

**RECEIVED**

**Jan 15 2025**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM YORK COUNTY  
In the Circuit Court

The Honorable Carolyn E. Wood-ruff, Judge of Probate  
The Honorable Daniel D. Hall, Circuit Judge

---

Appellate Case No. 2024-000259

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BERNICE CALDWELL,

Appellant,

v.

PATRICIA MITCHELL, in her own right and as Personal Representative,  
DENNIS MITCHELL, SHARON M. CULP, THOMAS LAMONT DAVIS, SUMTER  
O'NEAL CALDWELL and LATRINDA ROBINSON,

Of whom PATRICIA MITCHELL,

in her own right and as Personal Representative, is the

Respondent.

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RECORD ON APPEAL

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John Martin Foster  
Post Office Box 106  
Rock Hill, S. C. 29731  
803 324-8100  
Attorney for Appellant  
[jmfoster340@gmail.com](mailto:jmfoster340@gmail.com)

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2022-CP-46-01237

**ENTRY/ORDER OF DEFAULT**

Defendant Chris Cutway, by and through his counsel, has applied for entry of the default of the Plaintiff, Stephanie Kozak (Personal Representative for the Estate of John Witkowski) (“Plaintiff”).

The record of the Certificate of Service executed by Chan M. Ahn, Esq. that is on file with the Court and this Office reflects that the service of Defendant Chris Cutway’s Answer and Counterclaims upon Plaintiff was perfected electronically on May 21, 2022.

No answer or other response has been filed with the Court or this Office by Plaintiff to Defendant Chris Cutway’s Answer and Counterclaims. Defendant Chris Cutway’s counsel has attested that he has received no answer or response, and his Affidavit of Default was filed with the Court previously on or about June 22, 2022.

**THEREFORE**, the default of Plaintiff is hereby entered.

**SIGNATURE PAGE TO FOLLOW**





York Common Pleas

**Case Caption:** Stephanie Kozak , plaintiff, et al VS Chris Cutway  
**Case Number:** 2022CP4601237  
**Type:** Order/Entry of Default

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2022-06-23 11:01:01 page 3 of 3

ELECTRONICALLY FILED - 2022 Jun 23 11:01 AM - YORK - COMMON PLEAS - CASE#2022CP4601237

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

JUDGMENT IN A CIVIL CASE  
CASE NO. 2022CP4601237

Stephanie Kozak et al  
PLAINTIFF(S)

Chris Cutway  
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), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- 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:

After careful consideration, Plaintiff's Motion to Set Aside Default is DENIED.  
Defendant's Motion for Judgment By Default and Hearing for Attorney's Fees is GRANTED.

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 08/30/2022 .

John Witkowski Estate Of  
Stephanie Kozak Personal Representative  
John Witkowski

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2022 Aug 30 1:23 PM - YORK - COMMON PLEAS - CASE#2022CP4601237

**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-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

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ELECTRONICALLY FILED - 2022 Aug 30 1:23 PM - YORK - COMMON PLEAS - CASE#2022CP4601237



York Common Pleas

**Case Caption:** Stephanie Kozak , plaintiff, et al VS Chris Cutway  
**Case Number:** 2022CP4601237  
**Type:** Order/Electronic Form 4

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2022-08-30 13:15:33 page 3 of 3

ELECTRONICALLY FILED - 2022 Aug 30 1:23 PM - YORK - COMMON PLEAS - CASE#2022CP4601237

Stephanie Kozak et al  
PLAINTIFF(S)

Chris Cutway  
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.
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 Other
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- 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:

After careful consideration, Plaintiff's Motion to Reconsider is 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 10/04/2022 .

John Witkowski Estate Of  
Stephanie Kozak Personal Representative  
John Witkowski

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.

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ELECTRONICALLY FILED - 2022 Oct 05 8:06 AM - YORK - COMMON PLEAS - CASE#2022CP4601237



York Common Pleas

**Case Caption:** Stephanie Kozak , plaintiff, et al VS Chris Cutway  
**Case Number:** 2022CP4601237  
**Type:** Order/Electronic Form 4

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2022-10-04 17:25:34 page 3 of 3

ELECTRONICALLY FILED - 2022 Oct 05 8:06 AM - YORK - COMMON PLEAS - CASE#2022CP4601237

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

CASE NUMBER: 2022-CP-46-01237

**ORDER AND FINAL JUDGMENT**

This matter came before this Court on August 18, 2022, upon the Motion for Judgment by Default and Hearings for Attorney’s Fees filed by the Defendant, Chris Cutway (“Defendant”), and the Motion to Set Aside Entry of Default filed by the Plaintiff, Stephanie Kozak (Personal Representative for the Estate of John Witkowski) (“Plaintiff”). After careful consideration, this Court denied Plaintiff’s Motion to Set Aside Default and granted Defendant’s Motion for Judgment by Default and Hearing for Attorney’s Fees. A Form 4 Order announcing the Court’s decision and stating that it “ends the case” was issued on August 30, 2022.

Subsequently, Plaintiff filed a Motion to Reconsider, requesting that this Court reconsider its denial of Plaintiff’s Motion to Set Aside Entry of Default. A hearing on Plaintiff’s Motion to Reconsider was held on October 3, 2022. The Court denied Plaintiff’s Motion to Reconsider. On October 4, 2022, the Court issued a Form 4 Order announcing the denial of Plaintiff’s Motion to Reconsider and noting that it “ends the case.” Plaintiff has not contested or otherwise responded to this Order.

Rule 54(b), SCRCP, authorizes this Court to “direct the entry of a final judgment as to one or more but fewer than all of the claims or parties upon an express determination that there is no

just reason for delay and upon an express direction for the entry of judgment.” SCRCP 54(b). The Court determines that this matter has been fully adjudicated and finds that there is no just reason for delay.

NOW, THEREFORE, for good and sufficient cause shown, it is hereby **ORDERED, ADJUDGED, DECREED, AND DIRECTED** that the Final Judgment in the total amount of **\$13,925.96**—the sum of damages ascertained (\$12,805.48), plus prejudgment interest (\$1,120.48) computed pursuant to S.C. Code Ann. § 34-31-20(A)—in favor of Defendant and against Plaintiff as to all of Defendant’s counterclaims against Plaintiff shall be entered. The Clerk of Court shall enter and enroll said total judgment amount in the Judgment Index promptly.

**IT IS SO ORDERED.**

**[ ELECTRONIC SIGNATURE PAGE TO FOLLOW ]**

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

FORM 4

JUDGMENT IN A CIVIL CASE  
 CAS ENCL. 2022-CP-46-01237

Stephanie Kozak  
 (Personal Representative for the Estate of  
 John Witkowski)

Chris Cutway

PLAINTIFF(S)

DEFENDANT(S)

<b>Submitted by:</b> Chan M. Ahn (S.C. Bar No. 102173) on behalf of Defendant	<b>Attorney for:</b> <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant or <input type="checkbox"/> 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), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- 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:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk: Please enroll the amount shown below in the Judgment Index.

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)
Chris Cutway, Defendant	Stephanie Kozak (Personal Representative for the Estate of John Witkowski), Plaintiff	\$13,925.96
		\$
		\$

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.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

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

\_\_\_\_\_  
\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

\_\_\_\_\_  
CLERK OF COURT

Court Reporter:

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-Fileers or who are appearing pro se. See Rule 77(d), S.C.R.C.P.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

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

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_



York Common Pleas

**Case Caption:** Stephanie Kozak , plaintiff, et al VS Chris Cutway  
**Case Number:** 2022CP4601237  
**Type:** Order/Judgment and Form 4

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2022-11-15 11:58:01 page 5 of 5

ELECTRONICALLY FILED - 2022 Nov 15 12:04 PM - YORK - COMMON PLEAS - CASE#2022CP4601237

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

JUDGMENT IN A CIVIL CASE  
CASE NO. 2022CP4601237

Stephanie Kozak et al  
PLAINTIFF(S)

Chris Cutway  
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.
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 Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- 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:

After careful consideration, Plaintiff's Motion for Relief from Judgment is DENIED.

The parties have provided ample record on which the Court relies to deny the Motion for Relief from Judgment.

**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 01/26/2024 .

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-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

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ELECTRONICALLY FILED - 2024 Jan 26 3:40 PM - YORK - COMMON PLEAS - CASE#2022CP4601237



York Common Pleas

**Case Caption:** Stephanie Kozak , plaintiff, et al VS Chris Cutway

**Case Number:** 2022CP4601237

**Type:** Order/Electronic Form 4

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2024-01-26 15:28:10 page 3 of 3

ELECTRONICALLY FILED - 2024 Jan 26 3:40 PM - YORK - COMMON PLEAS - CASE#2022CP4601237





South Carolina.

**PRELIMINARY STATEMENT**

7. Comes now Stephanie Kozak, in her capacity as the Personal Representative for the Estate of John Adam Witkowski and Plaintiff in the above-mentioned action, and respectfully states her complaint against Defendant Chris Cutway as follows:
8. This action for compensatory, equitable, and punitive relief arising from actions taken by Defendant Chris Cutway with respect to personal property of John Adam Witkowski that passed to his estate upon Mr. Witkowski's untimely death. The personal property was located at the Decedent's home, 2536 Scrub Pine Drive, York, South Carolina 29745.

**FACTS**

9. The Decedent, John Adam Witkowski was a known collector of various items. He purchased rare coins, autographed baseball cards, Precious Moments Collectibles, Disney Collectibles, crystal vases and dishes; and most importantly he purchased eight (8) adult Prized Rottweilers and 3 Rottweiler puppies for breeding purposes.
10. Mr. Witkowski died October 28, 2021.
11. Upon his death all real and personal property passed to his estate.
12. At the time of his death, Mr. Witkowski maintained a home located at 2536 Scrub Pine Drive, York, South Carolina 29745.
13. At the time of his death, Mr. Witkowski was involved in caregiving for his Prized Rottweilers of which he was in the process of having a kennel constructed on his property to secure and for the long-term care of his 11 Rottweiler dogs.
14. A dispute arose between Stephanie Kozak and Chris Cutway when it became known that he removed personal property from the Witkowski estate without authorization.
15. On October 31, 2021 a larceny report was filed against the Defendant: Case No.:

SO202110873.

**CLAIM and DELIVERY**

16. Plaintiff restates the allegations set forth in paragraphs 1-15 above and incorporates same herein by reference.
17. Plaintiff states that on or about October 28, 2021 Defendant and his accomplices began to remove personal property from the Estate of John Adam Witkowski
18. Defendant did not receive authorization from the John Adam Witkowski estate prior to entering 2536 Scrub Pine Drive, York, South Carolina.
19. After entering 2536 Scrub Pine Drive, York, South Carolina without authorization, Mr. Cutway and his accomplices removed from the estate numerous of Mr. Witkowski's personal property that was passed to the Witkowski estate.
20. The personal, and private property removed from the Witkowski estate include the following:
  - a. 8 Adult Rottweilers, both male and female, black fur with Brown faces
  - b. 3 Rottweiler puppies
  - c. Documentation of lineage for aforementioned Rottweilers and Certificates of Ownership
  - d. 5x12 Trailer: exterior photos of the Virgin Mary and dogs: typically used to transport dogs
  - e. Cell Phone (belonging to John Adam Witkowski)
  - f. Driver's License (belonging to John Adam Witkowski)
  - g. Two (2) upright freezers: one of which is fairly new
  - h. One (1) chest freezer
  - i. One (1) 12 Foot Green Ladder, one (1) Silver Ladder, and one (1) Blue Ladder;
  - j. 4-5 Heavy Duty extension cords
  - k. Two (2) Concrete Statues: one (1) of deer lying down; one (1) Black Rottweiler
  - l. One (1) Propane Tank

- m. Two (2) Box Fans
- n. One (1) Blessed Mary statue with clam shell grotto
- o. Ten - Twelve (10-12) weights (iron plates)
- p. Various tools from toolbox once located on the deck
- q. Materials for kennels: fencing and posts (once located on Mr. Cutway's Trailer)
- r. 65" LG Television

- 21. No amicable resolution was possible.
- 22. Plaintiff restates all prior paragraphs.
- 23. The property described above is being wrongfully withheld by the Defendant.
- 24. The property was not taken from the ownership or possession of the Plaintiff due to any tax, fine, or assessment.
- 25. The approximate value of the above-described property is \$100,000.00.

**WHEREFORE**, Plaintiff prays for the following relief:

- (a) Judgment entered in favor of Plaintiff, Stephanie Kozak and against Defendant, Chris Cutway on Counts of Plaintiff's complaint and the return of the property taken;
- (b) If items have been sold or discarded the Plaintiff be given market value;
- (c) An award of attorney fees and costs to Plaintiff;
- (d) Such further and other legal and equitable relief as the Court may deem just and necessary under the circumstances.

DATED this 20<sup>th</sup> day of April, 2022

(signature on next page)

Respectfully submitted by:

/S/Neil T. Phillips

Neil T. Phillips, Esq.  
The Law Office of Neil T. Phillips, LLC  
30 N. Congress Street, Suite 106  
York, South Carolina 29745  
Phone: 803-810-5423  
Fax: 877-501-9002  
Bar No.: 102094  
Email: [neil@neilphillipslaw.com](mailto:neil@neilphillipslaw.com)  
Attorney for Stephanie Kozak

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )

VERIFICATION  
(Jury Trial Requested)

Plaintiff, )

vs. )

Case No.: 2022 - CP - 46 - \_\_\_\_\_

Chris Cutway, )  
Defendant. )

The undersigned personally appearing before the Notary Public, states that I am the Plaintiff in this matter. I have read the allegations contained in the Complaint herein and know or believe the contents and allegations are true to the best of my knowledge, except for those matters stated which are alleged on information and belief.

*Stephanie Kozak*  
Stephanie Kozak

Sworn to before me the 11th  
day of April, 2022

*Dikki Pappas*  
Notary Public for South Carolina

Commission Expires: 03-16-2026



ELECTRONICALLY FILED - 2022 Apr 20 4:06 PM - YORK - COMMON PLEAS - CASE#2022CP4601237

**EXHIBIT 1**

**Stephanie Kozak vs. Chris Cutway**

<b>ASSET</b>	<b>VALUE</b>	<b>EQUITY</b>
1. PURE BREED Adult & Puppy ROTTWEILERS	8 Adult (each) - \$4,000.00 3 Puppy (each) - \$1,450.00	\$36,350.00
2. THE BRADFORD COLLECTION	343.00	343.00
3. SPORT MEMORABILIA	1,443.57	1,443.57
4. FREEZERS	2,600.00	2,600.00
5. COIN COLLECTION	773.28	773.28
6. DISNEY COLLECTION	342.00	342.00
7. PRECIOUS MOMENTS	300.00	300.00
8. CELL PHONE	960.00	960.00
9. LADDERS	1,065.00	1,065.00
10. TOOLS	1,800.00	1,800.00
11. CONCRETE STATUES	420.00	420.00
12. FANS	120.00	120.00
13. IRON WEIGHTS	800.00	800.00
14. KENNEL PARTS	6,000.00	6,000.00
15. TELEVISION	1,400.00	1,400.00
16. PROPANE TANK	60.00	60.00
<b>VALUE</b>	<b>54,776.85</b>	<b>54,776.85</b>

<b>AGENCY</b>	<b>ID#</b>	<b>ITEM</b>	<b>DOB</b>	<b>OWNER</b>	<b>VALUE</b>
<b>American Kennel Club</b>					
DNA# V962667	688010000101459	ROTTWILER / FEMALE	12-28-2017	JOHN KOZAK	3000.00
DNA# V952642	688038000114987	ROTTWILER / MALE	03-15-2017	JOHN KOZAK	3000.00
DNA# V913049	688052000094391	ROTTWILER / MALE	05-07-2017	JOHN KOZAK	3000.00
DNA# V913050	688038000092979	ROTTWILER / FEMALE	11-07-2016	JOHN KOZAK	3000.00

ELECTRONICALLY FILED - 2022 Apr 20 4:06 PM - YORK - COMMON PLEAS - CASE#2022CP4601237

DNA# V876179	688038000092979	ROTTWILER / FEMALE	11-07-2016	JOHN KOZAK	3000.00
DNA# V876178	Not available	ROTTWILER / FEMALE	08-30-2018	JOHN KOZAK	3000.00
DNA# V819924	968000004482667	ROTTWILER / FEMALE	05-09-2012	JOHN KOZAK	3000.00
DNA# V819305	688035000092277	ROTTWILER / FEMALE	04-05-2012	JOHN KOZAK	3000.00
3 Purebred Rottweiler Puppies				JOHN KOZAK	3@1450.00 4350.00
<b>DISNEY COLLECTIONS</b>					
The Bradford Exchange					
Product ID	06028	92 A WISH COME TRUE EDWIM/ SNOW WHITE AND THE SEVEN DWARFS STUDIOS/ DISNEY		JOHN WITKOWSKI	21.00
	06039	93 A SURPRISE IN THE CLEARING EDWIM/SNO W WHITE AND THE SEVEN DWARFS STUDIOS/ DISNEY PORCELAIN		JOHN WITKOWSKI	52.00
	06040	93 HAPPY ENDING EDWIM/SNO W WHITE AND THE SEVEN DWARFS		JOHN WITKOWSKI	94.00

