

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2021-000269
Unpublished Opinion No. 2021-UP-429 (Filed on December 7, 2022)
(Rehearing Denied February 10, 2023)

Bobby E. Leopard, Donna, and Luther Harris,

Petitioners,

v.

Perry W. Barbour,

Respondent.

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI



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Attorneys for Respondent

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S.C. SUPREME COURT

INDEX

Record on Appeal, July 21, 2021	1
Final Brief of Appellants, July 26, 2021	131
Final Brief of Respondent, July 22, 2021	154
Final Reply Brief of Appellant, July 26, 2021	169
Unpublished Opinion of Court of Appeals, 22-UP-429,	179
Petition for Rehearing, December 27, 2022	183
Order, denying Motion to Consolidate Appeal	200
Court of Appeals Letter, February 10, 2023	201
Order, denying Petition for Rehearing, February 10, 2023	202
Motion to Consolidate Appeal, March 11, 2023	203
Motion to Consolidate Petition for Certiorari, April 13, 2023	205
Reply to Motion to Consolidate, April 20, 2023	211
Response to Reply to Motion to Consolidate, April 24, 2023	216
Order, denying Motion to Consolidate, May 17, 2023	220

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Judge

Appellate Case No.: 2021-000269
C.A. No. 2020CP1100632

Bobby E. Leopard, Luther Harris and Donna Harris,

Appellants,

v.

Perry W. Barbour,

Respondent.

RECORD ON APPEAL

Submitted by:

s/Donald L. Smith

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Attorney for Respondents

Anderson, South Carolina
July 21, 2021.

INDEX

Form 4, Denying Appellants' Motion for Reconsideration, filed March 9, 2021	1
Form 4, Granting Motion to Vacate Entry of Default, filed February 16, 2021	5
Order of Default and Order for Hearing to Ascertain Damages, filed December 16, 2020	9
Order of Default and Order for Hearing to Ascertain Damages, filed November 12, 2020	13
Summons and Complaint, filed August 27, 2020	16
Affidavit of Default, filed November 10, 2020	25
Appellants' Motion for Entry of Default and Exhibits, filed November 28, 2020	27
Certificate of Service, filed December 17, 2020	29
Respondent's Motion to Vacate and Exhibits, filed February 11, 2021	31
Respondent's Brief in Support of Motion to Set Aside Entry of Default, filed February 11, 2021	34
Respondent's Answer, filed February 11, 2021	39
Respondent's Motion to Dismiss, February 11, 2021	44
Appellants' Response in Opposition to Barbour's Motion to Set Aside Entry of Default and Exhibits, filed February 16, 2021	47
Appellants' Response in Opposition to Barbour's Motion to Dismiss, filed February 16, 2021	55
Appellants' Motion for Reconsideration of the Order Granting Motion to Vacate and Motion to Dismiss and Exhibits, filed February 26, 2021	61
Notice of Appeal, March 11, 2021	82
Exhibits	84
 <u>Exhibits for Appellant's Affidavit of Default filed on November 28, 2020</u>	
Letter From SCDMV to Appellants' Counsel Re: Service to Respondent, dated October 8, 2020	85

Affidavit of Ms. Natasha Thomas, October 8, 2020	87
Proof of Service by Certified Mail (Green Card) September 18, 2020	89
<u>Exhibit for Motion to Vacate, filed February 11, 2021</u>	
Letter of Appellant's Counsel to Sentry Select Insurance Co., dated February 1, 2021	91
<u>Exhibits for Response in Opposition to Motion to Set Aside Entry of Default, filed November 16, 2021</u>	
Certified Letter of SCDMV to Respondent, dated October 25, 2019	93
Envelope from SCDMV marked Return to Sender, dated November 21, 2019	95
Appellant's Certificate of Service of SCDMV's acceptance of service on behalf of Respondent, dated November 26, 2019	97
Form 4/Order Dismissing Case in Luther Harris, et al. v. Perry Wendell Barbour, et. al, 2019 CP-42-02092, dated March 10, 2020	99
<u>Exhibit Independently filed</u>	
Proof of Mailing to Respondent, filed February 16, 2021	104
<u>Exhibits for Motion for Reconsideration, filed February 26, 2021</u>	
Excerpts of Code of Virginia, Title 46.2. Motor Vehicles (law on applicants and License holders)	106
List of Respondent's Traffic Violations	109
<u>Exhibits from Luther Harris, et. al. v. Perry Wendell Barbour, et al., 2019 CP-42-02092</u>	
Summons and Complaint, dated June 7, 2019	111
Notice of Appeal, dated August 3, 2020	124
Certificate of Counsel	126

FORM 4
ORDER DENYING APPELLANTS'
MOTION FOR RECONSIDERATION
March 9, 2021

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MAY 30 2023
S.C. SUPREME COURT

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1100632

Bobby Leopard et al
PLAINTIFF(S)

Perry Wendell Barbour
DEFENDANT(S)

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.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled);
☐ Other
- ☐ **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 (formal order to follow) ☒ Statement of Judgment by the Court:

This matter comes before the Court through Plaintiff's motion to reconsider the Court's order granting Defendant's motion to vacate and Defendant's motion to dismiss. After careful review of the Court's ruling, this motion, and consideration of arguments from Counsel the Court remains satisfied with its order. Therefore, the Plaintiff's motion is respectfully denied..

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/08/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: 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 judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Cherokee Common Pleas

Case Caption: Bobby Leopard , plaintiff, et al VS Perry Wendell Barbour
Case Number: 2020CP1100632
Type: Order/Electronic Form 4

So Ordered

s/Letitia H. Verdin, SC Judge 2162

Electronically signed on 2021-03-08 19:39:03 page 3 of 3

FORM 4
ORDER GRANTING RESPONDENT'S
MOTION TO VACATE ENTRY OF
DEFAULT AND MOTION TO DISMISS
February 16, 2021

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1100632

Bobby Leopard et al
PLAINTIFF(S)

Perry Wendell Barbour
DEFENDANT(S)

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.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ 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 (formal order to follow) ☒ Statement of Judgment by the Court:

This matter was before the court on Plaintiffs' Motion for Default Judgment and Damages and Defendant's Motions to Vacate Entry of Default and Dismiss. After considering the Wham factors, this court grants Defendant's Motion to Vacate Entry of Default and orders that Defendant's filed Answer be entered. Furthermore, this court grants Defendant's Motion to Dismiss on the basis that the statute of limitations has passed in this matter. Accordingly, the court finds that it is unnecessary to address Plaintiff's Motion for Default Judgment and Damages.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/16/2021 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: 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 judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Cherokee Common Pleas

Case Caption: Bobby Leopard , plaintiff, et al VS Perry Wendell Barbour
Case Number: 2020CP1100632
Type: Order/Electronic Form 4

So Ordered

s/Letitia H. Verdin, SC Judge 2162

Electronically signed on 2021-02-16 15:51:40 page 3 of 3

**ORDER OF DEFAULT AND
ORDER FOR HEARING TO
ASCERTAIN DAMAGES
December 16, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE	)	
	)	
Bobby E. Leopard, Donna Harris and	)	Case No.: 2020-DR-11-00632
Luther Harris,	)	
	)	
Plaintiffs,	)	
vs.	)	ORDER OF DEFAULT AND ORDER FOR
	)	HEARING TO ASCERTAIN DAMAGES
Perry Wendell Barbour,	)	
	)	
<u>Defendant.</u>	)	

THIS matter is before the Court upon the filing of an Affidavit of Default against the Defendant, Perry Wendell Barbour, by Plaintiffs' attorney in the above-captioned action.

IT APPEARS that the Defendant, Perry Wendell Barbour, was duly served with a Summons and Complaint on September 15, 2020.

IT APPEARS that more than thirty (30) days have elapsed since such service.

IT APPEARS that the Defendant, Perry Wendell Barbour, has not filed an answer, demurrer, or other pleadings as required by the Summons, and that Defendant is in default pursuant to the South Carolina Rules of Civil Procedure as evidenced by the Plaintiff's Affidavit of Default filed on November 9, 2020.

IT FURTHER APPEARING that a hearing to ascertain damages pursuant to Rule 55 of the South Carolina Rules of Civil procedure should be held to determine the amount owed the Plaintiff.

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

1. The above Defendant, Perry Wendell Barbour, is in default.
2. That default judgment and damages hearing shall be held by the Court to make findings of fact and conclusions of law and to enter those findings of fact and conclusions of law

into a final order and judgement of the Court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, Perry Wendell Barbour, is hereby in default and a judgment in an amount to be determined at a damages hearing to be held shall be filed in favor of the Plaintiff.

**PRESIDING JUDGE
THE COURT OF COMMON PLEAS**

Gaffney, South Carolina

Date: November 10, 2020

I SO MOVE:

s/Donald L. Smith

Donald L. Smith (Bar # 6699)

Attorney for the Defendant

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attorneydonaldsmith@gmail.com



Cherokee Common Pleas

Case Caption: Bobby Leopard , plaintiff, et al VS Perry Wendell Barbour

Case Number: 2020CP1100632

Type: Order/Entry of Default

So Ordered

Brandy W McBee, Clerk of Court for Cherokee
County by Kimberly Brasier

Electronically signed on 2020-12-16 10:04:20 page 3 of 3

**ORDER OF DEFAULT AND
ORDER FOR HEARING TO
ASCERTAIN DAMAGES
November 12, 2020**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE	)	
	)	
Bobby E. Leopard, Donna Harris and	)	Case No.: 2020-DR-11-00632
Luther Harris,	)	
	)	
Plaintiffs,	)	
vs.	)	ORDER OF DEFAULT AND ORDER FOR
	)	HEARING TO ASCERTAIN DAMAGES
Perry Wendell Barbour,	)	
	)	
Defendant.	)	

THIS matter is before the Court upon the filing of an Affidavit of Default against the Defendant, Perry Wendell Barbour, by Plaintiffs' attorney in the above-captioned action.

IT APPEARS that the Defendant, Perry Wendell Barbour, was duly served with a Summons and Complaint on September 15, 2020.

IT APPEARS that more than thirty (30) days have elapsed since such service.

IT APPEARS that the Defendant, Perry Wendell Barbour, has not filed an answer, demurrer, or other pleadings as required by the Summons, and that Defendant is in default pursuant to the South Carolina Rules of Civil Procedure as evidenced by the Plaintiff's Affidavit of Default filed on November 9, 2020.

IT FURTHER APPEARING that a hearing to ascertain damages pursuant to Rule 55 of the South Carolina Rules of Civil procedure should be held to determine the amount owed the Plaintiff.

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

1. The above Defendant, Perry Wendell Barbour, is in default.
2. That default judgment and damages hearing shall be held by the Court to make findings of fact and conclusions of law and to enter those findings of fact and conclusions of law

into a final order and judgement of the Court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, Perry Wendell Barbour, is hereby in default and a judgment in an amount to be determined at a damages hearing to be held shall be filed in favor of the Plaintiff.

**PRESIDING JUDGE
THE COURT OF COMMON PLEAS**

Gaffney, South Carolina

Date: November 10, 2020

I SO MOVE:

s/Donald L. Smith

Donald L. Smith (Bar # 6699)

Attorney for the Defendant

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SUMMONS AND COMPLAINT

August 27, 2020

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

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-

**SUMMONS
(JURY TRIAL DEMANDED)**

TO THE DEFENDANT 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 said Complaint on the Plaintiffs' 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 Plaintiffs 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.

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

Anderson, South Carolina
August 27, 2020

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

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-

**COMPLAINT
(JURY TRIAL DEMANDED)**

Bobby Leopard, Donna Harris and Luther Harris by and through their undersigned attorney, complaining of the Defendant, alleges:

1. That Plaintiffs were, at all times pertinent to this action, citizens and residents of the County of Cherokee, State of South Carolina.
2. 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.
3. That substantial acts and omissions alleged herein occurred in the County of Cherokee, South Carolina.
4. That on or about June 10, 2016, Plaintiff Luther Harris and Defendant Barbour were involved in an automobile accident.
5. 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.
6. That Defendant Barbour was also traveling southbound on U.S. 85 at that time, in the same lane, though he was behind Plaintiff.
7. That Defendant failed to maintain a proper lookout; and, smashed into the rear of

Plaintiffs' vehicle with such force that Plaintiffs' Harris and Leopard were knocked unconscious.

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

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

FOR A FIRST CAUSE OF ACTION: NEGLIGENCE

10. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-9 above.

11. That Defendant owed Plaintiffs a duty of care to operate his tractor trailer in a reasonably safe manner.

12. That Defendant breached his 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.

13. That Defendant's breach of the duty he 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, permanent impairment and mental anguish.

14. That Plaintiffs are entitled to recover from Defendant for damages caused by Defendant's negligent, grossly negligent and reckless acts.

FOR A SECOND CAUSE OF ACTION: RECKLESSNESS

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

20. That the acts and/or omissions of Defendant, 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 Defendant's 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, permanent impairment and mental anguish.

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

FOR A THIRD CAUSE OF ACTION: DAMAGES

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

24. That as a direct and proximate result of the negligence, gross negligence,

willfulness, wantonness, and reckless of Defendant, Plaintiffs suffered numerous injuries.

25. That as a direct and proximate result of the negligence, gross negligence, willfulness, wantonness and recklessness of Defendant, Plaintiff Luther Harris has suffered the following:

- a. Physical pain and suffering, including but not limited to:
 1. Concussion with loss of consciousness of 30 minutes or less
 2. Post-concussion syndrome
 3. Abnormalities of Gait and Mobility
 4. Chronic Headache
 5. Right Shoulder Pain
 6. Right Leg Pain
 7. Neck pain or Cervicalgia
 8. Lower back pain or Dorsalgia
 9. Cervical degenerative disc disease and spondylosis exacerbated by the Motor Vehicle Accident;
 10. Lumbar degenerative disc disease and spondylosis exacerbated by Motor Vehicle Accident
 11. Post-Traumatic Stress Disorder (PTSD)
- b. Economic damages, including but not limited to lost income:
 1. Future medical expenses in the amount of \$40,000.00, taking into account potential periodic trigger point injections and other medicinal therapies.
 2. Lost wages to be determined.

- c. Psychological distress;
- d. Permanent impairment;
- e. Loss of enjoyment of life; and,
- f. Punitive damages.

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

- a. Physical pain and suffering, including but not limited to:
 - 1. 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. Cervicalgia
 - 10. Lumbar spondylosis with radiculopathy
 - 11. Central and Peripheral Vertigo
 - 12. Closed Head Injury
 - 13. Chronic Headache
 - 14. Mild Lumbar Levoscoliosis
 - 15. Post Traumatic Syndrome Disorder (PTSD)

16. Anxiety
 17. Depression
 18. Traumatic Brain Injury and Memory Impairment
 - b. Economic damages, including but not limited to lost income:
 1. Future medical expenses in the amount of \$735, 621.00.
 2. Potential future medical expenses with placement of spinal cord stimulator of \$750,000.00
 3. Lost wages to be determined;
 - c. Psychological distress;
 - d. Permanent impairment;
 - e. Loss of enjoyment of life; and,
 - f. Punitive damages.
27. That Plaintiff is entitled to recover actual and punitive damages from Defendant in an amount to be determined by this Court.

FOR A FOURTH CAUSE OF ACTION: LOSS OF CONSORTIUM

28. Plaintiffs re-allege and incorporate herein all of the allegations contained in paragraphs 1-27 above.
29. That Plaintiff, Donna Harris, is the spouse of Luther Harris.
30. That as a direct and proximate result of the acts of negligence, gross negligence, recklessness, willfulness and wantonness of Defendant 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.

FOR A FIFTH CAUSE OF ACTION: PUNITIVE DAMAGES

31. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-30 above.

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

33. That as a direct and proximate result of the willful, wanton and/or reckless acts and/or omissions of Defendant, Plaintiffs suffered physical injuries and/or aggravation of existing condition(s), permanent impairment, mental anguish and/or anxiety.

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

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for a judgment against Defendant for actual damages, punitive damages, future medical expenses, permanent impairment, 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.

s/Donald L. Smith

Donald L. Smith, (SC Bar#6699)
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Anderson, South Carolina
August 27, 2020.

AFFIDAVIT OF DEFAULT
November 10, 2020

STATE OF SOUTH CAROLINA)

COUNTY OF CHEROKEE)

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

Plaintiffs,)

vs.)

Perry Wendell Barbour,)

Defendant.)

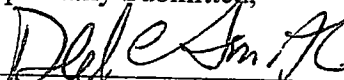
IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-00632

AFFIDAVIT OF DEFAULT

PERSONALLY appeared before me, Donald L. Smith, who after first being duly sworn, states that he is the attorney for Plaintiffs in the above entitled action; that although the Defendant, Perry Wendell Barbour, was duly served with a copy of the Summons and Complaint in the above captioned matter on September 15, 2020, by and through Natasha Thomas, Office of General Counsel, SC Department of Motor Vehicles, pursuant to Section 15-9-350 of the 1976 Code of Laws of South Carolina, and thirty (30) days have passed, and no answer or any other type pleading has been filed by or on behalf of the Defendant, Perry Wendell Barbour, and he is in default.

Respectfully Submitted,



Donald L. Smith (Bar # 6699)

Attorney for the Defendant

122 N. Main St.

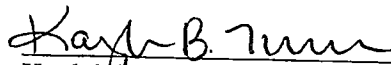
Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

SWORN TO BEFORE ME THIS

11th day of November 2020.

Kayleigh B. Turner

Notary Public for the State of South Carolina

My Commission Expires: July 19, 2027.

APPELLANTS'
MOTION FOR ENTRY OF DEFAULT
November 28, 2020

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

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-00632

MOTION FOR ENTRY OF DEFAULT

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 September 15, 2020; and, the Affidavit of Default, filed November 10, 2020, Plaintiffs hereby request for an entry of default against Defendant, Perry Wendell Barbour.

s/Donald Smith
Donald L. Smith (SC Bar #6699)
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attorneydonaldsmith@gmail.com

Anderson, South Carolina
November 28, 2020.

Kayleigh B. Turner
Notary Public for the State of South Carolina
My Commission Expires: July 19, 2027.

**CERTIFICATE OF SERVICE
FOR ORDER OF DEFAULT
December 17, 2020**

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

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-11-00632

CERTIFICATE OF SERVICE

THE UNDERSIGNED person deposes and says that he served an **ORDER OF DEFAULT AND ORDER FOR HEARING TO ASCERTAIN DAMAGES** and this Certificate of Service for the aforementioned on Perry Wendell Barbour, via the United States Postal Service utilizing his last known address shown below:

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:

Perry Wendell Barbour
130 Valentine Court
Martinsville VA 24112-0731

Anderson, South Carolina
December 16, 2020.

**RESPONDENT'S MOTION TO
VACATE ENTRY OF DEFAULT
February 11, 2021**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHEROKEE	)	Docket No.: 2020-CP-11-00632
	)	
	)	
BOBBY E. LEOPARD, DONNA	)	
HARRIS AND LUTHER HARRIS,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	MOTION TO VACATE
	)	ENTRY OF DEFAULT
	)	
PERRY WENDELL BARBOUR,	)	
	)	
Defendant.	)	

TO BOBBY E. LEOPARD, DONNA HARRIS AND LUTHER HARRIS AND THEIR
ATTORNEY, DONALD L. SMITH:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendant, would move before the Court, at such time and place as the Court may hereinafter direct, for an Order setting aside the entry of default dated December 16, 2020 and entered by Brandy W. McBee, as Clerk of Court for Cherokee County. This motion is based upon Rule 55(c) of the South Carolina Rules of Civil Procedure, pursuant to which a Court may set aside an entry of default upon a showing of "good cause". This Defendant would assert that "good cause" exists in this particular matter inasmuch as the present action is a duplication of another action presently pending before the South Carolina Court of Appeals which was originally filed in Spartanburg County, but was dismissed followed by an appeal. This Defendant would further assert that this motion is timely made in light of the fact that notice was given only on February 1, 2021 to the insurer for the Defendant, that a meritorious defense exists in the form of the application of the statute of limitations and the fact there would be no prejudice to the Plaintiffs if the motion were granted inasmuch as discovery would not have been started and the Courts are

at this time not holding in person hearings. For the above reasons, this Defendant would pray that the Court set aside the entry of default and permit the parties to engage in such litigation as is necessary.

TURNER PADGET GRAHAM & LANEY, P.A.

s/ David L. Moore, Jr.

