

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letita H. Verdin, Circuit Court Judge

Supreme Court File No.: 2023-000417

Appellate Case No. 2021-000269

Unpublished Opinion No. 2021-UP-429 (Filed on December 7, 2022)

(Rehearing Denied February 10, 2023)

**REPLY TO RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI**

Respectfully submitted by:

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June 29, 2023.

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S.C. SUPREME COURT

Petitioners make the instant submission in response to Respondent's Return to their Petition for Writ of Certiorari. Petitioners adopt and incorporate by reference the Statement of Case and Facts presented in their Petition.

I.

PETITIONERS' PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED.

Petitioners recognize that the denial of their Petition for Rehearing on February 10, 2023, set the deadline for filing a petition for Writ of Certiorari as March 12, 2023. However, since March 12, 2023, fell on a Sunday, it is well-established that the deadline is extended to the following business day. Accordingly, the Petitioners were fully aware that they had until March 13, 2023, to file their petition.

Petitioners promptly moved for an extension of time to file their Petition on March 13, 2023. However, due to the Court of Appeals placing the matter on hold for a period of 45 days, as confirmed in the Court's Letter dated March 16, 2023, the Petitioners' Motion for Extension was not acted upon during this interim.

On April 13, 2023, Petitioners subsequently sought to consolidate their Petitions for Certiorari of both the Cherokee and Spartanburg actions, which the Supreme Court denied. Petitioners thereafter submitted their Petition for Certiorari on May 31 2023, within the period stipulated in the Supreme Court's Letter, dated March 16, 2023.

II.

RESPONDENT WAS NOT ENTITLED TO RELIEF FROM ENTRY OF DEFAULT NOR FROM A DEFAULT JUDGMENT.

In relation to the issue of default judgment, it is imperative to note that the Circuit Court issued its Order for Default on November 12, 2020, and subsequently entered judgment on December 16, 2020. In light of these facts, the Petitioners maintain their steadfast belief that Rule

60 of the South Carolina Rules of Civil Procedure (SCRCP) should serve as the applicable standard for setting aside a default judgment.

Furthermore, the Petitioners contend that even assuming the entry of judgment alone, the Respondent has failed to present a compelling case or establish the necessary Wham factors to warrant the setting aside of an entry of default. In support of their position, the Petitioners assert that the Respondent's argument of "good cause" relies heavily on affirmative defenses concerning the pendency of action and statute of limitations. However, it should be emphasized that the Respondent ought to have been precluded from raising these affirmative defenses, as they were not raised within the prescribed reglementary period.

Apart from the issue of these affirmative defenses being deemed waived, it is crucial to highlight their inherent problematic nature. Firstly, regarding the pendency of action defense, Mr. Moore initially asserted that "no action was ever commenced in the Spartanburg court." Yet, not only has he altered his theory, but he has also employed the same argument to impede the Petitioners from pursuing their rightful claims.

Respondent's defense of statutory limitations based on "good cause" warrants careful examination. The Petitioners firmly assert that, considering the unique circumstances surrounding the dispute between the parties, the statute of limitations should be equitably tolled in favor of the Petitioners.

It is essential to note that the Petitioners diligently pursued their legal remedies; however, their ability to initiate the action in a timely manner was impeded due to the deliberate actions of the Respondent, who intentionally provided an outdated address. Contrary to the contentions put forth by the Respondent, the Petitioners were compelled to rely on the misinformation and/or misrepresentation furnished by the Respondent. Additionally, the Petitioners have substantiated

instances where the Respondent has exhibited a pattern of supplying erroneous information and contact details, effectively preventing numerous victims from obtaining rightful compensation for their injuries.

In light of these compelling circumstances, the Petitioners firmly submit that the Respondent should be equitably estopped from raising the defense of statute of limitations. Equitable estoppel, a defensive doctrine rooted in fairness, serves to prevent one party from unfairly exploiting another party by inducing them, through false language or conduct, to act in a particular manner that ultimately results in harm or injury to the latter. The circumstances surrounding the case necessitate equitable tolling, as the Petitioners were hindered in their timely pursuit of legal action due to the Respondent's deliberate actions.

Furthermore, Respondent has not satisfactorily met the Wham requirements.

