M.D., evaluated him for the purpose of assessing his permanency; and, found the following:

According to the AMA 5th Edition of the Guidelines to Evaluation of Permanent Impairment, he would be in a cervical DRE Category 3, with a 15% impairment of the whole person, and a lumbar DRE Category 2 with a 6% impairment of the whole person. From the conversion criteria on page 427 of the guides, this equates to a 43% impairment of the cervical spine, and an 8% impairment of the lumbar spine.

Loss of Enjoyment of Life:

Mr. Harris was stopped when he was suddenly struck from behind. The impact from the collision ejected him from the vehicle. He presently experiences severe anxiety when traveling, fearing that he may be struck by an erratic driver again. In addition, he constantly deals with substantial pain.

Punitive Damages:

The investigating officer charged Mr. Barbour with Driving Too Fast for Conditions and being at fault for the accident. The recklessness with which Mr. Barbour drove his vehicle cannot be measured. It is clear that he was not paying attention. In fact, it is clear that he had not looked at the road in quite some time. It is believed that discovery will produce evidence of Mr. Barbour using some technology such as text, email, messenger, etc., to occupy his focus and concentration when there should have been nothing but driving the killing machine in as safe of a manner as humanly possible. Should this matter come before a jury, we feel confident that Mr. Leopard will be awarded significant compensation due to the fact that he was injured as a result of the criminal recklessness exhibited by your insured.

Summary:

The injuries sustained by Luther Harris are serious; and, they are numerous. At the time of the wreck, he was fifty-three (53) years old. He has worked at various jobs throughout his life with the one commonality being the laborious nature of them. His increasing age have made such work difficult for him. The impairment to his spine following this wreck, coupled with the surgical intervention that he had previously, have left him with little control in his search for an occupation that is friendly to all of his deficits. The addition of significant Post Traumatic Stress caused by him seeing the semi in the rear-view mirror an instant before impact make it nearly

impossible to drive anywhere, let alone a significant distance to either go to work or drive for an employer. He had no physical limitations prior to this incredible collision, though he had previously had surgery on his thumb and his back. He now faces a future in which he has become extremely limited in the work he can do. His wife is disabled making his situation that much more dire. His advancing age, physical limitations, inability to be social in a work environment due to his post concussive syndrome; and, his inability to drive anywhere because of his PTSD, have made his present job most likely his last. The facts surrounding this event will have a significant impact on a jury in the Upstate. Everyone's fear of semis will be brought to the forefront. It is our belief that the punitive damage possibilities are significant.

Mr. Harris does not take pills; and, he is afraid of needles. The pain, vertigo, PTSD, radiculopathy, etc., that he will live with for at least the next twenty-five (25) years, will make his golden years less than desirable. However, he must continue to not only exist, but also work, to support he and his disabled wife. Taking into account the pain and suffering resulting from injuries he sustained and their effect on his life; the cost of care for the duration of his life; the permanency of his poor health condition; the overwhelming Post Traumatic Stress; and, the punitive damages related to a semi striking his large pick-up truck with such force that he was ejected through the windshield, he recognizes that he is deserving of a significant amount of money. As full compensation for all injuries and damages suffered personally by Mr. Harris, we demand the sum of **SEVEN HUNDRED FIFTY THOUSAND 00/100 DOLLARS (\$750,000.00)**. This demand is based upon medical specials, pain and suffering, economic loss, and punitive damages.

With highest regards, I remain
Very truly yours,

s/Donald L. Smith
Donald L. Smith
DLS/ds

Sentry Insurance
P.O. Box 8026
Stevens Point, WI 54481

August 8, 2019



Claim Number: 61A171897-952
Insured: Southland
Transportation Company
Regarding: LUTHER HARRIS &
BOBBY LEOPARD
Insured Driver: Perry Barbour
Date of Loss: 06/10/2016

ATTORNEY OFFICE OF DONALD SMITH
122 N MAIN ST
ANDERSON SC 29621-5609

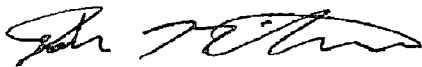

Dear Mr. Smith,

This letter is in regards to your clients, Luther Harris and Bobby Leopard and the accident that occurred on June 10, 2016. I'm following up on my starting offers of \$55,000 for Mr. Harris and \$90,000 for Mr. Leopard to try and resolve thier injury claims.

If you could please speak to your clients and provide a response that would be much appreciated.

Thank you,

Any person who knowingly and with intent to defraud any insurance company or other person files a statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which may be a crime.



Josh Neidermann, Claims Specialist
Sentry Select Insurance Company
A Member of the Sentry Insurance Group
800-473-6879 Ext 3469723
800-999-4642 Fax
joshua.neidermann@sentry.com

ELECTRONICALLY FILED - 2019 Nov 26 1:33 AM - SPARTANBURG - COMMON PLEAS - CASE#2019CP4202092

AFFIDAVITS OF LEGAL STAFF

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Luther Harris, Donna Harris and,
Bobby E. Leopard,

Case No.: 2019-CP-42-02092

Plaintiffs,

vs.

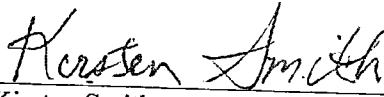
**AFFIDAVIT OF
KIRSTEN SMITH**

Perry Wendell Barbour and
Southland Transportation Co.

Defendant.

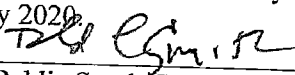
PERSONALLY, appeared before me, Kirsten Smith, who being duly sworn, states: I am the Office Manager at the Attorney Office of Donald Smith. On October 4, 2019, a Summons and Complaint was mailed via US Postal Service Certified/Return Receipt to Defendant Barbour. The envelope was addressed with Defendant Barbour's last know address, 130 Valentine Court, Martinsville VA 24112. Despite the letter being post marked October 4, 2019 and being mailed from Anderson South Carolina, postal service records show that it was mailed from Greenville South Carolina on Monday, October 7, 2019.

On October 10, 2019, the Certified/Return Receipt envelope was returned to this office marked unable to deliver due to Mr. Barbour no longer residing at that residence. Based on the Summons and Complaint being returned as undeliverable, I assisted Ms. Ford in searching for a valid address for Defendant Barbour. After a diligent search turned up no other address, I contacted Upstate Legal Support to perform a Skip Trace to locate him. I was provided with an address which Ms. Ford sent a second Certified/Return Receipt envelope containing the Summons and Complaint. This mailing was also returned to this office marked as unable to deliver-no longer at this address.


Kirsten Smith

SWORN before me this 24th day of

February 2020.


Notary Public South Carolina

My Commission Expires: 11/18/24

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Luther Harris, Donna Harris and)
Bobby E. Leopard,)
Plaintiffs,)
vs.)
Perry Wendell Barbour and)
Southland Transportation Co.)
Defendant.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-02092

**AFFIDAVIT OF
AISABAI A. FORD**

Personally, appeared before me the undersigned affiant, after being duly sworn, deposes and says as follows that:

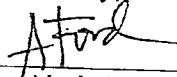
1. I have been employed as a legal assistant at the Attorney Office of Donald Smith for two and a half (2 1/2) years.
2. Part of my duties as a legal assistant are to assist in the filing and serving of summons and processes for cases assigned to me.
3. I assisted Attorney Smith in the filing of the above-captioned case; and, I am individually responsible for same.
4. On October 4, 2019, I caused the service of the Summons and Complaint for the above-captioned case to herein Defendant Perry Barbour by sending a copy of the same by certified mail to his last known address at 130 Valentine Court, Martinsville, VA 24112.
5. The Post Office failed to forward the certified mail on October 4, 2019, as it was postmarked. Post Office records show it was mailed out of Greenville on Monday, October 7, 2019.
6. I also served a copy of the Summons and Complaint by registered mail to another address found under Defendant Barbour's name: 272 Mary Hunter Dr., Bassett, VA 24055.
7. Both certified mails were returned to sender.
8. Since Defendant Barbour is a non-resident driver, I caused the service of a copy of the Summons and Complaint on Barbour, by and through the Office of General

Counsel of South Carolina Department of Motor Vehicle (SCDMV). The service was sent via certified mail.

9. The SCDMV acknowledged receipt of the service in its Letter, dated October 25, 2019. This service was as if served on Defendant Barbour himself pursuant to S.C. Code Ann. §15-9-350.
10. The SCDMV's attempt at notifying Defendant Barbour of its acceptance of service in the action was returned to sender.
11. I am executing this Affidavit to confirm that Plaintiffs did not have control over service after it left their hands.

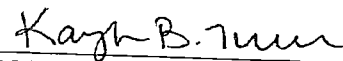
FURTHER THE AFFIANT SAYETH NAUGHT.

Respectfully submitted this the 24th day of February, 2020.



Aisabai A. Ford
Affiant

SWORN TO & SUBSCRIBED before me
This 24th day of FEBRUARY 2020.



NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 7/19/27

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
Luther Harris, Donna Harris and)
Bobby E. Leopard,)
Plaintiffs,)
vs.)
Perry Wendell Barbour and)
Southland Transportation Co.)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-02092

**AFFIDAVIT OF
AISABAI A. FORD**

Personally, appeared before me the undersigned affiant, after being duly sworn, deposes and says as follows that:

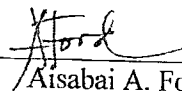
1. I have been employed as a legal assistant at the Attorney Office of Donald Smith for two and a half (2 1/2) years.
2. Part of my duties as a legal assistant are to assist in the filing and serving of summons and processes for cases assigned to me.
3. I assisted Attorney Smith in the filing of the above-captioned case; and, I am individually responsible for the same.
4. On October 4, 2019, I caused the service of the Summons and Complaint for the above-captioned case to herein Defendant Southland Transportation Co., by sending a copy of the same by registered mail to South Carolina Secretary of State, pursuant to South Carolina Code Ann. §15-9-245.
5. I also served a copy of the Summons and Complaint by certified mail to Mr. R.J. Cummings, the registered agent of service for Southland transportation Company in North Carolina.
6. The Post Office failed to forward the certified mails on October 4, 2019, as they were postmarked. Post Office records show they were mailed out of Greenville on Monday, October 7.
7. The Secretary of State received service on October 9th due to the failure of the Post Office to forward the mail until October 7th, rather than the actual mailing

date of October 4th. Had the Post Office ran it off on October 4, the processes would have been timely received.

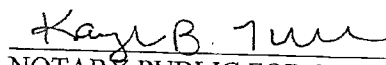
8. But for the unnecessary delay by the Post Office, service was not completed on October 7, 2019.
9. I am executing this Affidavit to confirm that Plaintiffs did not have control over service after it left their hands.

FURTHER THE AFFIANT SAYETH NAUGHT.

Respectfully submitted this the 24th day of February, 2020.


Aisabai A. Ford
Affiant

SWORN TO & SUBSCRIBED before me
This 24th day of February 2020.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 7/19/27

**COPY OF CASE
BROWN vs. EVATT**

24425

Supreme Court of South Carolina

Brown v. Evatt

322 S.C. 189 (S.C. 1996) · 470 S.E.2d 848

Decided May 13, 1996

24425

Submitted February 21, 1996.

Decided May 13, 1996.

Appeal from Circuit Court, Richland County,

190 Joseph M. Strickland, Special Judge. *190

191 Affirmed. *191

*Phillip A. Brown, Bishopville, pro se, Appellant.**Ramon E. Lark, Jr., and John J. Fantry, Jr., of
Lewis, Rogers Lark, P.A., Columbia, for
Respondent.*

BURNETT, Justice:

Phillip A. Brown began serving a life sentence for murder and armed robbery in 1982. He escaped from prison in 1983 and 1985. In addition, he attempted escapes in 1990 and 1991. Brown's escapes were major offenses as set forth in the policies of the South Carolina Department of

192 Corrections (SCDC). *192 As a result of his escape history, Brown was considered to be a maximum security risk and was given a ML5 classification — the highest maximum security and custody classification.

Brown's attempted escape in 1991 occurred on April 1st. He was captured and placed in maximum security that same day. He remained there for approximately 108 days before a reclassification hearing was held, after which he continued to be classified as ML5. As a result, Brown filed a petition for a writ of habeas corpus in the circuit court on July 13, 1992, alleging that

Respondent violated his constitutional rights by continuing to classify him as ML5. This action sought \$800,000.00 in actual damages and \$800,000.00 in punitive damages. Brown did not serve and file a summons and complaint, nor did he serve the petition on Respondent.

On January 25, 1993, Brown filed an amendment to the petition for a writ of habeas corpus. It was not served on Respondent. On May 17, 1993, Brown filed a petition for a writ of mandamus with this Court. The Clerk's Office notified the Attorney General's Office that the petition for a writ of mandamus had been filed at which time the Attorney General's Office became aware that a petition for a writ of habeas corpus had been filed in the circuit court. The Attorney General's Office learned that the SCDC had not been served with the petition for a writ of habeas corpus. In fact, the SCDC did not know that the petition had been filed.

On August 19, 1993, Brown served an amendment to the petition for a writ of habeas corpus on Respondent. Respondent filed an answer to the amendment on September 17, 1993. Brown filed another amendment on March 30, 1994. There is no indication in the record that the second amendment was served on Respondent.

Following a number of other motions filed by Brown, Respondent filed a motion for dismissal pursuant to Rule 12(b), SCRCP, for lack of subject matter jurisdiction and for summary judgment under Rule 56, SCRCP. A hearing was held on the motion on July 12, 1994. The circuit court granted Respondent's motion for several reasons. First, the

court found that it lacked subject matter jurisdiction because Brown failed to serve and file a summons and complaint as required by Rule 65(f)(1), SCRCP. Nevertheless, the court found ¹⁹³ that even if it ^{*193} had jurisdiction, Respondent would be entitled to summary judgment, because South Carolina law does not create a constitutionally protected liberty interest in regard to an inmate's security classification. Slezak v. Evatt, 21 F.3d 590 (4th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 235, 130 L.Ed.2d 158 (1994).

In addition, the circuit court determined that Brown had failed to overcome the qualified immunity defense raised by Respondent who is a public official. The court found that Respondent was acting within the scope of his employment and Brown had failed to prove that Respondent was guilty of corruption, bad faith, or was influenced by malicious motives. Lastly, the court concluded that the undisputed facts regarding Brown's escape history fully demonstrated that Respondent's decision to maintain Brown on the strictest custody level was within his discretionary authority, was reasonable, and was not actionable. This appeal followed.

ISSUES

Did the circuit court err in:

- I. Determining that it lacked jurisdiction?
- II. Determining that there is no constitutionally protected interest in regard to an inmate's security classification?
- III. Determining that Brown failed to overcome Respondent's defense of qualified immunity?

DISCUSSION

I. Jurisdiction

Brown asserts that the circuit court erred in determining that it lacked subject matter jurisdiction. Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.

Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994). Because the circuit court has the power to entertain petitions for writs of habeas corpus, it erred in finding a lack of subject matter jurisdiction over this matter.

Nevertheless, the circuit court did not have *personal* jurisdiction in this matter. The inquiry on habeas corpus is limited to the legality of the prisoner's present detention. *McCall v. State*, 247 ¹⁹⁴ S.C. 15, 145 S.E.2d 419 ^{*194} (1965). The only remedy which can be granted on habeas corpus is release from custody, whether absolute or conditional. *Id.*

Here, instead of seeking release from custody, Brown was seeking damages for being confined in maximum lockup. Thus, Brown was essentially seeking to file a civil action for damages under the guise of a petition for a writ of habeas corpus. In South Carolina a civil action is commenced by the filing and service of a summons and complaint. Rule 3, SCRCP. A summons is not a mere notice, but a means for giving jurisdiction to the court, and unless it is waived, the court cannot otherwise obtain personal jurisdiction. *Wren v. Johnson*, 62 S.C. 533, 40 S.E. 937 (1902).

Brown admits that he never served and filed a summons and complaint in this matter. Therefore, original jurisdiction was not properly instituted and the circuit court did not have personal jurisdiction over Respondent. Under these circumstances, we conclude that the circuit court correctly dismissed the action by granting summary judgment even though it should have based its decision on the lack of personal jurisdiction instead of the lack of subject matter jurisdiction. *Estate of Corley v. Harring*, 299 S.C. 525, 386 S.E.2d 264 (Ct.App. 1989).

II. Constitutionally Protected Interest

Brown contends that the South Carolina security and custody classification system creates constitutionally protected liberty interests. We disagree.