David L. Moore, Jr., SC Bar No.: 4050

Turner Padget Graham & Laney PA

Post Office Box 1509

Greenville, South Carolina 29602

Phone: 864-552-4625

Email: DMoore@turnerpadget.com

Greenville, South Carolina
February 11, 2021

ATTORNEYS FOR DEFENDANT

**BRIEF IN SUPPORT OF
RESPONDENT'S MOTION TO SET
ASIDE ENTRY OF DEFAULT
February 11, 2021**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHEROKEE	)	Docket No.: 2020-CP-11-00632
	)	
	)	
BOBBY E. LEOPARD, DONNA	)	
HARRIS AND LUTHER HARRIS,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	BRIEF IN SUPPORT OF
	)	MOTION TO SET ASIDE
	)	ENTRY OF DEFAULT
PERRY WENDELL BARBOUR,	)	
	)	
Defendant.	)	

On June 16, 2016, Luther Harris, Bobby Leopard and Jerry White were injured when the vehicle they were riding in was struck by a truck being operated by Perry Barbour on behalf of Southland Transportation Company while each vehicle was traveling south on interstate 85 in Cherokee County. Luther Harris and his wife, Donna Harris, and Bobby Leopard filed suit in Spartanburg County on June 7, 2019 seeking damages for injuries they sustained in that accident. (Jerry White was represented by another attorney in a separate action which has now been resolved.) Although that Complaint was timely filed, the Plaintiffs failed to timely serve the Complaint upon Perry Barbour within 120 days after filing as required by Rule 3 of the South Carolina Rules of Civil Procedure. Based upon the failure to properly commence the action, the Spartanburg Circuit Court dismissed the matter. The Plaintiffs in this action then appealed that ruling to the South Carolina Court of Appeals. That appeal is still pending.

After the appeal of the Spartanburg County litigation, the Plaintiffs filed a second suit in Cherokee County on August 27, 2020. Notice of this suit was not given to the insurer for the Defendant nor was notice given to his attorney, although that attorney was known to Plaintiffs' attorney. Instead, the Plaintiffs made service upon the Defendant through certified mail at 130 Valentine Court, Martinsville, Virginia 24112. This is the same address at which service was attempted in 2019 with the Spartanburg litigation and which the Plaintiffs had learned was an incorrect address for the Defendant. There is no indication that the Plaintiffs had made any other attempt to determine the whereabouts of the Defendant and simply served him at that address knowing that the matter would go into default. After the matter went into default, Plaintiffs' counsel then notified the insurance company for the Defendant that the matter was now in default and that a default judgment hearing was being scheduled.

Pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure, an entry of default can be set aside for "good cause." In the case of Wham v. Shearson Lehman Brothers, Inc., 298 S.C. 462, 381 S.E. 2nd 499 (1989), the South Carolina Supreme Court held that under Rule 55(c) a motion to set aside default should be granted on a much broader and liberal basis than would be required with regard to when a default judgment had been entered, which requires a showing of "excusable neglect". The factors to be considered with regard to a demonstration of "good cause" include (1) the timing of the defendant's motion for relief; (2) whether the defendant has a good and meritorious defense; and (3) the degree of prejudice to the plaintiffs if the motion is

granted. In this case, the Defendant has acted swiftly through its insurance company once notice was received by the insurance company of the alleged default through a February 1, 2021 letter from Don Smith, attorney for the Plaintiffs. Obviously, less than two weeks have elapsed since that letter was mailed. Additionally, this Defendant would have a meritorious defense in that the three-year statute of limitations as set forth in section 15-3-540 would be applicable since the accident in question occurred on June 16, 2016 and the Cherokee County Complaint was not filed until August 27, 2020. Also, the fact that an appeal had been taken of the Spartanburg County case involving the same parties and revolving around the same factual issues would indicate that this litigation is inappropriate pursuant to Rule 12(b)(8). Further, there would be no prejudice to the Plaintiffs by allowing this Defendant to answer. Litigation in this state has been stalled due to the COVID 19 outbreak. Moreover, if litigation were required, there is nothing to prevent the parties from engaging in discovery in order to prepare for that trial. Finally, as noted above, there are strong defenses to the effect that this matter should when properly considered be dismissed due to the applicable statute of limitations or the fact that there is other pending action on the same matter.

In light of the timely motion on the part of the Defendant to dismiss the entry of default, the strong affirmative defenses available and the absence of any prejudice to the Plaintiffs by granting this motion, this Defendant would request that the Court issue an order dismissing the entry of default, forgoing the default judgment hearing and allowing this matter to move forward on its merits.

TURNER PADGET GRAHAM & LANEY, P.A.

s/ David L. Moore, Jr.

David L. Moore, Jr., SC Bar No.: 4050
Turner Padget Graham & Laney PA
Post Office Box 1509
Greenville, South Carolina 29602
Phone: 864-552-4625
Email: DMoore@turnerpadget.com

ATTORNEYS FOR DEFENDANT

Greenville, South Carolina
February 11, 2021

RESPONDENT'S ANSWER
February 11, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHEROKEE	)	Docket No.: 2020-CP-11-00632
	)	
	)	
BOBBY E. LEOPARD, DONNA	)	
HARRIS AND LUTHER HARRIS,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	ANSWER
	)	(JURY TRIAL)
PERRY WENDELL BARBOUR,	)	
	)	
Defendant.	)	

The Defendant, reserving his right to dismiss due to the existence of another pending identical action, would show unto the Court and Jury as follows:

FOR A FIRST DEFENSE

1. This Defendant would assert that the above action is the identical action now pending on appeal before the South Carolina Court of Appeals under appellate case number 2020-001110 which involves the same parties seeking damages against the same Defendant arising out of the same vehicular accident which is subject to dismissal pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE

2. This Defendant would assert that inasmuch as the accident giving rise to this litigation occurred on June 10, 2016 and this matter was not filed until August 27, 2020 that this action is barred pursuant to section 15-3-530 of the South Carolina Code which precludes actions which occur more than three years after the accrual of an action.

FOR A THIRD DEFENSE

3. The allegations of paragraph 1 of the Complaint are admitted on information and belief.

4. The allegations of paragraph 2 of the Complaint are denied.

5. The allegations of paragraphs 3 and 4 of the Complaint are admitted.

6. This Defendant would admit that Luther Harris was operating his vehicle on south Interstate Highway 85 in Cherokee County, South Carolina when it was involved in a collision with a vehicle being operated by this Defendant which was traveling in the same direction on the interstate highway. The remaining allegations of paragraphs 5 and 6 of the Complaint are denied.

7. The allegations of paragraph 7 of the Complaint are denied.

8. This Defendant lacks knowledge and information regarding what injuries may have been sustained by the Plaintiffs in the accident of June 10, 2016 and therefore require proof thereof. The remaining allegations of paragraph 8 of the Complaint are denied.

9. The allegations of paragraph 9 of the Complaint are denied.

AS TO THE FIRST CAUSE OF ACTION

10. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

11. In responding to paragraph 11 of the Complaint, this Defendant would acknowledge that all who operate their vehicles on the highways of South Carolina owe a duty to do so with care and in a reasonable manner.

12. The allegations of paragraphs 12, 13 and 14 of the Complaint are denied.

13. The remaining allegations of the First Cause of Action, not hereinabove expressly admitted, modified or explained, are denied.

AS TO THE SECOND CAUSE OF ACTION

14. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

15. The allegations of paragraphs 20, 21 and 22 of the Complaint are denied.

16. The remaining allegations of the Second Cause of Action, not hereinabove expressly admitted, modified or explained, are denied.

AS TO DAMAGES

17. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

18. The allegations of paragraph 24 of the Complaint are denied.

19. This Defendant lacks knowledge and information regarding the allegations of paragraphs 25 and 26 of the Complaint and therefore require proof thereof.

20. The allegations of paragraph 27 of the Complaint are denied.

AS TO THE FOURTH CAUSE OF ACTION

21. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

22. This Defendant lacks knowledge and information concerning the allegations of paragraph 29 of the Complaint and therefore require proof thereof.

23. The allegations of paragraph 30 of the Complaint are denied.

24. The remaining allegations of the Fourth Cause of Action, not hereinabove expressly admitted, modified or explained, are denied.

AS TO PUNITIVE DAMAGES

25. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

26. The allegations of paragraphs 32, 33 and 34 of the Complaint are denied.

27. This Defendant would request that the determination of punitive damages be made through a bifurcated procedure as provided by section 15-32-520 of the South Carolina Code and that such other limitations upon the assessment of punitive damages as are set forth in sections 15-32-520 and 15-32-530 be applied.

28. The remaining allegations of the Complaint, not hereinabove expressly admitted, modified or explained, are denied.

WHEREFORE, having answered the Complaint, this Defendant would pray that it be dismissed with costs.

TURNER PADGET GRAHAM & LANEY, P.A.

s/ David L. Moore, Jr.

David L. Moore, Jr., SC Bar No.: 4050
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Email: DMoore@turnerpadget.com

Greenville, South Carolina
February 11, 2021

ATTORNEYS FOR DEFENDANT

**RESPONDENT'S
MOTION TO DISMISS
February 11, 2021**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHEROKEE	)	Docket No.: 2020-CP-11-00632
	)	
	)	
BOBBY E. LEOPARD, DONNA	)	
HARRIS AND LUTHER HARRIS,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	MOTION TO DISMISS
	)	
PERRY WENDELL BARBOUR,	)	
	)	
Defendant.	)	

TO: BOBBY E. LEOPARD, DONNA HARRIS AND LUTHER HARRIS AND THEIR
ATTORNEY, DONALD L. SMITH:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendant, would move before the Court, at such time and place as the Court may hereinafter direct, for an Order dismissing the above matter pursuant to Rule 12(b)(8) inasmuch as the exhibits attached hereto demonstrate that there is another action pending in the South Carolina Court of Appeals between the same parties concerning the same claims, and that, therefore, this action is inappropriate. The attached documents demonstrate that the Plaintiffs to this action have appealed an order dismissing their action in Spartanburg County, South Carolina involving claims asserted with regard to the accidents of June 10, 2016 involving this same Defendant which has yet to be ruled upon.

Signature on next page

TURNER PADGET GRAHAM & LANEY, P.A.

s/ David L. Moore, Jr.

David L. Moore, Jr., SC Bar No.: 4050
Turner Padget Graham & Laney PA
Post Office Box 1509
Greenville, South Carolina 29602
Phone: 864-552-4625
Email: DMoore@turnerpadget.com

ATTORNEYS FOR DEFENDANT

Greenville, South Carolina
February 11, 2021

**APPELLANTS' RESPONSE
IN OPPOSITION TO
RESPONDENT'S MOTION TO
SET ASIDE ENTRY OF DEFAULT
February 16, 2021**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE	)	
	)	
Bobby E. Leopard, Donna Harris and	)	Case No.: 2020-DR-11-00632
Luther Harris,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' RESPONSE IN
vs.	)	OPPOSITION TO BARBOUR'S
	)	MOTION TO SET ASIDE ENTRY OF
Perry Wendell Barbour,	)	DEFAULT
	)	
Defendant.	)	

Plaintiffs, by and through their undersigned counsel, respectfully submit this Opposition to Defendant's Motion to Set Aside Entry of Default, and in support of which, allege the following:

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 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, Plaintiffs sustained injuries that necessitated medical attention.

On June 7, 2019, Plaintiffs filed action for damages (hereinafter, Spartanburg action) against Barbour and Southland Transportation for the injuries they sustained as a result of the wreck. Unfortunately, due to the carrier's insurer dragging the negotiations over a lengthy period of time and negligence and/or mistake by the United States Postal Service, the Summons and Complaint were served beyond the prescribed period under Rule 3 of the SCRCF, despite having been posted within 120 days after filing the complaint.

Plaintiffs, thereafter, attempted to serve Barbour through the Office of the General Counsel of the South Carolina Department of Motor Vehicle (SCDMV), pursuant to S.C. Code Ann. § 15-9-350 in relation to §15-9-370. SCDMV accepted service upon Barbour and mailed the same to Barbour's residence. When the SCDMV attempted to notice Mr. Barbour that it had accepted service on a lawsuit against him, it was returned to sender. (Exhibit 1-Stamped Returned Envelope).

On November 8, 2019, Mr. Alan Jones, Esquire of Turner Padgett Graham & Laney PA, filed an Answer and a Motion to Dismiss on behalf of Southland, alleging Plaintiffs failed to properly and timely file their Summons and Complaint. Southland contended it was not served within the period required under Rule 3 SCRPC. Plaintiffs opposed Southland's Motion to Dismiss on November 26, 2019, invoking good cause and equity consideration.

On December 23, 2019, Mr. Jones, filed a Motion to Dismiss, on behalf of Barbour alleging failure to properly and timely serve the Summons and Complaint. Mr. Jones was substituted by Mr. David Moore, Esquire, whose main contention was alleging there was no case at all since there was no proper and timely service of a Summons and Complaint. On March 10, 2020, the Court agreed with Mr. Moore, granting the Motion to Dismiss based on Rule (12)(b)(2), (4) and (5) SCRPC. The Court ruled as follows:

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

(Exhibit 2-Form 4, dated March 10, 2020).

Plaintiffs moved for reconsideration of the Order on March 20, 2020, which was subsequently denied. Plaintiffs appealed the Spartanburg action against Southland and Barbour.

Pursuant to the Order, dated March 10, 2020, Plaintiffs filed the instant case on August 27, 2020. On September 18, 2020, Plaintiffs served the Summons and Complaint via certified/return receipt mail to SCDMV. SCDMV sent Barbour a copy of the processes, but the same were returned to its office marked "Return to Sender Not Deliverable as Addressed Unable to Forward".

After a lapse of more than thirty-five (35) days following the service of the Summons and Complaint, and complying with the requirements of Section 15-9-380 of the 1976 Code of Laws, Plaintiffs filed an Affidavit of Default on November 10, 2020. They moved for an Order of Entry of Default on November 28, 2020. On December 16, 2020, the Court issued its Order of Default and Order for Hearing to Ascertain Damages.

Approximately two (2) and a half months after Barbour had accepted service of the Summons and Complaint through the SCDMV, Mr. Moore, Esquire filed a Rule 55 (c) SCRCPP, Motion to Vacate Entry of Default and Motion to Dismiss on February 11, 2021. He also, belatedly filed, an Answer on the same date. These two (2) motions are aimed at denying Plaintiffs their right to be compensated for the injuries sustained at the hands of Barbour. Thus, this Response in Opposition to Barbour's Motion.

ARGUMENT

BARBOUR HAD NO MERITORIOUS DEFENSE HAVING BEEN IN DEFAULT.

The standard for granting relief from an entry of default under Rule 55(c) SCRCPP is mere "good cause." This standard requires a party seeking relief from an entry of default under Rule 55(c) SCRCPP to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for

relief; (2) whether the [defaulting party] has a meritorious defense; and (3) the degree of prejudice to the Plaintiffs if relief is granted. *Sundown Operating Co.*, 383 S.C. at 607-08, 681 S.E.2d at 888 (citations omitted) as cited in Campbell v. City of North Charleston, Appellate No. 2017-001628 (S.C. Ct. App. July 22, 2020).

Applying the above-mentioned factors to the instant case, Plaintiffs submit:

A. Barbour's extensive delay

The instant Summons and Complaint were filed on August 27, 2020 and served upon Barbour on September 18, 2020. No Answer or any responsive pleadings were filed by, or on behalf, of Barbour within the 30-day prescribed period by law. If Mr. Moore's contention, that he was hired by Barbour was true, then it only meant the latter had received and/or obtained a copy of the Summons and Complaint or acquired knowledge of its existence prior to consulting with Mr. Moore. Barbour had not presented a satisfactory reason for the extensive delay in filing a responsive pleading. It took more than four (4) months for Mr. Moore to file the Answer and Motion to Dismiss on behalf of Barbour.

The same thing is true with Barbour's Motion to Set Aside the Entry of Default. The Affidavit of Default in the instant case had been filed on November 10, 2020, and the Order for the Entry of Default was entered on, December 16, 2020. Barbour waited more than two (2) months from the filing of the Affidavit of Default for Barbour to oppose the same and pray to set aside the order.

Rule 55(c) SCRCP does not provide a specific time limit for the filing of a Motion to Set Aside an Entry of Default. The Fourth Circuit denied a Motion to Set Aside, determining that by waiting two (2) and one-half months between the date of entry of default and the motion, movant "did not act promptly." Consolidated Masonry & Fireproofing, Inc. v. Wagman

Construction Corporation, 383 F.2d 249, 251 (4th Cir. 1967). See also Nelson v. The Coleman Co., 41 F.R.D. 7 (D. S.C. 1966) (Simons, J) (even short delay not excused where circumstances showed lack of intent to act promptly)

B. Lack of Meritorious Defense

In his Memorandum in Support of Motion to Set Aside Entry of Default, Mr. Moore averred Plaintiffs failed to provide him a copy of the Summons and Complaint, despite Plaintiffs having known he was Barbour's counsel in the Spartanburg action.

Plaintiffs submit, it is common knowledge, parties may change counsel at any given time. Mr. Moore has not presented any evidence to show he has the sole power and/or authority to represent Barbour in, all litigation against the latter.

Furthermore, Plaintiffs believe neither Mr. Moore nor his law office had had any contact with, nor had been hired by Barbour. This is evidenced by the fact Mr. Jones, the original counsel in the Spartanburg action, did not file an Answer on Barbour's behalf.

Plaintiffs believe service of the processes pursuant to S.C. Code Ann. § 15-9-370 is sufficient. To impose additional requirements upon Plaintiffs to serve Barbour's counsel is to burden them for abiding by the law.

C. Setting aside the Default Will Cause Great Injustice.

Plaintiffs sustained permanent injuries which necessitated medical attention that continues to this date. Plaintiffs endure physical pain and suffering, as they have since June 2016, as well as financial difficulties due to this protracted litigation. To set aside this Default Order would potentially eliminate the opportunity for Plaintiffs to recover.

A dismissal of this case would allow the insurance company and the trucking company to avoid taking responsibility for an individual who appears to have no care in the world for

being responsible. Barbour has been ticketed in a significant number of traffic incidents. In fact, he has been tried in his absence on the majority of them-including in this case, in which he nearly killed all the passengers in Plaintiffs' vehicle. The following is a list of said tickets:

date	city/county	state	charge	case #	outcome
9/20/08		Virginia	Failure to obey highway sign	071GT0800453100	Guilty in absentia
10/19/07	Henry	Virginia	Speeding 48/35	089GT0700797900	Guilty in absentia
10/19/07	Henry	Virginia	Seat belt violation	089GT0700798000	Guilty in absentia
8/28/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
9/17/07	Montgomery	Virginia	Defective equipment generally	121GT0701637400	Guilty
9/30/03	Patrick	Virginia	Oper w/radar detect/jam device	141GT0300129200	Prepaid-Fine
5/28/04	Patrick	Virginia	Speeding 74/55	141GT0400068000	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey highway sign sleep	175GT0600711000	Guilty in absentia
1/16/08	Danville City	Virginia	Speeding 55/40	590GT0800067700	Guilty
		Kentucky	Driving on suspended	10-T-00307	
6/16/16	Spartanburg	South Carolina	Driving vehicle at greater speed than is re	5102P0362799	Guilty in absentia
6/23/11		Virginia	No county or city tag	GT11004149-00	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey high-sign sleep	175GT0600711000	Guilty in absentia
9/10/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
6/12/15	Danville City	Virginia	Speeding 53/40	590GT15006703-00	Guilty in absentia
1/21/95		Virginia	Illegal sunshading	089GT9500043700	Guilty in absentia

CONCLUSION

Barbour was properly served through the SCDMV. He did not have good cause for failing to answer the Summons and Complaint. Had he told the SCDMV he had moved (if he did), he would have had the opportunity to raise defenses.

This action is in a different county with a different case number. Since the actual Defendant did not answer the Summons and Complaint or file a motion in the first case, it was not commenced. Since there was no case, and this is it is a totally separate case, Plaintiffs had no duty to speak to a non-retained attorney.

Plaintiffs have suffered injustice at every turn to this point. The rules are clear, no response within 30 days = no affirmative defenses. Thus, there should be no delay in allowing Plaintiffs to pursue their damages hearing.

For the reasons stated herein, Barbour's Motion to Set Aside Entry of Default must be denied.

