

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable James O. Spence,
Lexington County

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S.C. Supreme Court

Opinion No. 5113 (S.C. Ct.App. filed April 10, 2013)

Regions BankPlaintiff

vs.

William S. Owens, David S. Hostetler,
Roland G. Paddy and Greer State Bank..... Defendants

OF WHOM:

William S. Owens is.....Petitioner
and

Regions Bank, Roland G. Paddy
and Greer State Bank are.....Respondents

APPENDIX

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Brief of Appellant..... attached

Brief of Respondent attached

The South Carolina Court of Appeals

Regions Bank, Plaintiff,

v.

William S. Owens, David S. Hostetler, Roland G. Paddy
and Greer State Bank, Defendants,

of whom, William S. Owens is the Appellant,

and Regions Bank, Roland G. Paddy and Greer State
Bank are the, Respondents.

Appellate Case No. 2011-193586

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.

Paul E. Short, Jr.

J.

OKO

J.

James C. Kelly

J.

Columbia, South Carolina

cc:

Stephen Peterson Groves, Sr.

William Wesley Johnson, Jr.

Sherman Brook Fowler

Gene McCain Connell, Jr.

Cheevin T. Lex Gardner

Robert Bruce Wallace

FILED

June 11, 2013

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

Regions Bank, Plaintiff,

v.

William S. Owens, David S. Hostetler, Roland G. Paddy
and Greer State Bank, Defendants,

of whom, William S. Owens is the Appellant,

and Regions Bank, Roland G. Paddy and Greer State
Bank are the Respondents.

Appellate Case No. 2011-193586

Appeal From Lexington County
James O. Spence, Master-in-Equity

Opinion No. 5113
Heard October 1, 2012 – Filed April 10, 2013

AFFIRMED

Gene McCain Connell, Jr., of Kelaher Connell &
Connor, PC, of Surfside Beach; and Cheevin T. Lex
Gardner, of Gardner Law Office, of Myrtle Beach, for
Appellant.

Stephen Peterson Groves, Sr. and Robert Bruce Wallace,
both of Nexsen Pruet, LLC, of Charleston; William
Wesley Johnson, Jr., of Barfield & Johnson, LLC, of
Lexington; and Sherman Brook Fowler, of Carter Smith

Merriam Rogers & Traxler, PA, of Greenville, for
Respondents.

LOCKEMY, J.: In this appeal from a mortgage foreclosure action, William Owens argues the master-in-equity erred in denying his motion to set aside entry of default. Owens contends the master erred in finding he failed to demonstrate good cause for failing to answer Regions Bank's (the Bank) summons and complaint as required by Rule 55(c), SCRPC. We affirm.

FACTS/PROCEDURAL BACKGROUND

On June 24, 2005, the Bank's records indicate it loaned Owens, Roland G. Paddy, and David S. Hostetler (collectively, Defendants) \$700,000 to purchase approximately one hundred acres of land (the property) in Lexington County. In consideration for the loan, Defendants executed and delivered a promissory note and mortgage to the Bank. On March 31, 2009, following the maturity of the promissory note and in consideration for an extension of the maturity date to July 1, 2009, a second promissory note and assignment of rents was executed in the amount of \$642,564 to the Bank. Defendants failed to pay the loan by July 1, 2009, thereby defaulting under the note.

On December 1, 2009, the Bank filed a mortgage foreclosure action seeking to recover the outstanding debt of \$683,154.75 as well as attorney's fees and costs. Paddy filed and served his answer on January 15, 2010. Paddy admitted participating in the loan transaction but denied the outstanding loan amount and the Bank's entitlement to attorney's fees and costs. Owens and Hostetler failed to answer. Owens was personally served with the foreclosure pleadings at his business address on January 26, 2010. After Owens failed to file an answer, the case was referred to the master, and a final hearing was set for July 19, 2010. Counsel for the Bank filed an affidavit of default against Owens on March 19, 2010. The Bank notified Owens of the final foreclosure hearing by letter on June 22, 2010.

On July 16, 2010, Owens filed a motion to set aside entry of default, for leave to file an answer, and for a continuance. Owens asserted Paddy misrepresented he would answer on behalf of himself and Owens. In his proposed answer, Owens denied he participated in the loan transaction, denied he signed the loan documents, and alleged the Bank was negligent in processing the loan without his

consent. Owens also asserted a counterclaim alleging the Bank violated the South Carolina Unfair Trade Practices Act.