The federal constitution vests no liberty interest in inmates in retaining or receiving any particular security or custody status as long as the challenged conditions or degree of confinement are within the sentence imposed and are not otherwise violative of the Constitution. *Sandin v. Conner*, ___ U.S. ___, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995); *Slezak v. Evatt*, *supra*. Within these limits, so far as the federal constitution is concerned, the security and custody classification of state prison inmates is a matter for state prison official discretion whose exercise is not subject to federal procedural due process constraints. *Id.*

Nonetheless, a liberty interest in state inmates to retain or attain a particular security or custody classification may be created by state law which places substantive limitations on official discretion. However, even if a state ¹⁹⁵ law regime mandates both a detailed procedural process for making classification decisions and substantive criteria to be used in making those decisions, no constitutionally protected liberty interest is created if under the regime either the primary decisionmaker or any reviewing authority is authorized to override, as a matter of discretion, any classification suggested by application of the prescribed substantive criteria. *Slezak v. Evatt*, *supra*.

Neither the state statutes which create and define the powers of the SCDC nor SCDC's operational classification regulations create the required liberty interest. Though they provide procedural safeguards and substantive criteria for making base-line classification decisions, these are made only as recommendations that are subject to

discretionary review and rejection by higher-level prison officials. Accordingly, Brown has no liberty interest in his security and custody classification.

III. *Qualified Immunity*

In his petition for a writ of habeas corpus, Brown set forth a claim pursuant to 42 U.S.C.A. § 1983. Brown asserts that the circuit court erred in determining that he failed to overcome the qualified immunity defense raised by Respondent. We disagree.

To prevail on a claim that actions by state officials respecting a state prison inmate's security and custody classification have violated the inmate's procedural due process rights, the claimant must first establish that he had a protected liberty interest in receiving a new or in retaining a current classification. Next, the claimant must prove that the interest was adversely affected by the state official's actions without the protection of due process guaranteed by the Fourteenth Amendment. *Slezak v. Evatt*, *supra*.

As previously determined, Brown did not have a liberty interest in his security and custody classification. Therefore, the § 1983 claim set forth in his petition for a writ of habeas corpus fails.

For the foregoing reasons, the decision of the circuit court is

Affirmed.

FINNEY, C.J., and TOAL, MOORE and
¹⁹⁶ WALLER, JJ., concur. *196

**COPY OF CASE
CHABEK vs. NATIONWIDE
MUTUAL FIRE INS. CO.**

1564

Court of Appeals of South Carolina

Chabek v. Nationwide Mutual Fire Ins. Co.

303 S.C. 26 (S.C. Ct. App. 1990) · 397 S.E.2d 786

Decided Oct 29, 1990

1564

Heard October 10, 1990.

27 Decided October 29, 1990. *27

George E. Mullen, Hilton Head Island, *Earle McGee Rice* and *Louisa Rice Lund*, Anderson, *Jean Bergeron* and *Jerrold M. Hillard*, both of *Nationwide Mut. Ins. Co.*, Columbia, for appellant.

Joseph G. Wright, III, of *Wright Trammell*, Anderson, for respondents.

Heard October 10, 1990.

Decided October 29, 1990.

GOOLSBY, Judge:

Nationwide Mutual Fire Insurance Company appeals the order of the master that reforms an insurance policy by substituting for Custom Stamping, Inc., the respondents Clarence S. Chabek and Helen E. Chabek as the named insureds. This court vacates *sua sponte* the judgment because the master lacked subject matter jurisdiction.

This controversy began when a hailstorm destroyed a warehouse owned by the Chabeks. A policy issued by Nationwide listed Custom Stamping, a closely-held corporation owned by the Chabeks, as the insured. After Nationwide denied Custom Stamping's claim, the Chabeks

sued Nationwide for "bad faith denial of insurance benefits." The Chabeks later sought to amend their complaint.

At the hearing on whether to allow the amendment, the Chabeks advised the circuit court they intended to file a separate action to reform the policy. The circuit court referred the "matter" to the master on January 23, 1989. Its order recites the parties had consented to the reference.

The Chabeks filed the action to reform the policy on February 2, 1989. The master conducted a trial on February 20, 1989, and on March 23, 1989, entered an order reforming the policy. The master
28 found the Chabeks had "proved by the *28 greater weight or preponderance of the evidence . . . a mutual mistake . . . had been made."

I.

Rule 53(b) of the South Carolina Rules of Civil Procedure permits the circuit court, with the consent of the parties, upon application of a party, or upon its own motion, to refer any or all issues in an "action." "An 'action' is a pending proceeding to determine the rights and liabilities of the parties. . . ." *Proctor v. Gissendaner*, 579 F.2d 876, 879 n. 5 (5th Cir. 1978). In South Carolina, "[a] civil action is commenced by filing and serving a summons and complaint." S.C.R. CIV. P. 3(a). Until an action is commenced, there is no proceeding pending and, thus, nothing to refer. *See State v. McQuillan*, 252 Mo. 334, 338-9, 158 S.W. 652, 653 (1913) ("Before there can be a reference there must be an action pending."); 66 Am.Jur.2d *References* § 1 at 477 (1973) ("A

reference is the trial and determination of questions arising in litigation by a person appointed for that purpose by the court wherein the cause is pending."); *id.* at 478 ("[A] reference . . . is always in a pending cause and rests upon the constitutional and statutory powers of the court which appoints the referee as its officer and upon which his entire authority depends."); 76 C.J.S. *References* § 2 at 187 (1952) ("A reference is a sending of a pending cause, or some question therein, by the court in which it is pending, to a private person to hear and determine it provisionally or to take evidence and report to the court.").

Because the Chabeks had not filed and served their summons and complaint in the action for reformation when the circuit court referred the matter to the master, there was no action involving reformation issues then pending; therefore, the circuit court had nothing to refer to the master at that time. *Cf. First Palmetto State Bank and Trust Co. v. Boyles*, 302 S.C. 136, 394 S.E.2d 313 (1990) (wherein the Supreme Court vacated a reference to a master as depriving the defendants of a jury trial where the reference was made four days prior to the filing of the answer and without the defendants' consent); *Holladay v. Holladay*, 27 S.C. 622, 3 S.E. 80 (1887) (wherein the Supreme Court set aside a reference to a master where the defendants had not consented thereto, holding that a reference cannot properly be made until the defendants had *29 answered the complaint). Absent a reference of any or all issues in an action, the master lacked jurisdiction to enter judgment since nothing can originate before a master. *Carpenter v. Bloomer*, 54 N.J. Super. 157, 148 A.2d 497 (1959); 5 Am.Jur.2d *Arbitration and Award* § 4 at 521 (1962).

We deem as irrelevant the fact that both parties consented to the reference of the matter and, indeed, tried the matter before the master. See *Harden v. South Carolina State Highway Department*, 266 S.C. 119, 124, 221 S.E.2d 851, 853 (1976) ("Lack of jurisdiction of the subject

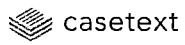
matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court *ex mero motu.*"); *Morrill v. Johnson*, 152 Me. 150, 152, 125 A.2d 663, 664 (1956) ("Reference of cases is authorized by provisions of statute. The jurisdiction of referees cannot be conferred by consent."); *Ford v. Inhabitants of Town of Whitefield*, 137 Me. 125, 126, 15 A.2d 857, 857 (1940) ("The parties cannot by agreement confer jurisdiction on the referee to determine any matter which may arise between them."); 76 C.J.S. *supra* § 11 at 190 ("[C]onsent alone cannot confer jurisdiction on the referee."); *cf. Karl Sitte Plumbing Co., Inc. v. Darby Development Company of Columbia, Inc.*, 295 S.C. 70, 367 S.E.2d 162 (Ct. App. 1988) (where the circuit court had referred an action and a party participated in the reference proceedings, the party waived any objection the party might have had to the action being referred and to the master's authority to enter a final judgment).

II.

Were we inclined to view the master as having subject matter jurisdiction, we would reverse and remand the matter for a new trial because the master failed to apply the correct burden of proof. A party seeking reformation because of mutual mistake must prove a mutual mistake by clear and convincing evidence. *Crosby v. Protective Life Insurance Co.*, 293 S.C. 203, 359 S.E.2d 298 (Ct.App. 1987). Here, however, the master applied the greater weight or preponderance of the evidence standard.

Judgment vacated.

30 GARDNER and CURETON, JJ., concur. *30



RESPONDENTS' EXHIBITS

**LETTER OF SCDMV TO
APPELLANTS' COUNSEL,
November 22, 2019**



**S. C. DEPARTMENT OF
MOTOR VEHICLES**

OFFICE OF GENERAL COUNSEL

P.O. Box 1498, Blythewood, S.C. 29016: (803) 896-9900

November 22, 2019

Donald L. Smith, Esquire
122 N. Main Street
Anderson, SC 29261

**Re: *Luther Harris, Donna Harris and Bobby Leopard v. Perry Wendell Barbour and
Southland Transportation Co.***
Case No.: 2019-CP-42-02092, DMV 19-510

To Whom It May Concern:

As stated in a letter to you previously, a copy of the Summons and Complaint in the above-referenced case was placed in the open mail to Defendant Perry Wendell Barbour. I have received this open mail copy back from the postal service with the notation "Return to Sender Not Deliverable as Addressed Unable to Forward." I am enclosing this original envelope for your files.

If you need further information, please do not hesitate to contact me.

Yours very truly,

Natasha D. Thomas, Paralegal
Office of General Counsel

For: Director, S.C. Department of Motor Vehicles

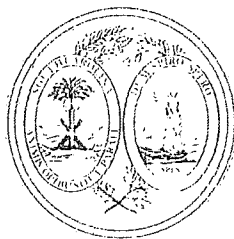
Enclosure

**LETTER OF SECRETARY OF STATE
TO SOUTHLAND TRANSPORTATION,
(Service of Summons and Complaint)**

November 22, 2019

State of South Carolina
Office of the Secretary of State
The Honorable Mark Hammond

1205 PENDLETON STREET, SUITE 525
COLUMBIA, SC 29201



803-734-2170
www.sos.sc.gov

October 10, 2019

ELECTRONIC CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Southland Transportation Co.
7925 Highway 601 North
Boonville, NC 27011

RE: Southland Transportation Co., 2019-CP-42-02092

Dear Madam/Sir:

In accordance with South Carolina Code § 15-9-245, we are enclosing herewith a copy of the Summons; Complaint; and Certificate of Service in the above-entitled case. Service was accepted on October 9, 2019 and a copy has been duly filed in our office as of this date. The fee of \$10.00 has been paid.

Yours very truly,

A handwritten signature in cursive script that reads "Allyson Green".

Allyson Green
South Carolina Secretary of State's Office

Enclosures

cc: Attorney of Donald Smith
Donald L. Smith
122 N. Main St.
Anderson, SC 29621

CERTIFICATE OF COUNSEL

RECEIVED

Feb 12 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

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

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certify that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material, as provided under Rule 210(g) of SCACR. Exhibits that have been duplicated in motions filed by any of the parties were eliminated for conciseness.

Anderson, South Carolina
February 12, 2021

s/Donald L. Smith
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Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

FINAL BRIEF OF APPELLANTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

Mar 01 2021

SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

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

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

FINAL BRIEF OF APPELLANTS

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Date: February 27, 2021

Other Counsel:

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TURNER PADGET

Post Office Box 1509

Greenville, SC 29602

Attorney for Respondents

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STATEMENT OF ISSUES ON APPEAL

- V. WHETHER THE LOWER COURT COMMITTED AN ERROR OF LAW BY NOT FINDING RESPONDENT BARBOUR HAD WAIVED HIS AFFIRMATIVE DEFENSES.**
- VI. WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO RECOGNIZE APPELLANTS HAVE SUBSTANTIALLY COMPLIED WITH THE RULES ON SERVICE OF PROCESS.**
- VII. WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN NOT EXTENDING THE TIME TO PERFECT THE SERVICE OF PROCESS UPON RESPONDENTS.**
- VIII. WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN NOT APPLYING EQUITABLE TOLLING IN THE CASE AT BAR.**

STATEMENT OF THE CASE

On June 10, 2016, Appellants were traveling southbound on U.S. Interstate 85, when they came to a stop due to traffic which resulted from a motor vehicle accident further south on 85 in the County of Spartanburg, State of South Carolina. Respondent Barbour, driving a truck owned by Southland, was also traveling southbound on U.S. 85 at the time. Without warning, Barbour's truck smashed into the rear of Appellants' vehicle. The impact left all four (4) occupants knocked out and found by the trooper in the grass on the side of the road. As a result of Respondents' negligence, gross negligence, and reckless acts, Appellants sustained injuries necessitating medical attention. Appellants filed this action for damages for the injuries they sustained as a result of the wreck.

Appellants filed their complaint on June 7, 2019, three (3) days before the running of the three-year statute of limitations for personal injury. S.C. Code §15-3-530(5). Pursuant to South Carolina Rules on Civil Procedure, Plaintiff had 120 days after filing her complaint to serve process on the Respondents, or until October 5, 2019.

On June 7, 2019, Appellants sent a demand letter to Sentry. (R., p. 163). A modified demand letter was sent to Sentry on June 9, 2019. Sentry reviewed the demand and found a couple of instances where the copies were illegible. Appellants quickly complied with any issue surrounding the ability of Sentry to evaluate the claims in hopes of resolution prior to engaging in litigation. (R., p. 153).

On June 13th and 14th, the carrier for the Respondents contacted counsel due to illegible aspects of the demand. Based on a lack of any further correspondence, it was believed the demand was complete, and the carrier was evaluating the individual claims.

On July 23, 2019, counsel left a phone message for the Sentry claims adjuster and inquired about the prospect of getting offers for the claims. The adjuster apologized for the delay in responding to the demand. He said the delay was based on the illegible documents (addressed in the middle of June), and the fact upper management had been "out of the office". (R., p. 154). Despite the fact the carrier had the demand for greater than five (5) weeks, he "hoped to get an answer out on both individual claims the following week. (R., p. 156).

Discussion between the adjuster and counsel continued for the next couple of days regarding the facts of the incident. Based on some clarity issues with the facts, counsel said he would depose the investigating trooper to clear up the understanding of the facts (if the case was in fact litigated). (R., p. 160).

The following morning, July 25, 2019, the adjuster asked whether he should have defense counsel file an answer to the Complaint. The reply was there had been no service, and there had been no offers. The adjuster understood and said he would be in touch the next week.

On August 8, 2019 (or two weeks later), Appellants received the offers from Sentry.

(R., p. 172). Contrary to Sentry's declaration it was following up on its offer to resolve the claims, there was no such prior offer. It was believed the offers were unacceptable. A discussion between Appellants and counsel confirmed this fact.

When it became apparent Sentry would not accede to Appellants' demands, Appellants served their previously filed Summons and Complaint. Appellants had to exert efforts to locate the Respondents since both provided addresses in the Accident Report were apparently no longer operational. Additionally, Appellants discovered Southland had long ago forfeited its standing in South Carolina.

On Friday October 4, 2019, Appellants served their Summons and Complaint on Southland by mailing a copy of same to the Secretary of State, pursuant to South Carolina Code Ann § 15-9-245 (R., p. 145); and by mailing a copy to Mr. RJ Cummings, who is the registered agent of service for Southland Transportation Company in North Carolina (R., p. 143).

On the same date, Appellants served Barbour, by certified mail, at his last known address: 130 Valentine Court, Martinsville, VA 24112. On October 10, 2019, said certified mail was returned "undeliverable". After a diligent search, Appellants attempted to serve Barbour at another address: 272 Mary Hunter Dr., Bassett, VA 24055. This service was returned to sender as well.

Plaintiff thereafter served Barbour a copy of the processes, by and through the Office of the General Counsel of South Carolina Department of Motor Vehicle (hereinafter referred as SCDMV) (R., p. 147). Pursuant to SC Code Ann. § 15-9-370, if a foreign (or a non-resident) driver utilizes the roads of South Carolina, he or she agrees to allow the SCDMV to accept service in his/her stead. The SCDMV attempted to notice Mr. Barbour it accepted service on a lawsuit against him, it was returned to the sender. (R., p. 149).

On November 8, 2019, Respondent Southland filed an Answer and a Motion to Dismiss, alleging Appellants failed to properly and timely file their Summons and Complaint. (R., pp. 33 & 40). Respondent Southland contended it was not served within the period required under Rule 3 of the SCRCF. Appellants opposed Respondent Southland's Motion to Dismiss on November 26, 2019, invoking good cause and equity consideration. (R., p. 44).

On November 26, 2019, the Court issued an Order Reference to Master in Equity after finding Barbour in default. The court found the need to hold hearing to ascertain damages. (R., p. 17).

On December 23, 2019, Respondent Barbour moved to dismiss the Complaint based on Rule 12(b)(1), (2), (4) and (5). (R., p. 57). He alleged Appellants failed to properly and timely serve the Summons and Complaint. On January 7, 2020, Appellants opposed said Motion, stating Respondent Barbour waived this defense by failing to file an Answer or any responsive pleading within thirty (30) days prescribed by law. (R., p. 61).