Respectfully submitted by:

s/Donald L. Smith

Donald L. Smith (Bar No: 6699)

Attorney for Plaintiffs

122 N. Main Street

Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Anderson, SC
February 16, 2021

**APPELLANTS' RESPONSE
IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS
February 16, 2021**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE	)	
	)	
Bobby E. Leopard, Donna Harris and	)	Case No.: 2020-DR-11-00632
Luther Harris,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' RESPONSE IN
vs.	)	OPPOSITION TO BARBOUR'S
	)	MOTION TO DISMISS
Perry Wendell Barbour,	)	
	)	
Defendant.	)	
_____	)	

Plaintiffs, by and through their undersigned counsel, respectfully submit this Opposition to Defendant's Motion to Dismiss, and in support of which, allege the following:

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 Barbour's negligence, gross negligence and reckless acts, Plaintiffs sustained injuries that necessitated medical attention.

On June 7, 2019, Plaintiffs filed action for damages (hereinafter referred as Spartanburg action) against Barbour and Southland Transportation for the injuries they sustained as a result of the wreck. Unfortunately, due to the carrier's insurer dragging the negotiations over a lengthy period of time and negligence and/or mistake by the United States Postal Service, the Summons and Complaint were served beyond the prescribed period under Rule 3 of the SCRCF, despite having been posted within 120 days after filing the complaint.

Plaintiffs thereafter attempted to serve Barbour through the Office of the General Counsel of the South Carolina Department of Motor Vehicle (SCDMV), pursuant to S.C. Code Ann. § 15-9-350 in relation to §15-9-370. SCDMV accepted service upon Barbour and mailed the same to Barbour's residence. When the SCDMV attempted to notice Mr. Barbour it had accepted service upon him, it was returned to sender. (Exhibit - Stamped Returned Envelope).

On November 8, 2019, Mr. Alan Jones, Esquire of Turner Padget Graham & Laney PA, filed an Answer and a Motion to Dismiss on behalf of Southland, alleging Appellants failed to properly and timely file their Summons and Complaint. Southland contended it was not served within the period required under Rule 3 of the SCRCP. Plaintiffs opposed Southland's Motion to Dismiss on November 26, 2019, invoking good cause and equity consideration.

On December 23, 2019, Mr. Jones, filed a Motion to Dismiss, on behalf of Barbour, alleging failure to properly and timely serve the Complaint. Mr. Jones was substituted by David Moore, Esquire, whose main contention was the lack of proper service meant the action was never commenced.

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.

(Motion to Dismiss Transcript p. 4, 17.21).

There was no case since there was no proper and timely service of Complaint. On March 10, 2020, the Court agreed with Mr. Moore and granted the Motion to Dismiss based on Rule (12)(b)(2), (4) and (5). The Circuit court ruled as follows:

The Barbours' **MOTION** to **DISMISS** pursuant to Rules **12(b)(2)**, **(4)**, and **(5)**, SCRCP, should be and **IS** therefore **GRANTED** for

failure of the Plaintiffs to commence this action with effective service upon the Barbours within the applicable limitations period.

(Exhibit- Form 4, dated March 10, 2020).

Plaintiffs moved for reconsideration of the Order on March 20, 2020, which was subsequently denied. Plaintiffs appealed the Spartanburg action against Southland and Barbour.

The Spartanburg action was dismissed without prejudice. The law of that case is it never began due to the failure to serve Defendants according to Rule 3 of the SCRCPP. Plaintiffs filed the instant case on August 27, 2020. On September 18, 2020, Plaintiffs served the Summons and Complaint via certified mail to the SCDMV. SCDMV sent a copy of the processes to Defendant Barbour but they were once again returned to its office marked "Return to Sender Not Deliverable as Addressed Unable to Forward".

After a lapse of more than thirty-five (35) days following the service of the Service and Complaint, and compliance with the requirements of Section 15-9-380 of the 1976 Code of Laws, Plaintiffs filed an Affidavit of Default on November 10, 2020 and moved for Order of Entry of Default on November 28, 2020. On December 16, 2020, this court issued its Order of Default and Order for Hearing to Ascertain Damages.

Plaintiffs served notice of the Damages Hearing on February 1, 2021. The notice was served on the Defendant at his last known address and upon Defendant's insurance company. Defense Counsel stated in the first case he was retained by Defendant Barbour. However, defense counsel stated he was responding on behalf of the insurance company because he never was retained in the first action. He doesn't know where Defendant Barbour is. Regardless, he filed two motion and an answer two and a half months following the expiration of the time for serving a motion or an answer. This is Response in Opposition to Barbour's Motion.

ARGUMENT

In his Motion to Dismiss, Defendant sought the dismissal of the instant case based on a pending appeal on a matter between the same parties. However, Mr. Moore has always taken the position that the Spartanburg action had not commenced. Thus, he should not be allowed to argue that there was a first case. His argument is opposite to what he argued in the Spartanburg action.

In his Order, dated March 10, 2020, Judge Cole of the Spartanburg Circuit Court dismissed the Spartanburg action saying the failure to serve was the cause for the dismissal:

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

(Exhibit- Form 4, dated March 10, 2020).

Nothing in the Order indicated the dismissal was with prejudice.

Well-established is the doctrine that res judicata precludes the parties from relitigating issues actually litigated and those that might have been litigated in the first action. Town of Sullivan's Island v. Felger, 318 S.C. 340, 457 S.E.2d 626 (Ct. App. 1995). In order for the doctrine of res judicata to apply, the following elements must be shown: (1) the identities of the parties are the same as the prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Garris v. Governing Bd. of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998); Lowe v. Clayton, 264 S.C. 75, 212 S.E.2d 582 (1975); Wold v. Funderburg, 250 S.C. 205, 157 S.E.2d 180 (1967).

In the present case, however, Plaintiffs submit Defendant has failed to establish the third element. The third factor to consider is whether the original action was judged on the merits of the case; and, whether that judgment was a final judgment. Final judgment does not occur when

the case is settled by the parties on their own; where the judge decides a motion; or makes some other determination that does not resolve the case based on the facts and evidence of the case. This means that the final judgment must concern the actual facts giving rise to the claim.

In the Spartanburg action, the dismissal of the case was based on notice issues—failure to properly and timely serve defendants. It was not a judgment on the merits of the case. As such, subsequent litigation as to whether Defendant is liable would not be barred.

Since the dismissal in the Spartanburg action was without prejudice, Plaintiffs believe this case may continue.

CONCLUSION

For the above and foregoing reasons, Plaintiffs move for this Court to deny Defendant's Motion to Dismiss and allow Plaintiffs an opportunity to have their case heard in court and decided not based on technicality. In the alternative, Plaintiffs prays this Court hold the instant case in abeyance pending the resolution of the appeal on the Spartanburg action.

Respectfully submitted by:

s/Donald L. Smith

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Anderson, SC
February 16, 2021.

**APPELLANTS' MOTION FOR
RECONSIDERATION
February 26, 2021**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE	)	
	)	
Bobby E. Leopard, Donna Harris and	)	Case No.: 2020-DR-11-00632
Luther Harris,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' MOTION FOR
vs.	)	RECONSIDERATION OF THE
	)	ORDER GRANTING MOTION TO
Perry Wendell Defendant,	)	VACATE AND MOTION TO DISMISS
	)	
Defendant.	)	
	)	

Plaintiffs, by and through their undersigned counsel, respectfully move this Court to reconsider its Order, dated February 16, 2021, granting Defendant's Motion to Set Aside Default Judgment and Defendant's Motion to Dismiss, and allege the following in support of this Motion:

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, driving a truck owned by Southland Transportation Company, was also traveling southbound on U.S. 85 at that time. Without warning, Defendant'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 Defendant's negligence, gross negligence and reckless acts, Plaintiffs sustained injuries that necessitated medical attention.

On June 7, 2019, Plaintiffs filed action for damages (hereinafter referred as Spartanburg action) against Defendant and Southland Transportation for the injuries they sustained as a result of the wreck. Unfortunately, negotiations with the carrier were delayed due to a variety of reasons offered by the adjuster, a workers' compensation claim which had yet to be resolved and a delay by

the U.S. Postal Service in mailing the certified mailing done pursuant to the long-arm statute, all of which led to the Summons and Complaint being served beyond the prescribed period under Rule 3 of the SCRCP.

The aforementioned mailing delay caused the service for Southland Transportation Company to be received by the Secretary of State on Wednesday October 9, 2019. Based on Southland being incorporated in North Carolina, service could be made in that manner pursuant to S.C. Code Ann. §15-9-245. The certified mailing was mailed on Friday October 4, 2019. However, the Anderson Post Office forwarded the certified letter, return receipt requested on Monday October 7, 2019. The two-day delay resulted in the service being two days late.

On November 8, 2019, Mr. Alan Jones, Esquire of Turner Padget Graham & Laney PA, filed an Answer and a Motion to Dismiss on behalf of Southland, alleging Appellants failed to properly and timely serve their Summons and Complaint. Southland contended it was not served within the period required under Rule 3 of the SCRCP. Plaintiffs opposed Southland's Motion to Dismiss on November 26, 2019, invoking good cause and equity considerations.

Plaintiffs thereafter attempted to serve Defendant through the Office of the General Counsel of the South Carolina Department of Motor Vehicle (SCDMV), pursuant to S.C. Code Ann. § 15-9-350 in relation to §15-9-370. SCDMV accepted service on behalf Defendant and mailed the same to Defendant's residence. When the SCDMV attempted to notice Mr. Defendant that it accepted service on a lawsuit against him, it was returned to sender. (Exhibit-Stamped Returned Envelope).

Defendant failed to respond to the lawsuit served upon him by and through the Office of General Counsel within thirty (30) days. Thereafter, Plaintiffs moved for an Entry of Default. The Clerk recognized the default and scheduled an Order of Reference was clocked.

On December 23, 2019, nearly two (2) months after the last day to timely file a response, Mr. Jones filed a Motion to Dismiss, on behalf of Defendant, alleging a failure to properly and timely serve the Complaint. Mr. Jones was substituted by Mr. David L. Moore, Esquire, whose main contention was the failure to serve the pleadings within the requisite 120-day period meant the case had never been commenced. The failure to commence implicitly said there had never been a case. Without a case, Plaintiffs' argument regarding the fact Defendant had not timely raised his affirmative defenses relating to the Statute of Limitations and the related issue of service, was a nullity. On March 10, 2020, the Spartanburg Circuit court granted the Motion to Dismiss based on Rule (12)(b)(2), (4) and (5). The Spartanburg Circuit court ruled as follows:

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 Plaintiffs to commence this action with effective service upon the Defendants within the applicable limitations period.

(Exhibit-Form 4, dated March 10, 2020).

Plaintiffs moved for reconsideration of the Order on March 20, 2020, which was subsequently denied. Plaintiffs appealed the Spartanburg action against Southland and Defendant.

Pursuant to the Order, dated March 10, 2020, Plaintiffs filed the instant case on August 27, 2020. On September 15, 2020, Plaintiffs served the Summons and Complaint on the SCDMV via certified mail. SCDMV sent Defendant a copy of the processes, but the same was returned to its office marked "Return to Sender Not Deliverable as Addressed Unable to Forward" on September 25, 2020. Since he had not changed his address, there was nowhere to forward the mailing.

After complying with the requirements of Section 15-9-380 of the 1976 Code of Laws and a lapse of more than thirty (30) days upon filing of the Complaint, Plaintiffs filed an Affidavit of Default on November 10, 2020 and moved for Order of Entry of Default on November 28, 2020. On December 16, 2020, this court issued its Order of Default and Order for Hearing to Ascertain Damages.

Five (5) days prior to the scheduled damages hearing, Mr. Moore, Esquire filed a Rule 55 (c) SCRCF Motion to Vacate Entry of Default and Motion to Dismiss on February 11, 2021. He also belatedly filed an Answer on the same date. The goal of these two (2) motions was to deny Plaintiffs their right to be compensated for the injuries sustained at the hands of Defendant. The Court ruled in favor of Defendant's position. Thus, Plaintiffs file this Motion for Reconsideration of the ultimate prejudice that could be absorbed by parties to a lawsuit-the termination of their action for damages.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct.App. 1988). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App. 1997). Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to set aside the entry of default.

The standard for granting relief from an entry of default is "good cause". Rule 55(c), SCRCF. 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. Once a party has put forth a satisfactory explanation of good cause for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App. 1989). The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App. 1994).

ARGUMENTS

I.

IT WAS ERROR OF LAW FOR THE COURT TO SET ASIDE THE DEFAULT JUDGMENT AND SUBSEQUENTLY DISMISS THE CASE.

Defendant waived his right to raise affirmative defenses.

In his motions, Defendant raised the defense of the simultaneous pendency of an action involving the same parties in seeking to have the Default Order (Judgment) set aside, and eventual dismissal of the case. Plaintiffs believe Defendant has waived his right to such action.

The law is well-settled that failure to raise objections under Rule 12(b)(2) through (5) in either a responsive pleading or by Rule 12(b) motion will waive the right to make an objection. Rule 12(h) South Carolina Rules on Civil Procedure (SCRCF).

Plaintiffs filed their Complaint on August 27, 2020. A copy of the Summons and Complaint was served upon Defendant, by and through the Office of the General Counsel of South Carolina Department of Motor Vehicle (hereinafter referred as SCDMV), who accepted service on September 18, 2020. On December 16, 2020, Plaintiffs obtained an Order of Default for Defendant's failure to file any responsive pleadings within the time requirement.

On February 11, 2021, one hundred sixty-eight days (168) days after the filing of the Complaint, Defendant filed his Motion to Vacate or Set Aside Default Judgment, Motion to Dismiss and Answer. In all three pleadings, Defendant raised the defense of pendency of action (appeal) between same parties. However, since Rule 12 (h)(1) of SCRCP specifically includes pendency of action as one of the waivable defenses. In this case, since Defendant failed to file his Answer and Motions within the period required by Rule 12 (a), Defendant is deemed to have waived this defense.

The same can be argued with regards to Defendant's allegation that the instant action is barred by statute of limitation. Defendant avers he can raise the three-year statute of limitations for tort cases as meritorious defense. Statute of limitations is an affirmative defense which must be specifically pled. Rule 8 (c) SCRCP.

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 September 18, 2020, Defendant's Motion to Dismiss must have been filed by October 18, 2020. The February 11 filing, therefore, was untimely, resulting in a waiver of defenses Rules 12(b)(2), (4), and (5), SCRCP, relied upon by the Court in its decision. Defendant cannot now be awarded for sleeping on his rights by granting him relief based on defenses he has waived.

Rule 12(h) of the SCRCP relates to the fact that you can waive your defenses to the statute of limitations or failure to serve the pleadings within the necessary 30 days. Specifically, it holds the following:

- (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.

Defendant did not have the defenses used by the Court in dismissing Plaintiffs' claims at his disposal. His failure to respond within 30 days failed to preserve his defenses, thereby waiving them.

Equitable estoppel may be applied in the instant case precluding the application of the statute of limitations.

Plaintiffs submit the mere allegation of statute of limitations does not automatically warrant dismissal of a case. Plaintiffs believe 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).

In the instant case, while Plaintiffs attempted to comply with the statute of limitations with the Spartanburg action, they were prevented from pursuing the same due to Defendant's

inaccurate mailing address. It will be established in the latter part of this Motion that Defendant has a propensity not only in driving recklessly but also in intentionally providing incorrect mailing address and/or contact detail in his driver's license to avoid prosecution.

That doctrine has been described as "a standard of fair dealing applied by the courts." As applied to the statute of limitations, its central premise is that *Delson v. Minoque* (E.D.N.Y. 1961) 190 F. Supp. 935, 937.

one cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute [of limitations], and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.

Howard v. West Jersey S. S. R. Co. (1928) 102 N.J. Eq. 517, 141 A. 755, 757-58, *aff'd. mem.* 104 N.J. Eq. 201, 144 A. 919 (1929).

Cited in City of Bedford v. James Leffel Co., 558 F.2d 216 (4th Cir. 1977).

II.

DEFENDANT MISTAKENLY APPLIED THE WRONG STANDARD IN SETTING ASIDE THE JUDGMENT.

Plaintiff believes Defendant had mistakenly applied the wrong standard in seeking to vacate the default judgment against him. In the case of *Sundown v. Intedge Industries*, the Court differentiated the standard for granting relief from judgment under Rule 55(c) and Rule 60(b) of the SCRCP. Sundown v. Intedge Industries, 383 S.C. 601 (S.C. 2009). To quote:

The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. 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. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App. 1989). The trial court need

not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App. 1994).

Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App. 1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRCP. The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default.

Sundown, *supra*.

In the instant case, default order has been entered against Defendant on December 16, 2020. Defendant sought relief from judgment by moving to vacate the default order under Rule 55 (c) of the SCRCP. But since an Order of Default has already been entered, Defendant should have applied Rule 60(b) instead. Therefore, his reliance on Rule 55(c) SCRCP and the "good cause" standard was incorrect.

The truth of the matter is Defendant never made an appearance in the Spartanburg matter. The previous representative for Sentry Insurance did not answer for Defendant. He did not answer because he no longer worked for the insured, Southland Transportation Company. Since Defendant no longer worked for the company, and had no contact with defense counsel, he did not file an answer on his behalf.

Defense counsel's sudden departure from the law firm did not make Defendant compliant

with aiding in Sentry's defense. Defendant has not participated in either of these actions. In essence, the Court is allowing a non-party (Sentry Insurance) to participate in the defense of a near catastrophic wreck. Counsel for Sentry has alleged he was retained by Defendant. However, he makes no reference to him whatsoever. On the same token, defense counsel discusses how he and the insurance company were allegedly due notice of the Summons and Complaint of a new action when Plaintiffs complied with the State statute regarding service of a non-resident.

Furthermore, Defendant is not entitled to relief from the default order under Rule 60(b) since the Rule requires a more stringent standard, and Defendant has not shown mistake, fraud, excusable neglect, surprise nor misconduct of the Plaintiff is attendant in the instant case.

III.

DEFENDANT IS NOT ENTITLED TO RELIEF OF ENTRY OF DEFAULT UNDER RULE 55 (c) SCRCP.

There is no question Defendant failed to file an answer, any responsive pleading or a motion to dismiss within thirty (30) days of the service of summons and complaint upon him, through the SCDMV. As such, Defendants were technically in default. Plaintiffs were well within their right to move for (and obtain) an entry of default.

Assuming arguendo that Defendant has properly sought relief under Rule 55 (c) SCRCP, Plaintiff maintains Defendant has not presented a satisfactory explanation for the default. *The named defendant did not offer a notarized affidavit explaining his failure to respond within 30 days.* The Court's conclusory statement the Wham factors were controlling, was not substantiated with any analysis because Defendant could not satisfy any of the factors.

- A. Plaintiff failed to present sufficient proof of good cause for relief from default under Rule 55 (c).**

Plaintiffs assert Defendant was properly adjudged in default for failing to comply with the time requirements of Rule 12 (a) SCRCF. Defendant did not provide justifiable reason for not filing a responsive pleading.

That Plaintiff failed to and/or did not attempt to determine Defendant's correct address is not a good cause to relieve Defendant from default. Defendant was served with the processes by certified mail, at his last known address: 130 Valentine Court, Martinsville, VA 24112. This is evidenced by his driver's license. As a resident of the State of Virginia, Defendant is bound by its laws. Any license holder under Virginia laws is mandated to notify the Department of any change of address. Virginia Code §46.2-324 (Exhibit 1- Code of Virginia, Title 46.2, Chapter 3). Since Defendant presented a driver's license with the Virginia address, Plaintiffs (and the SCDMV) can safely assume Defendant may be found in the said address.

Defendant's gross negligence and/or reckless behavior is evident in this case. He knew he had an obligation to keep his contact information updated under the Virginia laws, but has continuously refused to do so. Through diligent search, Plaintiff discovered this Defendant had a number of traffic infractions in which he was found guilty in absentia, presumably due to the inability of plaintiffs to reach out to him. (Exhibit- List of Defendant's traffic violations).

If Defendant wanted to defend himself against suit, he had a duty of due diligence to ensure the DMV knew where to find him. His failure to ensure the SCDMV had the proper address, or accepted service if he simply wouldn't accept service, shows a callous disregard for society.

By asking Plaintiffs to locate Defendant's correct address, Mr. Moore and the insurance carrier are placing a heavy burden upon Plaintiffs who have already suffered from Defendant's grossly negligent and/or reckless acts.

Defendant's grossly negligent and/or reckless conduct has caused the delay.

Generally, motions to set aside a default judgment should be accompanied by one or more affidavits explaining the circumstances leading to the default. The motion, affidavits, or accompanying proposed answer should also establish that the defendant has a viable defense to the action, such as by controverting the factual allegations of the complaint. Defendant has not done any of the aforesaid acts.