The Bank deposed Owens, Paddy, and the loan closing attorney, Michele Paddy Refosco.¹ According to Owens, Paddy approached him about investing \$100,000 in a "deal." Although Owens denied he knew the deal was to purchase the property, Owens stated Paddy had discussed the property with him and he understood Paddy intended to "turn around and sell" the property to a bottling company. Owens testified Paddy told him he could expect a significant return on his investment. Owens recalled he discussed the deal with Paddy for several months before he gave Paddy the \$100,000 to invest. Owens and Paddy did not sign a contract or partnership agreement.

Owens denied purchasing the property, owning the property, or agreeing to participate in any financing for the property. According to Owens, he did not attend the loan closing at Refosco's office, and the signature on the 2005 promissory note is not his. Owens admitted he signed "a bunch of papers" Paddy brought to his office without reading them, but he could not recall what type of documents he signed. Owens testified he contacted Paddy after receiving the foreclosure summons and complaint, and Paddy represented to him he had retained an attorney and was "taking care of it." According to Paddy, he had discussions with Owens regarding the need to finance the property with the Bank. Paddy testified he attended the loan closing at Refosco's office along with Owens and Hostetler. Paddy testified Refosco explained the terms of the loan documents and all three Defendants signed the documents. Refosco also testified the Defendants signed the 2005 loan transaction documents in her presence at her law office on June 24, 2005.²

Owens admitted signing a limited power of attorney in favor of Paddy on May 24, 2007. Pursuant to the power of attorney, Owens authorized Paddy to execute in Owens's name the "HUD-1 Statement, Deed, Disbursement Authorizations, and any and all other closing documents in connection with the sale of [the property]." Owens, however, stated the power of attorney was solely for the purpose of allowing Paddy to pick up Owens's share of the property's sale proceeds in Columbia.³ Paddy did not disagree with Owens's characterization, but stated that

¹ Refosco is Paddy's daughter.

² Refosco testified she would not have witnessed and notarized the documents unless Owens had signed them in her presence.

³ Owens did not read the power of attorney agreement before signing it.

the power of attorney was also for the purpose of allowing Paddy to make decisions related to the property and sign documents associated with the property and its financing. Paddy signed the 2009 promissory note on behalf of Owens as attorney-in-fact. According to Paddy, he explained to Owens, prior to signing on his behalf, the terms of the transaction. Owens revoked the power of attorney on June 30, 2010.

After the Bank filed its mortgage foreclosure action, Paddy testified he hired an attorney to represent only himself and not Owens and Hostetler. Paddy stated he told Owens he had "hired a lawyer in that county to take care of whatever we had to do on this foreclosure and to keep me abreast of what was going on." According to Paddy, while the attorney was only representing Paddy, Paddy was "looking out for [Owens]." Paddy testified he did not tell Owens an attorney would appear on Owens's behalf.

In a November 30, 2010 order, the master denied Owens's motion to set aside entry of default, finding Owens's mistaken belief that Paddy would answer the complaint on his behalf did not meet the "good cause" standard set forth in Rule 55(c), SCRCF. The master noted the record was void of any evidence Paddy agreed or suggested he would hire an attorney for Owens. The master found Owens failed to take steps to protect himself and should not be rewarded for his "own negligence and intentional ignorance." Subsequently, Owens filed a motion to reconsider, which the master denied on March 9, 2011. The appeal followed.

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 court. *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. v. Gaffney*, 297 S.C. 160, 163, 375 S.E.2d 321, 322 (Ct. App. 1988). An abuse of discretion occurs when the judgment is 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).

LAW/ANALYSIS

I. Entry of Default

Owens argues the master erred in denying his motion to set aside entry of default because the Lexington County Clerk of Court failed to formally enter the default into the court records. Because Owens failed to raise this argument to the master, it is not preserved for our review. *See Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006) ("To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court.").

II. Good Cause

Owens argues the master erred in finding Owens failed to demonstrate good cause for failing to answer the complaint. We disagree.

Rule 55(a), SCRCF, provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c), SCRCF, permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "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." *Id.* at 607-08, 681 S.E.2d at 888 (citing *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." *Id.* "A motion under Rule 55(c) is addressed to the sound discretion of the trial court." *Id.*

Owens contends he has shown good cause for failing to answer the complaint. First, Owens argues Paddy misled him into believing Paddy had hired an attorney to answer the complaint on Owens's behalf. Owens asserts he reasonably relied on Paddy's representations because Paddy had his power of attorney, which allowed him to act on Owens's behalf regarding the property. Owens argues he immediately hired an attorney when he learned Paddy did not file an answer on his

behalf. Owens maintains that, as a 79-year-old with a limited education, he was unaware he was signing loan documents and had complete trust in Paddy.