On January 8, 2020, Respondent Barbour moved to vacate the Order of Reference to Masters-in-Equity, while Appellants moved for entry of default upon Respondent Barbour. (R., p. 73). On January 17, 2020, the court issued Form 4 ruling the matter was not properly referred to Masters-in-Equity and ordered to remand the case to the circuit court as pleadings contained demands for jury trial which are not waived. (R., p. 10).

On February 24, 2020, Appellants filed an Addendum to their Opposition to Respondent's Motion to Dismiss, challenging Respondents failure to file a Joint Answer and invoked defense of lack of retention of counsel. (R., p. 79). On February 25, 2020, Appellants filed a Second Addendum invoking tolling of statute of limitations on causes of actions against out-of-state defendants under SC Code Ann. §15-3-30. (R., p. 82).

On March 10, 2020, the court denied the Motion to Dismiss based on Rule 12(b)(1) but granted the same based on Rule (12)(b)(2), (4) and (5). (R., p. 5). Appellants moved for reconsideration of the Order on March 20, 2020. (R., p. 86).

On April 6, 2020, Respondent Barbour filed his Opposition to the Motion for Reconsideration alleging there was no case at all since there was no proper and timely service of Complaint. (R., p. 90). He further contends since there was no viable case, the rule on defenses and tolling of statutes of limitations may not apply.

On April 10, 2020, Appellants filed their Response to the Opposition to Motion for Reconsideration, citing a case where the court granted relief to plaintiff despite failure to timely serve a defendant. (R., p. 94).

On May 5, 2020, Respondents filed their Supplemental Brief in Opposition to the Motion for Reconsideration, reiterating their contention there was no default on their part. (R., p. 99). Appellants submitted a Reply to the Supplemental Brief insisting the cases cited by Respondents were inapposite. (R., p. 120).

On July 14, 2020, the court issued its challenged Form 4/Order denying Appellants' Motion for Reconsideration. (R., p. 2). Appellants perfected their Appeal on August 3, 2020. (R., p. 137).

STANDARD OF REVIEW

A court may grant a motion to dismiss under Rule 12(b)(5) of the Federal Rules of Civil Procedure based on insufficiency of service of process. See Fed. R. Civ. P. 12(b)(5). To effectuate service, a plaintiff must comport with the requirements of the Federal Rules of Civil Procedure Rule 4. See Fed. R. Civ. P. 4(c). If a defendant claims service is defective, the

defendant must raise this objection in the first responsive pleading. See Fed. R. Civ. P. 12; Pusey v. Dallas Corp., 938 F.2d. 498, 501 (4th Cir. 1991).

When a defendant challenges the manner or sufficiency of service of process, "[t]he plaintiff bears the burden of establishing service of process has been performed in accordance with the requirements of Federal Rule of Civil Procedure 4." Elkins v. Broome, 213 F.R.D. 273, 275 (M.D.N.C. 2003) (citing Plant Genetic Sys., N.V. v. Ciba Seeds, 933 F. Supp. 519, 526 (M.D.N.C. 1996)). "In determining whether the plaintiff has satisfied his burden, the technical requirements of service should be construed liberally as long as the defendant had actual notice of the pending suit." Id. (citing Karlsson v. Rabinowitz, 318 F.2d 666, 668-69 (4th Cir. 1963)).

In dismissing a cause of action due to the insufficiency of service of process, a court must dismiss the case "without prejudice." See Fed. R. Civ. P. Rule 4(m). A dismissal "without prejudice" gives the plaintiff the right to refile the complaint as if the original had never been filed, but the new complaint will be subject to time defenses, such as the statute of limitations. Mendez v. Elliot, 45 F.3d 75, 78 (4th Cir. 1995); United States v. Brit, 170 F.R.D. 8, 9 (D. Md. 1996).

The trial court's findings of fact regarding the validity of service of process are reviewed under an abuse of discretion standard. Ex Parte Gregory, 378 S.C. 430, 437, 663 S.E. 2d 46, 50 (2008). Thus, our standard of review limits this court to determining whether the trial court abused its discretion. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions are without evidentiary support. McClurg v. Deaton, 380 S.C. 563 (S. Ct. App. 2008).

ARGUMENTS

I.

THE LOWER COURT COMMITTED AN ERROR OF LAW IN NOT FINDING RESPONDENT BARBOUR WAIVED HIS AFFIRMATIVE DEFENSES

A. The affirmative defenses of insufficiency of process and insufficiency of service of process must be raised by pleading or motion within 30 days of service of Complaint.

As a general rule, SCRCP require defendants to serve their answer within thirty (30) days after the service of the complaint upon him. (Rule 12 SCRCP). These rules require defendants to raise any defense to a cause of action in a responsive pleading or a motion to dismiss. (Rule 12(b) SCRCP). Rule 12(b) provides in pertinent part:

Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

The Civil Rules provide a violation of Rule 12 (h)(1) is fatal to these affirmative defenses:

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Thus, a violation of Rule 12(h)(1) is fatal to these affirmative defenses. In *Garner v.*

Houck, our Supreme 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), as cited in Unisun Insurance v. Hawkins, 342 S.C. 537 (S.C. 2000).

Appellants posit while Respondent Barbour filed a motion to dismiss alleging insufficiency of process and insufficiency of service of process, the same was filed outside the timing requirements of the Civil Rules. Whether by pleading or motion, if defendants raised such affirmative defenses, they must do so with some specificity and within the permissible timeframe for filing an answer.

B. Respondent Barbour was in default.

For failure of Respondent Barbour to file an Answer, demurrer or other responsive pleading, the instant case was referred to the masters in Equity by Order, dated November 26, 2019. This Order was later vacated since it was not properly referred pursuant to Rule 53 of the SCRCP. Despite this procedural defect, this act by the lower court was recognition the 30-day period to file an answer or responsive pleading should have been computed from October 10, 2019. Respondent Barbour was in default, and as such, has waived his rights to allege any defense.

C. Respondent Barbour was dilatory in asserting a defense.

South Carolina provided for the procedure for service of processes on non-resident motorist. (SC Code Ann. §15-9-350, §15-9-370, §15-9-380). Pursuant to these laws, Appellants served the Director of the SCDMV with the Summons and Complaint, which was received on October 25, 2019. The Director thereafter mailed a copy of the processes to Respondent Barbour by open mail. On November 22, 2019, SCDMV forwarded the envelope stamped with "Return to Sender".

Based on this, Respondent Barbour moved to dismiss the Complaint against him on December 23, 2019, alleging failure to properly and timely serve the Summons and Complaint. Appellants argued service was effectuated on October 25, 2019, upon the acceptance of service by the Director of the SCDMV.

Appellants maintained Respondent Barbour was first served the processes on October 10, 2019. This service by and through the Director of SCDMV was the third attempt to serve him. In all three instances, Respondent Barbour failed to accept the mail-let alone, timely file an answer or a pre-answer motion. Since service with the SCDMV was executed on October 25, 2019, Respondent Barbour had until November 25, 2019 to file an answer or a motion. Respondent moved to dismiss the Complaint on December 23, 2019, more than fifty (50) days after the service of said Summons and Complaint. For failure to file an answer (or a pre-answer motion) on time, Respondent Barbour failed to challenge the sufficiency of process and sufficiency of service of process, and as such he is considered to have waived these affirmative defenses under Rule 8 (c), Rule 12(a), 12(b), and 12(h)(1) of the SCRCF.

It should be noted Respondents are represented by the same counsel. Thus, counsel had actual notice of a suit against the two Respondents as early as October 9, 2019. Instead of filing a Joint Answer or a Joint Motion to Dismiss, raising the above-mentioned affirmative defenses, counsel asserted the same on behalf of Barbour, on December 23, 2019. The failure to file joint pleadings brings into question whether defense counsel was ever retained by Defendant Barbour since he no longer works for Southland.

II.

THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO RECOGNIZE APPELLANTS HAD SUBSTANTIALLY COMPLIED WITH THE RULES ON SERVICE OF PROCESS.

A. Respondent Southland was properly served.

Under South Carolina laws, service on corporations may be effectuated by delivering a copy of the Summons and Complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. (Rule 4(d)(3) of the SCRCP.

In compliance with this Rule, Appellants mailed a copy of the Summons and Complaint by certified mail/returned receipt, upon its registered agent of service in its Boonville, North Carolina office.

Since Respondent Southland had forfeited its standing in South Carolina, Appellants also effected service of its processes to the South Carolina Secretary of State, pursuant to S.C. Code Ann. §15-9-245.

Both services were made by certified mail/returned receipt and posted on October 4, 2019. However, the Post Office did not forward the mail until October 7, 2019. The certified mails were received by Respondent Southland and the Office of the Secretary of State on October 9, 2019, two (2) days beyond the 120-day period for service of processes (i.e. October 7, 2019 was the last day of the 120-day reglementary period). Had the Post Office actually forwarded the mailings on Friday, October 4, 2019, when it was deposited, the Secretary of State would have received the Summons and Complaint on Monday, October 7, 2019 and it would have been timely.

B. Respondent Barbour was properly served.

South Carolina law affords several options for service of process to an individual defendant, such as Respondent Barbour. Under Rule 4 of the SCRCP, an individual may be

served processes by delivering a copy of the summons and complaint to him personally, by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process. (Rule 4(d) SCRCPP). Service may also be accomplished through the sheriff, his deputy or mail, by commercial delivery or registered mail, return receipt requested and delivery restricted to the addressee. (Rule 4(d)(8) SCRCPP).

In this case, Appellants served Respondent Barbour with a copy of the Summons and Complaint by certified mail, addressed to his last known address at 130 Valentine Court, Martinsville, Virginia, 24112. The mail went out on October 4, 2019, well-within the 120-day period limitation for serving the Complaint.

The service by certified mail was returned to sender. Appellants then sent a copy of the processes by certified mail to an alternative address for Barbour at 272 Mary Hunter Dr., Bassett, VA 24055. Again, it was returned to sender. Appellants could not locate Barbour. After two (2) failed attempts, Appellants served him through SCDMV pursuant to §15-9-370. The processes were received on October 25, 2019.

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

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

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

Appellants submit they have substantially complied with the aforementioned rules on service of processes. That the Respondents failed to receive the processes on time due to the inadvertence or negligence of the post office should not discredit the substantial efforts by Appellants to serve the Respondents with the Summons and Complaint. In the end, Respondents received copies of the processes, and had actual notice of the commencement of the action against them.

Appellants further assert Respondent Southland knew, or should have known of a pending action against it as early as June 7, 2019, when Appellants submitted their demand letter to its agent, Sentry Insurance Co. A copy of Appellants' Summons and Complaint was attached with the said demand letter, which Sentry acknowledged receipt of same in its June 13, 2019 email correspondence with Appellants' counsel. Appellants believe the insurer's general duty to advise and inform its insured about matters which may affect the insured's interests, rights and obligations necessitate Sentry relayed the existence of Appellants' pending action to its insured. As mentioned previously, Sentry acknowledged the Summons and Complaint and asked whether it should retain counsel to file an Answer to said Complaint on July 25, 2019. Therefore, Respondent Southland had both imputed and actual notice of the Complaint. Since Appellants had substantially complied with the service of process and Respondents had received actual notice of the suit against them, Appellants are entitled to the liberal construction of the law, and a finding service was sufficient.

III.

THE LOWER COURT ABUSED ITS DISCRETION IN NOT EXTENDING THE TIME TO PERFECT THE SERVICE OF PROCESS UPON RESPONDENTS.

South Carolina law requires Summons and Complaints must be served upon defendants within the statute of limitations or within 120 days after the filing of the complaint. (Rule 3 SCRCPP). This Rule is not absolute. South Carolina courts have long adhered to the "sound public policy of deciding cases on their merits".

As a result, we have long adhered to "the sound public policy of deciding cases on their merits," *Herbert v. Saffell*, 877 F.2d 267, 269 (4th Cir. 1989) (quotation omitted); *Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978); *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974), and not "depriving . . . part[ies] of [their] `fair day in court.'" *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 504 (4th Cir. 1977) (quoting *Gill v. Stolow*, 240 F.2d 669, 670 (2d Cir. 1957) (Clark, J.)), *cert. denied*, 434 U.S. 1020, 98 S.Ct. 744, 54 L.Ed.2d 768 (1978). This policy of deciding cases on their merits is so strong that, when a plaintiff has committed a procedural error, we will allow a district court to impose on him the "harsh sanction" of prejudicial dismissal, *Herbert*, 877 F.2d at 269; *Chandler Leasing Corp. v. Lopez*, 669 F.2d 919, 920 (4th Cir. 1982), only in the "extreme cases," *McCargo v. Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976); 9 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2369, at 193 (1971), where the plaintiff has shown "a clear record of delay" or has engaged in "contumacious conduct." *Dove v. CODESCO*, 569 F.2d 807, 810 (4th Cir. 1978).

Choice Hotels v. Goodwin Boone, 11 F.3d 469 (4th Cir. 1993).

Rule 4 SCRCPP sets forth the requirements for service of process. While there are no provisions in the SCRCPP governing cases and/or instances where plaintiff fails to serve the summons and complaint within the 120-day reglementary period for service of process, the lower court "may look to the construction placed on the Federal Rules of Civil Procedure". Gardner v. Newsome Chevrolet-Buick, Inc. 304 S.C. 328, 404 S.E.2d 200 (1991).

Rule 4(m) of the Federal Rules of Civil Procedure (hereinafter referred as Fed. R. Civ. P.) provides:

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the **court**—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time.

Fed. R. Civ. P. Rule 4(m).

This rule has been interpreted by courts to contain two (2) standards which govern an extension of time to serve. They are the good cause standard and the judicial discretion standard. Appellants believe they deserve an extension of time to perfect the service of processes on both standards.

A. Extension for Good Cause

Appellants submit they have shown good cause for the failure to timely serve the summons and complaint.

This good cause exception is discussed in the case of *Martinez v. United States*,

"To establish good cause, the plaintiff generally must exercise reasonable diligence in trying to effect service." *Burns & Russell Co. of Blat. V. Oldcastle, Inc.*, 166 F. Supp.2d 432, 439 n.9 (D.Md 2001). Good cause may be found, for example, where a defendant is evading service; where the plaintiff experienced difficulty in obtaining a defendant's proper address; where court staff misdirected a *pro se* plaintiff as to the appropriate procedure for service; or where a plaintiff was unaware of the defect in service until after the deadline expired." *Hoffman v. Balt. Police Dep't*, 379 F. Supp.2d 778, 786 (D.Md 2005). The common thread in all of these examples is that the interference of some outside factor prevented the otherwise-diligent plaintiff from complying with the rule. *See Burns*, 166 F. Supp.2d at 439n9.

Martinez v. United States, 2013 WL 6858860, (D.Md. Dec. 26, 2013).

South Carolina courts have held to find good cause, some unusual circumstances must have prevented timely service.

To grant an extension of time for service for good cause the court must find that the plaintiff has made "reasonable and diligent

efforts to effect service" within the time period prescribed by law. Courts typically find good cause to extend the Rule 4(m) time limit where "'external factors [] stifle a plaintiff's due diligence' in effecting service." *McCollum v. Genco Infrastructure Solutions*, No. 10-210, 2010 WL 5100495, *2 (E.D. Va. Dec. 7, 2010), (quoting *T ampersand S Rentals v. United States*, 164 F.R.D. 422, 425 (N.D. W.Va. 1996)). In general, good cause is found to exist only when some outside factor, rather than inadvertence or negligence, prevented service. *Lepone-Dempsey v. Carroll County Comm'rs*, 476 F.3d 1277 (11th Cir. 2007).

Clyburn v. Champagne, C/A No. 6:10-1925-TMC (D.S.C. Sep. 28, 2012)

There can be no doubt as to Appellants efforts in attempting to serve both Respondents with the Summons and Complaint. Appellants made extensive inquiries after Respondent Barbour did not accept service at his last known address. Appellants caused the processes to be mailed prior to the expiration of 120-day period. They were unaware Respondents failed to receive the processes until after the deadline expired. Despite the expiration of the permissible timeframe for service, Appellants continued to exert efforts to notice the Respondents. Appellants believe they had good cause for the delay, and dismissal was unwarranted.