Furthermore, Plaintiffs maintain Mr. Moore has not established his status in this case. He claimed he was retained by Defendant, but he has failed to submit evidence to prove the same. Plaintiffs reiterate their position that if it were true Defendant retained Mr. Moore's services, then Defendant must have received the processes or had knowledge of the same. As such, it took Defendant sometime to hire a counsel to defend his case, and yet, Defendant has not provided a satisfactory explanation for the default.

In sum, the law requires Defendant to provide a reason, a "good cause", for the delay in responding to Plaintiffs' Complaint (as well as the succeeding motions) and as such, he should not be rewarded for his failure to comply with the law.

B. The Wham factors did not weigh in favor of relief.

As mentioned in the previous section, courts rely on a two-step analysis in determining whether to grant relief for an entry of default under Rule 55(c) of the SCRCF: First is to provide for a "good cause" explanation for the default; and then satisfy the three (3) factors mentioned in the Wham case: (a) timeliness; (b) meritorious defense; and, (3) degree of prejudice to Plaintiffs Wham, supra. Defendant failed to satisfy all three (3) aforementioned factors.

a) Timeliness of the motion

Plaintiffs reiterate their position that Defendant took an inordinately long time in filing

his Motion to Vacate and/or Set Aside Judgment. Plaintiffs filed the Summons and Complaint on August 27, 2020 and served Defendant on September 15, 2020 through SCDMV. Defendant did not submit an Answer nor any motion within the 30-day period prescribed under Section __ of the SCRCF. Neither did Defendant submit a response to Plaintiffs' Affidavit of Default and Motion for Entry of Default, which were filed on November 10, 2020. It took Defendant four (4) months to address Plaintiffs' Complaint, and two (2) months to respond to Plaintiff's Affidavit and Motions.

Rule 55(c) does not provide a specific time limit for the filing of a motion to set aside an entry of default. The Fourth Circuit denied a motion to set aside, determining that by waiting 2 ½ months between the date of entry of default and the motion, movant "did not act promptly." *Consolidated Masonry & Fireproofing, Inc.*, 383 F.2d 249, 251 (4th Cir. 1967). See also *Nelson v. The Coleman Co.*, 41 F.R.D. 7 (D. S.C. 1966) (Simons, J) (even short delay not excused where circumstances showed lack of intent to act promptly). The Courts in the cases of *Richardson v. P.V.* 383 S.C. 610, 613 (S.C. 2009), and *Rodriguez v. Gutierrez*, 391 S.C. 323 (S.C. Ct. App. 2011) denied relief to the movants who filed their respective motion two (2) months from the entry of default.

In sum, Defendant failed to act promptly in seeking relief.

b. Meritorious Defense

In his Memorandum in Support of Defendant's Motion to Set Aside Entry of Default, Mr. Moore raised the defense of statute of limitations barring the present action. To this end, Plaintiffs submit this defense has been precluded when Defendant failed to file his answer or motion within the period set forth by law, thereby making the insufficiency of service, and the associated statute of limitations, moot.

Mr. Moore brought the issue of the Spartanburg action being pending on appeal. In that same action, Mr. Moore, who represented the trucking company which employed herein Defendant, insisted no such action has commenced. In the instant case, Mr. Moore relied on the Spartanburg action to support his attempt for relief from default judgment, the very action he denounced as non-existent. Mr. Moore should not be allowed to change his theory of the case. The Court has ruled on this matter in the case of *Hayne Federal Credit Union*. Hayne Federal Credit Union v. Bailey, 327 S.C. 242 (S.C. 1997). The Court ruled:

It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory. However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence.

Ibid.

There is no newly discovered evidence presented in this case. And more importantly, the dismissal of the Spartanburg action was without prejudice to filing another action. Thus, the pendency of an appeal on the Spartanburg action is not a good defense to the plaintiff's claims that might allow you to avoid liability altogether.

Furthermore, in both the Spartanburg action and in the present case, Defendant has not provided a defense for his grossly negligent and/or reckless driving that caused severe physical injuries on Plaintiffs. Defendant has shrouded himself with procedural arguments, never addressing the substance of the claims raised against him.

And finally, Plaintiffs address what could be the only "defense" presented by Mr. Moore—Plaintiffs failure to provide Mr. Moore a copy of the Summons and Complaint. Mr. Moore argues Plaintiffs have known he was Defendant's counsel in the Spartanburg action and therefore, should have been provided a copy of the Complaint.

Bearing in mind Mr. Moore's theory that the Spartanburg action has not commenced and thus a nullity, Plaintiffs submit this case should be treated as a new action. Under Rule 4(d)(1), summons and complaint may be served upon the defendant as follows:

(d)(1) Individuals. Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or 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.

Nothing in the law mandates Plaintiffs to deliver a copy of the Summons and Complaint upon Mr. Moore, who has not established his authority to represent Defendant, either by appointment or by law. Plaintiffs served Defendant, through the SCDMV as required under SC Code Ann. § 15-9-370, in relation to Rule 4(d)(7) of the SCRCPP. To impose additional requirements upon Plaintiffs is to burden them for abiding by the law.

c. Prejudice to Plaintiffs

Plaintiffs maintains to set aside the judgment would eliminate the opportunity for Plaintiffs to pursue their claims against Defendant. Plaintiffs have sustained injuries which necessitated medical attention that continues to date. They had to endure physical pain and suffering as well as financial difficulties due to this protracted litigation. The Court in the previous Spartanburg action allowed Defendant to avoid the fact he was in default and allowed him to file dispositive motions despite the fact they were not filed within the thirty-day window. Defendant had a duty to assert his affirmative defenses within thirty days, otherwise they are considered waived. Plaintiffs believe the Court in the Spartanburg action committed an error of law when he failed to do so.

Likewise, in the present case, the Court disregarded the fact Defendant once again

ignored the complaint lodged against him despite having notice of the suit, overlooked Defendant could not use the affirmative defenses to avoid default, and ignored the fact Plaintiffs suffered the ultimate prejudice by having their case for damages dismissed even though the Judge specifically recognized the prejudice which would result to Plaintiffs if Defendant's motions were granted, and allowed the insurance carrier to respond to the default judgment.

C. Defendant has come to court with unclean hands.

Plaintiffs submits that the doctrine of unclean hands applies in this case. This doctrine precludes a party from recovering in equity if he acted unfairly in a matter which is the subject of the litigation to the prejudice of the defendant. Wilson v. Landstrom, 281 S.C. 260 (1984), 315 S.E.2d 130, citing Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E. (2d) 735 (1943).

Plaintiffs aver Defendant knowingly and willingly made himself available to the jurisdiction of SCDMV when he decided to work as a truck driver, plying South Carolina roads. Under S.C. Code Ann. §§ 15-9-350 and 15-9-370, a non-resident driver who operates his/her motor vehicle on the public highways, streets or public roads or anywhere within the State, is deemed to subject himself/ herself under the jurisdiction of SCDMV. As such, Defendant made himself available for SCDMV to notice in case of any motor vehicle accident. That Defendant did not provide correct contact details and/or updated mailing address is a blatant disregard of the laws in South Carolina. It has already been established in the previous section Defendant has also violated Virginia laws.

Plaintiffs discovered Defendant has had a significant number of traffic incidents, a majority of which have been tried in his absence.

date	city/county	state	charge	case #	outcome
9/20/08		Virginia	Failure to obey highway sign	071GT0800453100	Guilty in absentia
10/19/07	Henry	Virginia	Speeding 48/35	089GT0700797900	Guilty in

					absentia
10/19/07	Henry	Virginia	Seat belt violation	089GT0700798000	Guilty in absentia
8/28/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
9/17/07	Montgomery	Virginia	Defective equipomment generally	121GT0701637400	Guilty
9/30/03	Patrick	Virginia	Oper w/radar detect/jam device	141GT0300129200	Prepaid-Fine
5/28/04	Patrick	Virginia	Speeding 74/55	141GT0400068000	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey highway sign sleep	175GT0600711000	Guilty in absentia
1/16/08	Danville City	Virginia	Speeding 55/40	590GT0800067700	Guilty
		Kentucky	Driving on suspended	10-T-00307	
6/16/16	Spartanburg	South Carolina	Driving vehicle at greater speed than is re	5102P0362799	Guilty in absentia
6/23/11		Virginia	No county or city tag	GT11004149-00	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey high-sign sleep	175GT0600711000	Guilty in absentia
9/10/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
6/12/15	Danville City	Virginia	Speeding 53/40	590GT15006703-00	Guilty in absentia
1/21/95		Virginia	Illegal sunshading	089GT9500043700	Guilty in absentia

Clearly, Defendant is a habitual traffic violator, which his employer knew or should have known. They hired him to drive a semi for them. They disregarded his driving record and allowed him to drive a deadly weapon. The fact he never changed his address with the state DMV is proof positive that he drives without regard for those around him.

For this Court to allow Defendant, a habitual violator, to take refuge in the doctrine of statute of limitations when he failed to answer or file a motion within the requisite 30 days (or 100 days for that matter) is to condone his unlawful behavior.

Courts have allowed the filing of Complaints beyond the statute of limitations in the interest of justice.

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.

In Henneberry, 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.

CONCLUSION

Defendant failed to provide a good cause explanation for his failure to file an or a Motion within the thirty-day period required by law, he is precluded from raising the affirmative defenses of statute of limitations and pendency of appeal. Defendant cannot rely on them as meritorious defense when he has slept on his rights. The substantial prejudice to the plaintiffs would crush any prejudicial arguments made by Defendant, especially given his second chance at responding to the service of an S&C was also a willful and wanton refusal to respond to his implicit acceptance of service. Defendant also believes the court misapplied the standard in setting aside the default by granting the relief based on the less stringent standard in Rule 55 (c) instead of Rule 60 (b).

Based on the foregoing, and in the interest of justice, Plaintiffs move for this Court to reconsider its Order, dated February 16, 2021, and allow the parties litigate this matter. Plaintiffs believe allowing this case stand in abeyance while the appellate action takes its course would be far less prejudicial to either party. The Court's goal is to have cases tried on the merits. Both parties would benefit from having the other's motions (dismissal and default) denied so that the merits of the wreck on I-85 could be addressed by a jury of the parties' contemporaries. Plaintiffs believe disregarding the default judgment while granting the insurance carrier a

dismissal based on the defenses he waived according to the Rules is not representative of due process.

Anderson, South Carolina
February 26, 2021.

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

NOTICE OF APPEAL
March 11, 2021

RECEIVED

**FORM 1
NOTICE OF APPEAL**

Mar 11 2021

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

SC Court of Appeals

**APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas**

Letitia H. Verdin, Judge

Case No. 2020-CP-1100632

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

Appellants,

v.

Perry W. Barbour,

Respondent.

NOTICE OF APPEAL

The undersigned counsel respectfully appeals Judge Letitia H. Verdin's challenged Form 4/Orders, dated February 16, 2021 and March 9, 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
March 10, 2021

Other Counsel of Record

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

Perry W. Barbour
130 Valentine Court
Martinsville VA 24112

**LETTER FROM SCDMV TO
APPELLANTS' COUNSEL
RE: SERVICE TO RESPONDENT
October 8, 2020**



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

OFFICE OF GENERAL COUNSEL

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

October 8, 2020

Donald L. Smith, Esquire
122 North Main Street
Anderson, SC 29621

Re: Luther Harris Donna Harris and Bobby Leopard v. Perry Wendell Barbour
Case No.: 2020-CP-11-00632, DMV 20-421

To Whom it May Concern:

The notice of service and copy of the Summons and Complaint in the above-referenced action were sent via certified mail on September 15, 2020 to Defendant Perry Wendell Barbour and returned to this office marked "Return to Sender Not Deliverable as Addressed Unable to Forward" by the U.S. Postal Service.

In accordance with the provisions of Section 15-9-380 of the 1976 Code of Laws, as amended, I am today sending notice of service and a copy of the Summons and Complaint to Defendant Perry Wendell Barbour. Enclosed are: (1) the original certified mail envelope (**with** the return receipt card), (2) a photocopy of the open mail envelope, and (3) the Affidavit of Mailing. These documents will be filed by you with the Clerk of Court.

If you have any questions, please contact me at 803-896-9900.

Sincerely,

Natasha Thomas, Paralegal
Office of General Counsel

For: Director, South Carolina Department of Motor Vehicles

Enc.

**AFFIDAVIT OF
MS. NATASHA THOMAS
October 8, 2020**

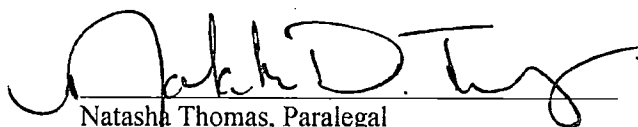
STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

AFFIDAVIT

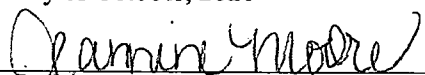
PERSONALLY appeared before me, Natasha Thomas, who, first being duly sworn, deposes and says that:

This Affidavit is made in compliance with Section 15-9-380 of the Code of Laws of South Carolina;

1. I am the designated representative of the Director of the South Carolina Department of Motor Vehicles;
2. On September 14, 2020, in accordance with the provisions of Sections 15-9-350 or 15-9-360 of the 1976 Code of Laws of South Carolina, the Summons and Complaint in an action styled *Luther Harris Donna Harris and Bobby Leopard v. Perry Wendell Barbour*, Case No.: 2020-CP-11-00632, DMV 20-421, was received by the South Carolina Department of Motor Vehicles;
3. On September 15, 2020, a copy of the Summons and Complaint was sent to Perry Wendell Barbour certified mail 130 Valentine Court Martinsville, VA 24112 which is the address furnished by Plaintiff's attorney.
4. On September 25, 2020, said copy of the Summons and Complaint was returned to the South Carolina Department of Motor Vehicles by the U.S. Postal Service marked "Return to Sender Not Deliverable As Addressed Unable to Forward," and is attached hereto; and
5. On October 8, 2020, a copy of the Summons and Complaint was sent to Perry Wendell Barbour by open mail to the same address with sufficient postage attached thereto.


 Natasha Thomas, Paralegal
 For: Director, S.C. Department of Motor Vehicles

Sworn to and subscribed before me this
 8th day of October, 2020


 Notary Public of South Carolina
 My Commission Expires: May 28, 2024

**PROOF OF SERVICE BY
CERTIFIED MAIL (GREEN CARD)
September 18, 2020**

SENDER: COMPLETE THIS SECTION

- 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.

1. Article Addressed to:

Perry Wendell Barbour
130 Valentine Court
Martinsville, VA 24112

20-421

7013 2250 0001 0887 0772

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1S40

COMPLETE THIS SECTION ON DELIVERY

A. Signature

x JN

☒ Agent

☐ Addressee

B. Received by (Printed Name)

Perry Barbour

C. Date of Delivery

9-18-2020

D. Is delivery address different from item 1? ☐ Yes

If YES, enter delivery address below:

☒ No

3. Service Type

☒ Certified Mail

☐ Express Mail

☐ Registered

☐ Return Receipt for Merchandise

☐ Insured Mail

☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

**APPELLANTS' LETTER TO
SENTRY SELECT INSURANCE,
February 1, 2021**

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

February 1, 2021

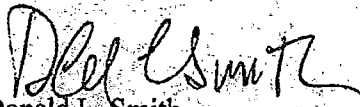
Sentry Select Insurance Co.
Attn.: Claims
1800 North Point Drive
Stevens Point, WI 54481

**RE: Luther Harris, Donna Harris and Bobby Leopard vs.
Perry Wendell Barbour and Southland Transportation Co.
C.A. No.: 2020-CP-11-00632
Claim No.: 61A171897-952**

To Whom It May Concern:

Please find enclosed a copy of the Notice of Hearing, Motion for Default Judgment, Entry of Default, Order of Default and Order to Ascertain Damages, Certificates of Service for these documents, as well as the Summons and Complaint. This hearing is to determine Plaintiffs' respective damages in conjunction with the previously issued Order to Ascertain Damages. I have enclosed a Certificate of Service for the mailing of these documents as well.

With highest regards, I remain
Very truly yours,


Donald L. Smith
DLS/ds
Enclosures

**CERTIFIED LETTER FROM
SCDMV TO RESPONDENT
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

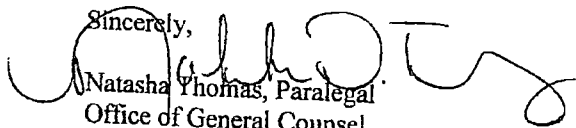
Dear Mr. Barbour:

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**

ELECTRONICALLY FILED - 2021 Feb 16 4:18 AM - CHEROKEE - COMMON PLEAS - CASE#2020CP1100632



South Carolina Department of Motor Vehicles

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

Form 103-A

Forwarding Service Requested

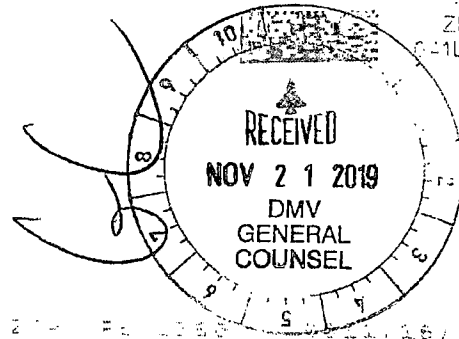
RTS

neopost
11/07/2019

DEPOSITEE

\$000

ZIP 29016
C-1L12204134



STATE OF SOUTH CAROLINA

FILED TO SENDER
NOT DELIVERABLE AS ADDRESSED
UNABLE TO FORWARD

AC: 19015140898 *0554-000107-43

2019-11-21 11:11

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.

**FORM 4/ORDER, DATED
MARCH 10, 2020
C.A. No. 2019-CP-42-02092
Harris et. al. v. Barbour et. al.**

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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other SC Code Section 15-3-530
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ 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), SCRCP.

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, SCRCP.

"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), SCRPC.

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), SCRPC. 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), SCRPC. 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)**, SCRPC, should be and **IS** therefore **DENIED**.

The defendants' **MOTION** to **DISMISS** pursuant to Rules **12(b)(2)**, **(4)**, and **(5)**, SCRPC, 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> Judge Code	<u>03/03/2020</u> 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.

ELECTRONICALLY FILED 2020 MAR 10 10:41 AM MS.FH.FROM KIRK GC D:\MOMON\FILE\ASA\SC\AS\F2020\CP\14020202



IT IS SO ORDERED!

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

**PROOF OF MAILING TO
RESPONDENT
FROM CLERK OF COURT
CHEROKEE COUNTY
February 16, 2021**



Mrs. Brandy W. McBee
Clerk Of Court, Cherokee County
Post Office Drawer 2289
Gaffney, S.C. 29342

Perry Wendell Barbour
130 Valentine Court
Martinsville, VA 24112

neopost[®]
02/16/2021
US POSTAGE

FIRST-CLASS MAIL

\$00.51⁰



ZIP 29340
041L11245001

**EXCERPTS OF
CODE OF VIRGINIA
Title 46.2. Motor Vehicles
(law on applicants and
license holders)**

Code of Virginia
Title 46.2. Motor Vehicles
Subtitle II. Titling, Registration and Licensure
Chapter 3. Licensure of Drivers
Article 4. Obtaining Licenses, Generally

§ 46.2-324. Applicants and license holders to notify Department of change of address; fee

- A. Whenever any person, after applying for or obtaining a driver's license or special identification card shall move from the address shown in the application or on the license or special identification card, he shall, within 30 days, notify the Department of his change of address. If the Department receives notification from the person or any court or law-enforcement agency that a person's residential address has changed to a non-Virginia address, unless the person (i) is on active duty with the armed forces of the United States, (ii) provides proof that he is a U.S. citizen and resides outside the United States because of his employment or the employment of a spouse or parent, or (iii) provides proof satisfactory to the Commissioner that he is a bona fide resident of Virginia, the Department shall (i) mail, by first-class mail, no later than three days after the notice of address change is received by the Department, notice to the person that his license and/or special identification card will be cancelled by the Department and (ii) cancel the driver's license and/or special identification card 30 days after notice of cancellation has been mailed.
- B. The Department may contract with the United States Postal Service or an authorized agent to use the National Change of Address System for the purpose of obtaining current address information for a person whose name appears in customer records maintained by the Department. If the Department receives information from the National Change of Address System indicating that a person whose name appears in a Department record has submitted a permanent change of address to the Postal Service, the Department may then update its records with the mailing address obtained from the National Change of Address System.
- C. There may be imposed upon anyone failing to notify the Department of his change of address as required by this section a fee of \$5, which fee shall be used to defray the expenses incurred by the Department. Notwithstanding the foregoing provision of this subsection, no fee shall be imposed on any person whose address is obtained from the National Change of Address System.
- D. The Department shall electronically transmit change of address information to the Department of State Police, in a format approved by the State Police, for comparison with information contained in the Virginia Criminal Information Network and National Crime Information Center Convicted Sexual Offender Registry Files, at the time of the change of address. Whenever it appears from the records of the State Police that a person has failed to comply with the duty to register, reregister, or verify his registration information pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, the State Police shall promptly investigate and, if there is probable cause to believe a violation has occurred, obtain a warrant or assist in obtaining an indictment charging a violation of § 18.2-472.1 in the jurisdiction in which the person last registered, reregistered, or verified his registration information or in the jurisdiction where the person made application for change of address.
- E. For any summons issued for a violation of this section, the court may, in its discretion, dismiss

the summons, where proof of compliance with this section is provided to the court on or before the court date.