A. Timeliness of the Motion

The chronology of events in this case clearly demonstrates the untimeliness of the Respondent's motion. Petitioners filed the Summons and Complaint on August 27, 2020, and the processes were served to the Respondent through SCDMV on September 15, 2020. Despite the thirty-day period elapsing without any response from the Respondent in the form of an Answer, responsive pleading, or motion, no action was taken. Petitioners proceeded to file an Affidavit of Default on November 10, 2020, and subsequently moved for Entry of Default on November 28, 2020. The Circuit Court entered an Order of Default and Order for Hearing to Ascertain Damages on December 16, 2020. It was not until February 11, 2021, that the Respondent filed a Motion to Vacate the Entry of Default and simultaneously moved for the dismissal of the case. Ultimately, on February 16, 2021, the Circuit Court granted the Respondent's Motion to Vacate the Entry of Default.

This extensive timeline reveals that the Respondent took four months to address the Petitioners' Complaint and an additional two months to respond to the Affidavit and Motions. Such significant delays in filing the Motion to Vacate and/or Set Aside Judgment do not constitute a timely filing under established legal precedents. South Carolina courts have consistently held that a two-month gap between the entry of default and the motion to set aside is not considered timely, as illustrated in cases such as Consolidated Masonry & Fireproofing, Inc., 383 F.2d 249, 251 (4th Cir. 1967); Nelson v. The Coleman Co., 41 F.R.D. 7 (D. S.C. 1966); 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). It is evident that the Respondent failed to act promptly in seeking relief.

B. Meritorious Defense(s)

Petitioners reiterate the affirmative defenses raised by Respondent cannot be considered meritorious defenses. As previously discussed, these defenses were waived and problematic. The Court has expressed disapproval of the Respondent's attempt to employ conflicting theories or change his theory of the case. This practice has been explicitly criticized in the case of 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.

Moreover, it is crucial to note that the dismissal of the Spartanburg action was without prejudice, allowing for the possibility of filing another action. Therefore, the pendency of an appeal in the Spartanburg action cannot serve as a valid defense to the plaintiff's claims, which would enable the respondent to evade liability entirely.

Furthermore, it is worth highlighting that in both the Spartanburg action and the present case, the Respondent has failed to provide a substantive defense against the allegations of gross negligence and/or reckless driving, which resulted in severe physical injuries to the Petitioners. Instead, the respondent has solely relied on procedural arguments, evading the core issues raised against him.

The respondent's persistent avoidance of addressing the substance of the claims raised against him demonstrates a lack of accountability for his actions and a failure to provide a valid defense. It is imperative that the court recognizes the Respondent's evasion tactics and ensures that the merits of the Petitioners' claims are fully examined and justly adjudicated.

C. Prejudice to Petitioners

The Petitioners firmly assert that setting aside the entry of default would cause them significant prejudice and effectively impede their ability to pursue their claims against the Respondent. This course of action would effectively close the door on the Petitioners' pursuit of justice and seeking redress for the injuries they have sustained. It is crucial to acknowledge that these injuries have necessitated ongoing medical attention, with the physical pain and suffering endured by the Petitioners persisting to the present day. Moreover, the protracted nature of this litigation has imposed substantial financial difficulties on the Petitioners, exacerbating the hardships they have already endured.

The Respondent seeks to narrow the applicability of the factor regarding prejudice to the other party, relying on the case of Maxwell v. Geney, 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002). However, it is important to note that this case was subsequently overturned by the Supreme Court in 2003. Furthermore, the Respondent fails to acknowledge that the Wham court did not exclusively refer to this particular type of injury when discussing the factor in question.

Most importantly, defense counsel seems to highlight the fact that Petitioners did not serve him a copy of the Complaint. Petitioners questioned Counsel's standing in this case. To establish the attorney-client privilege, the party asserting the privilege must demonstrate that there existed an attorney-client relationship between the parties and that the communications made were of a confidential nature. This principle was established in the case of Marshall v. Marshall, 282 S.C. 534, 538-39, 320 S.E.2d 44, 47 (Ct. App. 1984), as cited in Crawford v. Henderson, 356 S.C. 389 (S.C. Ct. App. 2003). To qualify as a client, an individual must have engaged in confidential communication with an attorney for the purpose of seeking legal advice. *Ibid.* This communication may be made with the intention of seeking professional assistance from the attorney, regardless of whether or not actual employment takes place. *Ibid.* Counsel has not provided any proof that Respondent has availed of his services. Petitioners have challenged Counsel's standing since the inception of this case. App., p. 56.