In the case of *Scott v. Md. State Department of Labor*, the Fourth Circuit Court examined possible factors to determine if good cause exists to excuse a plaintiff's failure to serve timely. Scott v. Md. State Dep't of Labor, 673 F. App'x 299, 306 (4th Cir. 2016). These factors include whether:

1) the delay in service was outside the plaintiff's control, 2) the defendant was evasive, 3) the plaintiff acted diligently or made reasonable efforts, 4) the plaintiff is pro se or in forma pauperis, 5) the defendant will be prejudiced, or 6) the plaintiff asked for an extension of time under Rule 6(b)(1)(A). *Scott v. Md. State Dep't of Labor*, 673 F. App'x 299, 306 (4th Cir. 2016); see *Beasley v. Bojangles' Rests., Inc.*, No. 1:17CV255, 2018 WL 4518693, at *1 (M.D.N.C. Sept. 20, 2018); *Martinez v. United States*, No. DKC 13-0237, 2013 WL 6858860, at *2 (D. Md. Dec. 26, 2013) ("The common thread in all of these examples is that the interference of some outside factor prevented the otherwise-diligent plaintiff from complying with the rule.").

What constitutes good cause "necessarily is determined on a case-by-case basis within the discretion of the district court."

Ibid. at 306.

As to the first factor, Appellants indicated the delay in the receipt of the Summons and Complaint by Respondents was caused by the Post Office's failure to forward the mails on time, according to its traditional practice. This act was beyond Appellants' control.

Second, while there is no evidence Respondent Southland has been evasive, the difficulty in locating Respondent Barbour due to his ever-changing addresses may be indicative of a tendency to be evasive. Moreover, the mailings were simply returned to sender, indicating they were refused.

Third, as previously discussed, Appellants acted diligently and made reasonable efforts to effectuate service.

The Fourth factor is not applicable in this case since Appellants are represented by counsel.

Fifth, Appellants were unable to request for an extension of time under Rule 6(b) of the SCRCF since they have caused the mailing of the processes within the 120-day period.

As to the Sixth factor, Respondents would not be prejudiced because they had actual notice of the action.

B. Extension by Court's Discretion

In 1995, the Fourth Circuit Court ruled courts may only grant extension of time for proper service upon establishing good cause. Mendez v. Elliot, 45 F.3d 79.

The following year, the Supreme Court, in the case of *Henderson v. United States*, concluded Rule 4(m) grants the courts the discretion to enlarge the 120-day period for service

“even if there is no good cause shown.” Henderson v. United States, 517 U.S. 654 (1996), quoting the Advisory Committee’s Notes on the 1993 Amendments to Federal Rules Civil Procedure 4, 28 U.S.C. App., p. 654.

The Court in the case of *Vantage, Inc. v. Vantage Travel Service, Inc.*, noted due to the *Henderson* ruling, along with other circuit court’s express rejection of the *Mendez* ruling, ruled *Mendez* is no longer good law, and if given the opportunity, the Fourth Circuit perforce would adopt the interpretation of Rule 4(m) held by the Supreme Court and the other circuit courts. Vantage, Inc. v. Vantage Travel Service, Inc., C.A. No. 6:08-2765-HMH (D.S.C. Mar. 20, 2009).

In sum, the lower court erred in dismissing the Complaint since Appellants demonstrated reasonable efforts to effect service on both Respondents. Upon Appellants showing of good cause for the delay in the receipt of processes by Respondents, the court, on its own, should have extended the period of service. Furthermore, even assuming Appellants failed to establish good cause existed, the Court could have exercised its discretion to grant an extension of time for service, considering there was no prejudice to herein Respondents and the significant injuries sustained by Plaintiffs.

IV.

THE LOWER COURT ABUSED ITS DISCRETION IN NOT APPLYING EQUITABLE TOLLING IN THE CASE AT BAR.

Appellants submit this case is substantially similar to the case of *Hooper v. Ebenezer Senior Services and Rehabilitation Services* (hereinafter referred as “Ebenezer”). Hooper filed his Summons and Complaint on February 6, 2006. He attempted to effect service of same, initially upon the agent named by Ebenezer at the address it supplied to the Secretary of State. The service was unsuccessful. He then hired a private investigator who found the agent’s personal address and caused the mailing the pleadings to Richland County Sheriff’s Office for

service. The Richland County Sheriff's Office returned the service to Hooper, stating the agent's address was not within its jurisdiction but of Lexington County's. Hooper's counsel thereafter forwarded the pleadings to the Lexington County Sheriff's Office for service. After the statute of limitations had run, Hooper's counsel received an Affidavit of Non-Service from Lexington County Sheriff's Office. Hooper's counsel thereafter hired a private investigator to serve Agape Rehabilitation of Rock Hill, which took over Ebenezer. The service was accepted by Inkelaar, Agape's Administrator on June 15, 2006, one week past the 120-days of filing of summons and complaint. Ebenezer, thereafter, moved for dismissal of the action based on non-completion of service within the statute of limitations nor within the time limits of Rule 3(a)(2) of the SCRCF. Hooper v. Ebenezer Sr. Services, 386 S.C. 108 (S.C. 2009).

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

Thus, under the unique circumstances of this case, we conclude it is appropriate to equitably toll the statute of limitations for the time Hooper spent in pursuit of Ebenezer's nonexistent agent.

Finally, we note that public policy and the interests of justice weigh heavily in favor of allowing Hooper's claim to proceed. The statute of limitations' purpose of protecting defendants from stale claims must give way to the public's interest in being able to rely on public records required by law.

Ibid. at 119.

In the same manner, the Fourth District Court applied equitable tolling in *Gittens vs. Equifax*. *Gittens v. Equifax*, 3:16-cv-00228-FDW-DSC (November 5, 2017). In *Gittens*, the complaint was dismissed without prejudice, upon showing plaintiff did not properly serve the process (i.e. plaintiff himself served the process and the summons was issued to a corporation without identifying the officer, director, managing agent or authorized agent to be served, in violation of Rule 4, N.C. Rules on Civil Procedures. *Ibid*.

In *Gittens vs. Equifax*, the Court opined:

Equitable tolling is "a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). The Fourth Circuit has stated that equitable tolling is available only in "those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003), (quoting *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000)). Equitable tolling is only appropriate where a plaintiff demonstrates "(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time." *Id*.

Gittens, supra.

In *Gittens*, the Court allowed the tolling of statute of limitations for thirty days from the issuance of the District Court's Order due to the unusual factors in the instant case, including the fact dismissal of the case would bar Plaintiff from re-filing his claims since the statute of limitations has prescribed. *Ibid*. Plaintiff was directed to file a new action reasserting the claims in this action not later than December 5, 2019 (i.e. 30 days from November 5, 2019, date the Court issued its Order).

In this case, even if Rule 4(m) is applied and the court dismissed the case without prejudice, the statute of limitations will bar the re-filing of this case.

The case of *Bonds v. Electrolux Home Products, Inc.*, reiterated the interpretation of the the Advisory Committee on Fed. R. Civ. P. Rule 4(m), stating "this section authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown ... Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action." *Bonds v. Electrolux Home Products, Inc.*, C/A No. 8:06-1650-GRA-BHH (D.S.C. Dec. 6, 2006).

The cases of Hooper, Gittens, Bonds and the present case called for the extension of time to serve process due to their peculiar circumstances.

Finally, Appellants submit the Court's ruling in Bonds applies to this case:

Even if the Court applied state law here, it is not clear that the case was procedurally dead in state court. Under South Carolina Rule of Civil Procedure 3(a), an action is commenced "when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing." Under Rule 6, the time for service may be extended even after the 120 days has passed for good cause shown.

Bonds, supra.

CONCLUSION

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

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Mar 01 2021

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SC Court of Appeals

J. Derham Cole, Judge

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

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

**CERTIFICATE OF COUNSEL
FOR FINAL BRIEF OF APPELLANT**

I HEREBY CERTIFY that Final Brief of the Appellant in the above-captioned case
complies with Rule 211 (b) SCACR.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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Luther Harris, Donna Harris, and Bobby E. Leopard, Appellants,

v.

Perry Wendall Barbour and Southland Transportation Co., Respondents.

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Date: March 1, 2021

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court properly determine that Respondent Perry Barbour had not waived any affirmative defenses since the action was never properly commenced?**
- II. Did the trial court properly determine that Appellants had failed to meet the requirement of commencing an action as set forth in the Rules of Procedure?**
- III. Did the trial court properly determine that equitable tolling was not applicable under the facts of this case?**

STATEMENT OF THE CASE

On June 16, 2016, Luther Harris, Donna Harris, Bobby Leopard and Jerry White were injured when they were struck by a truck operated by Perry Barbour on behalf of Southland Transportation Co. while travelling on south Interstate 85 in Spartanburg County. Luther Harris, Donna Harris and Bobby Leopard (Appellants) filed suit in Spartanburg County on June 7, 2019 seeking damages for injuries they sustained in the accident (R. pp. 20-30). (Jerry White was represented by another attorney in a separate action also filed in Spartanburg County). The Appellants, through their attorney, thereafter attempted to negotiate with the liability insurer for Perry Barbour and Southland Transportation Co. ("Respondents") (R. pp. 153-161), but did not immediately attempt service until much later after negotiations apparently failed on August 8, 2019 (R. p. 172). The various attempts at service of the Respondents thereafter attempted by Appellants, however, failed to meet the deadline set by Rule 3 of the South Carolina Rules of Civil Procedure, which requires that service be accomplished no later than 120 days after filing in order that the civil action might properly be commenced. Respondents' motion to dismiss for failure to timely commence the civil action was granted by court Order, dated March 10, 2020 (R. pp. 5-8). This Order was subsequently affirmed on July 14, 2020 after a motion for reconsideration was filed (R. p. 2). Appellants have thereafter appealed those rulings.

STANDARD OF REVIEW

Appellants' action for damages was dismissed by the circuit court for failure to comply with Rules 3(a) and 12(b)(2), (4) and (5) of the South Carolina Rules of Civil Procedure (R. pp. 5-8). Rule 3(a) concerns the commencement of an action, which requires both filing and service of a Summons and Complaint. Rule 12 is concerned with the response to a Complaint. Specifically, Rule 12 requires a response to be made within thirty days after service. Rule 12 (b) (2) concerns the lack of personal jurisdiction, while Rule 12(b)(4) concerns the inefficiency of process and Rule 12 (b)(5) concerns the insufficiency of service of process. Normally, when an appeal is made from a motion to dismiss, the underlying facts are to be construed in a light most favorable to the non-moving party with the allegations of the Complaint being taken as true. Stiles v. Onorato, 318 S.C. 297, 457, S.E.2d 601 (1995). Otherwise, in an appeal from a non-jury matter, the findings of fact of the trial judge will not be disturbed unless found to be without evidence which would reasonably support the judge's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C.81, 221 S.E.2d 773 (1976).

ARGUMENTS

I.

THE TRIAL COURT PROPERLY DISMISSED APPELLANTS' CASE DUE TO A FAILURE TO COMMENCE THE CASE WITHIN 120 DAYS AFTER FILING. (Issue I)

Appellants contend that the trial court erred by failing to find that Respondents had waived their affirmative defenses of personal jurisdiction, sufficiency of process and sufficiency of service of process by failing to timely raise those defenses in accordance with Rule 12 of the South Carolina Rules of Procedure. However, before Rule 12 becomes applicable, Rule 3 requires that a civil action be commenced by filing and serving the Complaint. Only after an action has been commenced does Rule 12 direct a defendant to serve his response to the Complaint within thirty days after service has been made.

Rule 3 of the South Carolina Rules of Civil Procedure requires that a Summons and Complaint be filed and served before an action is commenced. In this instance, the Appellants properly and timely filed their Complaint with the Spartanburg County Clerk of Court on June 7, 2019 Complaint. Since the accident occurred on June 10, 2016, the three year statute of limitations would become applicable on June 10, 2019. (See §15-3-530, S.C. Code (1976)) However, Rule 3 permits a Plaintiff to serve the Complaint within 120 days after filing if the Complaint is filed within the applicable statute of limitations but not served within that statutory period, thereby staying the application of the Statute of Limitations for that time period. Under the facts of this case, the 120 days would end on October 5, 2019. However, because that day was on a weekend, the deadline was extended until October 7, 2019. Any service beyond that

date would be out of compliance with Rule 3 since there would be no proper service within the allotted 120 day period and, therefore, no commencement of the action.

If we return to the facts of this matter, it becomes clear that there was no commencement of this action. After properly filing the Complaint, Appellants' attorney began to negotiate with the insurer for Respondents (R. pp. 153-161). These negotiations apparently broke down around August 8, 2019, almost two months before the deadline of October 7, 2019 (R. p. 172). Appellants then attempted to serve Southland Transportation Company pursuant to section 15-9-245 of the South Carolina Code (R. p. 143). Section 15-9-245 is applicable to any foreign business which is not authorized to transact business in South Carolina, as was true with Southland Transportation Company. Under this statute, the Secretary of State serves as agent for service of process for the foreign corporation. Service of process is accomplished by delivering the Complaint to the Secretary of State who thereafter forwards the Complaint by certified mail to the corporation. Proof of service by affidavit of compliance is filed with the Clerk of Court along with the signed return receipt for the certified mail. In this case, the certified mail to Respondents was posted on October 4, 2019 but not sent by the Post Office until October 7, 2019. The certified mail was not received by Southland Transportation Co. and the Secretary of State until October 9, 2019 (R. p. 145), outside of the specified time period for service. Since service was not timely made on Southland Transportation Co., the action was not properly commenced.

Appellants nonetheless argue that Respondents were required to raise these affirmative defenses within thirty days of service under Rule 12. However, with regard to Southland Transportation Co., the defenses were timely filed, even if the issue of "commencement" is overlooked. As noted, Southland Transportation would not have received the Complaint until October 9, 2019 (R. p. 143). Assuming the service was timely, a response from Southland

Transportation would not have been due until November 13, 2019 since it would be entitled to thirty days plus an additional five days under Rule 6(e). Southland Transportation's Answer was filed on November 8, 2019 (R. pp. 33-38), where the defenses of insufficiency of process, inefficiency of service of process and lack of personal jurisdiction were raised. Therefore, there was no waiver of any potential affirmative defenses.

Likewise, with regard to Perry Barbour, there was a failure by the Appellants to timely serve him such that there might be a commencement of the action against him. As noted, the Complaint was filed on June 7, 2019. Service pursuant to Rule 3 was to be completed by October 7, 2019. Appellants initially attempted to serve Perry Barbour by certified mail but were unsuccessful in doing so. According to the affidavit of Kristen Smith, office manager for the Appellants' attorney, the Summons and Complaint were post marked for October 4, 2019, but not mailed until October 7, 2019 (R. p. 174). On October 10, the certified letter to Perry Barbour was returned due to the fact that Perry Barbour had moved and, therefore, the letter was not accepted. A second certified letter was thereafter sent but also returned as undeliverable. Appellants then attempted service upon the Office of General Counsel for the South Carolina Department of Motor Vehicles on October 25, 2019 pursuant to section 15-9-350 (R. p. 147). Obviously, this service was untimely and did not meet the deadline of October 7, 2019, as required by Rule 3.

Appellants, however, argue that the affirmative defenses were not timely made pursuant to Rule 12 and therefore, have been waived. Again, this argument ignores the fact that without timely service under Rule 3, the litigation had not commenced. In fact, Rule 12 only comes into play when service has been completed. See Rule 12 (a), SCRCF.

Moreover, when a party has failed to accept and receipt for certified mail which contains the notice of service and a copy of the process, section 15-9-380 provides the procedure for

service. Pursuant to that statute, when the certified mail is returned, the envelope is to be retained and process is to be resent by open mail. The original envelope and subsequent affidavit of mailing is to be filed with the Clerk of Court. When the envelope and affidavit of mailing have been filed, section 15-9-380 provides that "the filing thereof [of the envelope and affidavit] shall have the same force and legal effect as if such process had been personally served upon such defendant". As a result, under circumstances where the certified letter has not been accepted, filing of the returned envelope enclosing the Summons and Complaint and affidavit of service of subsequent mailing sets the date of filing for purposes of service. In this case, any such filing would have had to occur after November 21, 2019 since that is the date that the South Carolina Department of Motor Vehicles received the open letter back from the Post Office as being undeliverable (R. p. 149). If we assume the original envelope and subsequent Affidavit of Mailing were properly filed with the Clerk of Court on November 21, 2019, the service would be completed on that date pursuant to section 15-9-380. Perry Barbour would then have until December 26, 2019 to file an Answer or Motion to Dismiss pursuant to Rule 12 and the five day extension provided by Rule 6(e). A Motion to Dismiss on behalf of Perry Barbour was filed on December 23. As a result, even assuming there was a proper commencement of this case, there was no waiver of affirmative defenses.