1974, c. 347, § 46.1-368.1; 1989, c. 727; 1996, cc. 943, 994; 2002, cc. 767, 834; 2006, cc. 857, 914; 2010, cc. 25, 55; 2017, c. 670; 2020, c. 829.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

date	city/county	state	charge	case #	outcome
9/20/08		Virginia	Failure to obey highway sign	071GT0800453100	Guilty in absentia
10/19/07	Henry	Virginia	Speeding 48/35	089GT0700797900	Guilty in absentia
10/19/07	Henry	Virginia	Seat belt violation	089GT0700798000	Guilty in absentia
8/28/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
9/17/07	Montgomery	Virginia	Defective equipment generally	121GT0701637400	Guilty
9/30/03	Patrick	Virginia	Oper w/radar detect/jam device	141GT0300129200	Prepaid-Fine
5/28/04	Patrick	Virginia	Speeding 74/55	141GT0400068000	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey highway sign sleep	175GT0600711000	Guilty in absentia
1/16/08	Danville City	Virginia	Speeding 55/40	590GT0800067700	Guilty
		Kentucky	Driving on suspended	10-T-00307	
6/16/16	Spartanburg	South Carolina	Driving vehicle at greater speed than is re	5102P0362799	Guilty in absentia
6/23/11		Virginia	No county or city tag	GT11004149-00	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey high-sign sleep	175GT0600711000	Guilty in absentia
9/10/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
6/12/15	Danville City	Virginia	Speeding 53/40	590GT15006703-00	Guilty in absentia
1/21/95		Virginia	Illegal sunshading	089GT9500043700	Guilty in absentia

SUMMONS AND COMPLAINT
Harris, et. al., vs. Barbour, et.al.,
2019-CP-42-02092
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
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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

NOTICE OF APPEAL
Harris, et. al., vs. Barbour, et.al.,
2019-CP-42-02092
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

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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

CERTIFICATE OF COUNSEL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jul 21 2021

SC Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Judge

Appellate Case No.: 2021-000269
C.A. No. 2020CP1100632

Bobby E. Leopard, Luther Harris and Donna Harris,

Appellants,

v.

Perry W. Barbour,

Respondent.

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.

Submitted by:

s/Donald L. Smith

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Attorney for Appellants

Anderson, South Carolina
July 21, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jul 26 2021

SC Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Judge

Appellate Case No.: 2021-000269
C.A. No. 2020CP1100632

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

Appellants,

v.

Perry W. Barbour,

Respondent.

FINAL BRIEF OF APPELLANTS

Submitted by:

s/Donald L. Smith

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Attorney for Appellants

Anderson, South Carolina
July 26, 2021

TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal	1
Statement of the Facts	1
Standard of Review.....	4
Arguments	
I. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT RELIEF FROM ENTRY OF DEFAULT.	4
II. THE CIRCUIT COURT ERRED IN NOT FINDING RESPONDENT WAIVED HIS AFFIRMATIVE DEFENSE.	10
III. THE DOCTRINE OF EQUITABLE ESTOPPEL APPLIES IN THE INSTANT CASE.	12
IV. THE CIRCUIT COURT ERRED IN NOT APPLYING THE UNCLEAN HAND DOCTRINE AGAINST RESPONDENT.	17
Conclusion	18
Certificate of Counsel	19

TABLE OF AUTHORITIES

Cases

City of Bedford v. James Leffel Co., 558 F.2d 216 (4th Cir. 1977)	15
Consolidated Masonry & Fireproofing, Inc., 383 F.2d 249, 251 (4th Cir. 1967)	8
Glus v. Brooklyn E. District Terminal, 359 US 231 (1959), 79 S.Ct. 760, 762, 3L.Ed 2d 770 (1959)	15
Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006)	4
Hayne Federal Credit Union v. Bailey, 327 S.C. 242 (S.C. 1997)	9
Henneberry v. Borstein, 2012 NY Slip Op. 00235 [91 AD3d 493]	16
In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)	4
Kleckley v. Nw. Nat. Cas. Co., 338 S.C. 131, 136--137 (2000)	12
Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988)	4
Nelson v. The Coleman Co., 41 F.R.D. 7 (D. S.C. 1966)	8
Richardson v. PV, 303 S.C. 610, 613 (S.C. 2009)	8
Rodriguez v. Gutierrez, 391 S.C. 323 (S.C. Ct. App. 2011)	8
Sundown v. Intedge Industries, 383 S.C. 601 (S.C. 2009)	5
Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)	6
Wilson v. Landstrom, 281 S.C. 260 (1984), 315 S.E.2d 130, citing Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E. (2d) 735 (1943)	17

Statutes

South Carolina Rules on Civil Procedure (SCRCP)

Rule 3	1
Rule 4	7, 11
Rule 8(c)	11

Rule (12)(b)(2), (4) and (5).	3, 11
Rule 12(h)	11
Rule 55(c)	4,5, 6
Rule 60(b)	5
<u>South Carolina Code Annotated</u>	
S.C. Code Ann. §15-9-245	2
S.C. Code Ann. § 15-9-350	2,14
§15-9-370	7,10,14
§15-9-380	3
<u>Virginia Code</u>	
§46.2-324 (Exhibit 1- Code of Virginia, Title 46.2, Chapter 3	17

STATEMENT OF ISSUES

- I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT RELIEF FROM ENTRY OF DEFAULT.**
- II. WHETHER THE CIRCUIT COURT ERRED IN NOT FINDING RESPONDENT WAIVED HIS AFFIRMATIVE DEFENSE.**
- III. WHETHER THE DOCTRINE OF EQUITABLE ESTOPPEL APPLIES IN THE INSTANT CASE.**
- IV. THE CIRCUIT COURT ERRED IN NOT APPLYING THE UNCLEAN HAND DOCTRINE AGAINST RESPONDENT.**

STATEMENT OF FACTS

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, driving a truck owned by Southland Transportation Company, was also traveling southbound on U.S. 85 at that time. Without warning, Respondent's truck smashed into the rear of Appellants' 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 Respondent's negligence, gross negligence and reckless acts, Appellants sustained injuries that necessitated medical attention.

On June 7, 2019, Appellants filed action for damages (hereinafter referred as Spartanburg action) against Respondent and Southland Transportation for the injuries they sustained as a result of the wreck. Unfortunately, negotiations with the carrier were delayed due to a variety of reasons offered by the adjuster, a workers' compensation claim which had yet to be resolved and a delay by the U.S. Postal Service in mailing the certified mailing done pursuant to the long-arm statute, all of which led to the Summons and Complaint being served beyond the prescribed period under Rule 3 of the SCRPC.

The aforementioned mailing delay caused the service for Southland Transportation Company to be received by the Secretary of State on Wednesday October 9, 2019. Based on Southland being incorporated in North Carolina, service could be made in that manner pursuant to S.C. Code Ann. §15-9-245. The certified mailing was mailed on Friday October 4, 2019. However, the Anderson Post Office forwarded the certified letter, return receipt requested on Monday, October 7, 2019. The two-day delay resulted in the service being two days late.

On November 8, 2019, Mr. Alan Jones, Esquire of Turner Padgett Graham & Laney PA, filed an Answer and a Motion to Dismiss on behalf of Southland, alleging Appellants failed to properly and timely serve their Summons and Complaint. Southland contended it was not served within the period required under Rule 3 of the SCRCF. Appellants opposed Southland's Motion to Dismiss on November 26, 2019, invoking good cause and equity considerations.

Appellants thereafter attempted to serve Respondent through the Office of the General Counsel of the South Carolina Department of Motor Vehicle (SCDMV), pursuant to S.C. Code Ann. § 15-9-350 in relation to §15-9-370. SCDMV accepted service on behalf Respondent and mailed the same to Respondent's residence. When the SCDMV attempted to notice Mr. Respondent that it accepted service on a lawsuit against him, it was returned to sender. (R., p. 96).

Respondent failed to respond to the lawsuit served upon him by and through the Office of General Counsel within thirty (30) days. Thereafter, Appellants moved for an Entry of Default. The Clerk recognized the default and scheduled an Order of Reference was clocked.

On December 23, 2019, nearly two (2) months after the last day to timely file a response, Mr. Jones filed a Motion to Dismiss, on behalf of Respondent, alleging a failure to properly and timely serve the Complaint. Mr. Jones was substituted by Mr. David L. Moore, Esquire, whose

main contention was the failure to serve the pleadings within the requisite 120-day period meant the case had never been commenced. The failure to commence implicitly said there had never been a case. Without a case, Appellants' argument regarding the fact Respondent had not timely raised his affirmative defenses relating to the Statute of Limitations and the related issue of service, was a nullity. On March 10, 2020, the Spartanburg Circuit court granted the Motion to Dismiss based on Rule (12)(b)(2), (4) and (5). The Spartanburg Circuit court ruled as follows:

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

(R., p. 99).

Appellants moved for reconsideration of the Order on March 20, 2020, which was subsequently denied. Appellants appealed the Spartanburg action against Southland and Respondent.

Pursuant to the Order, dated March 10, 2020, Appellants filed the instant case on August 27, 2020. (R., p. 17). On September 15, 2020, Appellants served the Summons and Complaint on the SCDMV via certified mail. SCDMV sent Respondent a copy of the processes, but the same was returned to its office marked "Return to Sender Not Deliverable as Addressed Unable to Forward" on September 25, 2020. Since he had not changed his address, there was nowhere to forward the mailing.

After complying with the requirements of Section 15-9-380 of the 1976 Code of Laws and a lapse of more than thirty (30) days upon filing of the Complaint, Appellants filed an Affidavit of Default on November 10, 2020 (R., p. 26), and moved for Order of Entry of Default

on November 28, 2020. (R., p. 28). On December 16, 2020, this court issued its Order of Default and Order for Hearing to Ascertain Damages. (R., p. 10).

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

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the Circuit judge. *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The Circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

ARGUMENTS

I.

THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT RELIEF FROM ENTRY OF DEFAULT.

Appellants aver the Circuit Court erred in granting Respondent relief from entry of default based on procedural and substantial laws.

A. The Circuit Court applied the wrong standard.

Appellants submit the Circuit Court had mistakenly applied the wrong standard in vacating the entry of default against Respondent. In the instant case, default order has been entered against Respondent on December 16, 2020. (R., p. 10-12). Respondent sought relief from judgment by moving to vacate the default order under Rule 55 (c) of the SCRCP. (R., p. 31-38). But since an Order of Default has already been entered, Respondent should have applied Rule 60(b) instead. Therefore, his reliance on Rule 55(c) SCRCP and the "good cause" standard was incorrect.

In the case of *Sundown v. Intedge Industries*, the Court differentiated the standard for granting relief from judgment under Rule 55(c) and Rule 60(b) of the SCRCP. *Sundown v. Intedge Industries*, 383 S.C. 601 (S.C. 2009). To quote:

The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. 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. Once a party has put forth a satisfactory explanation for the default, the Circuit court must also consider: (1) the timing of the motion for relief; (2) whether the Respondent has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). The Circuit court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the Circuit court. *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).

Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule

55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRPC. The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default.

Sundown, supra.

Furthermore, Respondent is not entitled to relief from the default order under Rule 60(b) since the Rule requires a more stringent standard. In this case, Respondent has not alleged any mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation or misconduct on the part of Appellants to warrant a relief from the order in his favor. In fact, if there is any misconduct involved in this case, it is that of Respondent's deliberate and knowing disregard of traffic laws.

B. Respondent did not satisfy the WHAM factors.

In its Form 4/Order, the Circuit Court granted Respondent's Motion to Vacate Entry of Default, ruling that Appellants failed to establish the WHAM factors. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). Appellants argue otherwise.

In granting relief for entry of default under Rule 55(c) of the SCRPC, courts rely on a two-step analysis: first is to provide for a "good cause" explanation for the default; and then satisfy the three (3) factors mentioned in the Wham case: (a) timeliness; (b) meritorious defense; and, (3) degree of prejudice to Appellants Wham, supra. Respondent failed to satisfy all three (3) aforementioned factors.

1. Respondent has not established good cause for the delay.

Respondent failed to file an answer, any responsive pleading or a motion to dismiss within thirty (30) days of the service of summons and complaint upon him, through the SCDMV. By law, Respondents were in default. Appellants were exercising their right under the law, to move for (and obtain) an entry of default.

Furthermore, Respondent has not presented a satisfactory explanation for not filing a responsive pleading, and for the default. Neither did he offer a notarized affidavit explaining his failure to respond within 30 days.

Respondent contends Appellants failed to and/or did not attempt to determine his correct address. This argument is a clear attempt to shift the burden onto Appellants. It is not, nor may it be considered, a good cause to relieve Respondent from default. Respondent was served by certified mail and through the SCDMV according to the laws of the State. Rule 4 SCRCPP and SC Code Ann. § 15-9-370.

By asking Appellants to locate Respondent's correct address, Mr. Moore and the insurance carrier placed a heavy burden upon Appellants who have already suffered from Respondent's grossly negligent and/or reckless acts.

2. Respondent failed to establish the WHAM factors.

Appellants posit Respondent did not establish any of the WHAM factors in his motion.

a) Timeliness of the motion

The facts of the case show the following:

- i. On August 27, 2020, Appellants filed the Summons and Complaint.
- ii. On September 15, 2020, the processes were served to Respondent through SCDMV
- iii. Thirty-days elapsed with Respondent not filing any Answer, responsive pleading or a motion.
- iv. On November 10, 2020, Appellants filed an Affidavit of Default, and moved for Entry of Default on November 28, 2020.

- v. On December 16, 2020, the Circuit Court entered an Order of Default and Order for Hearing to Ascertain Damages.
- vi. On February 11, 2021, Respondent filed Motion to Vacate the Entry of Default as well as moved for the dismissal of the case.
- vii. On February 16, 2021, Circuit Court granted Respondent's Motion to Vacate Entry of Default.

It took Respondent four (4) months to address Appellants' Complaint, and two (2) months to respond to Plaintiff's Affidavit and Motions. Respondent took an inordinately long time in filing his Motion to Vacate and/or Set Aside Judgment.

While Rule 55(c) does not provide a specific time limit for the filing of a motion to set aside an entry of default, South Carolina courts have decided in several cases that a two-month gap between the entry of default and the motion to set aside is not a timely filing. Consolidated Masonry & Fireproofing, Inc., 383 F.2d 249, 251 (4th Cir. 1967). See also Nelson v. The Coleman Co., 41 F.R.D. 7 (D. S.C. 1966) (Simons, J) (even short delay not excused where circumstances showed lack of intent to act promptly). The Courts in the cases of Richardson v. P.V. 383 S.C. 610, 613 (S.C. 2009), and Rodriguez v. Gutierrez, 391 S.C. 323 (S.C. Ct. App. 2011) denied relief to the movants who filed their respective motion two (2) months from the entry of default.

In sum, Respondent failed to act promptly in seeking relief.

b. Meritorious Defense

Mr. Moore, purportedly representing Respondent, raised several defenses such as statute of limitations, pendency of a similar action on appeal, and failure of service.

In his Memorandum in Support of Respondent's Motion to Set Aside Entry of Default, Respondent raised the defense of statute of limitations barring the present action. (R., p. 35). However, this defense has been waived when Respondent failed to file his answer or motion

within the period set forth by law, thereby making the insufficiency of service, and the associated statute of limitations, moot.

On the issue of pendency of appealed action, Mr. Moore who represented the employer in the Spartanburg case, took the position that no such action commenced. In the instant case however, Mr. Moore cited the Spartanburg as a prior action to support his attempt for relief from default judgment, in effect recognizing the existence of the Spartanburg action. Respondent should not be permitted to employ conflicting theories or to change his theory of the case. This practice has been frowned upon by the Court in the case of *Hayne Federal Credit Union. Hayne Federal Credit Union v. Bailey*, 327 S.C. 242 (S.C. 1997). The Court ruled:

It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory. However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly discovered evidence.

Ibid.

There is no newly discovered evidence presented in this case. And more importantly, the dismissal of the Spartanburg action was without prejudice to filing another action. Thus, the pendency of an appeal on the Spartanburg action is not a good defense to the plaintiff's claims that might allow you to avoid liability altogether.

Furthermore, in both the Spartanburg action and in the present case, Respondent has not provided a defense for his grossly negligent and/or reckless driving that caused severe physical injuries on Appellants. Respondent has shrouded himself with procedural arguments, never addressing the substance of the claims raised against him.

Finally, Mr. Moore contends he was not provided a copy of the Complaint, despite his involvement in the Spartanburg action. Appellants however treated the instant case as a new action based on Mr. Moore's theory that the Spartanburg action has not commenced.

Appellants served Respondent, through the SCDMV as required under SC Code Ann. § 15-9-370, in relation to Rule 4(d)(7) of the SCRPC. Nothing in the law mandates Appellants to deliver a copy of the Summons and Complaint upon Mr. Moore, who has not established his authority to represent Respondent, either by appointment or by law. To impose additional requirements upon Appellants is to burden them for abiding by the law.

c. Prejudice to Appellants

Appellants believe they would be highly prejudiced with the setting aside of the entry of default. It would close the door for Appellants to pursue their claims against Respondent. Appellants have sustained injuries which necessitated medical attention that continues to date. They had to endure physical pain and suffering as well as financial difficulties due to this protracted litigation.

Appellants maintain Respondent should not be allowed to succeed in avoiding his liability, while violating the very same procedural laws he takes refuge on.

II.

THE CIRCUIT COURT ERRED IN NOT FINDING RESPONDENT HAS WAIVED HIS RIGHT TO RAISE AFFIRMATIVE DEFENSE.

In seeking to have the Default Order (Judgment) against him set aside, Respondent raised the defense of the pendency of an action involving the same parties. Appellants assert Respondent has waived his right to such action.

The law is well-settled that failure to raise objections under Rule 12(b)(2) through (5) in either a responsive pleading or by Rule 12(b) motion will waive the right to make an objection. Rule 12(h) South Carolina Rules on Civil Procedure (SCRCP).

The instant Complaint was filed on August 27, 2020 and served upon Respondent, by and through the Office of the General Counsel of South Carolina Department of Motor Vehicle (hereinafter referred as SCDMV). SCDMV General Counsel accepted service on September 18, 2020. No Answer or any responsive pleadings was filed by or on behalf of Barbour within the 30-day prescribed period by law. On December 16, 2020, Appellants obtained an Order of Default for Respondent's failure to file any responsive pleadings within the time requirement.

On February 11, 2021, one hundred sixty-eight days (168) days after the filing of the Complaint, Respondent filed his Motion to Vacate or Set Aside Default Judgment, Motion to Dismiss and Answer. In all three pleadings, Respondent raised the defense of pendency of action (appeal) between same parties and statute of limitations. Rule 12 (h)(1) of SCRCP¹ specifically includes pendency of action as one of the waivable defenses, while Rule 8 (c) SCRCP² considers statute of limitations as an affirmative defense which must be specifically pled.

¹ Rule 12(h)(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.

² Rule 8(c) **Affirmative Defenses; Reply.** In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation. A party may file a reply to any of the foregoing affirmative defenses.

Under the Rule, a Respondent must file an Answer within 30-day period. 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 September 18, 2020, Respondent's Motion to Dismiss must have been filed by October 18, 2020. The February 11, 2021 filing, therefore, was untimely, resulting in a waiver of defenses Rules 12(b)(2), (4), and (5), SCRCPP, relied upon by the Court in its decision. Respondent cannot now be awarded for sleeping on his rights by granting him relief based on defenses he has waived.

Respondent did not have the defenses used by the Court in dismissing Appellants' claims at his disposal. His failure to respond within 30 days failed to preserve his defenses, thereby waiving them.