We find evidence in the record supports the master's finding Owens did not show good cause for failing to answer the complaint. While Owens testified he contacted Paddy after receiving the complaint and Paddy told him he had hired an attorney and would "take care of it," Paddy disputed this characterization. Paddy testified he never told Owens he had hired an attorney to represent him and file an answer on his behalf. Furthermore, Owens presented no evidence he took any steps to protect himself by contacting either Paddy or Paddy's attorney to confirm an answer would be filed on his behalf. *See Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (holding "a party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney.").

Owens argues he is entitled to relief pursuant to the factors outlined in *Wham*. *See Wham*, 298 S.C. at 465, 381 S.E.2d at 502-03 (holding the master shall consider the following factors in deciding whether to grant relief from an entry of default: (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). Owens contends his motion for relief was timely, he had a meritorious defense, and the Bank would not be prejudiced. Because we find the master did not err in finding Owens failed to show good cause for failing to answer the complaint, we need not consider the *Wham* factors. *See Sundown*, 383 S.C. at 607-08, 681 S.E.2d at 888 (holding a court need only consider the *Wham* factors "[o]nce a party has put forth a satisfactory explanation for the default"); *Dixon v. Besco-Eng'g, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995) (holding the trial court is not required to make specific findings of fact on the record for each *Wham* factor if the record contains sufficient evidentiary support for the finding of lack of good cause).

Owens also asserts the master erred in applying an excusable neglect standard in determining Owens was not entitled to any relief. Although the master discussed this standard during the hearing on Owens's motion to reconsider, the master also discussed good cause during the hearing on Owens's motion to set aside entry of default, and he properly applied the good cause standard in his final order.

Finally, Owens argues the master erred in citing *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 529 (Ct. App. 2002), in his order. The master cited *Pilgrim* for the

proposition that a defendant's mistaken belief that a fellow defendant would file an answer on his behalf does not meet the good cause standard. In *Pilgrim*, this court noted that "[t]he courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant." 350 S.C. at 642, 567 S.E.2d at 529. Here, the master concluded that "[i]f reliance on one's own attorney is insufficient to show 'good cause,' then reliance on another defendant and *his* attorney is equally insufficient." Owens contends the master's reliance on *Pilgrim* was an error of law because *Pilgrim* was vacated by our supreme court. We agree with Owens that *Pilgrim* was vacated on April 25, 2003. See *Bage, LLC v. Se. Roofing Co. of Spartanburg, Inc.*, 383 S.C. 489, 490, 681 S.E.2d 867 (2009) (noting the parties in *Pilgrim* settled while the petition for certiorari was pending before our supreme court; therefore, the decision was vacated). However, the master's reliance on *Pilgrim* was not an error justifying reversal because the proposition for which *Pilgrim* stands was not overturned by the court and remains the law of this state. See *Sundown*, 383 S.C. at 609, 681 S.E.2d at 889 (holding "the law is clear that an attorney or insurance company's misconduct is imputable to the client").

CONCLUSION

Based on the foregoing, we find the master did not abuse his discretion in refusing to grant Owens relief under Rule 55(c), SCRCP. Accordingly, the master's order is

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable James O. Spence,
Lexington County

CASE NO. 2009-CP-32-5373

Regions BankPlaintiff

vs.

William S. Owens, David S. Hostetler,
Roland G. Paddy and Greer State Bank..... Defendants

OF WHOM:

William S. Owens is.....Appellant

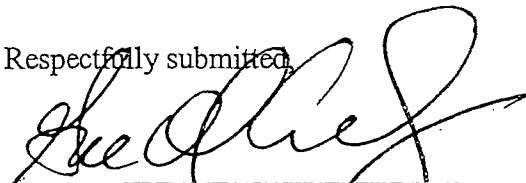
and

Regions Bank, Roland G. Paddy
and Greer State Bank are.....Respondents

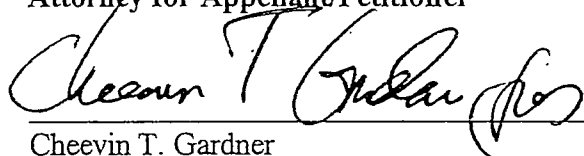
PETITION FOR REHEARING

The Appellant/Petitioner, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for a rehearing of its decision filed April 10, 2013 and received by Appellant's counsel on April 12, 2013. The basis of this Petition for Rehearing is the attached Memorandum of Law.