Despite not providing proof that he represents Respondent, defense counsel admitted receiving the notice of entry of default *from Petitioners*, after receipt of a February 1, 2021, letter. What Mr. Moore failed to state is the letter and notice was sent to the Insurance Company. It is therefore clear and convincing defense counsel was acting on behalf of the insurance carrier, as opposed to Respondent.

In conclusion, Petitioners unequivocally assert that the appropriate standard for setting aside the default judgment is Rule 60 of the SCRCF. Additionally, the Respondent's reliance on affirmative defenses raised beyond the prescribed timeframe is procedurally deficient and lacks substance. The inconsistency in the Respondent's position regarding the pendency of action defense further undermines their argument. Furthermore, the Respondent's defense based on statutory limitations fails to hold merit when considering equitable considerations. Lastly, the

Respondent has not met the requirements of the Wham factors to justify the vacating of the default judgment or the entry of default.

III.

THE DOCTRINE OF UNCLEAN HANDS IS APPLICABLE IN THIS CASE.

Petitioners contend that the doctrine of unclean hands is applicable to the present case. This doctrine prevents a party from seeking equitable relief if they have acted unfairly in the matter at hand, to the detriment 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).

The Respondent is bound by both Virginia and South Carolina laws. As a resident of Virginia, he is obligated to notify the Department of any change of address, as outlined in Virginia Code §46.2-324 (R., p. 107). Since the Respondent presented a driver's license with a Virginia address, it is reasonable for Petitioners (and the SCDMV) to assume that the Respondent can be located at that address.

As a motorist who travels on the streets and highways of South Carolina, the Respondent is expected to comply with its laws. He was aware of his obligation to keep his contact information updated under both laws. However, he has repeatedly violated these laws and evaded responsibility, as demonstrated by the numerous traffic infractions for which he was found guilty in absentia. Presumably, this was due to Petitioners' inability to reach him.

Respondent's failure to provide updated information hindered Petitioners from correctly filing and serving the Complaint. Mr. Moore's improper and/or unauthorized representation of Respondent necessitated the refiling of this Complaint by Petitioners.

IV.

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

Petitioners have presented evidence indicating that Respondent has displayed a pattern of both reckless driving and deliberately providing false mailing addresses or contact information on his driver's license to evade prosecution. Petitioners have uncovered a substantial number of traffic incidents involving Respondent, the majority of which were resolved in his absence.

Respondent continued to provide inaccurate contact details and neglected to update his mailing address, demonstrating a disregard for the safety of others on the road. This is further supported by the Incident Report, which highlights his negligent behavior. This blatant disregard for law forced Petitioners to re-file the Complaint, subject matter of this petition. Petitioners seek this Court to apply the principle of equitable estoppel in this situation, aiming to prevent one party from unfairly exploiting another by inducing them to act in a certain manner through false language or conduct, ultimately resulting in harm to the affected party.

V.

THE “INTEREST OF JUSTICE” DOCTRINE SHOULD BE APPLIED TO THIS CASE.

The courts have consistently rejected the inequitable use of statute of limitations, guided by the principle that one should not benefit from their own wrongdoing. This principle was highlighted in the case of Glus v. Brooklyn E. District Terminal, 359 US 231 (1959), where the Court declined to dismiss the petitioner's complaint based on the respondent's assertion of the statute of limitations defense. The petitioner argued that the respondent had caused the delay in filing through misrepresentation, leading the court to recognize the unfairness of allowing the respondent to take advantage of their own misconduct.

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.

In his response to Petitioners' Petition for Writ of Certiorari, Respondent once again seeks to limit the application of the "interest of justice" doctrine solely to the New York cases cited (Henneberry v. Borstein, 2012 NY Slip Op. 00235 [91 AD3d 493]). Petitioners insist that since this doctrine is rooted in equity, it should be left to the discretion of the Court to determine its applicability in this case.

Furthermore, Petitioners strongly object to Respondent's assertion that their failure to file the Complaint was a result of their own inadequate efforts. To the contrary, Petitioners have shown unwavering determination in their pursuit of justice and have exhausted all available means to serve the Respondent with the necessary legal documents, even going so far as to re-file the Complaint. In contrast, defense counsel, who has yet to establish his standing in this case, has engaged in unauthorized practice of law.

CONCLUSION

Based on the foregoing, in addition to the arguments made in their Petition for Writ of Certiorari, Petitioners respectfully request this Honorable Court to grant their petition, declare Respondent in default, and/or, in the alternative, remand the case to the Circuit Court to allow the parties to litigate the case.

{SIGNATURE TO FOLLOW}

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