III.

EQUITABLE ESTOPPEL MAY BE APPLIED IN THE INSTANT CASE PRECLUDING THE APPLICATION OF THE STATUTE OF LIMITATIONS.

A. Equitable estoppel precludes Respondent's Defenses.

Appellants submit the mere allegation of statute of limitations does not automatically warrant dismissal of a case. Appellants submit the doctrine of equitable estoppel applies in the instant case. Under South Carolina law:

A Respondent 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 Respondent'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 Respondent'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).

Appellants aver they complied with South Carolina procedural rules when they initially brought their claims against Respondent in Spartanburg. They were prevented from pursuing the same due to Respondent's inaccurate mailing address.

Appellants have shown Respondent had a propensity not only in driving recklessly but also in intentionally providing incorrect mailing address and/or contact detail in his driver's license to avoid prosecution. Appellants discovered Respondent has had a significant number of traffic incidents, a majority of which have been tried in his absence.

date	city/county	state	charge	case #	outcome
9/20/08		Virginia	Failure to obey highway sign	071GT0800453100	Guilty in absentia
10/19/07	Henry	Virginia	Speeding 48/35	089GT0700797900	Guilty in absentia
10/19/07	Henry	Virginia	Seat belt violation	089GT0700798000	Guilty in absentia
8/28/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
9/17/07	Montgomery	Virginia	Defective equipment generally	121GT0701637400	Guilty
9/30/03	Patrick	Virginia	Oper w/radar detect/jam device	141GT0300129200	Prepaid-Fine
5/28/04	Patrick	Virginia	Speeding 74/55	141GT0400068000	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey highway sign sleep	175GT0600711000	Guilty in absentia
1/16/08	Danville City	Virginia	Speeding 55/40	590GT0800067700	Guilty
		Kentucky	Driving on suspended	10-T-00307	
6/16/16	Spartanburg	South Carolina	Driving vehicle at greater speed than is re	5102P0362799	Guilty in absentia
6/23/11		Virginia	No county or city tag	GT11004149-00	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey high-sign sleep	175GT0600711000	Guilty in absentia
9/10/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia

6/12/15	Danville City	Virginia	Speeding 53/40	590GT15006703- 00	Guilty in absentia
1/21/95		Virginia	Illegal sun-shading	089GT9500043700	Guilty in absentia

Clearly, Respondent is a habitual traffic violator, which his employer knew or should have known. They hired him to drive a semi for them. They disregarded his driving record and allowed him to drive a deadly weapon.

By working as a truck driver using South Carolina roads, Respondent is presumed to know and abide by its laws. Under S.C. Code Ann. §§ 15-9-350 and 15-9-370, a non-resident driver who operates his/her motor vehicle on the public highways, streets or public roads or anywhere within the State, is deemed to subject himself/ herself under the jurisdiction of SCDMV. As such, Respondent made himself available for SCDMV to notice in case of any motor vehicle accident. Respondent did not provide correct contact details nor updated his mailing address. The fact he never changed his address with the state DMV is proof positive that he drives without regard for those around him. (as evidenced in the Incident Report).

Equitable estoppel is a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, which resulted in the other person being injured in some way.

That doctrine has been described as "a standard of fair dealing applied by the courts." As applied to the statute of limitations, its central premise is that *Delson v. Minoque* (E.D.N.Y. 1961) 190 F. Supp. 935, 937 one cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute [of limitations], and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought. *Howard v. West Jersey S. S. R. Co.* (1928) 102 N.J. Eq. 517, 141 A. 755, 757-58, *aff'd. mem.* 104 N.J.Eq. 201, 144 A. 919 (1929).

Cited in City of Bedford v. James Leffel Co., 558 F.2d 216 (4th Cir. 1977).

Due to his reckless and willful disregard of the laws of this State, Respondent should not be allowed to benefit from the defenses and/or advantages available under the very law he violates.

B. Courts have allowed the filing of Complaints beyond the statute of limitations in the interest of justice.

The courts have barred inequitable reliance on statute of limitations applying the maxim “no man may take advantage of his own wrong”. Glus v. Brooklyn E. District Terminal, 359 US 231 (1959), 79 S.Ct. 760, 762, 3L.Ed 2d 770 (1959). In the cited case, the Court refrained from dismissing Petitioner’s Complaint based on Respondent’s claim that the same was barred by Statute of Limitations, where Petitioner argued Respondent induced the delay in filing through its misrepresentation.

The Court in Glus declared:

Despite the delay in filing his suit petitioner is entitled to have his cause tried on the merits if he can prove that respondent's responsible agents, agents with some authority in the particular matter, conducted themselves in such a way that petitioner was justifiably misled into a good-faith belief that he could begin his action at any time within seven years after it had accrued.

Glus, supra.

Applying the above ruling in the instant case, it may be argued considering Respondent’s history, his willful, wanton, and deliberate failure to provide a current mailing address can only be seen as a misrepresentation with objective of escaping his liability for reckless tortious actions.

Appellants believe that the Barbour’s successful withholding of his actual addresses caused the statute to be an issue, when it would not have been had he kept the State or Appellants

aware of his location given the opportunity given by South Carolina for Respondents to take their products on the highways of this State.

In an out-of-state case that bears resemblance to the instant action, the New York Supreme Court, using the “interest of justice” doctrine, allowed the filing of a third complaint, where Plaintiff’s initial complaint was filed within the Statute of Limitations but where service was defective. Henneberry v. Borstein, 2012 NY Slip Op. 00235 [91 AD3d 493].

The Plaintiff in the above-cited case filed a legal malpractice and breach of fiduciary complaint against Respondent 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 Respondents 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, Respondents 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, Respondent 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. Respondents 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 Respondents by hiring process server within the 120-day time requirement, Respondents’ knowledge/awareness of the action as soon after the filing of the complaint and that her complaint sets forth actionable claims.

In Henneberry, the New York Supreme Court ruled that even though Plaintiff failed to show good cause for failure to serve her respective processes within the 120 days, using the “interest of justice” standard, it may grant Plaintiff’s extension of time to serve where the statute of limitations had expired in order to avoid “harsh result” to the Plaintiff.

IV.

THE CIRCUIT COURT ERRED IN NOT APPLYING THE UNCLEAN HAND DOCTRINE AGAINST RESPONDENT.

Appellants submit that the doctrine of unclean hands applies in this case. This doctrine precludes a party from recovering in equity if he acted unfairly in a matter which is the subject of the litigation to the prejudice of the Respondent. Wilson v. Landstrom, 281 S.C. 260 (1984), 315 S.E.2d 130, citing Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E. (2d) 735 (1943).

Respondent is bound by both Virginia and South Carolina laws. As a resident of the State of Virginia, he is mandated to notify the Department of any change of address. Virginia Code §46.2-324 (R., p. 107). Since Respondent presented a driver’s license with the Virginia address, Appellants (and the SCDMV) can safely assume Respondent may be found in the said address.

As a motorist who ply the streets and highways of South Carolina, Respondent is expected to abide by its laws. He knew he had an obligation to keep his contact information

updated under both laws. He has continuously violated the laws and evaded responsibility as evidenced by the number of traffic infractions in which he was found guilty in absentia, presumably due to the inability of Appellants to reach out to him. (R., p. 110).

CONCLUSION

Based on the foregoing, and in the interest of justice, Appellants move for this Court to reverse the Circuit Court's Orders, dated February 16, 2021 and March 9, 2021, and remand the case to allow the parties litigate this matter on its merit.

Anderson, South Carolina
July 26, 2021.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jul 26 2021

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

SC Court of Appeals

Letitia H. Verdin, Judge

Appellate Case No.: 2021-000269
C.A. No. 2020CP1100632

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

Appellants,

v.

Perry W. Barbour,

Respondent.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that aside from correction of pagination in the Table of Authorities and the body of the brief to conform to the Record on Appeal, this Final Brief of the Appellants in the above-captioned case complies with Rule 211 (b) SCACR.

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July 26, 2021

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Jul 22 2021

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHEROKEE COUNTY
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Appellate Case No.: 2021-000269
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Bobby E. Leopard, Luther Harris, and Donna Harris Appellants,

v.

Perry W. Barbour, ... Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	2
Standard of Review	4
Arguments	4
I. THE CIRCUIT COURT PROPERLY DETERMINED THAT “GOOD CAUSE” EXISTED TO PERMIT THE ENTRY OF DEFAULT TO BE SET ASIDE AND AN ANSWER FILED.	4
II. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE EXISTENCE OF VIABLE AFFIRMATIVE DEFENSES WARRANTED VACATING THE ENTRY OF DEFAULT.	7
III. IN THE ABSENSE OF ANY ACT OR REPRESENTATION BY THE RESPONDENT WHICH CAUSED THE APPELLANTS TO COMMENCE THEIR ACTION AFTER THE TIME ALLOTTED BY THE STATUTE OF LIMITATIONS, EQUITABLE ESTOPPEL TOLLING THAT STATUTE IS INAPPLICABLE.	8
IV. THE DOCTRINE OF UNCLEAN HANDS IS INAPPLICABLE WHERE THE ASSERTED CONDUCT IS UNRELATED TO THE ISSUE PRESENTED.	10
Conclusion	11

TABLE OF AUTHORITIES

Cases

<u>Henneberry v. Borstein</u> , 91 A.D. 3d 493, 937 N.Y. S. 2d 177 (2012)	10
<u>Kleckley v. Northwestern Nat. Cas. Co.</u> , 338 S.C. 131, 526 S.E. 2d 218 (2000)	9
<u>Maher v. Tietex Corp.</u> , 331 S.C. 391, 500 S.E. 2d 204 (Ct. App. 1998)	9
<u>Maxwell v. Genez</u> , 350 SC 563, 567 S.E. 2d 496 (Ct. App. 2002)	6, 7, 11
<u>Mitchell Supply Co., Inc. v. Gaffney</u> , 297 S.C. 160, 275 S.E. 2d 321 (Ct. App. 1988)	4
<u>Roberson v. Southern Finance of South Carolina, Inc.</u> , 365 S.C. 302, 615 S.E. 2d 112 (2005) ..	4
<u>Top Value Houses, Inc. v. Harden</u> , 319 S.C. 302, 460 S.E. 2d 427 (Ct. App. 1995)	5
<u>Wham v. Shearson Lehman Bros., Inc.</u> , 298 S.C. 462, 381 S.E. 2d 499 (Ct. App. 1989)	5, 7
<u>In re Estate of Weeks</u> , 329 SC 251, 495 S.E. 2d 454 (Ct. App. 1997)	4, 11

Statutes

§ 15-3-350, S.C. Code (1976, <u>as amended</u>)	9, 10
§ 15-3-380, S.C. Code (1976, <u>as amended</u>)	9, 10
§ 15-3-530, S.C. Code (1976, <u>as amended</u>)	8

Rules

Rule 3, SCRCP.	10
Rule 55, SCRCP.	2, 4, 5, 11
Rule 60, SCRCP.	4, 5

Other Authorities

27 Am. Jur. 2d <u>Equity</u> §142	11
Appellate Case No. 2020-001110 (S.C. Court of Appeals)	2
Flanagan, James F., <u>South Carolina Civil Procedure</u> (2d ed. 1996)	5

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT PROPERLY RULE WITHIN ITS DISCRETION THAT THE ENTRY OF DEFAULT AGAINST THE RESPONDENT SHOULD BE SET ASIDE?
2. DID THE CIRCUIT COURT, AFTER DETERMINING THAT THE ENTRY OF DEFAULT SHOULD BE SET ASIDE, PROPERLY DETERMINE THAT RESPONDENT'S AFFIRMATIVE DEFENSES HAD NOT BEEN WAIVED?
3. DOES THE DOCTRINE OF EQUITABLE ESTOPPEL APPLY WHERE APPELLANTS HAVE FAILED TO DEMONSTRATE ANY ACT OR REPRESENTATION BY RESPONDENT UPON WHICH THEY RELIED TO CAUSE THEM TO FAIL TO TIMELY COMMENCE THEIR ACTION?
4. DOES THE DOCTRINE OF CLEAN HANDS APPLY WHERE THE ASSERTED WRONGFUL ACT IS UNRELATED TO APPELLANTS' FAILURE TO TIMELY COMMENCE THEIR ACTION?

STATEMENT OF CASE

On June 16, 2016, Luther Harris, Donna Harris and Bobby Leopard (Appellants) were injured in a vehicular accident on Interstate 85 in Spartanburg County. They instituted suit in Spartanburg County against Perry Barbour (Respondent) and his employer Southland Transportation Co., alleging that a vehicle operated by Barbour had struck the rear of the vehicle they occupied (R. pp. 113-122). That action was subsequently dismissed pursuant to the Order of Judge Derham Cole for failure to timely commence the litigation due to the failure to properly serve the defendants (R. pp. 100-102). That Order is now the subject of an ongoing appeal (R. p. 125, Appellate Case No.: 2020-001110).

Subsequent to the filing of that appeal, Appellants on March 10, 2020 instituted this action against Wendall Barbour in Cherokee County (R. pp. 17-24). This action involves the same accident, the same injuries, and the same parties (except Southland Transportation Co., which would potentially have vicarious liability under respondent superior). Service was attempted to be made upon Wendall Barbour at the same address as utilized in the initial Spartanburg action (R. p. 123) despite the fact that Appellants knew that Wendall Barbour no longer resided at that address. As expected, Wendall Barbour made no response or appearance since he never received the Complaint. Appellants did not supply either the attorney for Wendell Barbour or his insurer with a courtesy copy of the Complaint or notice that it had been filed. An Entry of Default was thereafter filed with Appellants seeking a Default Judgment (R. pp. 10-12). (Entry of Default).

Respondent, after receiving notice of the default entry, moved to vacate the default under Rule 55, SCRPC, asserting that good cause existed to set aside the default in light of the ongoing

appeal on the same matter, the timely response after notice of the default, the existence of a meritorious defense, and the absence of any prejudice should the motion to set aside be granted (R. pp. 32-33). The Court, through Judge Letitia Verdin, granted the motion to set aside the default (R. pp. 5-8). Additionally, since there was no factual issue regarding the application of the Statute of Limitations, the Court dismissed the action with prejudice (R. pp. 5-8).

Appellants thereafter filed a Motion for Reconsideration, which was denied (Order of 3/19/21). Notice of Appeal was then filed. (R. p. 83).

STANDARD OF REVIEW

A circuit court's decision to set aside an entry of default is not to be disturbed on appeal absent a clear showing of an abuse of discretion. Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 275 S.E. 2d 321 (Ct. App. 1988). Such an abuse of discretion occurs only when the circuit judge is controlled by an error of law or the ruling is without evidentiary support. In re Estate of Weeks, 329 SC 251, 495 S.E. 2d 454 (Ct. App. 1997).

ARGUMENTS

I. THE CIRCUIT COURT PROPERLY DETERMINED THAT "GOOD CAUSE" EXISTED TO PERMIT THE ENTRY OF DEFAULT TO BE SET ASIDE AND AN ANSWER FILED.

Pursuant to Rule 55, SCRCP, a court may, for good cause shown, set aside an entry of default. Pursuant to this rule, Respondent moved to set aside the entry of default in this case based upon the fact that Appellants had attempted to serve Respondent at an address known to be outdated, while another case involving the same parties and facts was pending on appeal (R. p. 125). Respondent further demonstrated that he acted as quickly as it was determined that a second suit was filed and set forth the existence of a valid affirmative defense (R. pp. 32-33). The circuit court, acting within its discretion, agreed that the entry of default should be set aside (R. pp. 5-8).

Appellants initially argue that the circuit court applied that wrong standard, asserting that because an entry of default had been entered, the more rigorous standard of Rule 60, SCRCP, should have been utilized. Appellants are confused. Rule 60 provides that a court may relieve a party from a final judgment, order, or proceeding upon a showing of mistake, inadvertence, surprise or excusable neglect. Based upon the cases of Roberson v. Southern Finance of South

Carolina, Inc., 365 S.C. 302, 615 S.E. 2d 112 (2005) and Top Value Houses, Inc. v. Harden, 319 S.C. 302, 460 S.E. 2d 427 (Ct. App. 1995), the appropriate standard for setting aside an entry of default is the “good cause” standard of Rule 55 rather than the “excusable neglect” standard of Rule 60. As noted in South Carolina Civil Procedure

[t]he different standards reflect the different actions that have been taken and the policies implicated in granting relief. The entry of default is the official recognition of the failure to answer or otherwise respond entered in the docket or file book. Relief granted at this point is within the equitable power of the court and excuses the previous failure to act promptly. In most instances, the opposing party suffers little or no prejudice because there is no detrimental reliance on the entry of default...

Relief from a default judgment, however, destroys the finality of the judgment and is contrary to the strong argument that litigation should be concluded and the parties able to rely on judgments that have been obtained.

Flanagan, James F., South Carolina Civil Procedure (2d ed. 1996).

In this instance, Appellants had had an entry of default submitted (R. pp. 10-12). There was, however, no default judgment. As a result, the “good cause” standard used by the circuit court was the correct standard.

Appellants go on to argue that the circuit court improperly applied the Wham factors to determine that the entry of default should be set aside. Pursuant to Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E. 2d 499 (Ct. App. 1989), once a party has set forth a satisfactory explanation for a default, the court is to consider the following factors in reaching its decision of whether to set aside the default:

1. the timing of the Motion for Relief
2. the evidence of a meritorious defense; and
3. the degree of prejudice to the Plaintiff if relief is granted

Appellants argue that the Motion to set aside default was made fifty-seven (57) days after the entry of default. They ignore the fact that notice of the entry of default was received only after a February 1, 2021 letter from Appellants' attorney was received. According to Maxwell v. Genez, 350 SC 563, 567 S.E. 2d 496 (Ct. App. 2002), the focus of the court with regard to the timeliness of a motion is upon when the response was made after notice was received. Obviously, if notice has not been received, then a defaulting party cannot act to protect his rights. On the other hand, a court will not grant equitable relief where a party procrastinates and sits on his rights. In this case, the response was timely based upon when notice was received.

Appellants go on to argue that a meritorious defense was lacking. This argument disregards the assertion that filing was not made within the statute of limitations and the assertion of another pending action involving the same parties and same accident (R. pp. 40-43). Appellants argue that these affirmative defenses have been waived due to the default. The argument is circular in nature. The proposed Answer was submitted to demonstrate that there existed valid, affirmative defenses to be considered if the default were to be set aside. The existence of these potential affirmative defenses was a factor to be considered if the default was to be set aside. Appellants argue illogically that because there was a default, these defenses may not be considered.

Appellants also argue that the defense asserting that another case involving the same parties and facts is pending cannot be utilized as a potential affirmative defense since that case

was dismissed without prejudice. The prior case was in fact dismissed without prejudice since it had not been properly commenced due to the Appellants' failure to properly serve the defendants in that case (R. pp. 100-102). According to Appellants' argument, if the case was not commenced, it does not exist. However, this argument ignores the fact that the Order dismissing the prior case is the subject of an ongoing appeal. Until that appeal is resolved, the prior Order of dismissal is not final and could be subject to change. For example, if Appellants were to prevail in that appeal, the matter would necessarily be remanded to Spartanburg County for potential trial while the present action is possibly still pending.

Finally, Appellants argue they have been prejudiced by the dismissal of their claim due to their inability to recover damages through a judgment. However, this is not the type of prejudice the Wham Court envisioned. Instead, there must be some type of prejudice due to lost witnesses or evidence or inability to conduct discovery if the matter reinstated. See Maxwell v. Genez, supra. In the instant case there is no evidence of any lost witness, evidence or discovery opportunity. In fact, at the time the motion to set aside the default was made, the courts had been dramatically slowed due to the Covid-19 pandemic with little to no opportunity for trial. As a result, any time lost in pursuing litigation was inconsequential and not prejudicial.

II. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE EXISTENCE OF VIABLE AFFIRMATIVE DEFENSES WARRANTED VACATING THE ENTRY OF DEFAULT.

Pursuant to Wham v. Shearson Lehman Bros., Inc., supra, one of the factors to be considered by a court in determining whether "good cause" exists to permit a default to be set aside is whether the defendant has a meritorious defense. Appellants argue that all meritorious defenses were waived by virtue of the default. In other words, a default exists because

meritorious defenses were not timely raised; in order to have an entry of default set aside, there must be a showing of the existence of a meritorious defense; however, because the default serves as a waiver of all defenses, no meritorious defense can be asserted. The argument is circular and would preclude the possibility of default ever being set aside.