Respectfully submitted,



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April 19, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable James O. Spence,
Lexington County

CASE NO. 2009-CP-32-5373

Regions BankPlaintiff

vs.

William S. Owens, David S. Hostetler,
Roland G. Paddy and Greer State Bank..... Defendants

OF WHOM:

William S. Owens is.....Appellant

and

Regions Bank, Roland G. Paddy
and Greer State Bank are.....Respondents

**MEMORANDUM OF LAW IN SUPPORT
OF PETITION FOR REHEARING**

The Appellant moves the Court for a rehearing pursuant to Rule 221 of the South Carolina Appellate Court Rules. The basis of this Petition for Rehearing is as follows:

1. The Court's decision that Owens did not raise the issue of an entry of default by the Clerk of Court prior to the Order of the Master referring this case is erroneous as a matter of law. The error being that lack of jurisdiction can be raised at any time. Further, Appellant raised this issue when he requested he be allowed to file a late Answer before the Master.

2. The Court erred in finding that Owens did not demonstrate good cause. The error being that the Court was required to consider the *Wham* factors in deciding whether good cause was shown after an explanation was offered.

3. The Court erred as a matter of law in upholding the Master's decision which relied on *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 529 (Ct. App. 2002). The basis of this error is that *Pilgrim* had been withdrawn and that case had no application to the facts of this matter because there was neither an attorney or insurance company in default as cited in the Opinion.

I. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN RULING THAT OWENS DID NOT RAISE THE ENTRY OF DEFAULT ISSUE BEFORE THE TRIAL COURT.

This Court found that Owens should have raised the issue that the Lexington County Clerk of Court did not formally enter a default against Owens before the proceeding before the Master-In-Equity.¹ Appellant believes that this was a jurisdictional issue which can be raised at any time either in this Court, the Master-in-Equity's Court or in the Supreme Court. The facts of this case are compelling since an entry of default was never entered prior to the referral to the Master.

On March 2, 2010, Judge William P. Keesley signed an Order of Reference referring this matter to the Lexington County Master-in-Equity, James O. Spence. In his Order, Judge Keesley noted:

AND IT FURTHER APPEARING that Defendant William[s] S. Owens and Defendant David S. Hostetler have failed to file responsive pleadings to the Summons and complaint herein and are in default, pursuant to the Affidavits of Default and Non-Military Service filed herein or that shall be filed soon.
(R. pp. 30-31)

¹ Plaintiff's counsel put the "cart before the horse." He had the case referred to the Master before holding Owens in default or filing an affidavit of default.

It is undisputed that at the time the Order of Reference to the Master-in-Equity was executed and filed neither the Clerk of Court of Lexington County nor Plaintiff's counsel had entered a default against William S. Owens. Further, the Affidavit of Default signed by Regions Bank's counsel was not filed until March 19, 2010 -- 17 days after the Order of Reference referred this case to the Master in Equity without the consent of Owens. (R. pp. 30-31; R. pp. 44-45).²

Counsel believes that such actions created a lack of subject matter jurisdiction in that the case could not be referred to the Master-in-Equity because there was no official entry of default and there had been no consent by Owens to refer it to the Master-in-Equity.

If there is lack of jurisdiction, there is no power to act. Accordingly, the Master-in-Equity's judgment on the Order of Default was a complete nullity and had no legal effect. This lack of jurisdiction cannot be waived by consent and can be questioned for the first time on appeal. See *Petroleum Transportation Co. v. Public Service Commission*, 255 S.C. 419, 179 S.E.2d, 326 (1971). Further, if there is a lack of jurisdiction there is no power to issue a ruling. See *S.C. Dept. of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 675 S.E. 2d 756 (S.C.App. 2009). See, also, *Thomas and Howard v. T.W. Graham*, 318 S.C. 286, 457 S.E.2d 340 (Ct.App. 1995) (a void judgment is a complete nullity and has no legal effect).

In this case, the due process defects in the procedure caused prejudice and warrant reversal. *Chastain v. Hiltabidle*, 781 S.C. 501, 673 S.E.2d 826 (Ct.App. 2009). It is axiomatic that in order for the circuit court to refer a matter to the Master-in-Equity, an entry of default must have been filed prior to the Order of Reference. The Supreme Court of this

² It seems elementary that a default must be entered prior to Order of Reference or at the very least Appellant had the right to be notified and heard prior to Judge Keesley referring the case to the Master. (Due process demands it.)

state has held on numerous occasions that judgments were void where an itemized verified statement of account was not attached to a complaint which made it so deficient as to not entitle the plaintiff to a judgment. (That situation is analogous to this one.) See *Knight v. Martin*, 230 S.C. 460, 96 S.E. 2d 473 (1957) and *H.W. Carriker Co. v. Johnson*, 286 S.E.2d 140 (S.C. 1982).