		STUDIOS/ DISNEY PORCELAIN			
	06021	91 DANCE OF SNOW WHITE EDWIM/SNO W WHITE AND THE SEVEN DWARFS STUDIOS/ DISNEY PORCELAIN		JOHN WITKOWSKI	15.00
	06023	91 A SPECIAL TREAT EDWIM/SNO W WHITE AND THE SEVEN DWARFS STUDIOS/ DISNEY PORCELAIN		JOHN WITKOWSKI	20.00
	06025	92 THE POISON APPLE EDWIM/SNO W WHITE AND THE SEVEN DWARFS STUDIOS/ DISNEY PORCELAIN		JOHN WITKOWSKI	26.00
	06029	92 TIME TO TIDY UP EDWIM/SNO W WHITE AND THE SEVEN DWARFS STUDIOS/ DISNEY PORCELAIN		JOHN WITKOWSKI	25.00
	06030	93 MAY I HAVE THIS		JOHN WITKOWSKI	42.00

		DANCE EDWIM/SNO W WHITE AND THE SEVEN DWARFS STUDIOS/ DISNEY PORCELAIN			
	06026	92 FIRESIDE LOVE STORY EDWIM/SNO W WHITE AND THE SEVEN DWARFS STUDIOS/ DISNEY PORCELAIN		JOHN WITKOWSKI	24.00
	06027	92 STUBBORN GRUMPY EDWIM/SNO W WHITE AND THE SEVEN DWARFS STUDIOS/ DISNEY PORCELAIN		JOHN WITKOWSKI	24.00
<b>SPORTS MEMORABILIA</b>					
BUD'S SPORTS CARDS 5755	Certificate# A144464	HAND SIGNED STEINER SPORTS MEMORABIL IA COLLECTIBLE S - ROY WHITE		JOHN WITKOWSKI	
		HAND SIGNED STEINER SPORTS		JOHN WITKOWSKI	

		MEMORABIL IA COLLECTIBLE S - HANK AARON			
<b>THE COIN VAULT</b>					
Order date 02-02-2017	20-02-183136	2017 SAE MS70 FDI PCGS 1 OF 2000 1 <sup>ST</sup> LABEL		JOHN WITKOWSKI	59.95
	20-02-182738	2017 SAE MS70 FSI PCGS FLAG LABEL		JOHN WITKOWSKI	44.98
<b>GOVMINT.COM</b>					
DATE OF PURCHASE: 02-08-2017	298555	2017/ \$1 1- OZ SILVER EAGLE PCGS MS70 FIRST STRIKE		JOHN WITKOWSKI	39.95
	298978	2017/ \$1 1- OZ SILVER EAGLE NGC MS70 FR 225 <sup>TH</sup> BLACK		JOHN WITKOWSKI	44.95
	232911	2012/ \$1 1- OZ SILVER EAGLE NGC MS70 EARLY RELEASE		JOHN WITKOWSKI	85.39
	266404	2009/ \$1 1- OZ SILVER EAGLE NGC PCGS MS70		JOHN WITKOWSKI	98.12
<b>AMERICA'S AUCTION NETWORK</b>					
Date of Purchase: 4-29-2017	741083	2014-W \$1 American Silver Eagle Proof David Hall		STEPHANIE KOZAK	199.97

		PR70DCAM/ PCGS			
	741082	2015-W \$1 American Silver Eagle Proof David Hall PR70DCAM/ PCGS		STEPHANIE KOZAK	199.97
<b>PRECIOUS MOMENTS</b>					
Cell Phone	IPHONE			JOHN WITKOWSKI	960.00
Driver's License				JOHN WITKOWSKI	n/a
Two (2) upright freezers				JOHN WITKOWSKI	2 @ 1100.00 2200.00
One (1) chest freezer				JOHN WITKOWSKI	400.00
<b>LADDERS</b>					
One (1) 12 Foot Green Ladder, One (1) 12 Foot Silver Ladder One (1) 12 Foot Blue Ladder				JOHN WITKOWSKI JOHN WITKOWSKI	3 @ 355.00 1065.00
<b>CONCRETE STATUES</b>					
(1) Concrete Statues: of deer lying down one (1) Black Rottweiler				JOHN WITKOWSKI	60.00

(1)Concrete Statues: of Black Rottweiler				JOHN WITKOWSKI	160.00
One (1) Blessed Mary statue with clam shell grotto				JOHN WITKOWSKI	200.00
<b>PROPANE TANK</b>					
One (1) Propane Tank				JOHN WITKOWSKI	60.00
<b>FANS</b>					
Two (2) Box Fans				JOHN WITKOWSKI	2@ 60.00 120.00
<b>WEIGHTS</b>					
Ten - Twelve (10-12) weights (iron plates)				JOHN WITKOWSKI	800.00
<b>TOOLS</b>					
Various tools from toolbox once located on the deck				JOHN WITKOWSKI	1200.00
(4-5) Heavy Duty extension cords				JOHN WITKOWSKI	5 @ 120.00 600.00
<b>KENNEL</b>					
Materials for kennels: fencing and posts (once located on Mr. Cutway's Trailer)				JOHN WITKOWSKI	6000.00
<b>TELEVISION</b>					

65" LG Television				JOHN WITKOWSKI	1400.00
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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2022-CP-46-01237

**ANSWER AND COUNTERCLAIMS**  
(JURY TRIAL REQUESTED)

The Defendant, Chris Cutway (“Defendant”), answers the Complaint filed by the Plaintiff, Stephanie Kozak (Personal Representative for the Estate of John Witkowski) (“Plaintiff”), and avers his Counterclaims as follows:

**GENERAL DENIAL**

I. Defendant denies each and every allegation of Plaintiff’s Complaint (“Complaint”) not specifically admitted herein.

**ANSWER**

II. Defendant responds to the allegations of the Complaint by paragraph numbers corresponding to the respective paragraph numbers of the Complaint as follows:

To the extent that the first sentence of the Complaint sets forth any averments purporting to characterize this lawsuit or its subject matter, which present legal conclusions or questions of law to be determined solely by this Court, no response is required. To the extent that a response is required, Defendant denies the averments of the first sentence of the Complaint.

**PARTIES**

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 of the Complaint concerning Plaintiff's residence, and thus, denies the same. Defendant denies all remaining allegations of Paragraph 1 of the Complaint.

2. Defendant admits the allegation in Paragraph 2 of the Complaint.

JURISDICTION AND VENUE

3. Because Paragraph 3 of the Complaint sets forth jurisdictional averments, which present legal conclusions or questions of law to be determined solely by this Court, no response is required.

4. Because Paragraph 4 of the Complaint sets forth jurisdictional averments, which present legal conclusions or questions of law to be determined solely by this Court, no response is required.

5. Because Paragraph 5 of the Complaint sets forth jurisdictional averments, which present legal conclusions or questions of law to be determined solely by this Court, no response is required.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6 of the Complaint concerning the factual nexus or the subject matter of Plaintiff's Complaint, and thus, denies the same. Defendant denies all remaining allegations of Paragraph 6 of the Complaint.

PRELIMINARY STATEMENT

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7 of the Complaint, and thus, denies the same.

8. To the extent that Paragraph 8 of the Complaint purports to characterize this lawsuit,

which present legal conclusions or questions of law to be determined solely by this Court, no response is required. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 8 of the Complaint, and thus, denies the same.

#### FACTS

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9 of the Complaint, and thus, denies the same.

10. Defendant admits only that upon information and belief, Mr. John Adam Witkowski died in or about October 2021. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 10 of the Complaint, and thus, denies the same.

11. To the extent that Paragraph 11 of the Complaint avers a statement which present legal conclusions or questions of law to be determined solely by this Court, no response is required. To the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 11 of the Complaint, and thus, denies the same

12. Defendant admits only that upon information and belief, Mr. John Adam Witkowski lived in York, South Carolina prior to his death. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 12 of the Complaint, and thus, denies the same.

13. Defendant admits only that one or more kennels had been or were being constructed upon Mr. John Adam Witkowski's property in York, South Carolina at the time that Mr. Witkowski died. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 13 of the Complaint, and thus, denies the same.

14. Defendant denies the allegations in Paragraph 14 of the Complaint.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15 of the Complaint, and thus, denies the same.

CLAIM and DELIVERY

16. Defendant incorporates by reference and restates all prior responses to the allegations asserted in the Complaint.

17. Defendant denies the allegations in Paragraph 17 of the Complaint.

18. Defendant denies the allegations in Paragraph 18 of the Complaint.

19. Defendant denies the allegations in Paragraph 19 of the Complaint.

20. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 20 of the Complaint, and thus, denies the same.

21. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 21 of the Complaint, and thus, denies the same.

22. Paragraph 22 of the Complaint constitutes a reference averment which requires no response. To the extent that it requires a response, Defendant denies all allegations therein.

23. Defendant denies the allegations in Paragraph 23 of the Complaint.

24. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 24 of the Complaint, and thus, denies the same.

25. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 25 of the Complaint, and thus, denies the same.

Defendant denies each of Plaintiff's prayers for relief sought in the Complaint and asserted in and following the **WHEREFORE** clause of the Complaint.

**FIRST AFFIRMATIVE DEFENSE**

**(Failure to State a Claim; Rule 12(b)(6) of the S.C. Rules of Civil Procedure)**

III. The Complaint fails to state facts sufficient to constitute a cause of action.

**SECOND AFFIRMATIVE DEFENSE**

**(Laches)**

IV. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, such action is barred by laches.

**THIRD AFFIRMATIVE DEFENSE**

**(Waiver/Estoppel)**

V. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, Plaintiff has waived such claims and/or is estopped from asserting such claims by her own conduct or past actions.

**FOURTH AFFIRMATIVE DEFENSE**

**(Unclean Hands)**

VI. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, Plaintiff is not entitled to any relief due to her own wrongdoing and/or liability for an offense.

**FIFTH AFFIRMATIVE DEFENSE**

**(Fraud or Misrepresentation)**

VII. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, no relief or judgement could be granted for or in favor of Plaintiff due to fraud or misrepresentation on Plaintiff's part.

**SIXTH AFFIRMATIVE DEFENSE**

**(Mistake)**

VIII. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, such action is barred by mistake of fact.

**SEVENTH AFFIRMATIVE DEFENSE**  
**(Failure to Mitigate)**

IX. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, Plaintiff is not entitled to obtain recovery of any and all damages which she failed to mitigate.

**EIGHTH AFFIRMATIVE DEFENSE**  
**(Intervening and Superseding Breach, Negligence, or Wrongdoings)**

X. Plaintiff's claims are barred by her own breach and/or intervening and superseding negligence and/or wrongful actions.

**NINTH AFFIRMATIVE DEFENSE**  
**(Setoff)**

XI. Plaintiff's claims are barred to the extent that Defendant is entitled to a setoff against any amount allegedly due to Plaintiff, which Defendant denies is due to Plaintiff.

**TENTH AFFIRMATIVE DEFENSE**  
**(Statute of Frauds)**

XII. Plaintiff's claims are barred by the statute of frauds, which renders an oral contract unenforceable.

**ELEVENTH AFFIRMATIVE DEFENSE**  
**(Negligence and/or Breach of Third Parties)**

XIII. Plaintiff' claims against Defendant are barred to the extent that the alleged loss or injuries to Plaintiff were caused in whole or in part by the negligence and/or breach of third parties over whom Defendant had no control.

**TWELFTH AFFIRMATIVE DEFENSE**  
**(Payment)**

XIV. Plaintiff is barred from recovery in whole or in part because each of her claims

was discharged by any of Defendant' and/or a third party's payment and Plaintiff's acceptance thereof.

**THIRTEENTH AFFIRMATIVE DEFENSE**  
**(Satisfaction)**

XV. Plaintiff is barred from recovery in whole or in part because each of Defendant's obligations forming the basis for Plaintiff's claims, if any, has already been fully satisfied.

**FOURTEENTH AFFIRMATIVE DEFENSE**  
**(Parol Evidence Rule)**

XVI. Plaintiff is barred from recovery to the extent that her claims rely on any written agreement between the parties, which was intended to be the full agreement between the parties, and that Plaintiff fails to present any evidence in writing to establish any terms of any other agreement not set forth in the full written agreement between the parties.

**FIFTEENTH AFFIRMATIVE DEFENSE**  
**(Illegality)**

XVII. Plaintiff's claims are barred in whole or in part by the doctrine of illegality to the extent that the contract or agreement forming the basis of Plaintiff's causes of action violates the law of the State of South Carolina or the United States. Plaintiff's claims are further barred by illegality arising from Plaintiff's failure to comply with the rules and regulations promulgated by the State of South Carolina or the United States.

**SIXTEENTH AFFIRMATIVE DEFENSE**  
**(No Waiver of Defendant's Rights)**

XVIII. Defendant reserves and does not waive any additional or further defenses as may be revealed by information obtained in discovery or information that may otherwise be acquired at a later date, and Defendant reserves her right to amend this Answer and Counterclaims to assert any and all such further defenses should such an amendment become necessary.

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**COUNTERCLAIMS**

XIX. Defendant by and through the undersigned counsel, asserts his Counterclaims against Plaintiff as follows:

**GENERAL ALLEGATIONS COMMON TO ALL COUNTERCLAIMS**

1. Upon information and belief, Plaintiff is a citizen and resident of York County, South Carolina.
2. Defendant is a citizen and resident of York, York County, South Carolina.
3. This Court has subject-matter jurisdiction over the claims in this lawsuit under Article V § 11 of the South Carolina Constitution and South Carolina Code § 14-5-350.
4. This Court has personal jurisdiction over the Parties to this case because upon information belief, each of them is a citizen and resident of York County, South Carolina.
5. Venue is proper in this circuit under South Carolina Code § 15-7-30 because upon information and belief, each of the Parties to this case is a citizen and resident of York County, South Carolina, and the acts and omissions that are the subject matter of this action occurred in York County, South Carolina.
6. In or about October 2009, Defendant and John Adam Witkowski formed a joint venture (“Joint Venture”), into which Defendant and Mr. Witkowski jointly invested funds, professional services, time, and efforts to accomplish the common goal of making profits from breeding, boarding, training, presenting/showcasing, transporting, and re-selling dogs.
7. For more than 12 years, Defendant and Mr. Witkowski operated their Joint

Venture.

8. Defendant and Mr. Witkowski did not have a written operating agreement; rather, they operated their Joint Venture under an oral agreement and mutual understanding that Mr. Witkowski would provide funds to purchase puppies available at many different locations across the world and that Defendant would handle the transportation of them to York County and be responsible for feeding, boarding, caring, training, presenting/showcasing, and re-selling them. Pursuant to their agreement and mutual understanding, the profits obtained from the participation in dog shows and the sale of dogs were to be re-invested into the Joint Venture or divided equally by Defendant and Mr. Witkowski.

9. In accordance with and reliance upon said agreements and mutual understanding, Defendant performed a variety of tasks, including without limitation, transporting, feeding, boarding, caring, training, and presenting/showcasing multiple dogs for 12 years. However, no dogs belonging to the Joint Venture operated by Defendant and Mr. Witkowski were ever sold to a third party.

10. Upon information and belief, on or about September 3, 2021, Stephanie Kozak initiated an eviction action against Mr. Witkowski to remove him from her real estate property—located at 2370 Hwy 55 E., Clover, South Carolina 29710—upon which Mr. Witkowski's residence had been established.

11. Also upon information and belief, Mr. Witkowski was evicted and removed by Stephanie Kozak from his residence located at 2370 Hwy 55 E., Clover, South Carolina 29710.

12. Having been evicted by Stephanie Kozak from his residence located at 2370 Hwy 55 E., Clover, South Carolina 29710, Mr. Witkowski relocated to a house located at 2536 Scrub

Pine Drive, York, South Carolina 29745.

13. Around this time, Mr. Witkowski requested that Defendant build eight (8) dog kennels, fences, and a wheelchair ramp and perform a variety of tasks for other related projects upon his newly-purchased property located at 2536 Scrub Pine Drive, York, South Carolina 29745, promising that he would personally and fully reimburse Defendant for all materials, labor, and professional services necessary for the construction and performance of the same.

14. In response to Mr. Witkowski's request and in reliance upon his promise for full reimbursement, Defendant began to construct eight (8) dog kennels, fences, and a wheelchair ramp and perform a variety of tasks for other related projects upon Mr. Witkowski's property located at 2536 Scrub Pine Drive, York, South Carolina 29745.

15. On or about October 27, 2021, Stephanie Kozak demanded that all dogs be removed immediately from Mr. Witkowski's prior residence located at 2370 Hwy 55 E., Clover, South Carolina 29710, which upon information and belief was then owned by Stephanie Kozak.

16. In response to Stephanie Kozak's demand, Defendant and Mr. Witkowski transported all of the dogs out of Mr. Witkowski's prior residence located at 2370 Hwy 55 E., Clover, South Carolina 29710 forthwith.