Respondent submitted a proposed Answer with his motion to set aside the default, including a general denial, pendency of another action with same parties and issues, and the three-year statute of limitations (R. pp. 40-43). These meritorious defenses demonstrated to the court the existence of the Respondent's basis for conflict resolution through litigation. Appellants' argument would be applicable only after the circuit court determined that setting aside the default was inappropriate. The determination to set aside a default is based in part upon the evidence of meritorious defenses. Once the default is set aside, there would no longer be a waiver since the default no longer exists. However, if the determination had been to deny the motion to set aside the default, then the Appellants' argument regarding waiver would have been controlling. Since the circuit court, in its discretion, ruled that the entry of default should be set aside, it could then consider the asserted affirmative defenses.

III. IN THE ABSENCE OF ANY ACT OR REPRESENTATION BY THE RESPONDENT WHICH CAUSED THE APPELLANTS TO COMMENCE THEIR ACTION AFTER THE TIME ALLOTTED BY THE STATUTE OF LIMITATIONS, EQUITABLE ESTOPPEL TOLLING THAT STATUTE IS INAPPROPRIATE.

The Appellants sustained injuries in a vehicular accident occurring on June 10, 2016 (R. pp. 17 - 24). They filed their Complaint in Cherokee County on August 27, 2020 (R. pp. 17 - 24), more than four years after their accident and beyond the three-year statute established by section 15-3-530, S.C. Code (1976, as amended). Based upon these undisputed facts the circuit court

dismissed the action.

Appellants now argue that the statute of limitations should have been tolled under the doctrine of equitable estoppel. Under South Carolina law, a party may be estopped from asserting 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 be applicable, 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 assert that they were misled by the failure of the Respondent to update his mailing address in order that they might properly serve him.

It must first be noted that Appellants' assertions have to do with their failure to timely serve the Respondent in the Spartanburg action, which is the subject of another appeal. As noted in that appeal, Appellants failed to properly commence their action due to a failure to timely serve the Respondent due to their procrastination in initiating service under section 15-3-350, S.C. Code (1976, as amended). Section 15-3-350 provides for substitute service when certain conditions are met. Pursuant to section 15-3-380, if the attempt to serve an individual under section 15-3-350 is unsuccessful, the envelope in which service by certified mail was attempted and affidavits of mailing are then filed with the Clerk of Court. Pursuant to section 15-3-380, when the envelope and affidavit have been filed, "the filing thereof shall have the same force and legal affect as if such process had been personally served upon such defendant." In other words, actual service upon the defendant would no longer be necessary. This is in fact the procedure followed by Respondents in this instance.

Because it was unnecessary to actually serve the Respondent, so long as the procedures for substitute service pursuant to sections 15-3-350 and 15-3-380 are adhered to, Appellants' arguments regarding equitable estoppel are of no consequence since there was no reliance upon the outdated address in this instance. Instead, Appellants filed this action after the statute of limitations had passed. Their arguments regarding estoppel are concerned with service rather than filing. Pursuant to Rule 3, SCRCF, to commence an action requires both timely filing and service. Because filing with the Cherokee County action was not timely, any delay with service was of no consequence.

Appellants go on to argue, however, asserting the "interest of justice" doctrine utilized in New York, that the court should have allowed the action to move forward. See Henneberry v. Borstein, 91 A.D. 3d 493, 937 N.Y. S. 2d 177 (2012). Pursuant to rule in New York, a court, upon good cause or in the interest of justice, is to extend the time for service. South Carolina does not recognize the extension of time for "the interest of justice". Moreover, the New York rule applies to the extension of time for service. Appellants' problem in this case is that filing was not made within the applicable statute of limitations. Even the New York rule would not help.

IV. THE DOCTRINE OF UNCLEAN HANDS IS INAPPLICABLE WHERE THE ASSERTED CONDUCT IS UNRELATED TO THE ISSUE PRESENTED.

Finally, appellants argue that the equitable doctrine of unclean hands should act to preclude the affirmative application of the statute of limitations. Appellants again rely upon the alleged failure of the Respondent to file a change of address so that he might properly be served. As noted above, the statutory substitute service utilized by Appellants in this action does not

mandate personal service if the applicable statutes are complied with. Moreover, the statute of limitations is applicable in this case because suit was not timely filed. As a result, any misdirection caused by a failure to file a change of address would have nothing to do with the dismissal based upon the statute of limitations. The equitable maxim of clean hands is not to be utilized by reason of acts unconnected to the transaction giving rise to the defense. See 27 Am. Jur. 2d Equity §142.

CONCLUSION

The granting of a motion to set aside an entry of default is based upon the "good cause" standard established under Rule 55 (c), SCRPC. This rule is to be liberally construed to promote justice and dispose of cases on their merits. In re Estate of Weeks, supra. The decision on whether to grant relief is solely within the discretion of the trial judge. Maxwell v. Genez, supra. Appellants have failed to demonstrate that the trial court relied upon inadequate facts or improper law and therefore the ruling on the motion to set aside the entry of default should be affirmed. Likewise, the dismissal of the case due to violation of the applicable statute of limitations should be affirmed since the undisputed facts confirm its application and Appellants' argument on clean hands and equitable estoppel are irrelevant as to timely filing.

TURNER PADGET GRAHAM & LANEY, P.A.

July 22, 2021

By: s/ David L. Moore, Jr.

David L. Moore, Jr., S.C. Bar No.: 4050
Attorneys for Respondent, Perry Barbour

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Jul 26 2021

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

SC Court of Appeals

Letitia H. Verdin, Judge

Appellate Case No.: 2021-000269
C.A. No. 2020CP1100632

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

Appellants,

v.

Perry W. Barbour,

Respondent.

FINAL REPLY BRIEF OF APPELLANTS

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July 26, 2021.

TABLE OF CONTENTS

Table of Authorities	ii
Arguments	
I. RESPONDENT IS NOT ENTITLED TO RELIEF FROM ENTRY OF DEFAULT.	1
II. APPELLANTS ARE ENTITLED TO EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS.	4
III. THE DOCTRINE OF UNCLEAN HANDS IS APPLICABLE IN THIS CASE.	5
Conclusion	6
Certificate of Counsel	7

TABLE OF AUTHORITIES

Cases

Hooper v. Ebenezer Sr. Services, 386 S.C. 108 (S.C. 2009)	4
Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261 (S.C. 2019), citing Factory Mutual, 256 S.C. at 381, 182 S.E.2d at 729-30 Squires v. Nat'l Grange Mut. Ins. Co., 247 S.C. 58, 67, 145 S.E.2d 673, 677 (1965)	3
Shores v. Weaver , 315 S.C. 347, 354, 433 S.E.2d 913, 916 (Ct. App. 1993)	3, 4
Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)	1

Appellants make the instant submission in response to Respondent's Initial Brief.

Appellants adopt and incorporate by reference the Statement of Case and Facts presented in their Initial Brief.

I.

RESPONDENT IS NOT ENTITLED TO RELIEF FROM ENTRY OF DEFAULT.

Appellants will address Respondent's Arguments Nos. 1 and 2 in this section because they are intricately connected.

Firstly, Appellants assert the two-step analysis relied upon by the courts in determining whether to grant relief from entry of default. (Appellants' Final Brief, p. 6). The first step is to provide "good cause", and after establishing the same, the court determines whether the Wham factors are satisfied. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). The three (3) factors mentioned in the Wham case are as follows: (a) timeliness; (b) meritorious defense; and (3) degree of prejudice to Appellants Wham, supra.

Appellants argue Respondent has not offered a "good cause", outside of the "potential affirmative defenses" he could have asserted. It is an established rule that failure to plead an affirmative defense results in the waiver of that defense and its exclusion as an issue in the case. Appellants maintain Respondent is precluded from raising the defense of statute of limitations and pendency of appeal because they were not raised within the reglementary period for filing an Answer or responsive pleading.

Apart from its exclusion as meritorious defense due to it being waived, the defense of statute of limitations does not apply in the instant case. Appellants believe due to the circumstances surrounding the matter between the parties, the statute of limitations should be equitably tolled in favor of Appellants, as will be discussed in the succeeding section.

Appellants reiterate their objection to Mr. Moore's reference of the Spartanburg action, which he considered as not having been filed at all. Mr. Moore should not be permitted to change his theory of the case.

It should be noted Mr. Moore raised the potential affirmative defenses as basis for his "good cause" as well as the meritorious defense. To establish a meritorious defense, defendant must make an affirmative showing of a defense that is likely to be successful. In this case, this "potential affirmative defenses" will not be successful because they have been waived by Respondent's inaction.

Secondly, in their Final Brief, Appellants challenged Mr. Moore's representation of herein Respondent. Mr. Moore has not provided proof of his standing to this case, as he has not disclosed if he was hired by Respondent. However, in his Final Brief for Respondent, Mr. Moore disclosed he received the notice of entry of default after a February 1, 2021, letter from Appellants. What Mr. Moore failed to state is the letter and notice was sent to the Insurance Company. It is therefore not improbable to assume Mr. Moore was hired by the Insurance Company. Mr. Moore represents the Insurance Company and not Respondent.

Mr. Moore argues that the timeliness of a motion should be based upon when it received the notice of entry of default. This would have been a valid argument if it were not for the fact the Appellants were the ones who sent the notice to the Insurance Company. It is not Appellants' primary responsibility to notify the insurance company—*that's the insured's responsibility*.

Therefore, as far as Appellants are concerned, they have served Respondent with the processes. It was Respondent's responsibility to notify the insurance company of the lawsuit against him. Respondent defaulted, and an order of default has been entered against him.

Appellants aver this case is akin to a situation where an insured fails to notify his insurer of a lawsuit. South Carolina courts have ruled the insurer may not automatically be permitted to avoid coverage to an innocent third party merely because the insured did not inform its insurer of a lawsuit. Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261 (S.C. 2019), decided July 24, 2019, citing *Factory Mutual*, 256 S.C. at 381, 182 S.E.2d at 729-30, *Squires v. Nat'l Grange Mut. Ins. Co.*, 247 S.C. 58, 67, 145 S.E.2d 673, 677 (1965). Thus, this notice-prejudice rule whereby the insurer had the burden to show it was substantially prejudiced by the failure of its insured to comply with the notice provision. *Id.* Mr. Moore has not shown the Insurance Company was substantially prejudiced by Respondent's failure to notify it of the instant suit.

Furthermore, in the case of *Shores v. Weaver*, SC Court of Appeals found that, even if the insurance company proves substantial prejudice after a default judgment where they were not notified of the lawsuit, it must pay the required statutory minimum coverage. Shores v. Weaver, 315 S.C. 347, 354, 433 S.E.2d 913, 916 (Ct. App. 1993).

In *Shores v. Weaver*, the SC Court of Appeals found that, even if the insurance company proves substantial prejudice after a default judgment where they were not notified of the lawsuit, they must pay the required statutory minimum coverage:

“[I]n accordance with the public purpose of protecting innocent third parties through mandatory insurance, [the insured's] violation of a provision of the policy providing this mandatory minimal coverage did not defeat or void that coverage.” *Id.* at 355, 433 S.E.2d at 917. The court's rationale was grounded on the fact that the legislature mandated minimum limits coverage to protect innocent third parties. *Id.* at 356, 433 S.E.2d at 917. In essence, a contrary holding would have permitted an insurer to deny the very coverage that the General Assembly mandated that all motorists obtain, effectively nullifying the legislature's efforts to safeguard the public. *Id.* at 355, 433 S.E.2d at 917.

Thus, it may be argued that the Insurance Company is liable for the statutory minimum coverage even without Appellants notifying Insurance Company.

In terms of prejudice to Appellants, the mere fact Respondent cannot be located despite all efforts to uncover his address is prejudicial to them and their case.

In sum, Respondent has not presented any good cause for failing to engage in this case. With regards to timeliness of the filing of the motion, it should have been fixed from the time the Respondent had been served with the notice, not at the time Insurance Company received the same, otherwise it would nullify the public purpose of protecting innocent third persons. Shores supra. More importantly, Appellants have been prejudiced and will continue to be prejudiced with the grant of relief from default because of the loss of witnesses, particularly Respondent.

II.

APPELLANTS ARE ENTITLED TO EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS.

The Court in *Hooper v. Ebenezer* 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". Hooper v. Ebenezer Sr. Services, 386 S.C. 108 (S.C. 2009). 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 such as:

Federal precedent equitably tolls the limitations period in three circumstances: (1) where the plaintiff has actively pursued his or her judicial remedies by filing a timely but defective pleading; (2) where extraordinary circumstances outside the plaintiffs control make it impossible for the plaintiff to timely assert his or her claim; or (3) where the plaintiff, by exercising reasonable diligence, could not have discovered essential information bearing on his or her claim." (footnotes omitted)); *Kaplan v. Morgan Stanley Co.*, 2009 Vt. 78, ___, 987 A.2d 258, ___ (2009) (2009

WL 2401952) ("Equitable tolling applies either where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit, or where the plaintiff has timely raised the same claim in the wrong forum.") (citing *Beecher v. Stratton Corp.*, 170 Vt. 137, 743 A.2d 1093, 1098 (1999)); cf. *Machules v. Dep't of Admin.*, 523 So.2d 1132, 1134 (Fla. 1988)

Ibid. at 116.

In the instant case, Appellants had actively pursued his judicial remedies, but was prevented from commencing their action properly due to Respondent's deliberate act of providing outdated address. Contrary to Respondent's contentions, Appellants had to rely on Respondent's misrepresentation and/or misinformation. Appellants also presented proof of Respondent's propensity to provide wrong information and/or contact details, preventing most of his victims from getting compensated for their injuries.

Appellants submit Respondent should be equitably estopped from raising the defense of statute of limitations. Equitable estoppel is a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, which resulted in the other person being injured in some way.

For his willful disregard of the laws of this State, and reckless and wanton misrepresentation with objective of escaping his liability, Respondent should not be allowed to benefit from the defenses and/or advantages available under the very law he violates.

III.

THE DOCTRINE OF UNCLEAN HANDS IS APPLICABLE IN THIS CASE.

Appellants posit Respondent has continuously violated the laws and evaded responsibility as evidenced by the number of traffic infractions in which he was found guilty in absentia. His

evasion strategy is tantamount to an inequitable conduct that prevented Appellants (as well as some of his victims) from properly commencing the case against him.

CONCLUSION

Based on the foregoing, in addition to the arguments made in their Final Brief, Appellants respectfully request this Honorable Court to grant their appeal, and put Respondent in default or, in the alternative, remand the case to the Circuit Court to allow the parties to litigate the case.

Anderson, South Carolina
Date: July 26, 2021.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Judge

Appellate Case No.: 2021-000269
C.A. No. 2020CP1100632

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Jul 26 2021

SC Court of Appeals

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

Appellants,

v.

Perry W. Barbour,

Respondent.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that aside from correction of pagination in the Table of Authorities and grammatical errors, this Final Reply Brief of the Appellants in the above-captioned case complies with Rule 211 (b) SCACR.

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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**

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

v.

Perry W. Barbour, Respondent.

Appellate Case No. 2021-000269

Appeal From Cherokee County
Letitia H. Verdin, Circuit Court Judge

Unpublished Opinion No. 2022-UP-429
Submitted November 1, 2022 – Filed December 7, 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 Respondent.

PER CURIAM: Bobby E. Leopard, Luther Harris, and Donna Harris
(collectively, Appellants) appeal the circuit court's order granting Perry W.
Barbour's motions for relief from the entry of default and to dismiss. On appeal,

Appellants argue the circuit court erred by (1) granting Barbour relief from the entry of default; (2) failing to find Barbour waived his affirmative defenses; and (3) failing to apply the doctrines of equitable estoppel and unclean hands. We affirm.

1. We hold the circuit court did not abuse its discretion in setting aside the entry of default as Barbour provided an explanation for the default and reasons why vacation of the entry of default would serve the ends of justice. See *Richardson v. P.V., Inc.*, 383 S.C. 610, 614, 682 S.E.2d 263, 265 (2009) ("The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the [circuit] court."); *id.* ("The [circuit] court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion."); *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997) ("An abuse of discretion . . . occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support."); *Richardson*, 383 S.C. at 616, 682 S.E.2d at 266 ("The standard for granting relief from an entry of default is good cause under Rule 55(c), SCRCF, while the standard is more rigorous for granting relief from a default judgment under Rule 60(b), SCRCF."); *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) (stating the good cause 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"); *id.* at 608, 681 S.E.2d at 889 (explaining the Rule 60(b) factors of mistake, inadvertence, surprise, or excusable neglect "are indeed relevant to a Rule 55(c) analysis, but only inasmuch as proof of any one of these factors is sufficient to show 'good cause'"); *McClurg v. Deaton*, 380 S.C. 563, 567-68, 573, 671 S.E.2d 87, 89-90, 92 (Ct. App. 2008) (holding employer and employee met the requirements of surprise or excusable neglect under Rule 60(b)(1) when the plaintiffs had negotiated with the employer and employee's insurer, sent the insurer a draft complaint naming the employer and employee as defendants, and stated they would send insurer a copy of the complaint, but brought suit against only the employee, who had left his employment with employer, and the insurer was not aware that the action was filed until after the plaintiffs received a default judgment), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011). In addition, we hold Barbour timely moved for relief upon receiving notice of the entry of default, he presented meritorious defenses in his proposed answer, and Appellants were not prejudiced by Barbour's delay in answering the complaint. See *Sundown*, 383 S.C. at 607-08, 681 S.E.2d at 888 ("Once a party has put forth a satisfactory explanation for the default, the [circuit] court must also consider: (1) the timing of the motion

for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted."); *McClurg*, 380 S.C. at 575, 671 S.E.2d at 93-94 ("To establish that he has a meritorious defense, a complainant need not show that he would prevail on the merits, but only that his defense is meritorious.").

2. We hold the circuit court did not err in considering Barbour's affirmative defenses in granting his motion to dismiss. After granting Barbour's motion for relief from the entry of default, the circuit court ordered Barbour's answer, in which he pled the affirmative defenses, to be entered. *See Thynes v. Lloyd*, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (Ct. App. 1987) (noting that a ruling extending the time for the defendant to answer would necessarily require granting him relief from the entry of default).

3. We hold Barbour was not estopped from asserting the statute of limitations as a defense because Appellants failed to identify any words or conduct from Barbour that induced them to delay in filing the Cherokee County action. *See Kleckley v. Nw. Nat'l Cas. Co.*, 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000) ("[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." (quoting *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997))). We hold Appellants' argument that the doctrine of equitable tolling applies is not preserved for appellate review because they raised it for the first time in their reply brief. *See Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use . . . the reply brief as a vehicle to argue issues not argued in the appellant's brief.").

4. We hold the doctrine of unclean hands does not apply. Barbour's failure to update his address with his home state's department of motor vehicles did not prejudice Appellants because they filed this action after the statute of limitations had run, making service immaterial. Additionally, Barbour's driving record was irrelevant to his assertion of the statute of limitations defense. *See First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant."); *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 350, 479 S.E.2d 67, 78 (Ct. App. 1996) ("An appellant seeking reversal must show error and prejudice.").

AFFIRMED.¹

KONDUROS, HEWITT, and VINSON, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Letitia H. Verdin, Circuit Court Judge

Opinion No. 2022-UP-429 (Filed December 7, 2022)
Appellate Case No.: 2021-000269
C.A. No. 2020CP1100632

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

Appellants,

v.

Perry W. Respondent,

Respondent.

**PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

Pursuant to SCACR Rule 22 (a) and SCACR Rule 240(i), Appellants respectfully petition this Court for a Rehearing of Opinion No. 2022-UP-429, filed December 7, 2022. Appellants filed a Motion to File Out of Time on December 19, 2022. The extension was requested until December 26, 2022. However, the Court was closed until December 27, 2022; and Petitioners filed their brief accordingly. They respectfully submit the Court overlooked or misapprehended their 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.

SUMMARY OF THE PANEL'S AFFIRMATION

The Lower Court's granting Respondent relief from default.

This Honorable Court affirmed the trial court's order granting Perry W. Barbour's (Respondent) motions for relief from the entry of default and to dismiss. This Court concluded the circuit court did not abuse its discretion in setting aside the entry of default as Respondent provided an explanation for the default and reasons why vacation of the entry of default would serve the ends of justice. Unpublished Opinion No. 2022-UP-429, December 7, 2022, p.2).

Appellants aver this Honorable Court misappreciated the fact Respondent did not provide an explanation for the default and reasons why the entry of default would serve the ends of justice. This situation is like the other appeal stemming from the facts and these parties in Opinion No. 2022-UP-397 (Spartanburg action). In both cases, Respondent failed to respond to any attempt at making contact with him; or serving him. Appellants made the argument there was no proof of his involvement in the prior action and they will provide greater analysis of this statement in the argument.

