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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

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Supreme Court Case No.: 2023-000417
Appellate Case No.: 2021-000269
Unpublished Opinion No.: 2021-UP-429 (Filed December 7, 2022)
(Rehearing Denied February 10, 2023)

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

v.

Perry W. Barbour, .....Respondent.

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# REPLY TO PETITION FOR WRIT OF CERTIORARI

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Turner, Padget, Graham & Laney, P.A.

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## INDEX

## STATEMENT OF FACTS

Petitioners were involved in a vehicular accident on June 10, 2016 when the vehicle they were travelling in on I-85 in Spartanburg County came to a stop in traffic. Their vehicle was subsequently struck from behind by a truck operated by Respondent, Perry Barbour.

Petitioners thereafter filed suit in Cherokee County on August 27, 2020 and served the Summons and Complaint through the South Carolina Department of Motor Vehicles pursuant to *Section 15-9-370, S.C. Code (1976).* Pursuant to that statute the Respondent was to be notified by certified mail of the action. However, because the Respondent no longer resided at the address where he lived at the time of the accident, he did not receive the notice. As a result, no appearance was made and the matter was placed in default.

Upon receiving notice of the default damages hearing, the Respondent moved to have the default set aside and a late Answer filed. Judge Letitia Verdin granted this motion. She also dismissed the Complaint based upon the application of the Statue of Limitations.

Petitioners appealed this ruling to the South Carolina Court of Appeals. The Court of Appeals affirmed the Circuit Court ruling in an unpublished opinion on December 7, 2022. A petition for rehearing was filed. It was subsequently denied on February 10, 2023.

Petitioners then requested an extension of time to file a petition for the issuance of a Writ of Certiorari due to a dispute in the companion appeal arising out of Spartanburg County, a forty-five (45) day abeyance was granted on March 16, 2023. The Court of Appeals thereafter declined to recall the remittitur in the companion Spartanburg County Appeal.

## ARGUMENTS

### I.

### PETITIONERS' REQUEST FOR THE ISSUANCE OF A WRIT OF CERTIORARI IS UNTIMELY AND OUTSIDE THE BOUNDS OF THE APPELLATE RULES.

According to *Rule 242 of the South Carolina Rules of Civil Procedure,* a petition for the issuance of a writ of certiorari must be served and filed within thirty (30) days of the denial of the petition for rehearing by the Court of Appeals. In this instance, the petition for rehearing was denied on February 10, 2023. Pursuant to *Rule 242(c),* the petition for the issuance of a writ of certiorari should have been filed by March 12, 2023. However, the court issued an Order holding the appeal in abeyance until the motion to recall the remittitur in the Spartanburg County was resolved. The Court of Appeals declined to recall the remittitur on March 17, 2023, thus ending the abeyance. As a result, the petition for the issuance of a writ of certiorari should have been made by April 16, 2023. It was not filed until May 30, 2023.

Petitioners may argue, however, that a motion to consolidate this petition with the petition filed in Appellate Case No.: 2020-001110 was made on April 12, 2023. This is well beyond the thirty (30) day limitation set forth in *Rule 242.* Moreover, according to *Rule 240(b) of the South Carolina Rules of Appellate Procedure*, a motion does serve to toll the time for filing.

### II.

### SETTING ASIDE AN ENTRY OF DEFAULT DOES NOT REQUIRE THE APPLICATION OF *RULE 60 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE* (Issues I and II)

Petitioners have misconstrued the purposes and application of *Rules 55 and 60* with regard to the facts of this case. Petitioners sought to serve the Respondent through the Director of the Department of Motor Vehicles, as provided, by *Section 15-9-370 of the South Carolina Code.*

Because the Respondent no longer resided at the address provided to the Director of the Department of Motor Vehicles, the matter went into default. An Affidavit of Default was filed on November 10, 2020 and an entry of default was made on December 16, 2020. Upon receiving notice of the entry of default and damages hearing, Respondent moved to vacate the entry of default and be permitted to file a late Answer.

Please note that there was no default judgment entered in this case. The entry of default and possible vacating are controlled by *Rule 55*. Pursuant to this rule, the appropriate standard for setting aside the entry of default is "good cause". When a judgment by default is entered, it can be challenged and possibly overturned pursuant to *Rule 60*. The standard utilized under that rule is "excusable neglect". 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 must be concluded and the parties able to rely on judgments that have been obtained.

Flanagan, James F., South Carolina Civil Procedure (2d ed. 1966).

In this instance, there was no default judgment, as contended by the Petitioners, only an entry of default. Therefore, the "good cause" standard of *Rule 55* is applicable.