Appellants go on to argue that the rule regarding the commencement of an action should be ignored where the insurer for the Respondents has knowledge that the Complaint has been filed. There is no authority for this. The insurer is not a party to the action and cannot legally accept service of the Summons and Complaint. Jurisdiction of a matter is based upon proper service of the Summons and Complaint which acts to bring a party before the court and subjects that party to its holdings. Financial Federal Credit, Inc. v. Brown, 384 S.C. 555, 683 S.E.2d 486

(2009). Without jurisdiction, the Court lacks the authority to give judgment against a defendant. Id. The insurer, by contrast, simply serves to indemnify the insured defendant for any monetary judgment rendered against him by a court of competent jurisdiction up to his policy limits. Because this matter was not properly commenced due to insufficient service, the trial court properly dismissed this action.

II.

BECAUSE THE ACTION WAS NOT PROPERLY COMMENCED, THE TRIAL COURT WAS WITHOUT AUTHORITY TO EXTEND THE TIME PROVIDED FOR PROPER SERVICE. (Issues II and III)

Appellants argue that under the Federal Rules of Civil Procedure, a court has the discretion to permit a Complaint to be served beyond the statute of limitations. Although the Federal Rules of Civil Procedure often serve as a guideline as to how the South Carolina Rules of Procedure are to be applied, in this instance, there are differences which preclude authority decided under the Federal Rules of Civil Procedure from being applicable.

Under Rule 3 of the South Carolina Rules of Civil Procedure, an action is commenced only after both filing and service of a Complaint. Under Rule 3 of the Federal Rules of Civil Procedure, an action is commenced when a Complaint is filed. As a result, in the federal system, a court has jurisdiction and the authority to act once a Complaint is filed. This is not true in the South Carolina court system. Since a state court has no authority to act in the absence of proper service, Appellant's reliance on Rule 4(m) of the Federal Rules of Civil Procedure is misplaced. As a result, Appellants' argument regarding the court's discretionary power to permit additional time to serve upon a showing of "good cause" is also misplaced. While a federal court has the

power to dismiss a Complaint if service is not made within ninety days, a state court has no corresponding authority because it has not acquired jurisdiction since the action has not commenced.

Appellants' argument mirrors an argument for an estoppel of the application of statute of limitation. Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute has been induced by the defendant's actions. Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000). In order for equitable estoppel to apply, however, the party to be estopped must have misrepresented or concealed material facts which were unknowingly relied upon by the aggrieved party. Maher v. Tietex Corp., 331 S.C. 391, 500 S.E.2d 204 (Ct. App. 1998). Appellants have not argued that any affirmative act of deceit or misrepresentation by the Respondents caused them to delay service. As a result, a theory of equitable estoppel is inapplicable even if it were assumed to be required where there was no commencement of the action.

A similar argument exists under the theory of equitable tolling. This theory is also inapplicable since the case was never properly commenced. Moreover, equitable tolling is reserved for use only in extraordinary circumstances. Hooper v. Ebenezer Senior Services and Rehabilitation Center, 377 S.C. 217, 659 S.E.2d (Ct. App. 208). Pursuant to Hooper, equitable tolling typically applies in cases where a litigant is prevented from filing suit because of an extraordinary event beyond his or her control. The Hooper court went on to note that equitable tolling is to be used sparingly and only when the interests of justice compel its use. As noted in the case of Irwin v. Dept. of Veteran Affairs, 111 S. Ct. 453, 112 L. Ed. 2d 435, 498 U.S. 89 (1990), equitable tolling is allowed where a claimant actively pursues available remedies but files

defective pleadings or is induced by an adversary into allowing a deadline to pass. However, it is normally not allowed where a claimant fails to exercise due diligence in pursuing his or her legal rights.

Notwithstanding Appellants arguments to the contrary, it is clear from a review of the facts of this case that Appellants simply failed to serve their Complaint in a timely manner when they had more than sufficient time to do so. As noted, the accident giving rise to Appellants' attempted action occurred on June 10, 2016 (R. p. 22, lines 3-4). They filed their Complaint on June 7, 2019. Pursuant to Rule 3, they had 120 days to complete service. They initially attempted to negotiate a settlement with the insurer for the Respondents (R. pp. 153-161). By August 8, 2019, Appellants had received an offer from the insurer which they knew was unacceptable (R. p. 172). At that point in time, they had sixty days in which to complete service (October 7, 2019). For some reason, Appellants did not attempt to serve Southland Transportation Co. by certified mail until October 7, 2019 (R. p. 143) (it should be noted that the certified letter was apparently sent to the Post Office on October 4 but not sent until October 7). Appellants attempted service by certified mail in two ways: service upon the defendant corporation and substitute service upon the Secretary of State pursuant to section 15-9-245 (R. p. 145). Delivery was made on Southland Transportation on October 9, 2019. Likewise, delivery was made on the Secretary of State on October 9, 2019. October 9, 2019 is beyond the deadline for completion of service.

Appellants also attempted to serve Nathan Barbour by certified mail to his last known address. On October 10, 2019, this was returned undeliverable (R. pp. 58, 175). Pursuant to Rule 4(d)(8), if service by certified mail is returned undeliverable, service must be made by other methods as provided by the Rules of Civil Procedure. Appellants then attempted service through the South Carolina Department of Motor Vehicles pursuant to section 15-9-370. This was

accomplished with a certified letter being sent out by the Department of Motor Vehicles on October 25, 2019 (R. pp. 58, 175-176). It was returned undeliverable. On November 22, 2019, the Department of Motor Vehicles advised the attorney for the Appellants that the Summons and Complaint were placed in open mail to Perry Barbour, but returned on November 21, 2019 (R. p. 189). Pursuant to Section 15-9-380, under these circumstances, upon filing of the letter with the Clerk of Court, the date of filing shall be deemed the equivalent of personal service. As a result, the earliest service would be November 22, 2019, well beyond the deadline for service.

Appellants have advanced the argument that the service by certified mail was late due to the Post Office failure to forward the mail on a timely basis. However, this argument ignores the fact that Appellants procrastinated until the next to last day service could be initiated and simply took the chance that nothing would go wrong with service by delivery. Equity does not reward those who sit on their rights. Hemmingway v. Mention, 228S.C. 211, 89 S.E.2d 369 (1955); Eldridge v. Eldridge, 398 S.C. 113, 728 S.E.2d 24 (2013).

Appellants have also argued that Respondents already had actual knowledge of the pending litigation since the attorney for Respondents was retained by the insurer for the Respondents. Appellants assert, without authority, that the insurer had a duty to advise and inform its insured about the filing of the litigation. However, the insurer is not an agent for service of process of its insured. The duty to accomplish proper service upon a named defendant lies with the plaintiff and cannot be handed off onto other entities unless there is a true agency relationship allowing vicarious service or there is statutory authority allowing substitute service. Neither exist with the insurer for the Respondents.

As noted by the Court in Pelzer v. State of South Carolina, 378 S.C. 516, 662 S.E.2d 618 [Ct. App. 2008]:

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.

Equitable tolling has been deemed available where –

- Extraordinary circumstances prevented the plaintiff from filing despite his or her diligence
- The plaintiff actively pursued his or her judicial remedies [but] has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass
- The plaintiff, despite due diligence, is unable to obtain vital information bearing on the evidence of his or her claim.

In this instance, Appellants were not tricked or misled by Respondents. The fact that the individual defendant moved after the accident is of no moment since people often move within a three year period and nothing suspicious has been proven about his moving his residence. As noted, Appellants simply allowed the time for service to slip away from them. Service could easily have been effectuated well within the 120 day period. Instead, Appellants procrastinated and waited until time had almost expired before attempting the substitute service which was always available to them.

CONCLUSION

Pursuant to Rule 3 of the South Carolina Rules of Civil Procedures, Appellants had an additional 120 days to properly serve the Respondents in order to commence their action. Despite the existence of numerous methods of service, Appellants failed to meet this requirement with regard to either Respondent. This failure to timely serve caused there to be an absence of a commencement of the action which was necessary for the court to rule on any factual or legal issues presented in the case. Although Appellants acknowledge a failure to timely serve, they argue that this failure should be excused due to circumstances beyond their control as well as due

to alleged misleading actions by the Respondents. However, the facts show otherwise. Appellants sat on their rights until the very end when they could have easily served Respondents well before the deadline of 120 days. They were not misled by any statements or actions by the Respondents. Respondents were never evasive – Respondent Barbour simply moved.

Appellants assert that service was late due to circumstances beyond their control. Their assertion that service was late due to a mistake by the Post Office is unfounded and without evidence. Moreover, any alleged untimely mailing by the Post Office could have been avoided by simply getting the certified mail to the Post Office earlier. There were no barriers. Most importantly, Appellants were not diligent in attempting to obtain service. Instead, they dallied until the last moment and now complain that failure of service was someone else's fault. Equitable tolling is only available to those who are diligent. Appellants were not. There was nothing extraordinary preventing them from properly perfecting service.

Since Appellants failed to properly file and serve, there is simply no active lawsuit. As a result, the requirements of Rule 12 do not apply nor can there be a default. Instead, the trial court properly dismissed this action.

Respectfully submitted,



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Mar 01 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

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

Luther Harris, Donna Harris, and Bobby E. Leopard, Appellants,

v.

Perry Wendall Barbour and Southland Transportation Co., Respondents.

CERTIFICATE OF COUNSEL

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

s/David L. Moore, Jr.

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Greenville, South Carolina

Date: March 1, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

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STATEMENT OF ISSUES

- I. WHETHER THE CIRCUIT COURT ERRED IN FINDING AFFIRMATIVE DEFENSES MAY NOT BE INVOKED WHEN ACTION HAS NOT PROPERLY COMMENCED.**
- II. WHETHER THE CIRCUIT COURT MAY EXTEND PERIOD OF TIME PROVIDED FOR PROPER SERVICE.**
- III. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN NOT FINDING EQUITABLE TOLLING WAS APPLICABLE IN THIS CASE.**

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. This appeal is brought pursuant to the dismissal by the circuit court of Appellants' Complaint against Respondents on March 10, 2020 and its denial of Appellants' Motion to Reconsider on July 14, 2020. Appellant has perfected his appeal and filed his Initial Brief on September 17, 2020. Respondent filed their Initial Brief on November 13, 2020.

ARGUMENTS

I.

THE CIRCUIT COURT ERRED IN NOT FINDING RESPONDENT BARBOUR WAIVED HIS RIGHT TO RAISE AFFIRMATIVE DEFENSES.

In their Initial Brief, Respondents contend the right to raise affirmative defense should only be entertained when the action has been commenced. (i.e. when Complaint has been filed and properly served within the statute of limitations, or within 120 days after the filing of the Complaint, when the same is not served within the statute of limitations. In other words, what Respondents assert is Rule 3 SCRCF should have been established first before Rule 12 SCRCF may be invoked. Appellants believe there is no hierarchy of importance in the provisions of the Rules of Court.

Firstly, Appellants maintain they have filed and served the Complaint within the reglementary period. Appellants had diligently performed all the acts that led to the service of the processes Respondents. Appellants should not be punished for the failure of the Post Office to forward the certified mail containing the processes on the day they were mailed. The negligence of the government entity is beyond Plaintiff's control.

It has long been held "in order to establish that service has been properly effected, the plaintiff need only show compliance with the civil rules on service of process." McCall v. IKON, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005); Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996). When these rules are followed, there is a presumption of proper service. Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995). Appellants showed compliance with the rules, and therefore service was presumptively proper.

Secondly, Appellants have shown that Courts of various jurisdictions have entertained and acted upon Complaints that have been filed but not properly served. Two such cases are Pusey v. Dallas Corp., 938 F.2d 498, 500 (4th Cir.1990) and Unisun Insurance v. Hawkins, 342 S.C. 537 (2000).

In Pusey v. Dallas Corp., 938 F.2d 498, 500 (4th Cir.1990), William Pusey filed a complaint for negligence, strict liability, breach of warranty and loss of consortium against Dallas Corporation. Due to a mistake in the identity of the registered agent for Dallas Corporation, the process was returned unexecuted on October 3, 1998. On January 26, 1989, Pusey requested for the re-issuance of the summons for service upon foreign corporation Dallas Corporation. The clerk has received this request on February 3, 1989, over 120-days after the filing of the Complaint. A new process was served on Dallas on March 1, 1989, which included

the complaint stamped filed on September 3, 1988 and February 3, 1989. Dallas Corporation filed no pre-answer motion under Rule 12 but served an answer that raised the statute of limitations defense. Dallas Corporation made no objection to the service of process. Ten months after filing its Answer, Dallas moved for summary judgment on the grounds of statute of limitations. Pusey contended that the action was timely filed on September 30, 1988 and that Dallas Corporation has waived any objections to the untimeliness of the service of process by not raising the defense either in a pre-answer motion or its answer. The District Court dismissed Pusey's case finding service was not made within the 120-days. On appeal, the Fourth Circuit Court of Appeals ruled:

The action as commenced when the Puseys filed their original complaint on September 30, 1998. Fed. R. Civ. P.3. Upon the expiration of 120 days from that date without service of process having been effected, the action was subject to dismissal without prejudice, either on motion of the defendant or on the court's own "initiative," Fed. R. Civ. P. 4(j), unless by its conduct Dallas could, and had, waived any right on its part or power on the court's part to have the action dismissed.

Pusey, supra.

In reversing the District Court's ruling, the Fourth Circuit Court of Appeals found Dallas waived its right to the affirmative defense of insufficiency of service of process when it failed to raise the same in its Answer. In so doing, the Dallas submitted itself to the personal jurisdiction of the Court. Ibid.

In the case of Unisun Insurance v. Hawkins, 342 S.C. 537 (2000), therein respondent Bruce Hawkins collided with a vehicle insured by Appellant Unisun Insurance. The accident occurred on October 8, 1994. Unisun was forced to pay the insured's losses under the uninsured motorist provision. Thereafter, Unisun filed a claim against Bruce Hawkins and his parents on October 3,

1997, for violation of the South Carolina Motor Vehicle Financial Responsibility Act. Unisun served the Hawkinses on October 4, 1997, four (4) days before the statute of limitations expired.

At the time of service, Bruce was no longer residing with his parents. In their Answer, the Hawkinses raised Unisun's failure to serve Bruce with the Complaint within the three (3)-year statute of limitations. The Hawkinses moved for summary judgment which the trial court granted. On appeal, Unisun asserted the trial court erred in finding that Bruce was not served within the statute of limitations period because he waived the right to contest the sufficiency of service of process by failing to properly challenge service under Rule 12(b)(5).

The Court of Appeals in *Unisun* ruled that the Hawkinses waived their right to assert affirmative defenses when they failed to properly object to the insufficiency of service of process. *Unisun, supra.*, citing *O'Brien v. R.J. O'Brien & Assocs.*, 998 F.2d 1394 (7th Cir. 1993). Furthermore, the Court deemed that Hawkinses' statute of limitations claim was inextricably tied to the attempt to serve the process, the doctrine laid down in the case of *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993), applies.

In *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993), our supreme court held that 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. *See also* James F. Flanagan, *South Carolina Civil Procedure* 100 (2d ed. 1996) ("The ... waiver provision affects not only the motion itself but any argument based on the alleged defect.").

Cited in *Unisun, supra.*

In *Unisun* and *Pusey*, as well as the case at bar, Appellants filed their respective complaints within the statute of limitations. In all three cases, Appellants attempted to serve Respondents with Summons and Complaint but failed, either due to Respondents' change of address (as in *Unisun* and the instant case), or due to a mistake (as in *Pusey*). While the service

of process was effected in both *Unisun* and *Pusey*, the processes were not received by the intended Respondents. In both cases, the Court held that due to Respondents' failure to object to the insufficiency of process in a timely manner, then Respondents could not successfully dismiss the case as they have waived such defense.

The ruling in *Pusey* sums up the principle in this matter: that the failure to serve process within the 120-day period does not automatically caused the dismissal of an action. The defendant must object and raise the affirmative defense of insufficiency of process in a responsive pleading or a motion, in a timely and proper manner. Barbour did not file an Answer nor his Motion to Dismiss within the 30-day period allowed to file a responsive pleading. Thus, he is deemed to have waived the right to dismiss the action based on the affirmative defense of insufficiency of service of process.

“... a defendant's unexcused failure to raise the untimeliness of a service defense by motion or answer must be held to deprive the court of that power, since a waiver of this defense constitutes a submission to personal jurisdiction of the court.” (citing *Pardazi*, 896 F.3e at 1316-17 & n.2)); see also *id.* At 501 n.4 (“[A] party's waiver operates not only to cut off his right to raise the defense, but the court's power to invoke it.” Citing *Pardazi*, 896 F.2d at 1316 n.2)).

Tate v. Smith, 1:14cv125 (M.D.N.C. Aug. 23, 2016).