Contrary to this Court's opinion, the rules relied upon in dismissing Appellants' claims are not absolute. If they were, there would be no need for the defenses found in 12(b)(2), (4), (5) and (8). Respondent did not offer an explanation of the failure to timely file his answer/motion to dismiss. Sentry Insurance offered its version of an explanation. Respondent had been served pursuant to SC Code Ann. §15-9-350, which stands for the fact any foreign driver submits to their service being accepted by the South Carolina Department of Motor Vehicles (DMV) if they are involved in a wreck. Respondent accepted service in the Spartanburg action on October 25,

2019, by way of the DMV. Defendant filed his Motion to Dismiss on December 23, 2019.

Clearly, if defense counsel was representing Respondent, they would have filed a joint answer with Southland on November 7, 2019. They did not. He was not represented in October, nor was he represented in December when Sentry Insurance had defense counsel imply he had been retained by Respondent. Seemingly, this would be an example of a conflict of interests.

Regardless, there was no communication between Respondent and defense counsel.

Appellants also submit this Court erred in affirming the Lower Court's relieving Respondent of default. In its decision, the Lower Court erroneously used Rule 55(c) to justify setting aside default yet did not mention the term Good Cause. (R., p. 6). The Court reiterated reasoning absent good cause in its denial of Appellants' Motion for Reconsideration. (R., p. 2). This represents an error of law.

Respondent has maintained an address for tax purposes which has not changed for the last twenty (20) years. (Exhibit 1-Tax Records). His license stated his address was 130 Valentine Court at the time of the wreck. Appellants provided this Court with a lengthy list of offenses in which Respondent was tried in his absence. (R., p.77.78). It appears this may have been the intent of using two addresses (or more)-to avoid prosecution. Respondent had a duty to keep his residence up to date on his license whether he was in South Carolina or Virginia (R., p. 107). He did not.

Defense counsel said the Spartanburg case was never commenced because it was not served within 120 days of the filing of the action. Despite this contention, counsel made a point to state the Appellants had some duty to alert him of the filing of this action. He was also troubled that Appellants did not notify the insurance company. Counsel argued the previous case was a nullity but has argued in this case the Spartanburg case provided the impetus for the

Appellants to notify them of the filing.

Defense counsel and this Court relied on the time which elapsed between the insurance company receiving notice of the action/order of default until counsel filed something in response. Meanwhile, the true measure of the Respondent's "swift action" is the 135 days from the date of service to notice to the insurance company. The insurance company's notice and his subsequent "swift" filing of a dispositive motion along with an answer to Appellants' filings were allegedly on behalf of Respondent. Respondent had nothing to do with defense counsel's filing. Defense counsel's efforts were for Sentry Insurance-period.

The Lower Court approving Respondent's use of affirmative defenses.

In this matter, Appellants filed a new action against Respondent due to the Court dismissing their case due to the failure to properly serve him. The Court dismissed the case without prejudice. Defense counsel maintained the Spartanburg case had never commenced and, therefore, it was a nullity. Based on this fact, Appellants filed a new action against Respondent (Co-defendant Southland had properly been dismissed due to its timely motion.). Respondent was again served in this action through the DMV on September 18, 2020. Ironically, "he" did not file any responsive pleadings until February 11, 2021-just days after the insurance company was notified of the damages hearing for default. Respondent had nothing to do with the response. Additionally, defense counsel did not file a Motion to Intervene.

Defendant admitted to whom he was representing in his Brief in Support of Motion to Set Aside Entry of Default. "Defendant has acted swiftly through its insurance company once notice was received by the insurance company..." (R., p. 37, 1.2). Service was performed on Respondent through the DMV, pursuant to statute, at 130 Valentine Court, Martinsville, VA 24112. (Exhibit 2, Accident Report). That was his address on his license on June 10, 2016. His

property tax records indicated his address was continuously 272 Mary Hunter Dr., Bassett VA 24055 from at least 2002 to the present. (Exhibit 1). His address was 130 Valentine Court at the time of the wreck, yet his address for tax purposes was 272 Mary Hunter Dr. at the very same time. He offered the address 130 Valentine on his license. Appellants had no reason to believe he lived anywhere else given his lengthy time at the address utilized for his taxes.

This panel also ruled on the Spartanburg case and made a similar finding in both. The lower court did not abuse its discretion in considering Respondent's affirmative defenses. This holding essentially means affirmative defenses are no longer affirmative. Respondent had no duty to respond within thirty (30) days. He did not have to file an answer. He did not have to file a motion or motions. However, Appellants were responsible for ensuring he was served within 120 days, regardless of his using a questionable address on his driver's license. Like his many trials in *abstentia*, he abstained from taking any responsibility for the injuries sustained by Appellants. (R., p. 111).

The Lower Court denying the application of equitable tolling in this instance.

The Court has the opportunity to equitably toll the statute of limitations and the related service of the pleadings. In this particular case, there are several aspects of the facts which lend the case to tolling. First and foremost, the carrier delayed their response nine (9) weeks to simply extend an offer. With that in mind, it would seem equitable to allow Appellants two days in excess of the statute of limitations. Equitable tolling relates to the pursuit of justice. Justice in this case would be allowing the parties to conduct a trial involving the facts.

Litigation would have begun in a timely manner had the U.S. Post Office served the mailings that had been deposited in the U.S. Mail on Friday, October 4, 2019. Unfortunately, they were actually forwarded on Monday, October 7, 2019. As a result, the pleadings were

served on Wednesday, October 9, 2019. Appellants had no control over the Post Office. If Appellants were aware there would be such a delay, the documentation would have been served by hand. The inability to control the USPS is certainly one of the instances which allow the court to toll the statute.

The Lower Court did not assess Appellants' unclean hands argument.

Unclean hands are those factors which prevent litigants from using equitable principles to their advantage. Appellants suffered significant losses as a result of the co-defendants' reckless behavior. Respondent had been the definition of the habitual driving offender prior to the wreck. He still managed to retain a position driving a tractor trailer. Either Respondent's inaccurate address prevented the state from properly tracking his violations; or the co-defendant simply disregarded the many violations to further their access to profits. Equity is something Respondent should not realize due to his illegal, habitual driving offenses.

ARGUMENTS

I. THIS COURT ERRED IN AFFIRMING THE LOWER COURT'S ORDER RELIEVING RESPONDENT FROM DEFAULT.

The Court affirmed the Lower Court's finding Respondent should be relieved from an entry of default. The Court erroneously based its decision on Rule 55(c), rather than Rule 60(b) which should have been done since an Order of Default had been entered. Not only was the relief granted based on the wrong rule, the rule utilized was not followed. The Court's explanation of Rule 55(c) omitted the necessary finding of good cause. In the Court's denial of Appellants' Motion for Reconsideration, it also failed to address good cause.

Appellants submit the Circuit Court had mistakenly applied the wrong standard in vacating the entry of default against Respondent. In the instant case, default order has been entered against Respondent on December 16, 2020. (R., p. 10-12). Respondent sought relief

from judgment by moving to vacate the default order under Rule 55 (c) of the SCRCP. (R., p. 31- 38). But since an Order of Default has already been entered, Respondent should have applied Rule 60(b) instead. Unfortunately, the Court followed Respondent's lead and attempted to utilize Rule 55(c). Attempted based on the fact the Court did not find good cause prior to expressing the Wham factors had been met.

In the case of *Sundown v. Intedge Industries*, the Court differentiated the standard for granting relief from judgment under Rule 55(c) and Rule 60(b) of the SCRCP. Sundown v. Intedge Industries, 383 S.C. 601 (S.C. 2009). To quote:

The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. 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. Once a party has put forth a satisfactory explanation for the default, the Circuit court must also consider: (1) the timing of the motion for relief; (2) whether the Respondent has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). The Circuit court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the Circuit court. *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994).

Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud,

misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRCP. **The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default.**

Sundown, supra.

Respondent is not entitled to relief from the default order under Rule 60(b) since the Rule requires a more stringent standard. In this case, Respondent has not alleged any mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation or misconduct on the part of Appellants to warrant a relief from the order in his favor. In fact, if there is any misconduct involved in this case, it is that of Respondent's deliberate and knowing disregard of traffic laws.

Respondent failed to file an answer, any responsive pleading or a motion to dismiss within thirty (30) days of the service of summons and complaint upon him, through the SCDMV. By law, Respondent was in default. Appellants were exercising their right under the law, to move for (and obtain) an entry of default. Respondent has not presented a satisfactory explanation for not filing a responsive pleading, and for the default. Neither did he offer a notarized affidavit explaining his failure to respond within 30 days.

**THIS COURT ERRED BY AFFIRMING THE LOWER COURT'S
FAILURE TO FIND RESPONDENT WAIVED HIS AFFIRMATIVE
DEFENSES.**

Respondent contends 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.

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 (by serving Respondent through the DMV), 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. Respondent submitted itself to the personal jurisdiction of the Court by failing to answer or file dispositive motion to dismiss **within thirty (30) days.**

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). In this case, unlike the Bruces, Respondent failed to file an answer or dispositive motion within thirty (30) days of being served.

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.* **Respondent waived his right to properly object to the insufficiency of service of process by failing to file an answer or dispositive motion within thirty (30) days of being served.**

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 accomplished 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 cause 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. Respondent 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. THIS COURT ERRED IN AFFIRMING THE LOWER COURT'S DISREGARD FOR THE ISSUE OF EQUITABLE TOLLING 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).

Appellants have shown Respondent had a propensity not only in driving recklessly but also in intentionally providing incorrect mailing address and/or contact detail in his driver's license to avoid prosecution. Appellants discovered Respondent has had a significant number of traffic incidents, a majority of which have been tried in his absence.

date	city/county	state	charge	case #	outcome
6/12/15	Danville City	Virginia	Speeding 53/40	590GT15006703-00	Guilty in absentia
1/21/95		Virginia	Illegal sun-shading	089GT9500043700	Guilty in absentia

9/20/08		Virginia	Failure to obey highway sign	071GT0800453100	Guilty in absentia
10/19/07	Henry	Virginia	Speeding 48/35	089GT0700797900	Guilty in absentia
10/19/07	Henry	Virginia	Seat belt violation	089GT0700798000	Guilty in absentia
8/28/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
9/17/07	Montgomery	Virginia	Defective equipment generally	121GT0701637400	Guilty
9/30/03	Patrick	Virginia	Oper w/radar detect/jam device	141GT0300129200	Prepaid-Fine
5/28/04	Patrick	Virginia	Speeding 74/55	141GT0400068000	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey highway sign sleep	175GT0600711000	Guilty in absentia
1/16/08	Danville City	Virginia	Speeding 55/40	590GT0800067700	Guilty
		Kentucky	Driving on suspended	10-T-00307	
6/16/16	Spartanburg	South Carolina	Driving vehicle at greater speed than is re	5102P0362799	Guilty in absentia
6/23/11		Virginia	No county or city tag	GT11004149-00	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey high-sign sleep	175GT0600711000	Guilty in absentia
9/10/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia

Clearly, Respondent is a habitual traffic violator, which his employer knew or should have known. They hired him to drive a semi for them. They disregarded his driving record and allowed him to drive a deadly weapon.

III. THIS COURT ERRED IN AFFIRMING THE LOWER COURT'S FAILURE TO APPLY THE DOCTRINE OF UNCLEAN HANDS.

Appellants posit Respondent has continuously violated the laws and evaded responsibility as evidenced by the number of traffic infractions in which he was found guilty in absentia. He is being provided with a get out of jail free card by this Panel, as well as the lower court.

Respondent, who has done absolutely nothing to participate in this case other than drive recklessly, has been able to: avoid filing an answer, avoid filing a dispositive motion, avoid expressly announcing his affirmative defenses, avoid a damages hearing, avoid the necessity of interacting with a lawyer, etc. The idea he is benefitting from some equity angle leaves the reader pining for a logical explanation as to why his conduct is more deserving of disregarding rules of civil procedure than the Appellants. It appears that Respondent is insulated from his transgressions as he has been for nearly a quarter century.

Defense Counsel in his Motion to Vacate and Brief in Support of Motion to Vacate Entry of Default, offered the following.

1. DMV served this action at 130 Valentine Court, Martinsville, VA 24112-not Appellants
2. Plaintiffs have not learned any address for Respondent is incorrect.
3. Based on the Order of Default being issued, the proper mechanism of attempting to set aside default is Rule 60 (b).
4. Defense counsel failed to illustrate good cause as the lower court has done since that time.
5. The Good cause factors are:
 - a. timing of defendant's motion for relief
116 days in default
 - b. whether Respondent has meritorious defenses
He does not being in default for 116 days.
 - c. Appellants would suffer the greatest prejudice with the dismissal of the case if the Respondent was let out of default.
6. Defendant has not acted in any way. Counsel equates his swift action on behalf of an insurance carrier as being a timely response by Respondent.
7. Defense counsel states Respondent would have meritorious defense despite being 116 days in default, with no affirmative defenses.
8. Defense counsel raises the issue of a competing appeal yet does not have that defense available to him due to being 116 days in default.
9. Defense counsel says Appellants would suffer no prejudice-a patently absurd statement given the dismissal associated with being relieved of default.
10. Defense counsel regurgitates the strong defenses he had prior to being default for 116 days.
11. Claims the Respondent made a timely motion for relief-116 days into default.
12. Claims defenses waived by a failure file an answer or motion 116 days prior, are still to be considered available.
13. "Absence of any prejudice to Plaintiffs."

14. Defense counsel asks the Court to allow litigation on the merits.

CONCLUSION

Based on the foregoing, Appellants pray this Honorable Court reviews its previous filing, and issues a new opinion which forces Respondent to address the fact he is required to adhere to the South Carolina Rules of Civil Procedure, just as the Appellants are.

s/Donald L. Smith
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Attorney for Appellants

Anderson, South Carolina
Date: December 27, 2022.

The South Carolina Court of Appeals

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

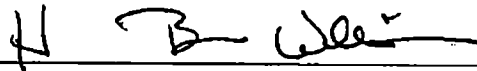
v.

Perry W. Barbour, Respondents.

Appellate Case No. 2021-000269

ORDER

Appellants have filed a motion to consolidate this appeal with the appeal in Appellate Case No. 2020-001110. Because the cases are in different stages of the briefing process, the motion to consolidate is denied.



FOR THE COURT

Columbia, South Carolina

cc:
David L. Moore, Jr., Esquire
Donald Loren Smith, Esquire

FILED
Apr 13 2021



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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February 10, 2023

Mr. Donald Loren Smith, Esquire
2722 W, Whitner St.
Anderson SC 29626

Re: Bobby E. Leopard v. Perry W. Barbour
Appellate Case No. 2021-000269

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

A handwritten signature in black ink, appearing to read "V. Claire Allen".

CLERK

cc: David L. Moore, Jr., Esquire
The Honorable Letitia H. Verdin

The South Carolina Court of Appeals

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

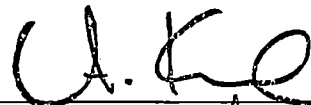
v.

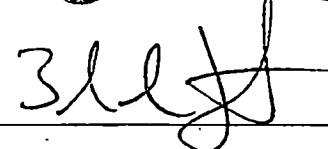
Perry W. Barbour, Respondent.

Appellate Case No. 2021-000269

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc:

David L. Moore, Jr., Esquire
Donald Loren Smith, Esquire
The Honorable Letitia H. Verdin

FILED
Feb 10 2023

RECEIVED

Mar 11 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Judge

Case No. 2020-CP-1100632

Bobby E. Leopard, Donna and Luther Harris,

Appellants,

v.

Perry W. Barbour,

Respondent.

MOTION TO CONSOLIDATE RELATED APPEALS

Appellants hereby moves for an Order consolidating the pending appealed case *Luther Harris, Donna Harris and Bobby E. Leopard vs. Perry Barbour and Southland Transportation, Appellate Case No. 2020-001110* and the present case, Bobby E. Leopard, Donna Harris and Luther Harris v. Perry Barbour, Case No 2020-CP-11-00632 which is being initiated by the contemporaneous filing of Notice of Appeal. Appellants states that:

1. On August 27, 2020, Appellants filed a Complaint against Respondent Perry Barbour.
2. On November 11, 2020, Appellants filed an Affidavit of Default against herein Respondent for failure to file an Answer or any responsive pleading or motion within thirty-days from filing of the Complaint.
3. On November 12, 2020, the Circuit Court entered an Order of Default.
4. Based on the Affidavit of Default and Order of Default, Appellants moved for Entry of Default, which was issued on December 16, 2020.
5. On February 11, 2021, Mr. David L. Moore, Esquire, without providing for any authority, filed several pleadings on behalf of Respondent Barbour.

6. Mr. Moore served Respondents' Motion to Vacate the Default, an Answer and a Motion to Dismiss.
7. On February 16, 2021, a hearing was conducted on the parties' motions.
8. On the same date, the Circuit Court issued a Form 4, granting Respondent's Motion to Vacate Default and Motion to Dismiss, and Denying Appellants' Motion for Entry of Default.
9. On February 26, 2021, Appellants moved for Reconsideration, which the Circuit Court denied in its Order, dated March 9, 2021.
10. On March 10, 2021, Appellants filed their Notice of Appeal, challenging Judge Verdin's Orders, dated February 16, 2021 and March 9, 2021.
11. Rule 214 of the SC Appellate Court Rules (SCACR) governs the procedure to consolidate appeals and proceedings. Rule 214 SCACR provides:

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.

12. This present matter, subject of the Notice of Appeal, involves related issues and presents common questions of fact and law as the pending appealed case. Consolidation will not delay the disposition of this case. It will, in fact, minimize delays and eliminate confusion.

CONCLUSION

WHEREFORE, because consolidation of this matter to a pending appealed case (*Luther Harris, Donna Harris and Bobby E. Leopard vs. Perry Barbour and Southland Transportation, Appellate Case No. 2020-001110*) will promote efficiency and judicial economy, and will not prejudice any party, Appellants respectfully request this Honorable Court to enter an Order consolidating all further proceedings in these actions.

Anderson, South Carolina
March 10, 2021.

Respectfully submitted:
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Attorney for Appellants

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 (SCRPC). Petitioners opposed the motion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted by:

s/Donald L. Smith

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Attorney for Petitioners

Anderson, South Carolina
April 12, 2023.

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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

TPGL 13620510v1

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.

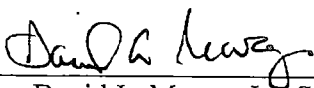
A petition for the issuance of a writ of certiorari is controlled by *Rule 242 of South Carolina Rules of Appellate Practice*. Pursuant to *subsection (c)*, a petition for writ of certiorari is to be served and filed within thirty (30) days after the petition for rehearing is finally decided by the Court 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: 
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Greenville, South Carolina

April 20, 2023

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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.

PROOF OF SERVICE

The undersigned certifies that she served a copy of the foregoing **RESPONDENT'S**

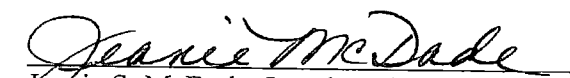
***REPLY TO MOTION TO PERMIT FILING OF CONSOLIDATED PETITIONS FOR WRITS
OF CERTIORARI*** to all counsel of record on April 20, 2023, by emailing a copy of the same, as follows:

The Honorable Jenny Abbott-Kitchens

ctappfilings@sccourts.org

Donald L. Smith, Esquire

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

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.

**RESPONSE TO REPLY TO MOTION TO PERMIT FILING OF
CONSOLIDATED PETITION FOR WRITS OF CERTIORARI**

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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Anderson, South Carolina
April 24, 2023.

The Supreme Court of South Carolina

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

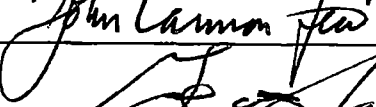
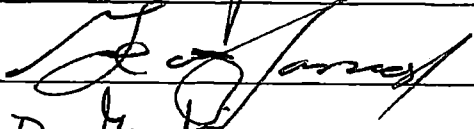
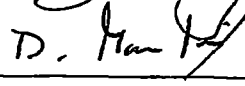
v.

Perry W. Barbour, Respondent.

Appellate Case No. 2023-000417

ORDER

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.

	C.J.
	J.
	J.
	J.
	J.

Columbia, South Carolina
May 17, 2023

cc:

David L. Moore, Jr., Esquire
Donald Loren Smith, Esquire