17. Shortly thereafter, Mr. Witkowski became severely ill.

18. While fighting against his illness, Mr. Witkowski asked Defendant to take possession and care of all of the dogs belonging to the Joint Venture and authorized Defendant to retain and exercise full and unencumbered ownership interest in them.

19. As Mr. Witkowski's health continued to deteriorate, Defendant issued an invoice in the amount of \$12,805.48, in an attempt to get reimbursed for the materials, labor, and/or

professional services he had provided for the construction of kennels and various other tasks and projects performed upon Mr. Witkowski's property.

20. Shortly thereafter, Mr. Witkowski died.

21. Consequently, Defendant did not receive any payment from Mr. Witkowski for the construction of the kennels or various other tasks and projects performed upon Mr. Witkowski's property.

22. Subsequently, Defendant reproduced the same invoice with "c/o Stephanie Kozak" added to it (**Exhibit A**) and presented the same to Stephanie Kozak to request payment.

23. However, Stephanie Kozak has refused to pay the invoiced amount to Defendant. As a result, the full amount owed to Defendant remains unpaid to date.

24. On or about March 15, 2022, Defendant filed a Statement of Creditor's Claim (**Exhibit B**) with the York County Probate Court.

**FIRST COUNTERCLAIM**  
**(Claims Against Decedent's Estate;**  
**Pursuant to S.C. Code Ann. §§ 62-3-804, *et seq.*)**

25. Defendant incorporates by reference and restates all responses or allegations set forth in the preceding paragraphs.

26. As set forth above, Defendant has a valid claim against the estate of Mr. Witkowski within the meaning of the South Carolina Probate Code—more specifically, S.C. Code Ann. § 62-1-201(4).

27. Pursuant to the South Carolina Probate Code—more specifically, S.C. Code Ann. §§ 62-3-803 and 62-3-804, *et seq.*—Defendant, as claimant against the estate of Mr. Witkowski, presented a claim to Plaintiff and also filed it with the York County Probate Court in a timely manner.

28. Because a valid claim, as asserted herein, exists against the estate of Mr. Witkowski and the full amount owed by Mr. Witkowski to Defendant at the time of Mr. Witkowski's death remains unpaid, Defendant is entitled to recover the full amount owed to him from the estate of Mr. Witkowski.

**SECOND COUNTERCLAIM**  
**(Breach of Contract)**

29. Defendant incorporates by reference and restates all responses or allegations set forth in the preceding paragraphs.

30. When Mr. Witkowski promised to Defendant that he would personally and fully reimburse Defendant for all materials, labor, and professional services necessary for the construction of kennels and various other tasks and projects performed upon Mr. Witkowski's property located at 2536 Scrub Pine Drive, York, South Carolina 29745, a valid, binding, and enforceable contract between Defendant and Mr. Witkowski was formed.

31. In accordance with the terms of said contract, Defendant performed all or substantial parts of his contractual duties owed to Mr. Witkowski.

32. Due to his sudden death, Mr. Witkowski failed to fulfill his contractual duties to pay the full contract price to Defendant.

33. Mr. Witkowski's failure to pay the full contract price owed to Defendant constituted a breach, which has caused Defendant substantial economic damages and other consequential damages to be shown at trial.

34. As such, Defendant is entitled to recover the full contract price from the estate of Mr. Witkowski, as well as other actual and consequential damages suffered as a direct and proximate result of Mr. Witkowski's breach.

**THIRD COUNTERCLAIM**  
**(Unjust Enrichment; *Quantum Meruit*)**

35. Defendant incorporates by reference and restates all responses or allegations set forth in the preceding paragraphs.

36. In constructing multiple kennels and performing various other tasks and projects upon Mr. Witkowski's property located at 2536 Scrub Pine Drive, York, South Carolina 29745, Plaintiff conferred on Mr. Witkowski (or his estate) substantial non-gratuitous benefits, including Defendant's professional services, materials, and labor.

37. Mr. Witkowski induced, encouraged, accepted, authorized, and benefitted from Defendant's non-gratuitous performance of professional services, as well as the materials and labor provided by Defendant, without compensating Defendant for the same.

38. Mr. Witkowski (or his estate) equitably ought to return or compensate Defendant for his non-gratuitous professional services, materials, and labor provided and cannot be permitted to induce, accept, encourage, or authorize Defendant to furnish or render something of value to Mr. Witkowski and avoid payment for the value received.

39. Because Mr. Witkowski's (or his estate's) retention of the benefits conferred by Defendant under the conditions would make it unjust for him/it to retain said benefits without paying for the value received, Defendant is entitled to recover and be compensated for the same in an amount to be shown at trial, but no less than \$12,805.48, in addition to an award of actual and punitive damages.

**FOURTH COUNTERCLAIM**  
**(Promissory Estoppel)**

40. Defendant incorporates by reference and restates all responses or allegations set forth in the preceding paragraphs.

41. When making the promises and certifications referenced and averred above—*i.e.*, that he would personally and fully reimburse Defendant for all materials, labor, and professional services necessary for the construction of kennels and the performance of various other tasks and projects upon Mr. Witkowski's property located at 2536 Scrub Pine Drive, York, South Carolina 29745—Mr. Witkowski reasonably expected or should have reasonably expected to induce action or forbearance on the part of Defendant, *i.e.*, to furnish materials, labor, and professional service for the construction of kennels and the performance of various other tasks and projects upon Mr. Witkowski's property.

42. Mr. Witkowski in fact did induce Defendant's action or forbearance as referenced and averred above, *i.e.*, to furnish materials, labor, and professional service for the construction of multiple kennels and the performance of various other tasks and projects upon Mr. Witkowski's property.

43. Mr. Witkowski's promises and certifications—*i.e.*, that that he would personally and fully reimburse Defendant for all materials, labor, and professional services necessary for the construction of kennels and the performance of various other tasks and projects upon Mr. Witkowski's property located at 2536 Scrub Pine Drive, York, South Carolina 29745—were unambiguous with clearly articulated, definite terms, and Mr. Witkowski intended his promises and certifications to be relied upon by Defendant, who in fact relied upon the same.

44. Due to his tragic death, Mr. Witkowski failed to comply with his promises and certifications by failing to personally and fully reimburse Defendant.

45. As a direct and proximate result and consequence of Mr. Witkowski's failure to comply with his promises and certifications constituting inconsistent disposition, Defendant has

sustained substantial injuries, including substantial pecuniary injuries and economic loss, including substantial attorney's fees required to assert and protect his rights against Plaintiff.

46. Under said circumstances, Mr. Witkowski's promises and certifications referenced and averred above are binding because injustice can be avoided only by the enforcement of Mr. Witkowski's promises and certifications. A refusal to enforce Mr. Witkowski's promises and certifications would be virtually to sanction the perpetration of fraud or would result in other injustice.

47. Defendant is entitled to recover economic and other damages resulting from an inconsistent disposition on the part of Mr. Witkowski.

**WHEREFORE**, having fully answered the Complaint and asserted his Counterclaims as set forth above, Defendant prays for the following relief:

1. That Plaintiff's Complaint be dismissed in its entirety with prejudice;
2. That this Court enter judgment in favor of Defendant and against Plaintiff on all of Plaintiff's claims asserted in the Complaint and on all of Counterclaims against Plaintiff asserted herein;
3. That this Court award Defendant any other relief which may be authorized under other causes of action asserted by Defendant herein;
4. That this Court award Defendant such other damages as shall be proven at trial, but no less than \$12,805.48, pursuant to the allegations set forth herein, plus pre-judgment interest;
5. That this Court award Defendant such punitive damages as shall be determined by a jury at trial in an amount sufficient to punish and deter Plaintiff and others similarly situated;

- 6. That Defendant be allowed to recover his attorney's fees in such an amount as shall be shown at trial;
- 7. That this Court tax the costs of this action against Plaintiff;
- 8. That this Court grant such other and further relief as equity may require and the Court and the jury would deem just and proper; and
- 9. That this case be tried by jury on all issues so triable.

Respectfully submitted,

**AHN LAW FIRM, LLC**

By: /s/ Chan M. Ahn  
Chan M. Ahn (SC Bar #102173)  
chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, SC 29710  
Telephone: (803) 810-4373  
Fax: (803) 817-9704  
**Counsel for Defendant**

May 21, 2022

Lake Wylie, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant, )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2022-CP-46-01237

**CERTIFICATE OF SERVICE**

The undersigned certifies that on May 21, 2022, a copy of the foregoing **Answer and Counterclaims** was filed with this Court through the *SC Courts E- Filing Portal*, which will have sent notification of such filing to all counsel of record in this matter.

This 21st day of May, 2022.

**AHN LAW FIRM, LLC**

BY: /s/ Chan M. Ahn  
Chan M. Ahn  
chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, South Carolina 29710  
Telephone: 803-810-4373  
Fax: 803-817-9704

# INVOICE

**Call One LLC**

108 Felix Lane  
York, SC 29745

**BILL TO**

John A. Witkowski  
2536 scrub pine dr  
York, SC 29745  
and c/o  
Stephanie Kozak  
6400 Royal Pines Dr

**INVOICE #**

172

**INVOICE DATE**

10/27/2021

<b>DESCRIPTION</b>	<b>AMOUNT</b>
Labor for the Following:Constructed wheelchair ramp, back porch steps, gate on porch, step out back door	1,500.00
Labor for the Following: prepared site,framed, poured, finished and epoxied 2 concrete slabs,	3,500.00
Labor for installing 400 ft livestock containment fence with partial privacy mesh.	3,000.00
Labor for 21x21 metal building, designed, supervised, assisted, and customized construction	1,000.00
Labor for Constructing 4 dog kennels	1,000.00
Purchased material from Lowe's 10/14/2021 never reimbursed	240.71
Purchased material from Lowe's 10/25/2021 never reimbursed	564.77
Cost of Replacing 4x8 utility trailer	2,000.00
<b>TOTAL</b>	<b>\$12,805.48</b>

ELECTRONICALLY FILED - 2022 May 21 5:52 AM - YORK - COMMON PLEAS - CASE#2022CP4601237

*Thank you*

**TERMS & CONDITIONS**

DUE UPON RECEIPT

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF YORK

STATEMENT OF CREDITOR'S CLAIM

IN THE MATTER OF  
John Adam Witkowski  
(Decedent)

CASE NUMBER 2022ES4601816  
2021

Decedent's Date of Death (if known): October 28th, 2021  
Decedent's Last Mailing Address: 2536 Scrub Pine Dr York, SC 29745

Creditor	<u>Chris Cutway</u>
Address	<u>108 Felia Lane</u>
	<u>York SC, 29745</u>
Telephone	<u>803-810-5470</u>
Email	<u>cjames8577@yahoo.com</u>
Original Creditor	<u>Chris Cutway</u>
Address (if different from above)	
Claim Amount Due:	<u>\$ 12,805.48</u>
Account Number:	<u>N/A</u>
Other Reference Number:	<u>Invoice #172</u>
Basis of claim (Ex: Contract, Services Rendered for decedent, etc):	<u>Services Rendered for decedent</u>
Date claim will become due (if not already due)	<u>10/27/2021</u>
Nature of uncertainty as to the claim, if any (i.e. contingent claim, amount of claim, due date):	<u>N/A</u>
Description of security as to the claim, if any (Ex: Collateral for the debt)	<u>N/A</u>

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Signature: *Chris Cutway*  
Printed Name: Chris Cutway  
Title: Owner Call One LLC  
Date: \_\_\_\_\_

**INSTRUCTIONS:** Claims MUST be filed in the Probate Court of the county in which the Decedent's Estate is under administration and may be delivered or mailed to the fiduciary appointed to administer the Estate (see SCRC §§ 63-400, 63-401, and 63-408).

No claim against a decedent's estate is barred by the commencement of legal action commenced against a Decedent's Estate prior to the appointment of a fiduciary to administer the Decedent's Estate (except as provided in § 63-408).

Satisfaction or withdrawal of claim: \_\_\_\_\_

FORM 607-SS (2019)  
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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2022-CP-46-01237

**VERIFICATION**

I, Chris J. Cutway, first being duly sworn, depose and state that I have read the foregoing Answer and Counterclaims and that the same is true to my own knowledge, except as to those matters alleged therein upon information and belief, and as to those matters, I believe them to be true.

Chris J. Cutway  
Signature of the Verifier

Chris J. Cutway  
Printed Name of the Verifier

Sworn/affirmed to and subscribed before me  
On this 20 day of may, 2022  
Personally known [ ] or Produced identification []  
Type of Identification produced: SCDL

[Signature]  
(Signature of Notary Public)

Tyler H. Cain  
(Printed name of Notary Public), Notary Public

York County, South Carolina  
My commission expires: 4/12/2031 (Notary Seal)



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
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vs. )  
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Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2022-CP-46-01237

**ANSWER AND COUNTERCLAIMS**  
(JURY TRIAL REQUESTED)

The Defendant, Chris Cutway (“Defendant”), answers the Complaint filed by the Plaintiff, Stephanie Kozak (Personal Representative for the Estate of John Witkowski) (“Plaintiff”), and avers his Counterclaims as follows:

**GENERAL DENIAL**

I. Defendant denies each and every allegation of Plaintiff’s Complaint (“Complaint”) not specifically admitted herein.

**ANSWER**

II. Defendant responds to the allegations of the Complaint by paragraph numbers corresponding to the respective paragraph numbers of the Complaint as follows:

To the extent that the first sentence of the Complaint sets forth any averments purporting to characterize this lawsuit or its subject matter, which present legal conclusions or questions of law to be determined solely by this Court, no response is required. To the extent that a response is required, Defendant denies the averments of the first sentence of the Complaint.

**PARTIES**

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 1 of the Complaint concerning Plaintiff's residence, and thus, denies the same. Defendant denies all remaining allegations of Paragraph 1 of the Complaint.

2. Defendant admits the allegation in Paragraph 2 of the Complaint.

#### JURISDICTION AND VENUE

3. Because Paragraph 3 of the Complaint sets forth jurisdictional averments, which present legal conclusions or questions of law to be determined solely by this Court, no response is required.

4. Because Paragraph 4 of the Complaint sets forth jurisdictional averments, which present legal conclusions or questions of law to be determined solely by this Court, no response is required.

5. Because Paragraph 5 of the Complaint sets forth jurisdictional averments, which present legal conclusions or questions of law to be determined solely by this Court, no response is required.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 6 of the Complaint concerning the factual nexus or the subject matter of Plaintiff's Complaint, and thus, denies the same. Defendant denies all remaining allegations of Paragraph 6 of the Complaint.

#### PRELIMINARY STATEMENT

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7 of the Complaint, and thus, denies the same.

8. To the extent that Paragraph 8 of the Complaint purports to characterize this lawsuit,

which present legal conclusions or questions of law to be determined solely by this Court, no response is required. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 8 of the Complaint, and thus, denies the same.

FACTS

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9 of the Complaint, and thus, denies the same.

10. Defendant admits only that upon information and belief, Mr. John Adam Witkowski died in or about October 2021. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 10 of the Complaint, and thus, denies the same.

11. To the extent that Paragraph 11 of the Complaint avers a statement which present legal conclusions or questions of law to be determined solely by this Court, no response is required. To the extent that a response is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 11 of the Complaint, and thus, denies the same

12. Defendant admits only that upon information and belief, Mr. John Adam Witkowski lived in York, South Carolina prior to his death. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 12 of the Complaint, and thus, denies the same.

13. Defendant admits only that one or more kennels had been or were being constructed upon Mr. John Adam Witkowski's property in York, South Carolina at the time that Mr. Witkowski died. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 13 of the Complaint, and thus, denies the same.

14. Defendant denies the allegations in Paragraph 14 of the Complaint.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 15 of the Complaint, and thus, denies the same.

CLAIM and DELIVERY

16. Defendant incorporates by reference and restates all prior responses to the allegations asserted in the Complaint.

17. Defendant denies the allegations in Paragraph 17 of the Complaint.

18. Defendant denies the allegations in Paragraph 18 of the Complaint.

19. Defendant denies the allegations in Paragraph 19 of the Complaint.

20. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 20 of the Complaint, and thus, denies the same.

21. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 21 of the Complaint, and thus, denies the same.

22. Paragraph 22 of the Complaint constitutes a reference averment which requires no response. To the extent that it requires a response, Defendant denies all allegations therein.

23. Defendant denies the allegations in Paragraph 23 of the Complaint.

24. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 24 of the Complaint, and thus, denies the same.

25. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 25 of the Complaint, and thus, denies the same.

Defendant denies each of Plaintiff's prayers for relief sought in the Complaint and asserted in and following the **WHEREFORE** clause of the Complaint.

**FIRST AFFIRMATIVE DEFENSE**

**(Failure to State a Claim; Rule 12(b)(6) of the S.C. Rules of Civil Procedure)**

III. The Complaint fails to state facts sufficient to constitute a cause of action.

**SECOND AFFIRMATIVE DEFENSE**

**(Laches)**

IV. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, such action is barred by laches.

**THIRD AFFIRMATIVE DEFENSE**

**(Waiver/Estoppel)**

V. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, Plaintiff has waived such claims and/or is estopped from asserting such claims by her own conduct or past actions.