Finally, Owens was entitled to relief from the Order as a matter of right. In *Richardson Construction Co. v. Meek Engineering & Construction, Inc.*, 313 S.C. 360, 262 S.E. 2d 913 (1980), the Supreme Court noted: “Relief from default judgment when grounded upon a lack of jurisdiction is not discretionary but a matter of right.”

Here, the Master-in-Equity lacked jurisdiction (subject matter and otherwise) to hear this case because no entry of default had been filed in the Lexington County Clerk of Court’s Office and the Order of Reference had been signed 17 days prior to the Affidavit of Default being entered. (A serious procedural defect.) Finally, Owens had not consented to such an Order of Reference. This lack of jurisdiction is not waivable and may be raised at any time. (See Order of Reference, R. pp. 30-31; and Affidavit of Default as to Defendant William Owens, R. pp. 44-45).

Also, these same issues were raised by Owens when he filed a request for a late Answer. Such request for a late Answer was encompassed in Defendant Owens’ Memorandum in Support of His Motion to Set Aside Default and Leave to File Answer because no default was ever entered. (R. pp. 54-61). Owens requested he be allowed to file a late Answer before being held in default.³

³ Neither the court nor Plaintiff’s counsel had filed an entry of default or affidavit of default prior to the Order of Referral.

In sum, Appellant suggests to the Court that it was erroneous for the Court to find that the issue of the entry of default had not been raised when such issue was raised and can be raised at any time because of the subject matter jurisdiction of the Master-in-Equity to be referred a case prior to the filing of an Affidavit of Default. It follows, if there is no entry of default filed with the Clerk and the Order of Reference filed by the circuit judge was prior to the Affidavit of Default, there cannot be an order holding an individual in default. This procedural defect cannot be over looked. The Master clearly lacked jurisdiction to hear this case and as a result his Order should be overturned because it is void.

II. THE COURT ERRED IN FINDING THAT OWENS DID NOT DEMONSTRATE GOOD CAUSE.

In its Opinion, this Court found that good cause had not been shown because Owens had executed a Power of Attorney to a co-Defendant.

In the instant case. Owens, a 79 year old high school graduate and welder, was served with the Summons and Complaint in this action at his welding business in Myrtle Beach, South Carolina. (Depo. of Owens, R. p. 390, lines 1-10). Owens immediately contacted Paddy who had previously convinced Owens to invest in the subject property. (Depo. of Owens, R. p. 396, lines 20-25). (Owens had previously given Paddy \$100,000 for investment since the property had drinkable water on it that Paddy planned to bottle and sell). (Depo. of Owens, R. p. 368, lines 10-20). Once suit was filed, Paddy told Owens that he had hired a lawyer in Columbia and that he would take care of the lawsuit. Paddy stated in his deposition that, "I was looking out for him and myself." (Depo. of Paddy, R. p. 517, line. 3). Paddy also admitted that he told Owens that he had a lawyer in Columbia. (Depo. of Paddy, R. p. 515, lines 24-25). Owens asserts that Paddy told him that he "didn't have to worry" and that he and his lawyer would "take care of it." (Depo. of Owens, R. p. 394, line

25 and R. p. 395, line 1). More specifically, Owens has stated that Paddy indicated to him that he would have his attorney answer the Plaintiff's Complaint on both their behalves. (Affidavit of William Owens, R. p. 49).

Further, when Owens moved for reconsideration of the order before the Master, the Court found: "The facts indicate Owens made a unilateral mistake in assumption that Paddy would file an Answer on Owens' behalf." (Order Denying Defendant's Motion for Reconsideration dated March 9, 2011, R. p. 18). Appellant asserts to this Court that a unilateral mistake does constitute good cause for a late Answer (especially when there has been no entry of default under SCRCF 55(c)) and that this Court committed an error of law in failing to find that a unilateral mistake was good cause under the more liberal standard allowed under SCRCF 55(c). Appellant points to *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011). (A party should give a reason why the vacation of the default entry would serve the interest of justice).⁴ See also, *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (2011). (Appellant's reason for not answering was appropriate under SCRCF 55(c) but not under SCRCF 60(b).)