The "good cause" standard is less rigorous than the "excusable neglect" standard utilized un *Rule 60* and is addressed to the sound discretion of the circuit court. *Ricks v. Weinrauch,* 293 SC 372, 360 SE2d 535 (Ct. App. 1987); *Williams v. Stalnaker*, 312 SC 373, 440 SE2d 408 (Ct.

App. 1994). Under the "good cause" standard, the party seeking to overcome the entry of default has to provide an explanation for the default and reasons why vacation of the default entry would serve the interests of justice. Once a satisfactory explanation has been made, the circuit court is also to consider (1) the timing of the motion for relief; (2) the existence of a meritorious defense; and (3) the degree of prejudice to the opposing party if relief is granted. *Wham v. Shearson Lehman Bros., Inc.,* 298 SC 462, 381 SE2d 499 (Ct. App. 1989). The circuit court is not required to make specific findings of fact as to each factor listed above so long as there is sufficient evidentiary support for finding of "good cause". See *Dixon v. Besco Engineering, Inc.,* 320 SC 174, 463 SE2d 636 (Ct. App. 1995).

In this case, Petitioners had already filed a separate action for damages in Spartanburg County, which was dismissed due Petitioners' failure comply with *Rule 3 of the South Carolina Rules of Civil Procedure* Petitioners appealed that dismissal and that appeal was active at the time the Cherokee action was filed.

Notwithstanding the fact that he had already instituted suit on the same accident with the same parties, Petitioners attempted to obtain a second bite of the apple by filing in Cherokee County. Even though Petitioners were aware of who the attorney for the Respondent in the first case was, they failed to advise that attorney of the second action or to provide a courtesy copy of the Complaint. Instead, the Petitioners filed suit and served the Director of the Department of Motor Vehicles, giving an address for the Respondent which Petitioners knew was out of date and unlikely to give notice to the Respondent of the additional litigation.

As quickly as the attorney for the Respondent gained knowledge of the second case, a motion was made to set aside the entry of default and allow a late Answer. This was appropriate since the motion was filed on February 11, 2021 after notice was received on February 1, 2021.

Petitioners have argued that the Respondent did not take action for fifty-seven (57) days after the entry of default. This ignores the fact that Respondent had no knowledge of the existence of a second case until February 1, 2021. The focus with this factor concerns the tardiness of the response after notice was received. *Maxwell v. Geney,* 350 SC 563, 567 SE2d 496, (Ct. App. 2002).

Attached to the motion to vacate the entry of default was a proposed Answer. Within that proposed Answer were defenses based upon the applicable statute of limitations and the fact that the case was a duplication of another pending action. Petitioners argue that these defenses were waived since the matter was in default. In essence, the Petitioners are arguing that even though the Respondent is required to show the existence of meritorious defense in order to have the default vacated, the meritorious defenses cannot be raised because the matter is in default. The argument is circular and illogical. The determination to set aside a default is based in part upon the existence of a meritorious defense. Once the default has been set aside, there can be no waiver of that defense since there is no longer a default. In this case, since the Circuit Court ruled in its discretion that the entry of default should be set aside, it then could properly consider the affirmative defenses set forth in the Complaint. Since the statues of limitations defense was without question applicable, the Circuit Court properly dismissed the case.

However, Petitioners also argue that they will be prejudiced if the default is set aside. They argue that by setting aside the default and applying the statute of limitations, they will be unable to collect damages for the injuries he sustained. However, this is not the type of damage to which the *Wham* Court was referring. Instead the damages which are to be considered are those which are caused by the delay in timely filing an Answer such as lost witnesses, lost evidence or inability to conduct discovery. See *Maxwell v. Geney*, 350 SC 563, 567 SE2d 496 (Ct. App. 2002).

Having satisfied the *Wham* factors and demonstrated that a good reason to vacate the default existed, the Circuit Court properly determined that the entry of default should be set aside.

## III.

## THE DOCTRINE OF UNCLEAN HANDS IS INAPPLICABLE IN THIS CASE SINCE THE ALLEGED IMPROPER ACTS ON THE PART OF THE RESPONDENT HAVE NOTHING TO DO WITH PETITIONERS' FAILURE TO TIMELY FILE HIS COMPLAINT. (Issue III).

Petitioners argue that the application of the statute of limitations to preclude this claim is inappropriate under the equitable doctrine of unclean hands. They argue that respondent has a lengthy record of being charged with traffic violations to which he failed to respond and that respondent failed to timely update his address so that he might be served on a timely basis. However, the equitable maxim of unclean hands is not to be utilized by reason of acts unconnected to the activity giving rise to the defense. See 27 Am. Jr. 2d Equity §142. The doctrine is inapplicable where the alleged improper conduct has not harmed the complaining party. Id. §144. In this case, Petitioners' complaints about the Respondent's driving record and failure to respond to citations have nothing to do with Petitioners' failure to timely file his Complaint. As noted, the accident occurred on June 10, 2016; the Complaint was filed in Cherokee County on August 27, 2020, more than four years later. The alleged traffic violations cited by Petitioners did not prevent the Petitioners from filing before June 10, 2019.