**FOURTH AFFIRMATIVE DEFENSE**

**(Unclean Hands)**

VI. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, Plaintiff is not entitled to any relief due to her own wrongdoing and/or liability for an offense.

**FIFTH AFFIRMATIVE DEFENSE**

**(Fraud or Misrepresentation)**

VII. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, no relief or judgement could be granted for or in favor of Plaintiff due to fraud or misrepresentation on Plaintiff's part.

**SIXTH AFFIRMATIVE DEFENSE**

**(Mistake)**

VIII. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, such action is barred by mistake of fact.

**SEVENTH AFFIRMATIVE DEFENSE**  
**(Failure to Mitigate)**

IX. To the extent that the Complaint states any cause of action against Defendant, which it fails to do, Plaintiff is not entitled to obtain recovery of any and all damages which she failed to mitigate.

**EIGHTH AFFIRMATIVE DEFENSE**  
**(Intervening and Superseding Breach, Negligence, or Wrongdoings)**

X. Plaintiff's claims are barred by her own breach and/or intervening and superseding negligence and/or wrongful actions.

**NINTH AFFIRMATIVE DEFENSE**  
**(Setoff)**

XI. Plaintiff's claims are barred to the extent that Defendant is entitled to a setoff against any amount allegedly due to Plaintiff, which Defendant denies is due to Plaintiff.

**TENTH AFFIRMATIVE DEFENSE**  
**(Statute of Frauds)**

XII. Plaintiff's claims are barred by the statute of frauds, which renders an oral contract unenforceable.

**ELEVENTH AFFIRMATIVE DEFENSE**  
**(Negligence and/or Breach of Third Parties)**

XIII. Plaintiff's claims against Defendant are barred to the extent that the alleged loss or injuries to Plaintiff were caused in whole or in part by the negligence and/or breach of third parties over whom Defendant had no control.

**TWELFTH AFFIRMATIVE DEFENSE**  
**(Payment)**

XIV. Plaintiff is barred from recovery in whole or in part because each of her claims

was discharged by any of Defendant' and/or a third party's payment and Plaintiff's acceptance thereof.

**THIRTEENTH AFFIRMATIVE DEFENSE**  
**(Satisfaction)**

XV. Plaintiff is barred from recovery in whole or in part because each of Defendant's obligations forming the basis for Plaintiff's claims, if any, has already been fully satisfied.

**FOURTEENTH AFFIRMATIVE DEFENSE**  
**(Parol Evidence Rule)**

XVI. Plaintiff is barred from recovery to the extent that her claims rely on any written agreement between the parties, which was intended to be the full agreement between the parties, and that Plaintiff fails to present any evidence in writing to establish any terms of any other agreement not set forth in the full written agreement between the parties.

**FIFTEENTH AFFIRMATIVE DEFENSE**  
**(Illegality)**

XVII. Plaintiff's claims are barred in whole or in part by the doctrine of illegality to the extent that the contract or agreement forming the basis of Plaintiff's causes of action violates the law of the State of South Carolina or the United States. Plaintiff's claims are further barred by illegality arising from Plaintiff's failure to comply with the rules and regulations promulgated by the State of South Carolina or the United States.

**SIXTEENTH AFFIRMATIVE DEFENSE**  
**(No Waiver of Defendant's Rights)**

XVIII. Defendant reserves and does not waive any additional or further defenses as may be revealed by information obtained in discovery or information that may otherwise be acquired at a later date, and Defendant reserves her right to amend this Answer and Counterclaims to assert any and all such further defenses should such an amendment become necessary.

**COUNTERCLAIMS**

XIX. Defendant by and through the undersigned counsel, asserts his Counterclaims against Plaintiff as follows:

**GENERAL ALLEGATIONS COMMON TO ALL COUNTERCLAIMS**

1. Upon information and belief, Plaintiff is a citizen and resident of York County, South Carolina.
2. Defendant is a citizen and resident of York, York County, South Carolina.
3. This Court has subject-matter jurisdiction over the claims in this lawsuit under Article V § 11 of the South Carolina Constitution and South Carolina Code § 14-5-350.
4. This Court has personal jurisdiction over the Parties to this case because upon information belief, each of them is a citizen and resident of York County, South Carolina.
5. Venue is proper in this circuit under South Carolina Code § 15-7-30 because upon information and belief, each of the Parties to this case is a citizen and resident of York County, South Carolina, and the acts and omissions that are the subject matter of this action occurred in York County, South Carolina.
6. In or about October 2009, Defendant and John Adam Witkowski formed a joint venture (“Joint Venture”), into which Defendant and Mr. Witkowski jointly invested funds, professional services, time, and efforts to accomplish the common goal of making profits from breeding, boarding, training, presenting/showcasing, transporting, and re-selling dogs.
7. For more than 12 years, Defendant and Mr. Witkowski operated their Joint

Venture.

8. Defendant and Mr. Witkowski did not have a written operating agreement; rather, they operated their Joint Venture under an oral agreement and mutual understanding that Mr. Witkowski would provide funds to purchase puppies available at many different locations across the world and that Defendant would handle the transportation of them to York County and be responsible for feeding, boarding, caring, training, presenting/showcasing, and re-selling them. Pursuant to their agreement and mutual understanding, the profits obtained from the participation in dog shows and the sale of dogs were to be re-invested into the Joint Venture or divided equally by Defendant and Mr. Witkowski.

9. In accordance with and reliance upon said agreements and mutual understanding, Defendant performed a variety of tasks, including without limitation, transporting, feeding, boarding, caring, training, and presenting/showcasing multiple dogs for 12 years. However, no dogs belonging to the Joint Venture operated by Defendant and Mr. Witkowski were ever sold to a third party.

10. Upon information and belief, on or about September 3, 2021, Stephanie Kozak initiated an eviction action against Mr. Witkowski to remove him from her real estate property—located at 2370 Hwy 55 E., Clover, South Carolina 29710—upon which Mr. Witkowski's residence had been established.

11. Also upon information and belief, Mr. Witkowski was evicted and removed by Stephanie Kozak from his residence located at 2370 Hwy 55 E., Clover, South Carolina 29710.

12. Having been evicted by Stephanie Kozak from his residence located at 2370 Hwy 55 E., Clover, South Carolina 29710, Mr. Witkowski relocated to a house located at 2536 Scrub

Pine Drive, York, South Carolina 29745.

13. Around this time, Mr. Witkowski requested that Defendant build eight (8) dog kennels, fences, and a wheelchair ramp and perform a variety of tasks for other related projects upon his newly-purchased property located at 2536 Scrub Pine Drive, York, South Carolina 29745, promising that he would personally and fully reimburse Defendant for all materials, labor, and professional services necessary for the construction and performance of the same.

14. In response to Mr. Witkowski's request and in reliance upon his promise for full reimbursement, Defendant began to construct eight (8) dog kennels, fences, and a wheelchair ramp and perform a variety of tasks for other related projects upon Mr. Witkowski's property located at 2536 Scrub Pine Drive, York, South Carolina 29745.

15. On or about October 27, 2021, Stephanie Kozak demanded that all dogs be removed immediately from Mr. Witkowski's prior residence located at 2370 Hwy 55 E., Clover, South Carolina 29710, which upon information and belief was then owned by Stephanie Kozak.

16. In response to Stephanie Kozak's demand, Defendant and Mr. Witkowski transported all of the dogs out of Mr. Witkowski's prior residence located at 2370 Hwy 55 E., Clover, South Carolina 29710 forthwith.

17. Shortly thereafter, Mr. Witkowski became severely ill.

18. While fighting against his illness, Mr. Witkowski asked Defendant to take possession and care of all of the dogs belonging to the Joint Venture and authorized Defendant to retain and exercise full and unencumbered ownership interest in them.

19. As Mr. Witkowski's health continued to deteriorate, Defendant issued an invoice in the amount of \$12,805.48, in an attempt to get reimbursed for the materials, labor, and/or

professional services he had provided for the construction of kennels and various other tasks and projects performed upon Mr. Witkowski's property.

20. Shortly thereafter, Mr. Witkowski died.

21. Consequently, Defendant did not receive any payment from Mr. Witkowski for the construction of the kennels or various other tasks and projects performed upon Mr. Witkowski's property.

22. Subsequently, Defendant reproduced the same invoice with "c/o Stephanie Kozak" added to it (**Exhibit A**) and presented the same to Stephanie Kozak to request payment.

23. However, Stephanie Kozak has refused to pay the invoiced amount to Defendant. As a result, the full amount owed to Defendant remains unpaid to date.

24. On or about March 15, 2022, Defendant filed a Statement of Creditor's Claim (**Exhibit B**) with the York County Probate Court.

**FIRST COUNTERCLAIM**  
**(Claims Against Decedent's Estate;**  
**Pursuant to S.C. Code Ann. §§ 62-3-804, *et seq.*)**

25. Defendant incorporates by reference and restates all responses or allegations set forth in the preceding paragraphs.

26. As set forth above, Defendant has a valid claim against the estate of Mr. Witkowski within the meaning of the South Carolina Probate Code—more specifically, S.C. Code Ann. § 62-1-201(4).

27. Pursuant to the South Carolina Probate Code—more specifically, S.C. Code Ann. §§ 62-3-803 and 62-3-804, *et seq.*—Defendant, as claimant against the estate of Mr. Witkowski, presented a claim to Plaintiff and also filed it with the York County Probate Court in a timely manner.

28. Because a valid claim, as asserted herein, exists against the estate of Mr. Witkowski and the full amount owed by Mr. Witkowski to Defendant at the time of Mr. Witkowski's death remains unpaid, Defendant is entitled to recover the full amount owed to him from the estate of Mr. Witkowski.

**SECOND COUNTERCLAIM**  
**(Breach of Contract)**

29. Defendant incorporates by reference and restates all responses or allegations set forth in the preceding paragraphs.

30. When Mr. Witkowski promised to Defendant that he would personally and fully reimburse Defendant for all materials, labor, and professional services necessary for the construction of kennels and various other tasks and projects performed upon Mr. Witkowski's property located at 2536 Scrub Pine Drive, York, South Carolina 29745, a valid, binding, and enforceable contract between Defendant and Mr. Witkowski was formed.

31. In accordance with the terms of said contract, Defendant performed all or substantial parts of his contractual duties owed to Mr. Witkowski.

32. Due to his sudden death, Mr. Witkowski failed to fulfill his contractual duties to pay the full contract price to Defendant.

33. Mr. Witkowski's failure to pay the full contract price owed to Defendant constituted a breach, which has caused Defendant substantial economic damages and other consequential damages to be shown at trial.

34. As such, Defendant is entitled to recover the full contract price from the estate of Mr. Witkowski, as well as other actual and consequential damages suffered as a direct and proximate result of Mr. Witkowski's breach.

**THIRD COUNTERCLAIM**  
**(Unjust Enrichment; *Quantum Meruit*)**

35. Defendant incorporates by reference and restates all responses or allegations set forth in the preceding paragraphs.

36. In constructing multiple kennels and performing various other tasks and projects upon Mr. Witkowski's property located at 2536 Scrub Pine Drive, York, South Carolina 29745, Plaintiff conferred on Mr. Witkowski (or his estate) substantial non-gratuitous benefits, including Defendant's professional services, materials, and labor.

37. Mr. Witkowski induced, encouraged, accepted, authorized, and benefitted from Defendant's non-gratuitous performance of professional services, as well as the materials and labor provided by Defendant, without compensating Defendant for the same.

38. Mr. Witkowski (or his estate) equitably ought to return or compensate Defendant for his non-gratuitous professional services, materials, and labor provided and cannot be permitted to induce, accept, encourage, or authorize Defendant to furnish or render something of value to Mr. Witkowski and avoid payment for the value received.

39. Because Mr. Witkowski's (or his estate's) retention of the benefits conferred by Defendant under the conditions would make it unjust for him/it to retain said benefits without paying for the value received, Defendant is entitled to recover and be compensated for the same in an amount to be shown at trial, but no less than \$12,805.48, in addition to an award of actual and punitive damages.

**FOURTH COUNTERCLAIM**  
**(Promissory Estoppel)**

40. Defendant incorporates by reference and restates all responses or allegations set forth in the preceding paragraphs.

41. When making the promises and certifications referenced and averred above—*i.e.*, that he would personally and fully reimburse Defendant for all materials, labor, and professional services necessary for the construction of kennels and the performance of various other tasks and projects upon Mr. Witkowski's property located at 2536 Scrub Pine Drive, York, South Carolina 29745—Mr. Witkowski reasonably expected or should have reasonably expected to induce action or forbearance on the part of Defendant, *i.e.*, to furnish materials, labor, and professional service for the construction of kennels and the performance of various other tasks and projects upon Mr. Witkowski's property.

42. Mr. Witkowski in fact did induce Defendant's action or forbearance as referenced and averred above, *i.e.*, to furnish materials, labor, and professional service for the construction of multiple kennels and the performance of various other tasks and projects upon Mr. Witkowski's property.

43. Mr. Witkowski's promises and certifications—*i.e.*, that that he would personally and fully reimburse Defendant for all materials, labor, and professional services necessary for the construction of kennels and the performance of various other tasks and projects upon Mr. Witkowski's property located at 2536 Scrub Pine Drive, York, South Carolina 29745—were unambiguous with clearly articulated, definite terms, and Mr. Witkowski intended his promises and certifications to be relied upon by Defendant, who in fact relied upon the same.

44. Due to his tragic death, Mr. Witkowski failed to comply with his promises and certifications by failing to personally and fully reimburse Defendant.

45. As a direct and proximate result and consequence of Mr. Witkowski's failure to comply with his promises and certifications constituting inconsistent disposition, Defendant has

sustained substantial injuries, including substantial pecuniary injuries and economic loss, including substantial attorney's fees required to assert and protect his rights against Plaintiff.

46. Under said circumstances, Mr. Witkowski's promises and certifications referenced and averred above are binding because injustice can be avoided only by the enforcement of Mr. Witkowski's promises and certifications. A refusal to enforce Mr. Witkowski's promises and certifications would be virtually to sanction the perpetration of fraud or would result in other injustice.

47. Defendant is entitled to recover economic and other damages resulting from an inconsistent disposition on the part of Mr. Witkowski.

**WHEREFORE**, having fully answered the Complaint and asserted his Counterclaims as set forth above, Defendant prays for the following relief:

1. That Plaintiff's Complaint be dismissed in its entirety with prejudice;
2. That this Court enter judgment in favor of Defendant and against Plaintiff on all of Plaintiff's claims asserted in the Complaint and on all of Counterclaims against Plaintiff asserted herein;
3. That this Court award Defendant any other relief which may be authorized under other causes of action asserted by Defendant herein;
4. That this Court award Defendant such other damages as shall be proven at trial, but no less than \$12,805.48, pursuant to the allegations set forth herein, plus pre-judgment interest;
5. That this Court award Defendant such punitive damages as shall be determined by a jury at trial in an amount sufficient to punish and deter Plaintiff and others similarly situated;

6. That Defendant be allowed to recover his attorney's fees in such an amount as shall be shown at trial;
7. That this Court tax the costs of this action against Plaintiff;
8. That this Court grant such other and further relief as equity may require and the Court and the jury would deem just and proper; and
9. That this case be tried by jury on all issues so triable.

Respectfully submitted,

**AHN LAW FIRM, LLC**

By: /s/ Chan M. Ahn  
Chan M. Ahn (SC Bar #102173)  
chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, SC 29710  
Telephone: (803) 810-4373  
Fax: (803) 817-9704  
***Counsel for Defendant***

May 21, 2022

Lake Wylie, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2022-CP-46-01237

**CERTIFICATE OF SERVICE**

The undersigned certifies that on May 21, 2022, a copy of the foregoing **Answer and Counterclaims** was filed with this Court through the *SC Courts E- Filing Portal*, which will have sent notification of such filing to all counsel of record in this matter.

This 21st day of May, 2022.

**AHN LAW FIRM, LLC**

BY: /s/ Chan M. Ahn  
Chan M. Ahn  
chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, South Carolina 29710  
Telephone: 803-810-4373  
Fax: 803-817-9704

ELECTRONICALLY FILED - 2022 May 21 5:52 AM - YORK - COMMON PLEAS - CASE#2022CP4601237  
ELECTRONICALLY FILED - 2022 Jun 22 3:02 PM - YORK - COMMON PLEAS - CASE#2022CP4601237

STATE OF SOUTH CAROLINA )  
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COUNTY OF YORK )  
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Stephanie Kozak )  
(Personal Representative for the Estate of )  
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Plaintiff, )  
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vs. )  
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 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
  
CASE NUMBER: 2022-CP-46-01237

**AFFIDAVIT OF DEFAULT**

PERSONALLY appeared before me, CHAN M. AHN, ESQ. who, being duly sworn, states (1) that he is the Attorney for Defendant Chris Cutway; (2) that more than thirty (30) days have elapsed since the service of Defendant Chris Cutway’s Answer and Counterclaims, exclusive of the date of service, upon the Plaintiff, Stephanie Kozak (Personal Representative for the Estate of John Witkowski) (“Plaintiff”), as shown by the Certificate of Service dated May 21, 2022, and filed with the Court concurrently with Defendant Chris Cutway’s Answer and Counterclaims; (3) that no Answer, Demurrer, Motion, or any other response, opposition, or objection has been served upon him as required; (4) that, upon information and belief, Plaintiff is neither incompetent nor a member of the military service; and (5) that Plaintiff is in default.