In the case of Leach v. BB & T Corp., 232 F.R.D. 545 (N.D.W. Va. 2005), the Court laid down the following principle:

Effectuation of service is a precondition to a lawsuit, while waiver of insufficient service is the forfeiture of defense to that service. *Jenkins v. City of Topeka*, 136 F.3d 1274, 1275-76 (10th Cir. 1998). By failing to raise the defense of insufficient of service of process either in a pre-answer motion, or if no such motion is made, then in an answer, a defendant waives that defense and submits to the personal jurisdiction of the court, unless at the time of the service of the answer, the defendant did not know the defense was available. *Pusey v. Dallas Corporation*, 938 F.2d 498, 501 (4th Cir. 1991).

II.

THE CIRCUIT COURT MAY EXTEND TIME PROVIDED FOR PROPER SERVICE.

It has been generally established, the failure of a party to comply with procedural requirements does not affect the Court's subject matter. *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (1984)), as cited in *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91 (S.C. 2008). Proceeding from this, Appellant submits since the Circuit Court has the power to hear and determine the case, it may exercise its discretion to allow Appellants to serve their processes beyond the 120-day period. While it is true that Rule 4(m) FCRCP does not have a corresponding provision in the state rules, there is no law prohibiting state judges from granting such extension.

Furthermore, courts in various jurisdictions have applied a less-stringent approach on the 120-day time period to serve processes. Summons and Complaints filed or served beyond the statutory period have survived upon a showing of good faith and reasonable efforts of service on the part of the Appellants.

In the case of *Brown v. Marriott International, Inc.*, the court held:

The plaintiff's failure to properly serve the defendant was based on the mistake of the process server. In addition, the defendant has not shown prejudice resulting from granting the plaintiff an extension of time to serve the defendant. The plaintiff has offered a good faith and reasonable basis for failing to timely serve the defendant and dismissing the case would be an unfair result based on the lack of prejudice to the defendant. The Court holds that good cause exists to extend the time for service.

Brown v. Marriott International, Inc., Civil Action No. 2:04-2378-CWH (D.S.C. Mar. 7, 2007).

“Good cause generally requires the Plaintiff to demonstrate that she exercised ‘reasonable diligence in trying to effect service.’” *Gbane v. Capital One, NA*, No. PX-16-701, 2016 WL 3541281, at *1 (D. Md. June 29, 2016)(quoting *Jones v. Sears and Roebuck*, No. DKC-15-3092, 2016-WL 1696557, at *2 (D. Md. Apr. 28, 2016)). Thus, the Court may find good cause “where the plaintiff has taken some affirmative action to effectuate service of process upon defendant or ha[s] been prohibited, through no fault of his own, from taking such an affirmative action.” *Tenenbaum v. PNC Bank Nat’l Ass’n*, No. DKC-10-2215, 2011 WL 2038550, at *4 (D. Md. May 24, 2011) (quoting *Vincent v. Reynolds Mem’l Hosp., Inc.*, 141 F.R.D. 436, 437 (N.D. W. Va. 1992)).

Shilling v. Thomas, Case No.: PWG-16-2696 (D. Md. Mar. 16, 2017).

In recent cases, the Courts exercised their discretion to extend period of time to serve processes beyond the 120-day time period without showing good cause. Defendant Barbour was not prejudiced by the delay in service of the Summons and Complaint, since he was represented by the same counsel as Defendant Southland, his employer, as such, he has actual notice of the facts and circumstances of the case, as well as the causes of action against him. Henderson v. United States, 517 U.S. 654 (1996), Vantage, Inc. v. Vantage Travel Service, Inc., C.A. No. 6:08-2765-HMH (D.S.C. Mar. 20, 2009).

In *Vantage, Inc. v. Vantage Travel Service, Inc.*, Plaintiff Vantage filed a complaint for violation of Lanham Act, alleging Defendant infringed on its right to exclusive use of the VANTAGE mark. The action was filed on August 6, 2008. On December 22, 2008, 138 days after the filing of the action (18 days after the 120-day time period set forth in rule 4(m). Plaintiff alleged in its motion that it needed more time because the parties were engaged in settlement negotiations. The court granted the Plaintiff’s motion and afforded the Plaintiff 60 days to effect service. The Plaintiff served the Defendant on January 30, 2009, within this time frame. Vantage, Inc. v. Vantage Travel Service, Inc., C.A. No. 6:08-2765-HMH (D.S.C. Mar. 20, 2009).

The instant case is akin to Vantage case. Appellants filed the Complaint within the statute of limitations. It entered into a settlement negotiation with Respondent's agent. After an unsuccessful attempt to settle, Appellants diligently performed all the acts that led to the service of the processes to Respondents. Appellants have given reasonable efforts in effecting service upon Respondents, even going beyond the duty by serving Respondent Barbour three times. Due diligence and reasonable efforts have been recognized by courts as "good cause" to permit an extension of time to serve process beyond the 120-days requirement.

In sum, the circuit court could have exercised its discretion to grant an extension of time for service of the Summons and Complaint as Appellants have demonstrated reasonable efforts to effect service on both Respondents, there was no prejudice to herein Respondents and considering the significant injuries sustained by Appellants.

III.

THE CIRCUIT COURT ABUSED ITS DISCRETION IN NOT FINDING EQUITABLE TOLLING WAS APPLICABLE IN THIS CASE.

Appellant maintains the statute of limitations should be tolled based on equitable tolling. In South Carolina, a statute of limitations may be tolled pursuant to statute or pursuant to the doctrine of equitable tolling. "[I]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." Hooper v. Ebenezer Sr. Services & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29 (2009).

Hooper court concluded "[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Hooper quoting Hausman v. Hausman, 199 S.W.3d 38,

42 (Tex. App. 2006). Therefore, “equitable tolling may be applied where it is justified under all the circumstances ... when the interests of justice compel its use.” *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 687 S.E.2d 29 (S.C. 2009). (Emphasis added).

This case arose from an accident occurred on June 10, 2016. Appellants filed the instant case on June 7, 2019. They entered into negotiations with Defendant Southland’s representative, Sentry Insurance (hereinafter referred as “Sentry”), on June 9, 2019. After a protracted negotiation, where Sentry delayed its response for various reasons, the two parties failed to reach an agreement. When the negotiations failed, Appellants served the Respondents copies of the Summons and Complaint. Defendant Southland Transportation’s license to operate a business in South Carolina had been forfeited. Defendant Barbour’s address at the time of the wreck was 130 Valentine Court, Martinsville, Virginia 24112. Both Respondents are considered out-of-state Respondents. As a result of the inaccurate addresses they gave, Appellants were unable to serve the individuals in a timely manner at their place of residence in a foreign state.

South Carolina enacted S.C. Code Ann. § 15-3-30 (1976) to address tortfeasors who caused personal injury in South Carolina, only to leave the state and put the ability of the victims to seek redress in jeopardy, particularly the ability to reach the Respondents to satisfy any judgments rendered against them. Appellants believe that this statute is applicable in the instant case. S.C. Code Ann. § 15-3-30 provides:

If when a cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the terms of this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside outside of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

In the case at hand, both individuals departed from this State and resided elsewhere, leaving no forwarding address with the SCDMV, and yet continued going about their business of transporting and going to and from South Carolina. This failure can only be seen as a willful and wanton attempt to escape the liability for their tortious actions. Appellants believe Respondents' successful withholding of their actual addresses caused the statute of limitations to be an issue. But for the invalid addresses, Appellants would have timely served them. Appellants have a right to seek the damages incurred as a result of South Carolina's gracious allowance of foreign drivers to traverse this State's highways.

The case of Meyer v. Paschal, 498 S.E.2d 635 (S.C. 1998) supports Appellants contention that the Statute of Limitations was tolled for each individual due to their continued departure from this State following the underlying wreck. Meyer v. Paschal held that "the period of limitations may be tolled when that information is not known to the plaintiff." The information relating to Respondents' whereabouts had not been provided to the State; and, therefore, not provided to Appellants. Defendant Barbour's location continues to be unknown to Appellants.

The tolling provision was created to prevent Appellants in this State from being unfairly damaged by foreigners without the chance to recover their damages. Appellants believe that they are the individuals for whom the tolling provision was created. The doctrine of equitable tolling should be applied in this case and can be summarized as:

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present

sufficiently rare and exceptional circumstances that would warrant the application of the doctrine.

Equitable tolling has been deemed available where—

- Extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
- The plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.
- The plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.

It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

51 Am.Jur.2d Limitation of Actions § 174 (2007) as cited in Pelzer v. State, 378 S.C. 516 (S.C. Ct. App. 2008)

Taking into consideration the facts and circumstances of this case, Appellants submit that equitable tolling should be applied. First, Appellants had been diligent in pursuit of an amicable resolution by undertaking negotiations with Respondents. Respondents had been provided a demand for the purpose of settlement on June 7, 2019, wherein requests were made for the purpose of clarifications in same. After June 14, 2019, Respondents made no further requests relating to the demand, implying it was ready for evaluation. On July 25, 2019, the parties communicated once more regarding a potential offer to the demands made. Respondents indicated that an offer would be made the following week. An offer was finally received on August 8, 2019. The offer was not reasonable. Ultimately, Appellants advised counsel to pursue litigation.

In short, the doctrine of equitable estoppel applies in the instant case. Under South Carolina law

A defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct. Such inducement may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary. The defendant's conduct may also involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue.

Kleckley v. Nw. Nat. Cas. Co., 338 S.C. 131, 136--137 (2000).

Second, Appellants had diligently performed all the acts that led to the service of the processes to herein Respondents. Appellants should not be punished for the failure of the Post Office to forward the certified mail containing the processes on the day they were mailed. The negligence of the government entity is beyond Plaintiff's control.

Appellants have certainly not slept on their rights but diligently attempted, in good faith, to enforce them. The interests of justice and fairness, as well as the purpose of the statute of limitations itself, favor allowing Appellants claim to proceed.

Third, as previously discussed, the tolling provision, S.C. Code Ann. § 15-3-30 and the doctrine laid down in Meyer v. Paschal, are applicable in this instant case.

CONCLUSION

Based on the foregoing, in addition to the arguments made in the opening brief, Appellant respectfully requests this Honorable Court to grant Appellant's appeal, and to remand the case to the Circuit Court to allow Appellant to properly serve the Respondents and litigate the case.

[SIGNATURE PAGE TO FOLLOW}

Anderson, South Carolina
Date: February 27, 2021

s/Donald L. Smith

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Mar 01 2021

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SC Court of Appeals

J. Derham Cole, Judge

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

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

**CERTIFICATE OF COUNSEL
FOR FINAL REPLY BRIEF OF APPELLANT**

I HEREBY CERTIFY that Final Reply Brief of the Appellant in the above-captioned case complies with Rule 211 (b) SCACR.

Anderson, S.C.
February 27, 2021

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**LETTER TO THE APPELLATE COURT CLERK
APPELLANT'S CITATION OF SUPPLEMENTAL AUTHORITY**

February 27, 2021

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

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Mar 01 2021

SC Court of Appeals

RE: Luther Harris, et.al. vs. Perry W. Barbour and Southland Transportation, Co.
Appellate Case No. 2020-001110

Dear Ms. Kitchings:

Pursuant to South Carolina Rules of Appellate Procedure, Rule 208(7), Appellants provide the following supplemental citation:

Henneberry v. Borstein, 2012 NY Slip Op. 00235 [91 AD3d 493]

This case bears some similarity with the facts of this case. The Plaintiff in the above-cited case filed a legal malpractice and breach of fiduciary complaint against Defendant Attorneys and law firm by filing a summons with notice on November 19, 2007, well within the three-year statute of limitations. Plaintiff arranged for a licensed process server to serve Defendants on March 13, 2008, within 120 days of the filing of the summons with notice. Two affidavits of service were filed to the court. On April 19, 2008, Defendants submitted a notice of appearance and demanded for a copy of the complaint, which Plaintiff served upon them on April 28, 2008. Alleging defective service and lack of personal jurisdiction, Defendant sought to dismiss the case on November 7, 2008, while Plaintiff moved for an extension of time to effect proper service.

In her desire to protect her claims in the event the first complaint is terminated, Plaintiff filed a second complaint in 2009, which contained substantially the same claims. Defendants moved to dismiss the 2009 case raising identical action pending before the court.

Both cases were dismissed: the first case for improper service (dismissed without prejudice), and the 2009 action based on the pendency of another identical action. It should be noted that in the first case, while the court dismissed the complaint, the court granted Plaintiff's motion for extension of time to serve his complaint.

Plaintiff thereafter filed the third action on February 11, 2010, which was dismissed for untimeliness. Plaintiff appealed all three orders.

In ruling in favor of the Plaintiff, the Supreme Court in New York County applied the "interest of justice" in granting Plaintiff the opportunity to pursue her action. The Supreme Court took into consideration Plaintiff's attempt to serve Defendants by hiring process server within

the 120-day time requirement, Defendants knowledge/awareness of the action as soon after the filing of the complaint and that her complaint sets forth actionable claims.

Myers v. Secretary of the Department of the Treasury, 173 F.R. D. 44 (E.D.N.Y. 1997)

Plaintiff in the above-mentioned case, worked as a Tax Examiner at Internal Revenue Services in January 1988. In November 1990, he was assigned to work to the computer room in IRS located in Holtsville, New York. While working there, he filed a claim under the grievance proceedings of the IRS as well as 6 claims of discrimination, harassment and retaliation with EEOC. He was again re-assigned to a different Department as a Remittance/Perfection Clerk for alleged performance. When his administrative claims have been disposed of, Plaintiff filed the above-mentioned case on April 26, 1996. The Complaint alleged discrimination under the Age Discrimination in Employment Act (ADEA), 20 U.S.C. §621 et. seq. and the New York State Executive Law Section 296.

On May 2, 1996, Plaintiff served the Office of Regional Counsel of IRS but failed to serve the Attorney General, the United States Attorney for Eastern District of New York and the Secretary of Treasury as required by law. The Attorney for Eastern District of New York was provided a copy by the IRS Regional Counsel. Defendant filed an Answer on July 1, 1996, raising lack of personal jurisdiction and insufficiency of process. In November 1996, Plaintiff attempted to serve Amended Verified Complaint correctly naming Defendants. Defendants did not accept service alleging the 120-day period had expired.

The Court finding that Plaintiff performed at least partial service upon the Government and subsequently made a good faith effort to correct service. The Court ruled in favor of Plaintiffs, allowing him to serve the Summons and Complaint within thirty 30 days from date of the Order, noting that Defendants will not be prejudiced having known of Plaintiff's claims since 1990.

In both Henneberry and Myers, the New York Supreme Court ruled that even though Plaintiffs failed to show good cause for failure to serve their respective processes within the 120 days, using the "interest of justice" standard, it may grant Plaintiffs extension of time to serve where the statute of limitations had expired in order to avoid "harsh result" to the Plaintiffs.

Spence v. Spence, 386 S.C. 106 (S.C. 2006)

This case bolsters Appellant's arguments found in pages 12-17 that Appellants should have given an opportunity to effect proper service upon Defendants. While not addressing the issue of improper service, Spence resolves the effect of expiration of the statute of limitations in cases that were dismissed without prejudice. The pertinent declaration in Spence is as follows:

When a complaint is dismissed without prejudice and the plaintiff is given the opportunity to file and serve an amended complaint, but instead chooses to appeal, the plaintiff ordinarily waives the right to amend his complaint. The appellate court may affirm the dismissal with prejudice if it determines the lower court properly

dismissed the complaint. Brighton, 102 S.W.3d at 468; Swink v. Ernst Young, 908 S.W.2d 660, 663 (Ark. 1995) (when trial court dismisses complaint pursuant to Rule 12(b)(6) for failure to state facts upon which relief can be granted, dismissal is without prejudice; plaintiff then has the election to plead further or appeal). When a plaintiff is not given the opportunity to file and serve an amended complaint but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice.

When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. (internal citation omitted).

Widener v. Fort Mill Ford, 381 S.C. 522, 524 (S.Ct. App. 2009)

This case supports Appellants arguments found in pages 12-17 that Courts have allowed parties to seek relief when their rights to their claims have been precluded by the stringent application of procedural rules. In Widener, the Supreme Court determined the dismissal of the case prejudiced therein Plaintiff because any future action will be barred by the statute of limitations. The Supreme Court reversed the decision of the trial court and remanded the case to the lower court to enter an Order staying action pending the outcome of arbitration proceedings.

Respectfully Submitted,

s/Donald L. Smith

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Luther Harris, Donna Harris, and Bobby E. Leopard,
Appellants,

v.

Perry Wendell Barbour and Southland Transportation
Co., Respondents.

Appellate Case No. 2020-001110

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Unpublished Opinion No. 2022-UP-397
Submitted October 1, 2022 – Filed November 2, 2022

AFFIRMED

Donald Loren Smith, of Attorney Office of Donald
Smith, of Anderson, for Appellants.