Likewise, the alleged failure of the respondent to update his mailing address has nothing to do with Petitioners' failure to timely file. Although *Rule 3 of the South Carolina Rules of Civil Procedure* requires both filing and service to start an action, only the absence of either filing or service is necessary to demonstrate that the action has not been commenced. Since filing of this action was only made on August 27, 2020, commencement could only be made by that date, which is well beyond the bar established by applicable statute of limitations.

## IV.

## EQUITABLE ESTOPPEL OR TOLLING OF THE STATUTE OF LIMITATIONS DOES NOT SERVE IN THIS CASE TO PRECLUDE THE OPERATION OF THE STATUTE OF LIMITATIONS. (Issue IV)

Petitioners have argued that the applicable 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 an affirmative defense if the delay in filing or serving the Complaint which otherwise would have given operation to the statute has been induced by the Respondent's actions. *Kleckley v. Northwestern Nat. Cas. Co.*, 338 SC 131, 526 SE2d 218 )2000). In order for equitable estoppel to be applicable, however, the Respondent must have misrepresented or concealed material facts which were there unknowingly relied upon by the aggrieved party. *Maker v. Tietex Corp.*, 331 SC 391, 500 SE2d 204 (Ct. App. 1998). Petitioners assert they were misled by the Respondent's failure to update his mailing address, thereby making it difficult to properly serve the respondent. However, the statute of limitations in this instance was enforced because Petitioners failed to file the Complaint on time. The failure to serve respondent would not otherwise impact whether the statute of limitations was applicable.

Petitioners further argue that the statute of limitations should be tolled. Tolling is a utilized when a party is prevented from pursuing his or her claim due to circumstances beyond his or her control, such as fraud, concealment or incapacity. Tolling applies where individuals are unfairly prevented from seeking redress due to factors beyond his or her control. The failure to timely file the Complaint in this case was the result of a failure on the part of the Petitioners and not due to external factors beyond Petitioners' control. Accordingly, the doctrine of equitable tolling is inapplicable.

## V.

**THE "INTEREST OF JUSTICE" DOCTRINE ESPOUSED BY THE PETITIONERS HAS NOT BEEN ADOPTED IN SOUTH CAROLINA AND WOULD NOT BE APPLICABLE UNDER THE FACTS OF THIS CASE. (Issues V).**

Petitioners advocate the adoption of an "interest of justice" doctrine to extend the time period beyond the bar supplied by a statute of limitations. This doctrine was applied in the New York case of *Henneberry v. Borstein*, 91 AD3d 493, 937 NYS2d 177 (2012) under limited circumstances. The case was controlled by a statute of which there is not a similar statute in South Carolina. Pursuant to the New York statute, where a party has made diligent efforts to file or serve and is frustrated in those actions by the acts of others, including law office failure, the bar created by the statute of limitations may be modified to allow proper service or filing. In this case, the Petitioners' failure to file their Complaint was not due to confusion or inconsistent instructions as was true in the *Henneberry* case. Instead the failure to file was simply the result of Petitioners' inadequate efforts. Equity need not intervene under the circumstances.

## CONCLUSION

Petitioners' request for a writ of certiorari should be denied due to the fact that the petition is untimely due to being made more than a month after the deadline mandated by *Rule 242* of the *Appellate Rules of Procedure*. Moreover, as noted by that Rule, the granting of a petition for writ of certiorari is not a matter of right but rather falls within the discretion of the members of the Supreme Court. *Rule 242, SCRAD.* Such a motion is only to be granted where there are special and important reasons. This case does not present any special or important issues. Nonetheless, *Rule 242* does not provide examples of the types of issues that will be relied upon:

(1) is there a novel question of law;

(2) was there a dissent in the Court of Appeals decision;

(3) is the decision by the Court of Appeals in conflict with prior precedent;

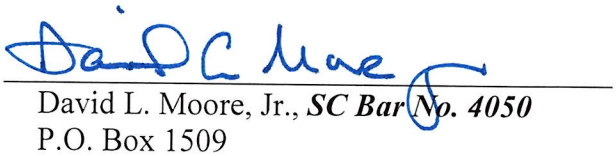
(4) are substantial constitutional issues involved;

(5) does the Court of Appeals' decision conflict with a decision of the U.S. Supreme Court on a federal question?

None of these apply with the possible exception of the third example and even there the Petitioners have incorrectly stated the prior precedent. Moreover, Petitioners' appeal to equity falls short since the failure to timely file was entirely their fault and not the fault of others or outside forces.

Respectfully submitted,

Turner, Padget, Graham & Laney, P.A.

By: 

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