Given the foregoing, the undersigned Affiant believes that Plaintiff’s default should be entered pursuant to Rule 55(a), SCRCP, and hereby requests that the Clerk of Court enter Plaintiff’s default upon the calendar in a form substantially similar to the Entry/Order of Default of Plaintiff being proposed and submitted to the Court along with this Affidavit of Default.

I certify under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

Executed on this 22nd day of June, 2022.

AHN LAW FIRM, LLC



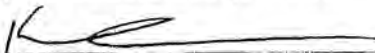
Chan M. Ahn (SC Bar No. 102173)  
chan@ahnlawfirmllc.com  
4381 Charlotte Hwy. Suite 103  
Lake Wylie, South Carolina 29710  
Telephone: (803) 810-4373  
Fax: (803) 817-9704  
*Counsel for Defendant*

Sworn/affirmed to and subscribed before me

On this 22 day of June, 2022

Personally known [ ] or Produced identification

Type of Identification produced:



(Signature of Notary Public)

Kishawhite

(Printed name of Notary Public), Notary Public

York County, South Carolina

My commission expires January 3, 2024 (Notary Seal)



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STATE OF SOUTH CAROLINA )  
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COUNTY OF YORK )  
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Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski, )  
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Plaintiff, )  
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vs. )  
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 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
  
CASE NUMBER: 2022-CP-46-01237

**CERTIFICATE OF SERVICE**

The undersigned certifies that on June 22, 2022, a copy of the foregoing **Affidavit of Default** was filed with this Court through the *SC Courts E- Filing Portal*, which will have sent notification of such filing to all counsel of record in this matter.

This 22nd day of June, 2022.

**AHN LAW FIRM, LLC**

BY: /s/ Chan M. Ahn  
Chan M. Ahn  
chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, South Carolina 29710  
Telephone: 803-810-4373  
Fax: 803-817-9704

STATE OF SOUTH CAROLINA )  
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Defendant. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

CASE NUMBER: 2022-CP-46-01237

**DEFENDANT'S MOTION FOR  
JUDGMENT BY DEFAULT  
AND HEARING FOR ATTORNEY'S  
FEES**

Pursuant to Rule 55(b) of the South Carolina Rules of Civil Procedure (SCRPC), the Defendant, Chris Cutway ("Defendant"), hereby moves for a Judgment by Default against the Plaintiff, Stephanie Kozak (Personal Representative for the Estate of John Witkowski) ("Plaintiff"). More specifically, Defendant requests that this Court enter a Judgment by Default in favor of Defendant and against Plaintiff in such liquidated amount or sum certain of \$12,805.48 as is set forth in Defendant's verified pleading, pursuant to Rule 55(b)(1), SCRPC. Additionally, Defendant requests that pursuant to Rule 55(b)(3), SCRPC, a hearing be held as soon as possible to determine the amount of attorney's fees recoverable by Defendant in connection with the Judgment by Default sought hereby. Defendant seeks to recover his attorney's fees incurred in connection with Plaintiff's default and respectfully applies to this Court therefor, pursuant to Rule 55, SCRPC.

In support of this Motion, Defendant states as follows:

1. The service of Defendant's verified Answer and Counterclaims upon Plaintiff was perfected electronically on May 21, 2022.

2. No answer or other response by Plaintiff to Defendant's verified Answer and Counterclaims has been filed with the Court.

3. Defendant's counsel filed with the Clerk of Court an Affidavit of Default of Plaintiff on or about June 23, 2022, and requested that the default of Plaintiff be entered.

4. The Honorable Daniel D. Hall, a Circuit Court Judge for the Sixteenth Judicial Circuit, entered the default of Plaintiff on June 23, 2022.

**WHEREFORE**, Defendant respectfully moves this Court, requesting that a Judgment by Default be entered against Plaintiff as to all of Defendant's verified Counterclaims asserted in this matter and in the liquidated amount or the sum certain of \$12,805.48. Further, Defendant respectfully requests a hearing to ascertain the total amount of attorney's fees recoverable by Defendant.

Respectfully submitted,

**AHN LAW FIRM, LLC**

By: /s/ Chan M. Ahn  
Chan M. Ahn (SC Bar #102173)  
Email: chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, SC 29710  
Telephone: (803) 810-4373  
Fax: (803) 817-9704  
***Counsel for the Defendant***

June 29, 2022

Lake Wylie, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
  
CASE NUMBER: 2022-CP-46-01237

**CERTIFICATE OF SERVICE**

The undersigned certifies that on June 29, 2022, a copy of the foregoing **Defendant’s Motion for Judgment by Default and Hearing for Attorney’s Fees** was filed with this Court through the *SC Courts E- Filing Portal*, which will have sent notification of such filing to all counsel of record in this matter.

This 29th day of June, 2022.

**AHN LAW FIRM, LLC**

BY: /s/ Chan M. Ahn  
Chan M. Ahn  
Email: chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, South Carolina 29710  
Telephone: 803-810-4373  
Fax: 803-817-9704  
***Counsel for the Defendant***

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2022-CP-46-01237

**CERTIFICATION OF DEFENDANT'S COUNSEL IN SUPPORT OF  
DEFENDANT'S MOTION FOR JUDGMENT BY DEFAULT AND HEARING FOR  
ATTORNEY'S FEES**

Pursuant to Rule 11, SCRPC, the undersigned counsel for the Defendant, Chris Cutway ("Defendant"), hereby affirms and certifies that Defendant's counsel, prior to filing *Defendant's Motion for Judgment by Default and Hearing for Attorney's Fees* ("Motion"), communicated with opposing counsel and attempted in good faith to resolve the matter contained in the Motion.

Pursuant to Rule 11, SCRPC, this Certification is being respectfully submitted promptly after the omission of the Rule 11 certification was called to the attention of the undersigned.

Respectfully submitted on this 18th day of August, 2022,

**AHN LAW FIRM, LLC**

By: /s/ Chan M. Ahn  
Chan M. Ahn (SC Bar #102173)  
Email: chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, SC 29710  
Telephone: (803) 810-4373  
***Counsel for the Defendant***

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
  
CASE NUMBER: 2022-CP-46-01237

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 18, 2022, a copy of the foregoing *Certification of Defendant's Counsel in Support of Defendant's Motion for Judgment by Default and Hearing for Attorney's Fees* was filed with this Court through the SC Courts E-Filing Portal, which will have sent notification of such filing to all counsel of record in this matter.

This 18th day of August, 2022.

**AHN LAW FIRM, LLC**

BY: /s/ Chan M. Ahn  
Chan M. Ahn  
Email: chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, South Carolina 29710  
Telephone: 803-810-4373  
***Counsel for the Defendant***

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
  
CASE NUMBER: 2022-CP-46-01237

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO  
PLAINTIFF'S MOTION TO SET ASIDE ENTRY OF DEFAULT**

The Defendant, Chris Cutway ("Defendant"), respectfully submits this *Defendant's Memorandum of Law in Opposition to Plaintiff's Motion to Set Aside Entry of Default*. Defendant respectfully avers that *Plaintiff's Motion to Set Aside Entry of Default* ("Plaintiff's Motion") is wholly without merit and requests that this Court deny Plaintiff's Motion based on the following:

In South Carolina, the standard for granting relief from an entry of default under Rule 55(c), SCRCP, "requires [the defaulting party] to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *See, e.g., Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) (emphasis added). "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 [movant] has a meritorious defense; and (3) the degree of prejudice to the [non-movant] 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). However, this 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.” *Sundown, supra*, 383 S.C. at 608, 681 S.E.2d at 888 (citing *Lixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995)). Stated differently, where the defaulting party fails to show good cause for her default, this Court “need not consider the *Wham* factors.” *Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct. App. 2013). Importantly, “the negligence of an attorney or insurance company is imputable to a defaulting litigant.” *Id.* “A motion under Rule 55(c) is addressed to the sound discretion of [this Court].” *Sundown, supra*, 383 S.C. at 608, 681 S.E.2d at 888 (citing *Williams v. Stalaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994)).

Here, Plaintiff’s Motion is without merit because it fails to “provide an explanation for the default[.]” *See Sundown, supra*, 383 S.C. at 608, 681 S.E.2d at 888. It is also without merit because it fails to “give reasons why vacation of the default entry would serve the interests of justice.” *See id.* Without providing any explanation for the default or offering any reasons why vacation of the default entry would serve the interests of justice, Plaintiff’s Motion merely seeks to invoke the *Wham* factors. However, this Court need not, and should not, consider the *Wham* factors because Plaintiff’s Motion does nothing to show good cause, which requires “an explanation for the default” and satisfactory “reasons why vacation of the default entry would serve the interests of justice.” *See Regions Bank, supra*, 402 S.C. at 649, 741 S.E.2d at 55; *see also Sundown, supra*, 383 S.C. at 607–08, 681 S.E.2d at 888 (holding that a court need only consider the *Wham* factors “[o]nce a party has put forth a satisfactory explanation for the default”); *Lixon, supra*, 320 S.C. at 179, 463 S.E.2d at 639 (holding that 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).

Finally, it must be noted that as shown by Exhibits A and B, Plaintiff has unsuccessfully pursued a default judgment against Defendant for multiple times without having any valid grounds. Given that Plaintiff has repeatedly sought to obtain a default judgment against Defendant without having any valid grounds, her request that this Court “determine the validity of the claims based upon the substantive issues rather than procedural” seems utterly ironic and inconsistent with her prior positions taken in this action. Thus, no relief on the basis of “the interests of justice” is available to her.

Given the foregoing, Defendant respectfully requests that this Court deny Plaintiff’s Motion.

Respectfully submitted,

**AHN LAW FIRM, LLC**

By: /s/ Chan M. Ahn  
Chan M. Ahn (SC Bar #102173)  
Email: chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, SC 29710  
Telephone: (803) 810-4373  
Fax: (803) 817-9704  
*Counsel for the Defendant*

August 18, 2022

Lake Wylie, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
  
CASE NUMBER: 2022-CP-46-01237

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 18, 2022, a copy of the foregoing *Defendant's Memorandum of Law in Opposition to Plaintiff's Motion to Set Aside Entry of Default* was filed with this Court through the *SC Courts E-Filing Portal*, which will have sent notification of such filing to all counsel of record in this matter.

This 18th day of August, 2022.

**AHN LAW FIRM, LLC**

BY: /s/ Chan M. Ahn  
Chan M. Ahn  
Email: chan@ahnlawfirmllc.com  
4381 Charlotte Hwy, Suite 103  
Lake Wylie, South Carolina 29710  
Telephone: 803-810-4373  
Fax: 803-817-9704  
***Counsel for the Defendant***

**Retraction: Courtesy NEF RE: 2022CP4601237**

efiledonotreply@sccourts.org <efiledonotreply@sccourts.org>  
To: chan@ahnlawfirmllc.com  
Cc: chan211@hotmail.com

Wed, Jun 22, 2022 at 11:56 AM

The Notice below is RESCINDED  
The filing was not filed.

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*  
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2022CP4601237

<b>Official File Stamp:</b>	06-22-2022 11:34:47 AM
<b>Court:</b>	CIRCUIT COURT Common Pleas York
<b>Case Caption:</b>	Stephanie Kozak , plaintiff, et al VS Chris Cutway
<b>Document(s) Submitted:</b>	Motion/Default Judgment - Exhibit/Filing of Exhibits Affidavit/Default Affidavit/Non Military Service Service/Affidavit Of Service
<b>Filed by or on behalf of:</b>	Neil Terrence Phillips

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:  
Neil Terrence Phillips for Stephanie Kozak  
Chan Mo Ahn for Chris Cutway

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:  
John Witkowski Estate Of  
Stephanie Kozak Personal Representative  
John Witkowski

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**Retraction: Courtesy NEF RE: 2022CP4601237**

efiledonoreply@sccourts.org <efiledonoreply@sccourts.org>  
To: chan@ahnlawfirmllc.com  
Cc: chan211@hotmail.com

Wed, Jun 22, 2022 at 3:17 PM

The Notice below is RESCINDED  
The filing was not filed.

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*  
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2022CP4601237

<b>Official File Stamp:</b>	06-22-2022 02:02:54 PM
<b>Court:</b>	CIRCUIT COURT Common Pleas York
<b>Case Caption:</b>	Stephanie Kozak , plaintiff, et al VS Chris Cutway
<b>Document(s) Submitted:</b>	Motion/Default Judgment - Exhibit/Filing of Exhibits Affidavit/Default Affidavit/Non Military Service Service/Affidavit Of Service
<b>Filed by or on behalf of:</b>	Neil Terrence Phillips

This notice was automatically generated by the Court's auto-notification system.

**The following people were served electronically:**  
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Chan Mo Ahn for Chris Cutway

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**  
John Witkowski Estate Of  
Stephanie Kozak Personal Representative  
John Witkowski

[Quoted text hidden]

ELECTRONICALLY FILED - 2022 Aug 18 6:56 AM - YORK - COMMON PLEAS - CASE#2022CP4601237

THE STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

**MOTION TO RECONSIDER**

Case No.: 2022-CP-46-01237

This matter comes before the Court on Defendant's Motion to Reconsider pursuant to South Carolina Rule 59 of the South Carolina Rules of Civil Procedure, which provides as follows:

**Rule 59 - New Trials; Amendment of Judgments(a) Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment.(b) Time for Motion. The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter. In non-jury actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action if no judgment has been entered.(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the

judgment shall be served not later than 10 days after receipt of written notice of the entry of the order. (f) Time for Appeal; End of Term. The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions. The time within which to make the motions under this Rule shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the trial judge shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion if not heard and disposed during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit where the trial was held. The motion may in the discretion of the court be determined on briefs filed by the parties without oral argument. (g) Judge to be Provided with Copy. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

*S.C.R.C.P. 59*

*This Rule 59 is substantially the Federal Rule. It is consistent with Code §15-27-150. Rule 59(b) provides that if the motions are not made and heard during the term, the more precise and definite Federal practice of allowing 10 days after the entry of judgment to make the motion is more equitable. Rule 59(f) is added to provide that departure from the circuit does not deprive the trial judge of jurisdiction to rule on motions under this Rule and Rules 50, 52 and 60. It also provides flexibility for the trial judge to determine the motions on briefs without oral argument.*

*Note to 1986 Amendment:*

*In jury trials, post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them. These amendments to Rules 59(b) and (e) and (f) conform the language to that of Rules 50 and 52 and provide that the time for appeal commences upon the receipt of written notice of entry of the order disposing of such motions which was prior state practice, rather than the date when the court signed the order which is the practice in the federal courts.*

*Note to 1998 Amendment:*

*This amendment adds Rule 59(g). It is intended to help ensure that the judge is promptly notified that the motion has been filed.*

The case was heard on August 18<sup>th</sup>, 2022 via a Virtual Motion Hearing before the Honorable Judge Daniel Hall. After considering the Motion to set aside the Motion for Default and the Defendant's Motion for a Default Judgment, the court denied the Plaintiff's Motion and granted the Defendant's Motion for Judgment by Default and granted a hearing for attorney's fees. The Plaintiff's essential argument for Reconsideration is that the court has overlooked the South Carolina Court's desire in general to decide cases upon merit and not upon a minor procedural error. This is in the interest of public policy and to encourage the furtherance of justice.

Both the Plaintiff and Defendant relied upon the *Wham v. Shearson Lehman Brothers* 298 S.C. 462 (1989), whereby the court directed the trial court to note three factors in considering whether to relieve the Defendant from the Entry of Default:” (1) the timing of [Defendant’s] Motion for Relief [After the Entry of Default]; (2) Whether [Defendant] has a meritorious defense; and (3) the degree of prejudice to [non-defaulting party] if relief is granted.”

The Defendant failed to state in their motion and memoranda of law how the Notice of Default, which was acknowledged within a day of the required filing date and then the subsequent filing of the reply five (5) days later, prejudiced their client in any way.

The issues at hand in this case are substantial and high-valued (over \$100,000.00). The damages, by not allowing the Set Aside of the Default Judgement to the Counterclaim, will also result in a substantial financial burden to the Plaintiff.

Further, the Defendant’s attorney’s statements as to the reasoning for the default filing indicate a series of misunderstandings and actually propel the Plaintiff’s Set Aside Motion. The filing of Default because the other party filed for Default. This indicates that the Answer and Counterclaim in question was truly missed. I assumed that I was dealing with a reluctant Pro se litigant.

Further cases, such as *McTronics*, also accentuate the South Carolina Court’s preference for hearing cases upon merit rather than decisions made upon procedural error.

### **Conclusion**

The Default Judgment rendered by this court will result in a considerable injustice. In the interest of public policy and justice, I am respectfully requesting that the court reconsider the denial of the Motion to Set Aside the Entry of Default.