David L. Moore, Jr., of Turner Padget Graham & Laney,
PA, of Greenville, for Respondents.

PER CURIAM: Luther and Donna Harris and Bobby Leopard (collectively, the Appellants) appeal a circuit court order granting Perry Barbour's and Southland Transportation Company's motions to dismiss. On appeal, the Appellants argue the

circuit court erred by (1) failing to equitably toll the statute of limitations, (2) failing to find that Barbour waived his affirmative defenses, (3) failing to find they substantially complied with the rules for service of process, and (4) failing to extend the time to perfect service of process. We affirm.

1. We hold the circuit court did not err by failing to equitably toll the statute of limitations. *See Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) ("Tolling' refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting." (quoting 51 Am. Jur. 2d *Limitation of Actions* § 169 (2000))); *id.* ("Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period." (quoting *Limitation of Actions* § 169)). The Appellants failed to show they were prevented from timely serving the summons and complaint on the director of the South Carolina Department of Motor Vehicles and the secretary of state by an event beyond their control. *See Hooper*, 386 S.C. at 115, 687 S.E.2d at 32 ("The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use."); *id.* at 116, 687 S.E.2d at 32 ("It has been observed that '[e]quitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.'" (alteration in original) (quoting *Ocana v. Am. Furniture Co.*, 91 P.3d 58, 66 (N.M. 2004))); S.C. Code Ann. § 15-9-350 (2005) (naming the DMV director as a nonresident driver's "true and lawful attorney upon whom may be served all summons or other lawful process in any action" that results from a collision that occurred in South Carolina); *Hooper*, 386 S.C. at 117-18, 687 S.E.2d at 33-34 (holding the appropriate remedy for the defendant's failure to properly list its registered agent for service with the secretary of state was to equitably toll the statute of limitations).

2. We decline to decide whether the circuit court erred by failing to find that Barbour waived his affirmative defenses because our finding that the circuit court did not err by failing to equitably toll the statute of limitations is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating appellate courts need not address remaining issues when disposition of prior issue is dispositive).

3. We find that the Appellants' remaining issues are not preserved for appellate review. *See Miller v. Dillon*, 432 S.C. 197, 207, 851 S.E.2d 462, 467 (Ct. App. 2020) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved

for appellate review." (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998))).

AFFIRMED.¹

KONDUROS, HEWITT, and VINSON, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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Dec 13 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

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

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

MOTION TO FILE OUT OF TIME

Appellants respectfully request leave to submit a check out of time in order to perfect their Petition for Rehearing. In support of this request, Appellants state as follows:

Appellants seek the opportunity to have their case reheard. Appellants do not ask for this courtesy for the purpose of delay. They ask for matter to be heard on its merits, as opposed to not being heard due to a check's absence. Moreover, this extension would not prejudice the Respondents in any way.

s/Donald L. Smith

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Attorney for Appellant

Anderson, South Carolina
December 12, 2022.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Nov 21 2022

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

SC Court of Appeals

J. Derham Cole, Judge

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

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

**PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

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

STATEMENT OF FACTS

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

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

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

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

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

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

Counsel immediately filed responsive pleadings following his notice of February 11th:

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

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

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

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

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

SUMMARY OF ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thus, under the unique circumstances of this case, we conclude it is appropriate to equitably toll the statute of limitations for the time Hooper spent in pursuit of Ebenezer's nonexistent agent.

Finally, we note that public policy and the interests of justice weigh heavily in favor of allowing Hooper's claim to proceed. The statute of limitations' purpose of protecting defendants from stale claims must give way to the public's interest in being able to rely on public records required by law.

Ibid. at 119.

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

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

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

CONCLUSION

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

Anderson, South Carolina
November 21, 2022.

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



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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November 22, 2022

Mr. Donald Loren Smith, Esquire
2722 W, Whitner St.
Anderson SC 29626

Re: Luther Harris v. Perry Barbour
Appellate Case No. 2020-001110

Dear Counsel:

Upon reviewing your petition for rehearing, the following deficiency has been noted under the South Carolina Appellate Court Rules (SCACR), and this deficiency must be corrected within ten (10) days of the date of this letter or your petition for rehearing will not be considered:

- The required filing fee has not been submitted. The correct filing fee is \$50.00.

Very truly yours,

A handwritten signature in black ink, appearing to read "V. Claire Allen".

CLERK

cc: David L. Moore, Jr., Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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V. CLAIRE ALLEN
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December 12, 2022

Mr. Donald Loren Smith, Esquire
2722 W, Whitner St.
Anderson SC 29626

Re: Luther Harris v. Perry Barbour
Appellate Case No. 2020-001110

Dear Counsel:

As of the date of this letter the deficiency for the petition for rehearing has not been cured per the court's letter of November 22, 2022, therefore the petition will not be acted upon. Furthermore, no action will be taken on the motion to allow late filing and the filing fee for that motion will be returned.

Very truly yours,

A handwritten signature in cursive script that reads "V. Claire Allen".

CLERK

cc: David L. Moore, Jr., Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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December 12, 2022

Paul Magargle
Div. of Finance and Personnel
1220 Senate St., Suite 101
Columbia, S.C. 29201

Re: Luther Harris v. Perry Barbour
Appellate Case No. 2020-001110

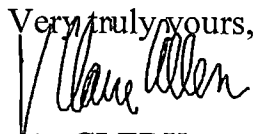
Dear Mr. Magargle:

We received a motion to allow late filing in the above entitled appeal. The appellant's counsel provided this office with a fifty dollar (\$50.00) filing fee in the form of a check, number 2077, which was deposited on November 21, 2022. This motion is no longer being considered.

Please refund the \$50.00 filing fee to Donald Loren Smith at their mailing address furnished below.

Mr. Donald Loren Smith, Esquire
2722 W, Whitner St.
Anderson SC 29626

Thank you for your assistance in this matter.

Very truly yours,

CLERK

cc: David L. Moore, Jr., Esquire
Donald Loren Smith, Esquire



The South Carolina Court of Appeals

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CLERK

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December 12, 2022

The Honorable Amy W. Cox
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: Luther Harris v. Perry Barbour
Lower Court Case No. 2019CP4202092
Appellate Case No. 2020-001110

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

A handwritten signature in cursive script that reads "V. Claire Allen".

CLERK

Enclosure

cc: Donald Loren Smith, Esquire
David L. Moore, Jr., Esquire

RECEIVED

Dec 13 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

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

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

MOTION TO FILE OUT OF TIME

Appellants respectfully request leave to submit a check out of time in order to perfect their Petition for Rehearing. In support of this request, Appellants state as follows:

Appellants seek the opportunity to have their case reheard. Appellants do not ask for this courtesy for the purpose of delay. They ask for matter to be heard on its merits, as opposed to not being heard due to a check's absence. Moreover, this extension would not prejudice the Respondents in any way.

s/Donald L. Smith

Donald L. Smith (SC Bar#6699)

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Anderson, SC 29626

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Attorney for Appellant

Anderson, South Carolina
December 12, 2022.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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February 03, 2023

Mr. Donald Loren Smith, Esquire
2722 W, Whitner St.
Anderson SC 29626

Re: Luther Harris v. Perry Barbour
Appellate Case No. 2020-001110

Dear Counsel:

We are in receipt of your motion to allow late filing of the petition for rehearing. Please be advised that the remittitur was properly sent, ending this Court's jurisdiction over this appeal. Therefore, no further action will be taken on your motion to allow late filing of the petition for rehearing.

Very truly yours,

A handwritten signature in cursive script, appearing to read "V. Claire Allen".

CLERK

cc: David L. Moore, Jr., Esquire

RECEIVED

Feb 21 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

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

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

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

PETITION TO RECALL REMITTITUR

**MOTION TO RECALL THE REMITTITUR TO THE HONORABLE H.
BRUCE WILLIAMS, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF
THE COURT OF APPEALS:**

Appellants/petitioners, Luther Harris, Donna Harris, and Bobby Leopard, respectfully petition this court for an order recalling the remittitur and permitting them to reinstate their appeal in this case. Remittitur was sent due to the Clerk having not received a check for the Petition for Rehearing. Petitioners pray for the recall to avoid a grave miscarriage of justice. Petitioners offer the following in support of their petition.

RELEVANT PROCEDURAL HISTORY

The above-captioned appeal has a sister appeal (Appellate Case No.: 2021-000269).

Upon filing the appeal in that case, Petitioners moved to have the cases consolidated because the facts and questions raised in the respective appeals were virtually the same. Said motion was filed on March 11, 2021. Opposing counsel announced his lack of opposition to the motion on March 18, 2021. The motion was denied because the appeals were in different stages on April 13, 2021. Decisions had yet to be made in either. The appeals proceeded from there.

The Court affirmed the lower court's decision (2022-UP-429). Petitioners filed a Motion to File Out of Time for the purpose of filing their Petition for Rehearing on Friday, November 18, 2022. Petitioners filed their Petition for Rehearing on Monday, November 21, 2022. The Court sent a deficiency letter due to lack of payment on Tuesday, November 22, 2022. Upon inquiry, the bookkeeper said a \$50.00 check was sent for the Petition. It was believed the deficiency related to the fact the payment was not associated with the email filing; and the check would get there when the petition arrived in Columbia.

On December 12, 2022, it was learned the Court of Appeals received the Monday mailing of the petition from Anderson on Tuesday in Columbia. The Petitioners learned the payment had never been received by the Court for the petition. Petitioners immediately sent a Motion to File Out of Time, along with two checks (one for the motion, #2093, and one for the petition, #2094).

On February 3, 2023, the Clerk cc'd the undersigned with a letter to the Finance and Personell Department which read, in part: "The appellant's (sic) counsel provided this office with a fifty dollar (\$50.00) filing fee in the form of a check, number 2093, which was deposited on December 15, 2022. This motion is not being acted on." It was at this point

Petitioners knew their case had been dismissed for the failure to provide a \$50.00 check, though the Court of Appeals retained the check earmarked for the petition, #2094.

ARGUMENTS

1. THE FAILURE TO INCORPORATE ELECTRONIC FILING IN THE APPELLATE SYSTEM AS IT RELATES TO FEES PROVIDES FOR UNFAIR RESULTS.

Electronic Filing (EF) began as a pilot program in 2015. All Circuit Courts in the State of South Carolina were participants in EF by September 18, 2019. The EF conducted in the forty-six (46) counties provides the filer with a manner in which to pay for the filing with a credit card. The system ensures payment is made simultaneously with the filing. The manual system in place prior to EF required payment prior to the clerk accepting the filing. Both systems required payment before the matter would be considered filed.

As of February 9, 2023, the Appellate Court System in South Carolina remains the only the aspect of the state's court system which does not require simultaneous payment due to the fact it has yet to incorporate a method of payment to work in conjunction with electronic filing. The appellate courts' lack of consistency as it relates to filing has created a situation wherein litigants can lose their cases because of things not related to the cases themselves. This is the antithesis to the goal of any court system. The goal of the courts is to provide the litigants, and the causes of which they are pursuing, with finality which is related to the merits of their cases. The courts do not wish for cases to be determined on technicalities. Seemingly, the Courts don't wish for the litigants to lose based on the misplacement of a check for the filing fee.

This matter was dismissed by the Clerk of Court because a check for the Petition for Rehearing had not been received by December 12, 2022. There was no "good cause" allowed

to be argued to prevent such an injustice. The Petition for Rehearing had already been clocked so the check, while necessary, was ministerial in nature. The litigants filed the documentation necessary to allow the Court to review anything it may have overlooked in arriving at its decision.

The deficiency letter which was emailed on November 22, 2022. It said the following: "Upon reviewing your petition for rehearing, the following deficiency has been noted..." Upon reviewing your petition means reviewing the actual document. The Petition for Rehearing was a document that had been emailed and mailed to the Court the day before. Based on the fact it was understood a payment had not been made when petition was electronically filed, the deficiency letter received via email the next day was considered protocol based on the payment not accompanying the electronic filing. This thought was corroborated by the bookkeeper's affirmation she had written the check. (Exhibit 1, Affidavit).

If the Court's deficiency letter had said, "Upon receiving Petitioners' Petition for Rehearing, the Court was unable to locate the \$50.00 payment for the Petition. If this deficiency is not addressed within the next ten days...", it would have been understood the money had not been in the envelope with the petition. Very simply, Petitioners were unaware payment had not been received once the petition was physically received. This mistake was based on the review of the petition, not receipt of the petition, language. Having Petitioners' petition be dismissed, when it had been filed and clocked, because of the inadvertent reading of the deficiency letter is an inequitable result. Petitioners believe that based on the circumstances they are deserving of having their appeal reheard.

2. THE COURTS IN SOUTH CAROLINA WISH FOR CASES TO BE DECIDED ON THEIR MERITS.

The purpose of the court system is to bring a peaceful resolution to a state's

constituents by way of the trial process, whether by a jury or by the bench. "Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits." Dixon v. Besco Eng'g, 320 S.C. 174, 463 S.E.2d 636 (Ct.App.1995). "There is no indication that the failure to transmit a copy of the [Rule 59(e), SCRCP, motion] to the circuit court affects the tolling provision of Rule 203(b)(1), SCACR." Gallagher v. Evert, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002).

3. RESPONDENTS' COUNSEL DID NOT OPPOSE THE MOTION TO FILE OUT OF TIME, THEREBY IMPLICITLY CONSENTING TO THE PETITION FOR REHEARING.

Respondents' Counsel did not file an objection to Petitioners' Motion to File Out of Time, and subsequent Petition for Rehearing. Respondents' silence is tantamount to waiving their option to object to Petitioners' motion and petition.

Waiver of [the statute of] limitations may be shown by words or conduct. Thus, waiver may result from express agreement, ... from failure to claim the defense, or by any action or inaction manifestly inconsistent with an intention to insist on the statute." (emphasis added) 54 C.J.S. Limitation of Actions § 22 at 52 (1987).

Mende v. Conway Hospital, Inc., 404 S.E.2d 33 (S.C. 1991). Based on Respondents' waiver of their right to object, they will not be prejudiced by the Court granting the prayer of the Petitioners.

CONCLUSION

Petitioners respectfully pray for the Court to recall the Remittitur so that they may pursue having the case adjudicated on the merits as opposed to technicality. The Court previously received and clocked the subject Petition for Rehearing. Since the acts were done to submit the petition; and it was received, it is ripe for the Court's consideration.

s/Donald L. Smith

Donald L. Smith (SC Bar#6699)

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Anderson, SC 29626

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Attorney for Appellants

Anderson, South Carolina

February 21, 2023.

RECEIVED

Feb 21 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

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

Luther Harris, Donna Harris and Bobby Leopard,

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

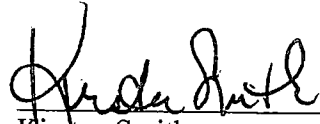
AFFIDAVIT OF KIRSTEN SMITH

PERSONALLY, appeared before me, Kirsten Smith, who being duly sworn and states: On Friday, November 18, 2022, Mr. Smith asked me to write a \$50 check for a filing fee related to the Petition for Rehearing he was preparing in Appellate Case No.: 2020-001110, before I left for the day. Knowing he had been working on the Petition for Rehearing, I surmised the check was being sent with the Petition in the afternoon mail.

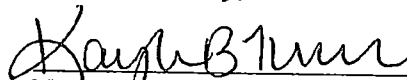
On Tuesday, November 22, 2022, a letter was received from the Court stating payment had not been received for the Petition and we had ten (10) days to correct the deficiency. Knowing that I had prepared the check on Friday for the Petition, I assured Mr. Smith that the filing fee had been sent. Given that information, there was no reason to believe any deficiency that may have existed hadn't been corrected.

I learned on December 12, 2022 that the \$50 check I thought had been sent for the Petition was, in fact, applied to a Motion to Extend time. Mr. Smith immediately informed the Court of the mistake; and two (2) additional \$50 checks were sent to the Court to cover another Motion to File Out of Time (#2093) and for the Petition for Rehearing (#2094).

On February 3, 2023, a letter was received from the Court stating that the \$50 filing fee which had been received on December 15, 2022 and deposited on the same date was not going to be accepted. To date, all motions and briefs have been filed and corresponding payments for each have been received and deposited by the Court.


Kirsten Smith

SWORN to before me this 21st
Day of February, 2023.


Notary Public for South Carolina
My Commission Expires: 7/19/27

RECEIVED

Feb 21 2023

SC Court of Appeals

**FORM 7
PROOF OF SERVICE**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Case No. 2019-CP-42-02092
Appellate Case No. 2020-001110 (2022-UP-397)

Luther Harris, Donna Harris and Bobby Leopard,

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

PROOF OF SERVICE

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

Ms. Jenny Abbott-Kitchings
Mr. David L. Moore, Esquire

ctappfilings@sccourts.org
DMoore@turnerpadget.com

s/Donald L. Smith

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

Anderson, South Carolina
February 21, 2023.