In sum, because Appellant had a reason (and there was no entry of default), the Court should have applied the *Wham* factors and was required to do so under the law. See *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Here, Owens put forth a reason for his failure to Answer timely and this Court had to as a matter of law consider the *Wham* factors. The failure to do so is error and this Court should reconsider its decision because the *Wham* factors were not considered in the Court's Opinion.

⁴ Here, there was never an entry of default, thus, the vacating of the Order is in the interest of justice.

If the *Wham* factors had been considered, those factors would have required reversal of the Master. Since there was never an entry of default by the Clerk, the timing of the motion for relief was thus open. Owens had a meritorious defense and the prejudice to Owens was extreme in that an Order of Default was entered against him without a trial. It follows that in order for the *Wham* factors to be even considered, the entry of default must have been entered first. (This did not happen in this matter.) Finally, when it became apparent to Owens that he was late in answering, he immediately took action upon notice by the Master-in-Equity that a hearing was to be held -- he hired counsel.⁵

III. THE CITATION OF *PILGRIM V. MILLER*, 350 S.C. 637, 567 S.E.2d 529 (Ct. App. 2002) WAS AN ERROR OF LAW.

This Court noted that the Master cited *Pilgrim* for the proposition that a defendant's mistaken belief that a fellow defendant would file an answer on his behalf does not meet the good cause standard. Appellant believes this to be error in that the law is clear that once a reason is given for the default, then the *Wham* factors must be considered regardless of the reason.

This Court in affirming the Master's Order denying Owens' Motion to set aside the default, noted the citation of *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 529 (Ct. App. 2002) was appropriate. Appellant suggests this was an error of law. The Supreme Court vacated *Pilgrim* on July 23, 2009 in the case of *Bage LLC v. Southeastern Roofing Co. of Spartanburg*, 383 S.C. 49, 681 S.E.2d 867 (2009). Further, the citation of *Pilgrim* is wholly inappropriate in this case because Owens was not an attorney or an insurance company as was cited in *Pilgrim*. In fact, Owens is an elderly man with limited experience and education in legal matters who relied on Paddy to assist him with this lawsuit. Imputing

⁵ There has never been a standard established by the Appellate Courts in filing a late Answer.

negligence to a defaulting Defendant because of his attorney or insurance company is vastly different than a man of limited education such as Owens relying upon his friend to assist him in this case. Insurance companies and attorneys are sophisticated in the matter of litigation and understand that Answers must be filed promptly. Owens did not understand this, nor as has been indicated before, did he ever get served with an entry of default. He took action immediately after being advised of a hearing. South Carolina Rule of Civil Procedure 55(c) provides that good cause should be liberally constructed to promote justice and have cases decided on the merits. The citation of a case (*Pilgrim*) that was vacated by the South Carolina Supreme Court was error especially in an attempt to draw an analogy to Owens who was neither an attorney or an insurance company and as a result, *Pilgrim* certainly had no application in this case.

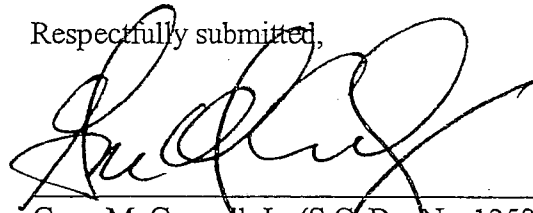
CONCLUSION

In this case, the trial court was without jurisdiction to decide this matter in that the Order of Reference was issued prior to the Affidavit of Default being filed by counsel for the Bank. Further, because there was no jurisdiction, the Master-in-Equity was without authority to hear the case. A case may only be referred to the Master in this state under two conditions: (1) consent by the parties; or (2) default by the defendants. In this case, Owens gave no consent nor was he consulted about the Order of Reference and an entry of default had not been entered. Accordingly, the Court did not have jurisdiction and the Order holding Owens in default was void.⁶

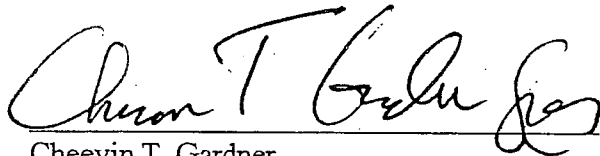
Further, Owens showed good cause and the Order of this Court finding *Pilgrim* was applicable was an error of law in that *Pilgrim* had been withdrawn by the Supreme Court.

⁶ It follows to be held in default you must have been declared in default, which simply didn't happen in this case.

Respectfully submitted,



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