The holding in the *Mictronics vs South Carolina Department of Revenue, Appeal from Charleston County Jackson V. Gregory, Circuit Court Judge Opinion Nol 3350 Heard April 5, 2001-Filed June 4, 2001*, states clearly, as follows, “ It appears that DOR will Suffer no prejudice should this case proceed for a determination on the merits. Here, DOR has no substantial stake in this windfall, and the resolution of the case on its merits has not been substantially delayed by the parties’ actions. Given Mictronics’ good faith mistake, its swift action to try to remedy the situation, the existence of a meritorious defense, and the lack of prejudice to DOR, we find the ALJ abused his discretion by refusing to reopen the case. Therefore, we affirm the circuit court’s motion to reopen and remanding the cast to the ALJD for an adjudication on the merits.”

It is well established in South Carolina that given the factors in this case at hand, like *Mictronics*, the case should proceed on its merits, notwithstanding the “good faith” error made by the Plaintiff’s attorney.

The Law Office of Neil T. Phillips, LLC

By: /s/Neil T. Phillips  
Neil T. Phillips  
30 North Congress Street, Suite 106  
York, South Carolina 29745  
Telephone: (803) 810-5423  
Email: neil@neilphillipslaw.com  
Fax: 877.501.9002  
SC Bar No: 0102094

September 8<sup>th</sup>, 2022  
York, South Carolina

THE STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

**MEMORANDUM IN SUPPORT  
OF MOTION TO RECONSIDER**

Case No.: 2022-CP-46-01237

The Plaintiff respectfully submits this memorandum in support of the Motion to Reconsider currently before the court, requesting that the Defendant's default judgment be set aside. In addition, the Plaintiff requests more detail for the Court's decision in case an appeal is required.

The Defendant argues that the case law in the State of South Carolina has established that the courts have a preference for cases to be decided upon merit rather than minor procedural errors. Both the Plaintiff and Defendant relied upon the Wham v. Shearson Lehman Brothers 298 S.C. 462 (1989), whereby the court directed the trial court to note three factors in considering whether to relieve the Defendant from the Entry of Default: " (1) the timing of [Defendant's] Motion for Relief [After the Entry of Default]; (2) Whether [Defendant ] has a meritorious defense; and (3) the degree of prejudice to [non-defaulting party] if relief is granted." The Defendant failed to state in their motion and memoranda of law how the Notice of Default, which was acknowledged within a day of the required filing date and then the subsequent filing of the reply five (5) days later ,prejudiced their client in any way. The issues at hand in this case are substantial and high-valued (over \$100,000.00). The damages, by not allowing the Set Aside of the Default Judgement to the Counterclaim, will also result in a substantial financial burden to the Plaintiff.

**Lack of Support For Decision**

Having submitted the Motion to Reconsider within the statutory period of ten (10) days from the

ruling, the Plaintiff may require an appeal if the Motion to Reconsider was to be unsuccessful. This would require actual analysis from the court rather than the Form 4 judgement which was submitted.

**CONCLUSION**

For all the forgoing reasons, the Defendant's motion for Default Judgment should be set aside and detail should be provided in case an appeal was to be required.

Respectfully Submitted,

/S/Neil T. Phillips  
Neil T. Phillips  
*Attorney for Plaintiff*  
SC Bar No. 102094  
30 N Congress St  
Suite 106  
York, SC 29745  
803-810-5423  
neil@neilphillipslaw.com

September 14th, 2022  
York, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
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Plaintiff, )  
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vs. )  
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Chris Cutway, )  
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Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2022-CP-46-01237

**DEFENDANT’S MOTION TO STRIKE  
AND DENY PLAINTIFF’S MOTION TO  
RECONSIDER WITHOUT HEARING AND  
MEMORANDUM OF LAW IN SUPPORT**

Pursuant to Rules 11 and 59, SCRCPP, and relevant interpretive laws of the State of South Carolina, the Defendant, Chris Cutway (“Defendant”), hereby moves for an Order striking and denying the pending Motion to Reconsider filed by the Plaintiff, Stephanie Kozak (Personal Representative for the Estate of John Witkowski) (“Plaintiff”). Defendant further moves for an Order requiring Plaintiff to pay to Defendant the amount of the reasonable expenses incurred in connection with Plaintiff’s Motion to Reconsider, this Motion, and all other related papers, including the court filing fees and a reasonable attorney’s fee.

**FACTS AND PROCEDURAL HISTORY**

On April 20, 2022, Plaintiff filed this action asserting one (1) cause of action for Claim and Delivery against Defendant. On April 24, 2022, a copy of Plaintiff’s Summons and Complaint was served upon Defendant.

On May 21, 2022, Defendant timely filed and served his Answer and Counterclaims. Plaintiff failed to respond to Defendant’s Counterclaims in a timely manner.

On June 23, 2022, this Court issued an Entry/Order of Default against Plaintiff. On June 29, 2022, Plaintiff filed a Motion to Set Aside Entry of Default. On the same day, Defendant filed a Motion for Judgment by Default and Hearing for Attorney's Fees.

On August 18, 2022, a hearing upon Plaintiff's Motion to Set Aside Entry of Default and Defendant's Motion for Judgment by Default was held. On August 30, 2022, this Court issued a Form 4 Order, by which "Plaintiff's Motion to Set Aside Default is DENIED" and "Defendant's Motion for Judgment by Default and Hearing for Attorney's Fees is GRANTED."

Between August 30, 2022, and September 8, 2022, there was absolutely no communication between the Parties or their counsel. On September 8, 2022, without having any communication whatsoever with Defendant or his counsel, Plaintiff filed a Motion to Reconsider requesting that this Court "reconsider the denial of [Plaintiff's] Motion to Set Aside the Entry of Default." It seeks to invoke, and relies exclusively upon, Rule 59, SCRCP. Notably, it fails to contain any affirmation or certification required by Rule 11, SCRCP.

On September 15, 2022—less than ten (10) days after the filing of Plaintiff's Motion to Reconsider—this Court scheduled a hearing on Plaintiff's Motion to Reconsider.

#### LAW

Rule 59(g), SCRCP, provides that "[a] party filing a written motion under this rule *shall* provide a copy of the motion to the judge within ten (10) days after the filing of the motion." Rule 59(g), SCRCP (emphasis added). Interpreting this Rule, the Court of Appeals has held that "the trial court properly denied [a] motion for reconsideration because [the movant] did not timely provide a copy of the motion to the judge." *Smith v. Fedor*, 422 S.C. 118, 126, 809 S.E.2d 612, 616 (Ct. App. 2017).

In *Smith*, the Court of Appeals emphasized that “Rule 59(g) would lack any purpose if trial courts committed error by denying the motion for failure to comply with the rule.” *Id.* The *Smith* court further noted that “our language in *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002) implies a trial court may deny the motion solely on the basis of the rule.” *Smith, supra*, 422 S.C. at 126, 809 S.E.2d at 616 (citing *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002)) (emphasis added). In *Smith*, the Court of Appeals further ruled that “[b]ecause the trial court did not err in denying [the movant’s] motion for reconsideration, the arguments presented in that motion are unreserved.” *Smith, supra*, 422 S.C. at 126, 809 S.E.2d at 616. Consequently, the *Smith* court held, “none of [the movant’s] arguments . . . are preserved for review.” *Id.*

Meanwhile, Rule 11, SCRCP provides, in pertinent part, that:

All motions filed shall contain an affirmation that the movant’s counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant’s counsel certifies that consultation would serve no useful purpose, or could not be timely held. There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants. Rule 11(a), SCRCP.

It further provides that:

If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney’s fee. *Id.*

### DISCUSSION

As explained above, Plaintiff's Motion to Reconsider was filed on September 8, 2022. More than ten (10) days have passed since the filing of Plaintiff's Motion to Reconsider. To date, however, neither Defendant nor Defendant's counsel has received a copy of any correspondence submitted to the judge by Plaintiff concerning her Motion to Reconsider.

Upon information and belief, Plaintiff violated Rule 59, SCRCP, by failing to provide a copy of her Motion to Reconsider to the judge within ten (10) days after the filing of it, as required by a key provision of the very Rule Plaintiff's Motion to Reconsider seeks to invoke. To be sure, Plaintiff's Motion to Reconsider properly cites, quotes, and restates each of the provisions of Rule 59, SCRCP, in its entirety, including Rule 59(g), SCRCP. Ironically, however, Plaintiff still failed to comply with the Rule cited, quoted, and restated in her own Motion to Reconsider.

Should it turn out that Plaintiff did provide a copy of her Motion to Reconsider to the judge within ten (10) days after the filing of it without serving a copy of the same upon Defendant, it should be found that Plaintiff or her counsel engaged in impermissible *ex parte* communication with the judge, warranting a proper disciplinary action. *See, e.g., Matter of White*, 328 S.C. 88, 492 S.E.2d 82 (1997).

Under *Gallagher, Smith*, and their progeny—the relevant holdings and dicta of which are more fully described and explained above—this Court is clearly authorized to deny Plaintiff's Motion to Reconsider solely on the basis of Plaintiff's failure to comply with the mandates of Rule 59(g), SCRCP. *See Gallagher, supra*, 353 S.C. at 63-64, 577 S.E.2d at 219; *see also Smith, supra*, 422 S.C. at 126, 809 S.E.2d at 616. Thus, this Court need not consider Plaintiff's Motion to Reconsider based on merit.

As explained above, this Court scheduled a hearing on Plaintiff's Motion to Reconsider on September 15, 2022, only seven (7) days after the filing of Plaintiff's Motion to Reconsider and prior to Plaintiff's failure to comply with Rule 59(g), SCRCP, occurred. Now, because Plaintiff has clearly violated Rule 59(g), SCRCP, none of her arguments associated with her Motion to Reconsider at bar are preserved for review. *See Smith, supra*, 422 S.C. at 126, 809 S.E.2d at 616. Thus, no issues or arguments necessitating a hearing are present at this time. Accordingly, this Court need not hold a hearing on Plaintiff's Motion to Reconsider at this juncture.

Also as explained above, there was absolutely no communication between the Parties or their counsel between this Court's issuance of a Form 4 Order being challenged by Plaintiff and the filing of Plaintiff's Motion to Reconsider being contested by Defendant. On September 8, 2022, without having any communication whatsoever with Defendant or his counsel, Plaintiff filed a Motion to Reconsider. Plaintiff's Motion to Reconsider contains no affirmation or certification required by Rule 11, SCRCP. Clearly, Plaintiff's Motion to Reconsider fails to comply with Rule 11, SCRCP.

Pursuant to Rule 11, SCRCP, Plaintiff's Motion to Reconsider should be stricken. Also pursuant to the same Rule, an appropriate sanction—including an order to pay to Defendant the amount of the reasonable expenses incurred in connection with Plaintiff's Motion to Reconsider, this Motion, and all other related papers, including the court filing fees and a reasonable attorney's fee—should be imposed.

### **CONCLUSION**

Given the foregoing, Defendant respectfully requests that the hearing on Plaintiff's Motion to Reconsider—which was pre-scheduled for October 3, 2022, at 3:30 p.m.—be cancelled. Defendant further requests respectfully that this Court issue an Order striking and denying

Plaintiff's Motion to Reconsider, without a hearing, on the ground that Plaintiff failed to comply with Rule 59(g), SCRCPP, a key provision of Rule 59, SCRCPP, which Plaintiff's own Motion to Reconsider seeks to invoke. Finally, pursuant to Rule 11, SCRCPP, Defendant respectfully requests that (i) Plaintiff's Motion to Reconsider be stricken; and (ii) this Court issue an Order directing Plaintiff to pay to Defendant the amount of the reasonable expenses incurred in connection with Plaintiff's Motion to Reconsider, this Motion, and all other related papers, including the court filing fees and a reasonable attorney's fee.

Pursuant to Rule 11(a), SCRCPP, the undersigned counsel affirms that he, prior to filing this Motion, has communicated via email with opposing counsel and has attempted in good faith to resolve the matter contained in this Motion; however, this matter could not be resolved.

Respectfully submitted on this 28th day of September, 2022.

**AHN LAW FIRM, LLC**

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***Counsel for the Defendant***

September 28, 2022

Lake Wylie, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
  
CASE NUMBER: 2022-CP-46-01237

**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 28, 2022, a copy of the foregoing **Defendant’s Motion to Strike and Deny Plaintiff’s Motion to Reconsider Without Hearing and Memorandum of Law in Support** was filed with this Court through the *SC Courts E- Filing Portal*, which will have sent notification of such filing to all counsel of record in this matter.

This 28th day of September, 2022.

**AHN LAW FIRM, LLC**

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***Counsel for the Defendant***

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Witkowski), )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
  
CASE NUMBER: 2022-CP-46-01237

**DEFENDANT’S MEMORANDUM OF LAW IN OPPOSITION TO  
PLAINTIFF’S MOTION TO RECONSIDER**

The Defendant, Chris Cutway (“Defendant”), respectfully submits this *Defendant’s Memorandum of Law in Opposition to Plaintiff’s Motion to Reconsider*. Defendant respectfully avers that *Plaintiff’s Motion to Reconsider* (“Plaintiff’s Motion” or “Motion to Reconsider”) is wholly without merit and requests that this Court deny Plaintiff’s Motion to Reconsider based on the following:

**FACTS AND PROCEDURAL HISTORY**

On April 20, 2022, Plaintiff filed this action asserting one (1) cause of action for Claim and Delivery against Defendant. On April 24, 2022, a copy of Plaintiff’s Summons and Complaint was served upon Defendant.

On May 21, 2022, Defendant timely filed and served his Answer and Counterclaims. Plaintiff failed to respond to Defendant’s Counterclaims in a timely manner.

On June 23, 2022, this Court issued an Entry/Order of Default against Plaintiff. On June 29, 2022, Plaintiff filed a Motion to Set Aside Entry of Default. On the same day, Defendant filed a Motion for Judgment by Default and Hearing for Attorney's Fees.

On August 18, 2022, a hearing upon Plaintiff's Motion to Set Aside Entry of Default and Defendant's Motion for Judgment by Default was held. On August 30, 2022, this Court issued a Form 4 Order, by which "Plaintiff's Motion to Set Aside Default is DENIED" and "Defendant's Motion for Judgment by Default and Hearing for Attorney's Fees is GRANTED."

Between August 30, 2022, and September 8, 2022, there was absolutely no communication between the Parties or their counsel. On September 8, 2022, without having any communication whatsoever with Defendant or his counsel, Plaintiff filed a Motion to Reconsider requesting that this Court "reconsider the denial of [Plaintiff's] Motion to Set Aside the Entry of Default." It seeks to invoke, and relies exclusively upon, Rule 59, SCRCF. Notably, it fails to contain any affirmation or certification required by Rule 11, SCRCF.

On September 15, 2022—less than ten (10) days after the filing of Plaintiff's Motion to Reconsider—this Court scheduled a hearing on Plaintiff's Motion to Reconsider.

#### **STANDARD OF REVIEW**

The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Smith v. Fedor*, 422 S.C. 118, 125, 809 S.E.2d 612, 615 (Ct. App. 2017) (citing *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct App. 2007)) (internal quotation marks omitted). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.*



**DISCUSSION**

**I. PLAINTIFF'S MOTION TO RECONSIDER NEED NOT BE REVIEWED AND SHOULD BE STRICKEN AT THE OUTSET BECAUSE PLAINTIFF FAILED TO COMPLY WITH RULE 11, SCRPC.**

Rule 11, SCRPC provides, in pertinent part, that:

All motions filed shall contain an affirmation that the movant's counsel prior to filing the motion has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held. There is no duty of consultation on motions to dismiss, for summary judgment, for new trial, or judgment NOV, or on motions in Family Court for temporary relief pursuant to Family Court Rule 21, or in real estate foreclosure cases, or with pro se litigants. Rule 11(a), SCRPC.

It further provides that:

If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. *Id.*

Here, as explained above, there was absolutely no communication between the Parties or their counsel between this Court's issuance of a Form 4 Order being challenged by Plaintiff and the filing of Plaintiff's Motion to Reconsider being contested by Defendant. On September 8, 2022, without having any communication whatsoever with Defendant or his counsel, Plaintiff filed her Motion to Reconsider. Unsurprisingly, Plaintiff's Motion to Reconsider contains no affirmation or certification required by Rule 11, SCRPC. Clearly, Plaintiff's Motion to Reconsider fails to comply with Rule 11, SCRPC.

Because it clearly fails to comply with Rule 11, SCRCP, Plaintiff's Motion to Reconsider should be stricken, as provided in Rule 11, SCRCP. Also pursuant to Rule 11, SCRCP, an appropriate sanction—including an order to pay to Defendant the amount of the reasonable expenses incurred in connection with Plaintiff's Motion to Reconsider, this Motion, and all other related papers, including the court filing fees and a reasonable attorney's fee—should be imposed upon Plaintiff.