RECEIVED

Feb 21 2023

SC Court of Appeals

**FORM 8
LETTER TO THE APPEALS COURT CLERK
PETITION TO RECALL REMITTITUR**

February 21, 2023

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

**RE: Luther Harris, Donna Harris and Bobby Leopard vs.
Perry Wendell Barbour and Southland Transportation Co.
C.A. No.: 2019-CP4202092
Appellate Case No. 2020-001110 (2022-UP-397)**

Dear Ms. Kitchings:

Please find enclosed the following documents for filing in the above-captioned, appealed case:

1. Petition to Recall Remittitur;
2. Affidavit;
3. Check for \$50.00; and,
4. Proof of Service of same.

Sincerely,

s/Donald L. Smith

Donald L. Smith, (Bar No. 6699)

Attorney for Appellant

2722 W. Whitner Street

Anderson SC 29626

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Attorney for Appellants

cc:

Mr. David L. Moore, Jr., Esquire

RECEIVED

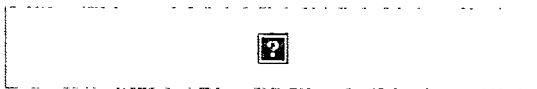
Feb 22 2023

SC Court of Appeals

From: Moore Jr., David L
To: Court Of Appeals Filings; Don Smith; Kirstenn0118; McDade, Jeanie
Subject: RE: Harris, et al. v. Barbour, et al.; 2020-001110 (2022-UP-397)
Date: Wednesday, February 22, 2023 12:32:04 PM

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. *******

I am not taking a position on this and will leave it to the Court's discretion



David L. Moore Jr.
Shareholder
PO Box 1509 | Greenville, SC 29602
200 East Broad Street, Suite 250 | Greenville, SC 29601
864-552-4625 | Fax 864-282-5966
dmoore@turnerpadget.com
[Bio](#) | [vCard](#) | [Location](#)

From: Court Of Appeals Filings <ctappfilings@sccourts.org>
Sent: Wednesday, February 22, 2023 8:30 AM
To: Don Smith <attorneydonaldsmith@gmail.com>; Court Of Appeals Filings <ctappfilings@sccourts.org>; Moore Jr., David L <DMoore@TurnerPadget.com>; Kirstenn0118 <kirstenn0118@gmail.com>; McDade, Jeanie <JMcDade@TurnerPadget.com>
Subject: RE: Harris, et al. v. Barbour, et al.; 2020-001110 (2022-UP-397)

Dear Counsel:

The Court has received your filing. A stamped copy is attached for your records.

Thank you.

From: Don Smith <attorneydonaldsmith@gmail.com>
Sent: Tuesday, February 21, 2023 11:27 PM
To: Court Of Appeals Filings <ctappfilings@sccourts.org>; Moore Jr., David L <dmoore@turnerpadget.com>; Kirstenn0118 <kirstenn0118@gmail.com>; McDade, Jeanie <JMcDade@turnerpadget.com>
Subject: Harris, et al. v. Barbour, et al.; 2020-001110 (2022-UP-397)

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. *******

Dear Ms. Kitchings:

Please find attached the Petitioners' Petition to Recall the Remittitur. We thank you in advance for filing said documentation.

Sincerely,
Don Smith

--
***** PLEASE NOTE OUR NEW ADDRESS LISTED BELOW*****

Donald L. Smith

Attorney Office of Donald Smith

2722 W. Whitner St.

Anderson SC 29626

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

# The South Carolina Court of Appeals

Luther Harris, Donna Harris, and Bobby E. Leopard,  
Appellants,

v.

Perry Wendell Barbour and Southland Transportation  
Co., Respondents.

Appellate Case No. 2020-001110

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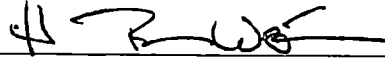
## ORDER

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On November 2, 2022, this Court issued an opinion affirming the circuit court. On November 18, 2022, the day the remittitur was to be sent, Appellants filed a motion to allow late filing of their petition for rehearing along with the \$50 filing fee. Appellants subsequently filed the petition on November 21, but failed to send the accompanying filing fee for the petition. Accordingly, on November 22, this Court sent Appellants a deficiency letter notifying Appellants of the deficiency and allowing them ten days to cure or the petition would not be considered. On December 12, 2022, this Court sent Appellants another letter, explaining the deficiency had not been cured and therefore, we would not act upon the petition for rehearing. The remittitur was sent the same day.

Appellants have now filed a motion to recall the remittitur, explaining counsel's employee mistakenly sent the filing fee for the November 18 motion to file out of time, but failed to send another filing fee for the petition for rehearing. Apparently unaware of the employee's error, Appellants believed the November 22 deficiency letter was a result of the petition having been e-filed and the check arriving separately. Based on that belief, Appellants took no action upon receipt of the November 22 deficiency letter. Appellants are correct in asserting South Carolina courts prefer to decide cases on the merits, when a procedural error can be easily cured. However, a remittitur cannot be recalled except upon "a very strong showing . . . that the remittitur was sent down through some mistake or inadvertence on the part of this Court or its officer." *State v. Keels*, 39 S.C. 553,

17 S.E. 802 (1893). Appellants have failed to make such a showing. Appellants' motion, therefore, is denied.



C.J.

FOR THE COURT

Columbia, South Carolina

cc:

Donald Loren Smith, Esquire

David L. Moore, Jr., Esquire

Amy W. Cox

**FILED**  
**Mar 17 2023**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

**RECEIVED**

**Apr 13 2023**

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

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) SCRPC. 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 20<sup>th</sup> 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**

Donald L. Smith (SC Bar#6699)

2722 W. Whitner St.

Anderson, SC 29626

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

[attorneydonaldsmith@gmail.com](mailto:attorneydonaldsmith@gmail.com)

*Attorney for Petitioners*

Anderson, South Carolina  
April 12, 2023.

**RECEIVED**

**Apr 20 2023**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Opinion No.: 22-UP429 (S.C. Ct. App. Filed December 7, 2022)  
Appellate Case No.: 2021-000269  
C.A. Case No.: 2020-CP-11-00632

Bobby E. Leopard, Luther Harris, and Donna Harris ..... Appellants,

v.

Perry W. Barbour, ..... Respondent.

\*\*\*\*\*

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Unpublished Opinion No.: 2022-UP-397 (S.C. Ct. App. Filed December 7, 2022)  
Appellate Case No.: 2020-001110  
C.A. Case No.: 2019-CP-42-02092

Luther Harris, Donna Harris, and Bobby E. Leopard ..... Appellants,

v.

Perry Wendell Barbour and Southland Transportation Co. .... Respondent.

REPLY TO MOTION TO PERMIT FILING OF CONSOLIDATED PETITIONS FOR  
WRITS OF CERTIORARI

Petitioners have moved that the Court permit the filing of one petition for writ of certiorari in conjunction with appeals arising out of actions arising out of Spartanburg County (Appellate Case No.: 2020-001110) and Cherokee County (Appellate Case No.: 2021-000269), respectively. Admittedly, both appeals arise out of the same accident involving the same parties with similar but not exact issues.

Respondents would, however, oppose this motion since it is unnecessary in light of the fact that one or both of the petitions for writ of certiorari have not been timely made. As acknowledged by the Petitioners in their motion, the Spartanburg County appeal was affirmed in the unpublished opinion of the South Carolina Court of Appeals on November 2, 2022. Petitioners submitted a petition for rehearing on November 21, 2022, after moving to allow for a late filing on November 18, 2022. The Court of Appeals issued a letter on November 22, 2022 indicating the appropriate fee had not been received. The Court of Appeals subsequently notified the Petitioners on December 12, 2022 that the petition for rehearing had not been acted upon due to the failure to pay the appropriate fee and issued a remittitur to the trial court on the same day. Petitioners thereafter moved the Court of Appeals to recall the remittitur. The Court of Appeals denied this motion on March 17, 2023.

With regard to the Cherokee County appeal, the Court of Appeals affirmed the trial court in an unpublished opinion on December 7, 2022. On December 28, 2022, the Petitioner filed a petition for rehearing. On February 10, 2023, this petition was denied.

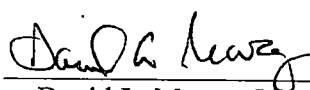
A petition for the issuance of a writ of certiorari is controlled by *Rule 242 of South Carolina Rules of Appellate Practice*. Pursuant to *subsection (c)*, a petition for writ of certiorari is to be served and filed within thirty (30) days after the petition for rehearing is finally decided by the Court of Appeals. With regard to the Spartanburg County appeal, the Court of Appeals notified

the Petitioners, on December 12, 2022 that their petition for rehearing would not be acted on due to their failure to pay the appropriate fee. Using this date, the petition for writ of certiorari would have to be filed by January 11, 2023. However, as noted, the Petitioners requested through another motion that the case be recalled. That motion was denied on March 17, 2023. Using this date, the petition for certiorari should have been filed by April 16, 2023. The Petitioners may argue that this motion, which was made on April 12, 2023 acts as a petition for the issuance of a writ of certiorari. However, this motion does not meet the standards for a petition for writ of certiorari, as set forth in *Rule 242*. Moreover, a motion does not serve to toll the time for filing. *Rule 240(b)*, *SCRAP*.

With regard to the Cherokee County appeal, the petition for rehearing was denied by the Court of Appeals on February 10, 2023. Pursuant to *Rule 242(c)*, the petition for writ of certiorari should have been filed by March 12, 2023.

Since neither petition for writ of certiorari has been timely filed, there are no petitions to consolidate and therefore the motion for consolidation should be denied.

Turner, Padget, Graham & Laney, P.A.

By:   
David L. Moore, Jr., *SC Bar No. 4050*  
P.O. Box 1509  
Greenville, SC 29602  
T: 864-552-4625  
Email: [dmoore@turnerpadget.com](mailto:dmoore@turnerpadget.com)  
Attorneys for Respondent Perry Barbour

Greenville, South Carolina

April 20, 2023

**RECEIVED**

**Apr 20 2023**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Opinion No.: 22-UP429 (S.C. Ct. App. Filed December 7, 2022)  
Appellate Case No.: 2021-000269  
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Bobby E. Leopard, Luther Harris, and Donna Harris ..... Appellants,

v.

Perry W. Barbour, ..... Respondent.

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Unpublished Opinion No.: 2022-UP-397 (S.C. Ct. App. Filed December 7, 2022)  
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Luther Harris, Donna Harris, and Bobby E. Leopard ..... Appellants,

v.

Perry Wendell Barbour and Southland Transportation Co. .... Respondent.

**PROOF OF SERVICE**

The undersigned certifies that she served a copy of the foregoing **RESPONDENT'S**

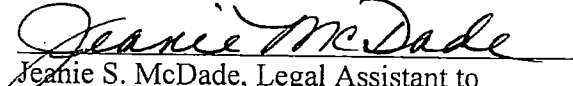
***REPLY TO MOTION TO PERMIT FILING OF CONSOLIDATED PETITIONS FOR WRITS  
OF CERTIORARI*** to all counsel of record on April 20, 2023, by emailing a copy of the same, as follows:

The Honorable Jenny Abbott-Kitchens

[ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)

Donald L. Smith, Esquire

[attorneydonaldsmith@gmail.com](mailto:attorneydonaldsmith@gmail.com)

  
Jeanie S. McDade, Legal Assistant to  
David L. Moore, Jr.

IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

---

RECEIVED

Apr 24 2023

APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Letitia H. Verdin, Circuit Court Judge

---

Opinion No.: 22-UP-429 (S.C. Ct. App. Filed December 7, 2022)

Appellate Case No.: 2021-000269

C.A. Case No.: 2020-CP-11-00632

---

Bobby E. Leopard, Luther Harris, and Donna Harris.....Appellants,

V.

Perry W. Barbour, .....Respondent.

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Opinion No.: 2022-UP-397 (S.C. Ct. App. Filed December 7, 2022)

Appellate Case No.: 2020-001110

C.A. Case No.: 2019-CP-42-02092

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Luther Harris, Donna Harris, and Bobby E. Leopard.....Appellants,

V.

Perry Wendell Barbour and Southland Transportation Co .....Respondent.

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**RESPONSE TO REPLY TO MOTION TO PERMIT FILING OF  
CONSOLIDATED PETITION FOR WRITS OF CERTIORARI**

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Petitioners argue that the opportunity to submit a Petition for Writ of Certiorari in the Cherokee action has not lapsed. According to Rule 242, a writ of certiorari must be delivered to opposing counsel and submitted with confirmation of service to the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days following the Court of Appeals' final decision on the petition for rehearing or reinstatement. As the Petition for Rehearing was denied on February 10, 2023, the deadline for filing a petition for Writ of Certiorari was March 12, 2023. However, since March 12, 2023, was a Sunday, the deadline for filing was the following business day. On March 13, 2023, the Petitioners moved for an extension of time to file the Petition, because they had an outstanding Motion to Recall Remittitur in the Spartanburg appeal. The Court of Appeals put the matter in abeyance for forty-five (45) days, starting on March 16, 2023.

Respondent's arguments are contradicted by the fact that the filing and service of a petition for certiorari can be extended, as established in South Carolina Supreme Court's decision in Jim Lancaster v. Georgia-Pacific Corp., 742 S.E.2d 867 (S.C. 2013). Additionally, the Supreme Court itself acknowledges that there may be situations where parties require an extension of time to submit a petition, as stated in Order 2014-07-16-01, RE: Extensions in Cases Seeking a Petition for a Writ of Certiorari to Review a Decision of the South Carolina Court of Appeals. This order outlines the Supreme Court's policy on extensions for cases filed under Rule 242 SCACR and is provided as Exhibit "A".

With respect to the Spartanburg action, Petitioners reiterate their position that the remittitur was sent prematurely, which goes against the provisions of the amended Rule 221(b) of SCACR. This rule states that if a petition for rehearing is received before the remittitur is sent, the remittitur should not be sent until the court has made a decision on the petition. Furthermore, if the petition for rehearing is denied, the court of appeals cannot send the remittitur to the lower court or administrative tribunal until the time to petition for a writ of certiorari under rule 226(c) has expired. In the Spartanburg action, Petitioners moved to Allow Late Filing of the Petition for Rehearing and subsequently the Petition for Rehearing prior to the remittitur being sent to the lower court.

Due to miscommunication on the payment of filing fee, the Court of Appeals did not act upon the Petition for Rehearing, which is tantamount to its denial on March 17, 2023. Following above-cited Rules, the Court of Appeals cannot send the remittitur until April 17, 2023, 30 days after the denial of the Petition for Rehearing, which is the deadline for filing of a Petition for Certiorari in this action. However, in this case, the Court of Appeals sent the remittitur on the very day it disposed of the petition for rehearing. This being a direct violation of the law, Petitioners are entitled to their prayer to recall the remittitur from the lower court.

### **CONCLUSION**

For the foregoing reasons, in addition to the arguments made in their Motion, Petitioners respectfully request this Honorable Court to grant their motion; and allow Petitioners to submit a Consolidated Petition for Writ of Certiorari.

Respectfully submitted by:

**s/Donald L. Smith**

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*Attorney for Petitioners*

Anderson, South Carolina  
April 24, 2023.

# The Supreme Court of South Carolina

Bobby E. Leopard, Luther Harris, and Donna Harris,  
Petitioners,

v.

Perry W. Barbour, Respondent.

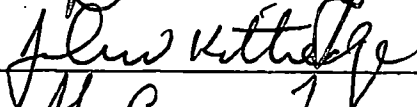
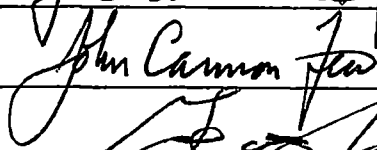
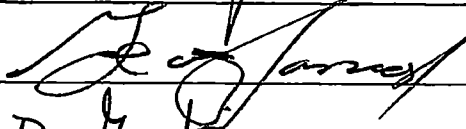
Appellate Case No. 2023-000417

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## ORDER

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Petitioners have filed a motion to consolidate this matter with Appellate Case No. 2020-001110 pursuant to Rule 214, SCACR. The motion to consolidate is denied.

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|--------------------------------------------------------------------------------------|------|
|  | C.J. |
|  | J.   |
|  | J.   |
|  | J.   |
| D. Han                                                                               | J.   |

Columbia, South Carolina  
May 17, 2023

cc:  
David L. Moore, Jr., Esquire  
Donald Loren Smith, Esquire