**II. PLAINTIFF'S MOTION TO RECONSIDER SHOULD BE DENIED WITHOUT REGARD TO ITS MERITS BECAUSE PLAINTIFF FAILED TO COMPLY WITH RULE 59, SCRCP.**

Rule 59(g), SCRCP, provides that “[a] party filing a written motion under this rule *shall* provide a copy of the motion to the judge within ten (10) days after the filing of the motion.” Rule 59(g), SCRCP (emphasis added). Interpreting this Rule, the Court of Appeals has held that “the trial court properly denied [a] motion for reconsideration because [the movant] did not timely provide a copy of the motion to the judge.” *Smith v. Fedor*, 422 S.C. 118, 126, 809 S.E.2d 612, 616 (Ct. App. 2017).

In *Smith*, the Court of Appeals emphasized that “Rule 59(g) would lack any purpose if trial courts committed error by denying the motion for failure to comply with the rule.” *Id.* The *Smith* court further noted that “our language in *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002) implies a trial court may deny the motion solely on the basis of the rule.” *Smith, supra*, 422 S.C. at 126, 809 S.E.2d at 616 (citing *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002)) (emphasis added). In *Smith*, the Court of Appeals further ruled that “[b]ecause the trial court did not err in denying [the movant's] motion for reconsideration, the arguments presented in that motion are unpreserved.” *Smith, supra*, 422 S.C.

at 126, 809 S.E.2d at 616. Consequently, the *Smith* court held, “none of [the movant’s] arguments . . . are preserved for review.” *Id.*

Here, Plaintiff’s Motion to Reconsider was filed on September 8, 2022. As of now, far more than ten (10) days have passed since the filing of Plaintiff’s Motion to Reconsider. To date, however, neither Defendant nor Defendant’s counsel has received a copy of any correspondence submitted to the judge by Plaintiff concerning her Motion to Reconsider.

Upon information and belief, Plaintiff violated Rule 59, SCRCP, by failing to provide a copy of her Motion to Reconsider to the judge within ten (10) days after the filing of it<sup>1</sup>, as required by a key provision of the very Rule Plaintiff’s Motion to Reconsider seeks to invoke. Admittedly, Plaintiff’s Motion to Reconsider properly cites, quotes, and restates each of the provisions of Rule 59, SCRCP, in its entirety, including Rule 59(g), SCRCP. Ironically, however, Plaintiff still disregarded, and failed to comply with, the mandates of Rule 59(g), which is clearly cited, quoted, and restated in its entirety in her own Motion to Reconsider.

Under *Gallagher, Smith*, and their progeny, this Court is clearly authorized to deny Plaintiff’s Motion to Reconsider solely on the basis of Plaintiff’s failure to comply with the mandates of Rule 59(g), SCRCP. *See Gallagher, supra*, 353 S.C. at 63-64, 577 S.E.2d at 219; *see also Smith, supra*, 422 S.C. at 126, 809 S.E.2d at 616. Thus, this Court need not consider Plaintiff’s Motion to Reconsider based on merit. Because Plaintiff has clearly violated Rule 59(g), SCRCP, none of her arguments associated with her Motion to Reconsider at bar are

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<sup>1</sup> Should it turn out that Plaintiff did provide a copy of her Motion to Reconsider to the judge within ten (10) days after the filing of it without serving a copy of the same upon Defendant, it should be found that Plaintiff or her counsel engaged in impermissible *ex parte* communication with the judge, warranting a proper disciplinary action. *See, e.g., Matter of White*, 328 S.C. 88, 492 S.E.2d 82 (1997).

preserved for review. *See Smith, supra*, 422 S.C. at 126, 809 S.E.2d at 616. Accordingly, no issues or arguments necessitating a hearing are present at this time. By failing to comply with Rule 59(g), SCRPC, Plaintiff has abandoned all of her arguments set forth in her Motion to Reconsider.

Therefore, Plaintiff's Motion to Reconsider should be denied without regard to its merits.

**III. PLAINTIFF'S ACCUSATION THAT THIS COURT ERRED BY OVERLOOKING SOUTH CAROLINA COURTS' DESIRE IS WHOLLY MISPLACED AND UNSUPPORTED; MICTRONICS IS INAPPLICABLE TO THE DETERMINATION OF RELIEF AVAILABLE TO PLAINTIFF.**

Having cited, quoted, and restated Rule 59, SCRPC, in its entirety, Plaintiff's Motion to Reconsider sets out to accuse this Court of having "overlooked the South Carolina Court's desire in general to decide cases upon merit and not upon a minor procedural error." The sole legal authority it references to support its accusation is *Mictronics v. South Carolina Department of Revenue*. *Mictronics v. South Carolina Department of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001).

It must be noted, however, that *Mictronics* arose under the South Carolina Administrative Procedures Act and the South Carolina Rules of the Administrative Law Judge Division ("SCRALJD"). *See generally Mictronics, supra*, 345 S.C. 506, 548 S.E.2d 223. In that case, the parties disputed the propriety of a circuit court's reversal of the ALJ's order denying the plaintiff's motion to reopen. *See id.* At issue in *Mictronics* was whether the circuit court erred in ruling that the plaintiff's motion should be governed by Rule 55, SCRPC, rather than the more stringent standard required by Rule 60, SCRPC. *Id.* at 510, 548 S.E.2d at 225. In reviewing the circuit court's decision, the Court of Appeals first noted the SCRALJD defines default differently than the rules of civil procedure. *Id.* It, then, proceeded with an in-depth analysis of the Rule 60(b)(1),

SCRCP, standards involving “mistake, inadvertence, surprise, or excusable neglect.” *Id.*; *see also* Rule 60(b)(1), SCRCP.

Here, Plaintiff’s Motion to Reconsider arises under Rule 59, SCRCP, not under Rule 60(b)(1), SCRCP. Moreover, neither Plaintiff’s Motion to Set Aside Entry of Default nor Defendant’s Motion for Judgment by Default—upon which this Court has already ruled—required an analysis of the Rule 60(b)(1) standards, which was the subject matter in *Mictronics*. Thus, *Mictronics* is not controlling or applicable here. Because Plaintiff’s Motion to Reconsider relies exclusively on *Mictronics* in accusing this Court of having “overlooked the South Carolina Court’s desire” and *Mictronics* is neither controlling nor applicable here, no further inquiries are necessary.

Any such argument as may be presented in reliance upon *Mictronics* by Plaintiff to assert that this Court committed a reversible error is wholly misplaced, unsupported, and without merit. Thus, Plaintiff’s Motion to Reconsider should be denied.

**IV. THE WHAM ANALYSIS IS INAPPLICABLE TO THE DETERMINATION OF ANY RELIEF AVAILABLE TO PLAINTIFF BECAUSE PLAINTIFF HAS FAILED TO SHOW GOOD CAUSE.**

In arguing that this Court’s decision should be based on merit, Plaintiff asserts that “[b]oth the Plaintiff and Defendant relied upon the [*sic*] *Wham v. Shearson Lehman Brothers*[.]” This assertion is absolutely baseless and seeks to introduce a fallacy.

Contrary to Plaintiff’s assertion, Defendant has never relied upon *Wham*. Rather, he has consistently taken the position that the *Wham* factors are irrelevant to the matter at bar, and thus, this Court need not apply the *Wham* analysis to this case.

In South Carolina, the standard for granting relief from an entry of default under Rule 55(c), SCRCP, “requires [the defaulting party] to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.” See, e.g., *Sundown Operating Co., Inc. v. Intedg Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) (emphasis added). “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 [movant] has a meritorious defense; and (3) the degree of prejudice to the [non-movant] 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)).

However, this 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.” *Sundown, supra*, 383 S.C. at 608, 681 S.E.2d at 888 (citing *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995)). Stated differently, where the defaulting party fails to show good cause for her default, this Court “need not consider the *Wham* factors.” *Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct. App. 2013).

Importantly, “the negligence of an attorney or insurance company is imputable to a defaulting litigant.” *Id.* “A motion under Rule 55(c) is addressed to the sound discretion of [this Court].” *Sundown, supra*, 383 S.C. at 608, 681 S.E.2d at 888 (citing *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994)).

Here, Plaintiff’s Motion to Set Aside Entry of Default was properly denied because it failed to “provide an explanation for the default[.]” See *Sundown, supra*, 383 S.C. at 608, 681 S.E.2d at 888. Further, Plaintiff Motion to Set Aside Entry of Default failed to “give reasons why vacation of the default entry would serve the interests of justice.” See *id.* Without providing any

explanation for the default or offering any reasons why vacation of the default entry would serve the interests of justice, Plaintiff's Motion to Set Aside Entry of Default merely sought to invoke the *Wham* factors. Similarly, Plaintiff's Motion to Reconsider merely repeats the same demand that the *Wham* factors be invoked while failing to articulate any facts enabling this Court to find good cause for Plaintiff's default. Plaintiff's Motion to Reconsider clearly fails to recognize that Plaintiff's showing of good cause for her default is a prerequisite to the *Wham* analysis.

Because Plaintiff's Motion to Reconsider fails to state any facts showing good cause, this Court need not, and should not, consider the *Wham* factors. *See Regions Bank, supra*, 402 S.C. at 649, 741 S.E.2d at 55; *see also Sundown, supra*, 383 S.C. at 607–08, 681 S.E.2d at 888 (holding that a court need only consider the *Wham* factors “[o]nce a party has put forth a satisfactory explanation for the default”); *Dixon, supra*, 320 S.C. at 179, 463 S.E.2d at 639 (holding that 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).

Plaintiff's Motion to Reconsider merely restates the arguments already presented to this Court through Plaintiff's Motion to Set Aside Entry of Default. In so doing, it still fails to state any facts showing good cause for Plaintiff's default. Thus, the *Wham* analysis is inapplicable here.

Clearly, Plaintiff's Motion to Reconsider is based on misrepresented facts and inapplicable case law. Accordingly, Plaintiff's Motion to Reconsider should be denied.

V. **DEFENDANT NEED NOT SHOW PREJUDICE RESULTING FROM RELIEF GRANTED TO PLAINTIFF.**

Plaintiff contends that “Defendant failed to state in their [*sic*] motion and memoranda of law how the Notice of Default . . . prejudiced their [*sic*] client in any way.” This contention

completely misses the important point in Defendant's position and erroneously presumes that the *Wham* factors are at play, requiring Defendant to establish prejudice resulting from this Court's grant of relief to Plaintiff. The truth of the matter is that Defendant is not required to state any facts to establish prejudice in this case.

As more fully discussed in Section IV above, the *Wham* factors are irrelevant and inapplicable to the matter at bar. This Court properly denied Plaintiff's Motion to Set Aside Entry of Default and granted Defendant's Motion for Judgment by Default because Plaintiff failed to "put forth a satisfactory explanation for the default" in the first place, not because it found prejudice resulting from relief granted to Plaintiff. *See Sundown, supra*, 383 S.C. at 608, 681 S.E.2d at 888. Because Plaintiff's Motion to Set Aside Entry of Default failed to state any facts showing good cause for Plaintiff's default, it was unnecessary for this Court to proceed with the *Wham* analysis to begin with. Similarly, because Plaintiff's Motion to Reconsider still fails to state any facts showing good cause, this Court need not, and should not, consider the *Wham* factors here. *See Regions Bank, supra*, 402 S.C. at 649, 741 S.E.2d at 55; *see also Sundown, supra*, 383 S.C. at 607–08, 681 S.E.2d at 888 (holding that a court need only consider the *Wham* factors "[o]nce a party has put forth a satisfactory explanation for the default"); *Dixon, supra*, 320 S.C. at 179, 463 S.E.2d at 639 (holding that 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).

Thus, any and all arguments being presented by Plaintiff concerning "prejudice"—which Plaintiff appears to draw repeatedly from *Wham* without regard to its inapplicability here—should be disregarded. Because Plaintiff's Motion to Reconsider relies on meritless "prejudice" contentions, it should be denied.

**VI. THE AMOUNT IN CONTROVERSY IS IRRELEVANT TO THE DETERMINATION OF RELIEF AVAILABLE TO PLAINTIFF.**

Next, Plaintiff argues that this Court should reconsider its ruling because “[t]he issues at hand in this case are substantial and high-valued (over \$100,000.00).” She further argues that “[t]he damages, by not allowing the Set Aside of the Default Judgment to the Counterclaim, will also result in a substantial financial burden to the Plaintiff.” In so doing, however, Plaintiff fails to cite any legal authority to support her arguments. Further, she does not explain how the amount in controversy in this case is a relevant factor in determining whether post-judgment relief is available to her.

The amount in controversy is of no consequence in this Court’s review of Plaintiff’s Motion to Reconsider (filed pursuant to Rule 59, SCRCP), Defendant’s Motion for Judgment by Default (filed pursuant to Rule 55, SCRCP), or Plaintiff’s Motion to Set Aside Entry of Default (filed pursuant to Rule 55, SCRCP). Nothing in the applicable Rules indicates that the amount in controversy should be considered in determining any relief available to the defaulting party. Moreover, the amount in controversy being alleged by Plaintiff—“over \$100,000.00”—is speculative at best and wholly without evidentiary support.

Thus, any argument presented by Plaintiff based on the amount in controversy must fail. Because Plaintiff’s Motion to Reconsider relies on baseless arguments concerning the amount in controversy, it should be denied.

**VII. PLAINTIFF’S PAST CONDUCT PRECLUDES HER FROM OBTAINING ANY POST-JUDGMENT RELIEF.**

Finally, it is argued in Plaintiff’s Motion to Reconsider that “Defendant’s attorney’s statements as to the reasoning for the default filing indicate a series of misunderstandings and

actually propel the Plaintiff's Set Aside Motion." This argument sounds extremely confusing and makes very little sense, if any, to Defendant.

Regardless of what Plaintiff intends mysteriously to argue concerning "the reasoning for the default filing[.]" the fact remains that Plaintiff has unsuccessfully pursued a default judgment against Defendant for multiple times without having any valid grounds. Because Plaintiff has repeatedly sought to obtain a default judgment against Defendant in the past, she is now precluded from arguing that this Court should "decide cases upon merit and not upon a minor procedural error" or presenting any statement based on "the interest of public policy and . . . the furtherance of justice."

Indeed, granting any relief to Plaintiff under these circumstances would be inconsistent with and antithetical to South Carolina's public policy and the traditional notions of fair play and substantial justice. Plaintiff's request—that this Court "determine the validity of the claims based upon the substantive issues rather than procedural"—being put forth now completely belies Plaintiff's intent, ideas, strategies, and position revealed by her previous conduct taken in this action.

Thus, no relief on the basis of "the interests of justice" is available to Plaintiff. Accordingly, Plaintiff's Motion to Reconsider should be denied.

#### **CONCLUSION**

Given the foregoing, Defendant respectfully requests that this Court deny Plaintiff's Motion to Reconsider and uphold its prior rulings, Order, and Judgment in this matter. Defendant further requests that an appropriate sanction pursuant to Rule 11, SCRCP—including an order to pay to Defendant the amount of the reasonable expenses incurred in connection with

Plaintiff's Motion to Reconsider, this Motion, and all other related papers, including the court filing fees and a reasonable attorney's fee—be imposed upon Plaintiff.

Respectfully submitted,

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***Counsel for the Defendant***

September 29, 2022

Lake Wylie, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
	)	CASE NUMBER: 2022-CP-46-01237
Stephanie Kozak	)	
(Personal Representative for the Estate of	)	
John Witkowski),	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Chris Cutway,	)	
	)	
Defendant.	)	

**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 29, 2022, a copy of the foregoing *Defendant’s Memorandum of Law in Opposition to Plaintiff’s Motion to Reconsider* was filed with this Court through the *SC Courts E- Filing Portal*, which will have sent notification of such filing to all counsel of record in this matter.

This 29th day of September, 2022.

**AHN LAW FIRM, LLC**

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***Counsel for the Defendant***

THE STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )  
 )  
Stephanie Kozak )  
(Personal Representative for the Estate of )  
John Adam Witkowski, )  
 ) Plaintiff, )  
 )  
vs. )  
 )  
Chris Cutway, )  
 ) Defendant. )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

**MOTION TO WITHDRAW AS  
COUNSEL OF RECORD WITHOUT  
SUBSTITUTIONS FOR PLAINTIFF**

Case No.: 2022-CP-46-01237

Pursuant to Rule 1.16 of the South Carolina rule of Professional Conduct and Rule 7 (b) of the South Carolina Rules of Civil Procedure, counsel for the Plaintiff Stephane Kozak ("Plaintiff") hereby requests that this Court allow Neil T Phillips and The Law Office of Neil T. Phillips, LLC, Attorney of record for Plaintiff, to withdraw as counsel of record for Plaintiff in the matter.

In support of the Motion, the undersigned, who is currently listed as counsel for Plaintiff, states that procedural matters associated with this litigation have led to a conflict of interest, and he is unable to proceed with the representation.

The undersigned counsel currently listed as Plaintiff's attorney affirms that a copy of this Motion was emailed and presented to Plaintiff prior to the filing thereof.

Plaintiff consents to the Motion.

The undersigned further affirms that prior to filing this Moton, he communicated with opposing Counsel and has attempted in good faith to resolve the matter contained in this Motion, but This matter could not be resolved.

(Signature on next page)

The Law Office of Neil T. Phillips, LLC

By: /s/Neil T. Phillips  
Neil T. Phillips  
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Email: neil@neilphillipslaw.com  
Fax: 877.501.9002  
SC Bar No: 0102094

January 19, 2023  
York, South Carolina

KOZAK VS. CUTWAY  
MOTION TO WITHDRAW/2022CP4601237  
6986199v.1

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STATE OF SOUTH CAROLINA ]  
COUNTY OF YORK ]  
STEPHANIE KOZAK, ]  
as Personal Representative of ]  
the Estate of John Witkowski, ]  
Plaintiff, ]  
vs. ]  
CHRIS CUTWAY, ]  
Defendant. ]

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

NOTICE and MOTION  
FOR RELIEF FROM JUDGMENT

Pursuant to:  
RULE 60(b)(4) and (5), S.C.R.C.P.,  
C.A. No. 2022-CP-46-01237

To: The Defendant above named and  
Chan M. Ahn  
Attorney for Defendant  
4381 Charlotte Highway, Suite 103  
Lake Wylie, South Carolina 29710  
chan@ahnlawfirmllc.com

You or your attorney should appear before this Court to present evidence or argument, if any you have, relating to the Motion and Petition herein, as follows:

**DATE AND TIME:** To be set by the Judge or Clerk of the Circuit Court, or as soon thereafter as counsel may be heard.

**PLACE:** York County Historic Courthouse  
2 South Congress Street  
York, South Carolina 29745,  
or at such other place as the Clerk or Court may designate

Pursuant to Rule 60(b), S.C.R.C.P., the Plaintiff STEPHANIE KOZAK, as Personal Representative of the Estate of John Witkowski, by and through her attorney, moves this Court for an Order:

- 1) Relieving the Movant from the Order filed November 15, 2023 in the above-captioned action; a copy of the said Order is attached hereto and incorporated herein as Exhibit "A"; and
- 2) For such other and further relief as this Court may deem just and proper.

This Motion is based on the following bases:

1. This matter began with the Plaintiff KOZAK filing her Complaint for damages against the Defendant CUTWAY on April 20, 2022.
2. On May 21, 2022, CUTWAY filed his Answer and Counterclaim in response to the Complaint.
3. Counsel for KOZAK failed to timely file a respond after a Motion to Reconsider by Order filed October 5, 2022.
4. On June 23, 2022, the Defendant CUTWAY filed a default on the failure of KOZAK to respond to the Answer and Counterclaim. This was followed with a Motion for Default Judgment on June 29, 2023.
5. In response to the Motion of KOZAK's counsel, the Court refused to set aside the default by its Order of August 22, 2022. This was confirmed after a Motion to Reconsider by Order filed October 5, 2022.
6. By Order and Final Judgment filed November 15, 2022, the Court entered default judgment for the Defendant CUTWAY. This Order purports to recite a dismissal of the entire action.
7. The Movant contends that nothing in the procedural history of the case presented grounds or a basis to dismiss the Plaintiff's original Complaint or the relief sought thereby. Lacking a procedural basis, and lacking grounds, any Order dismissing the Complaint herein is void.
8. In discussing the meaning of a void judgment, our Supreme Court has held as follows:

A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely "voidable." 46 AM.JUR.2D *Judgments* § 31 (1994). Generally, a judgment is void only if a court acts without jurisdiction. *Ross v. Richland Co.*, 270 S.C. 100, 240 S.E.2d 649 (1978). Irregularities which do not involve jurisdiction do not render a judgment void. *Genobles v. West*, 23 S.C. 154 (1885). There is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal. *Piana v. Piana*, 239 S.C. 367, 123 S.E.2d 297 (1961). *SEE ALSO Petroleum Transportation Inc. v. SCPSC*, 255 S.C. 419, 179 S.E.2d 326, 329 (1971). A judgment will not be vacated for a mere irregularity which does not affect the justice of the case, and of which the party could have availed himself, but did not do so until judgment was rendered against him. *Cosgrove v. Butler*, 1 S.C. 241 (1869).  
 [Thomas & Howard Co., Inc. v. T.W. Graham and Co., 318 S.C. 286, \_\_, 457 S.E.2d 340, 343 (1995); formatting added.]

9. As in the *Thomas & Howard* case, *supra*, the Circuit Court cannot issue an Order when the issue in question is not before it. The dismissal of the Plaintiff's Complaint was never noticed as an issue, nor argued before the Circuit Court. The Court lacked jurisdiction to issue an

Order ending the entire case.

10. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, show that the judgment is void, as defined by Rule 60(b)(4), S.C.R.C.P.

11. On knowledge and information, the facts alleged herein, and the reasonable inferences thereof, show that it is no longer equitable that the judgment should have prospective application, as defined by Rule 60(b)(5), S.C.R.C.P.

Pursuant to Rule 11(a), S.C.R.C.P., counsel for the Movant has consulted with opposing Counsel or attempted in good faith to resolve the matter contained in this Motion, or is precluded from such duty due to the conclusory nature hereof, as defined by the said Rule.

This Motion is based upon the applicable law, the matter set out herein below in this Motion and Petition by way of affidavits and other attachments hereto, and on the files, papers and pleadings in this Probate action.

/s/ John Martin Foster  
Attorney for Plaintiff  
SC Bar No. 2086

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October 6, 2023

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA	]	IN THE COURT OF COMMON PLEAS
	]	
COUNTY OF YORK	]	SIXTEENTH JUDICIAL CIRCUIT
	]	
STEPHANIE KOZAK,	]	
as Personal Representative of	]	
the Estate of John Witkowski,	]	
	]	
	]	
	]	C.A. No. 2022-CP-46-01237
vs.	]	
	]	
CHRIS CUTWAY,	]	
	]	
	]	
	]	

The undersigned counsel herein certifies that, pursuant to Rule 5(b)(1), S.C.R.C.P, on October 6, 2023 he served copies of the following pleadings, documents or papers in the above-captioned and numbered civil action:

Notice and Motion for Relief from Judgment, pursuant to Rule 60(b)(4) and (b)(5), S.C.R.C.P.; and this Certificate of Service.

by serving the following lawyers admitted to practice law in this state using the lawyer’s primary e-mail address listed in the Attorney Information System, as allowed by Section (e) of the Order of the Supreme Court entitled “Re: Operation of the Trial Courts During the Coronavirus Emergency (As Amended effective February 4, 2022)”.

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/s/ John Martin Foster  
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October 6, 2023

Rock Hill, South Carolina

STATE OF SOUTH CAROLINA )  
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COUNTY OF YORK )  
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Stephanie Kozak )  
(As Personal Representative for the Estate of )  
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Plaintiff, )  
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vs. )  
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Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NUMBER: 2022-CP-46-01237

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT**

The Defendant, Chris Cutway ("Defendant"), respectfully submits this *Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Relief from Judgment*. Defendant respectfully avers that *Plaintiff's Motion for Relief from Judgment* ("Plaintiff's Motion" or "*Motion for Relief from Judgment*," where appropriate) is wholly without merit and requests that this Court deny it based on the following:

**BACKGROUND**

On November 19, 2021, Stephanie Kozak was appointed as the Personal Representative of the Estate of John Witkowski in the York County Probate Court. See Exhibit A.

On April 20, 2022, the Plaintiff, in the capacity "as Personal Representative of the Estate of John Witkowski" ("Plaintiff"), initiated this lawsuit asserting one (1) cause of action for Claim and Delivery against Defendant. On April 24, 2022, a copy of Plaintiff's Summons and Complaint was served upon Defendant.

On May 21, 2022, Defendant timely filed and served his Answer and Counterclaims. Plaintiff failed to respond to Defendant's Counterclaims in a timely manner.

On June 23, 2022, this Court issued an Entry/Order of Default against Plaintiff. On June 29, 2022, Plaintiff filed a *Motion to Set Aside Entry of Default*. On the same day, Defendant filed a *Motion for Judgment by Default* and Hearing for Attorney's Fees.

On August 30, 2022, and after hearing on the pending motions, this Court issued a Form 4 Order, by which "Plaintiff's Motion to Set Aside Default is DENIED" and "Defendant's Motion for Judgment by Default and Hearing for Attorney's Fees is GRANTED."

On November 7, 2022, Plaintiff executed and filed an Application for Settlement of the Estate of John Witkowski with the York County Probate Court and requested that she be discharged as the Personal Representative of said Estate and the appointment of the Personal Representative be terminated. See Exhibit B.

On November 15, 2022, this Court issued an Order and Final Judgment in the total amount of \$13,925.96 in favor of Defendant and against Plaintiff. Accordingly, the Clerk of Court entered and enrolled said total judgment amount in the Judgment Index.

On December 7, 2022, the York County Probate Court issued an Order closing the Estate of John Witkowski. See Exhibit C.

Also on December 7, 2022, the York County Probate Court issued a Termination of Appointment, by which the appointment of Stephanie Kozak as the Personal Representative of Estate of John Witkowski was duly terminated. See Exhibit D.

On October 6, 2023—almost eleven (11) months after the Court's issuance of the Order and Final Judgment in this matter—Plaintiff filed the *Motion for Relief from Judgment*.

## DISCUSSION

### **I. THE MOTION FOR RELIEF FROM JUDGMENT MUST BE DENIED BECAUSE THE MOVANT HAS NO STANDING TO SEEK RELIEF, PURSUANT TO RULE 17, SCRCP.**

Rule 17(a), SCRCP, provides, in pertinent part, that:

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought[.]

In examining and applying this Rule, the Court of Appeals has consistently explained that “[a] plaintiff must have standing to institute an action.” *See, e.g., Sloan v. Greenville Cnty.*, 356 S.C. 531, 547, 590 S.E.2d 338, 347 (Ct. App. 2003). The Court of Appeals has also explained that “[s]tanding refers to a party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *See, e.g., Bank of Am. N.A. v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 480 (Ct. App. 2013).

To have standing, the Court of Appeals has emphasized, “one must be a real party in interest. A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” *See Sloan, supra*, 356 S.C. at 547, 590 S.E.2d at 347.

“[T]he burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff.” *Iisher ex rel. Estate of Shaw-Baker v. Iluckabee*, 422 S.C. 234, 241, 811 S.E.2d 739, 742 (2018). “Under ordinary circumstances, the Probate Court grants the personal representative the exclusive authority to bring civil actions . . . on behalf of an estate.” *Id.* at 238, 811 S.E.2d at 741.

Here, the York County Probate Court's record clearly shows that the appointment of Stephanie Kozak as the Personal Representative of Estate of John Witkowski was duly terminated as of December 7, 2022. *See Exhibit D.* Thus, when the *Motion for Relief from Judgment* at bar was filed on October 6, 2023, Stephanie Kozak was no longer the Personal Representative of the Estate of John Witkowski. Accordingly, she did not have standing to seek any relief on behalf of the Estate of John Witkowski at that time. Similarly, Stephanie Kozak has no standing now to seek any relief in this matter. In essence, the only Plaintiff in this action—that is, “Stephanie Kozak as Personal Representative for the Estate of John Witkowski”—has not existed since December 7, 2022, because the appointment of Stephanie Kozak as the Personal Representative was terminated at that time.

Because Stephanie Kozak lost her status as the Personal Representative of the Estate of John Witkowski on December 7, 2022, she did not have standing to file the pending *Motion for Relief from Judgment* on October 6, 2023. Similarly, no relief could now be granted to her because she no longer is a real party in interest under Rule 17(a), SCRCP. Moreover, when requesting that her appointment as the Personal Representative of the Estate of John Witkowski be terminated on November 7, 2022, she effectively abandoned all of her claims against Defendant in this action.

The only Plaintiff in this action—“Stephanie Kozak (as Personal Representative for the Estate of John Witkowski)” —is no longer present in this action. This is so because Stephanie Kozak voluntarily caused a real party interest to be eliminated. Thus, no real party in interest exists at this time to whom this Court could grant relief.

Accordingly, this Court need not make any inquiry into the merits of the *Motion for Relief from Judgment*. Absent the Movant's standing, the *Motion for Relief from Judgment* at bar cannot

be properly before this Court. Therefore, this Court should deny the *Motion for Relief from Judgment* for lack of standing, without having to review the content or merits thereof.

**II. THE MOTION FOR RELIEF FROM JUDGMENT MUST BE DENIED BECAUSE THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDES ANY RELIEF AVAILABLE TO MOVANT.**

“Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.” *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489, S.E.2d 472, 477 (1997). “The purpose of the doctrine is to ensure the integrity of the judicial process[.]” *Corthran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004).

The elements necessary for the application of the doctrine of judicial estoppel are:

- (1) two inconsistent positions taken by the same party or parties in privity with one another;
- (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
- (3) the party taking the position must have been successful in maintaining that position and have received some benefit;
- (4) the inconsistency must be part of an intentional effort to mislead the court; and
- (5) the two positions must be totally inconsistent. *Id.* at 215-16, 592 S.E.2d at 532.

“[T]he term ‘privity,’ when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right.” *Carrigg v. Cannon*, 347 S.C. 75, 80, 552 S.E.2d 767, 770 (Ct. App. 2001) (alteration in original).

Here, all of these elements are plainly satisfied. First, as described above, on November 7, 2022, Stephanie Kozak requested to the York County Probate Court that she be discharged as the Personal Representative of the Estate of John Witkowski and the appointment of the Personal

Representative be terminated. See Exhibit B. Subsequently, on October 6, 2023, she filed the *Motion for Relief from Judgment*, requesting that this Court grant her relief in the capacity “as the Personal Representative of the Estate of John Witkowski.” These two positions, taken by the same party, are clearly inconsistent and cannot be reconciled.

Second, these two inconsistent positions were taken in this action and the probate proceedings pending in the York County Probate Court, with which Defendant had filed a Statement of Creditor’s Claim against the Estate of John Witkowski and in connection with Defendant’s Counterclaims in this action while Stephanie Kozak was still acting as said Estate’s Personal Representative. See Exhibit E. Clearly, this action and the probate proceedings are closely related to each other and involve the same parties.

Third, Stephanie Kozak, who takes the inconsistent positions at issue, has been successful in maintaining one of the two inconsistent positions and has received some benefit in that she succeeded in disallowing Defendant’s claims for payment during the probate proceedings pending in the York County Probate Court. See Exhibit F. Indeed, these claims are the very subject matter of Defendant’s Counterclaims in this action, and Stephanie Kozak indisputably received benefits as the Personal Representative of the Estate by disallowing Defendant’s claims.

Fourth, Stephanie Kozak’s inconsistency cannot possibly be anything other than a product of her intentional effort to mislead this Court and/or the York County Probate Court, particularly given that she sought and procured the termination of the appointment of her as the Personal Representative in the York County Probate Court after disallowing Defendant’s claim, liquidating the assets of the Estate of John Witkowski, and taking the proceeds therefrom. She, then, filed this *Motion for Relief from Judgment* at bar, requesting that this Court grant her relief “as the

Personal Representative of the Estate of John Witkowski, in an apparent effort to “have her cake and eat it, too.”

Finally, the fifth element is easily satisfied because Stephanie Kozak’s two conflicting positions—*i.e.*, (1) requesting that the York County Probate Court discharge her as the Personal Representative; and (2) requesting that this Court grant her relief “as the Personal Representative”—are totally inconsistent and irreconcilable.

As shown above, all of the elements required for the application of the doctrine of judicial estoppel are plainly satisfied. Accordingly, no relief is available to the Movant (Stephanie Kozak, or the Plaintiff) under the doctrine of judicial estoppel.

Therefore, the *Motion for Relief from Judgment* is without merit and should be denied.

**III. THE MOTION FOR RELIEF FROM JUDGMENT MUST BE DENIED BECAUSE IT WAS NOT MADE WITHIN A REASONABLE TIME**

The *Motion for Relief from Judgment* purports to rely on Rule 60(b)(4) and Rule 60(b)(5), SCRCPP.

Rule 60(b), SCRCPP, provides, in pertinent part, that “[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken.”

Because the *Motion for Relief from Judgment* does not seek to invoke subsections (1), (2), or (3) of Rule 60, SCRCPP, the one-year period within which a Rule 60 motion must be made does not apply here. It follows, then, said *Motion for Relief from Judgment* must have been made “within a reasonable time.”

As explained above, the *Motion for Relief from Judgment* at bar was made on October 6, 2023—almost eleven (11) months after the Court’s issuance of the Order and Final Judgment in

this matter. Defendant contends that it was not made within a reasonable time. Indeed, eleven (11) months cannot be deemed an insubstantial period of time, and thus, such a delayed making of said Motion cannot be justified or reasonably explained.

Therefore, the *Motion for Relief from Judgment* should be denied on the grounds that it failed to satisfy the filing requirements prescribed under Rule 60, SCRCP.

**CONCLUSION**

Given the foregoing, Defendant respectfully requests that this Court deny *the Motion for Relief from Judgment* and uphold all of its prior rulings, Order, and Judgment in this matter.

Respectfully submitted,

**AHN LAW FIRM, LLC**

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January 23, 2024

Lake Wylie, South Carolina