

STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

On Appeal from Charleston County
Court of Common Pleas

The Honorable Roger M Young, Circuit Judge
The Honorable Daniel F Pieper, Circuit Judge

Case No 06-CP-10-1578

Lawton Limehouse, Jr

RESPONDENT,

v

Paul H Hulsey and The Hulsey
Litigation Group, LLC,

APPELLANTS

APPELLANTS' FINAL BRIEF

Robert H Hood
James B Hood
John K Weedon
HOOD LAW FIRM, LLC
Post Office Box 1508
Charleston, SC 29402
(843) 577-4435

A Camden Lewis
Ariail E King
LEWIS & BABCOCK, LLP
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

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Table of Contents

Table of Authorities	111
Statement of the Issues on Appeal	1
Statement of the Case	2
Statement of the Facts	4
Argument	8
I The lower court did not properly apply Rule 55, SCRCP	8
A The lower court used the wrong standard in considering whether there was good cause to set aside the entry of default under Rule 55(c)	8
B The entry of default should be set aside because the answer was not late, or in the alternative, the confusion about the time to answer coupled with the admitted lack of prejudice constitutes good cause to aside the entry of default	13
C Jurisdiction has not been revested in the state court because the remand from federal court is not complete under 28 U S C A §1447(c), which § mandates that the District Court mail a certified copy of the order of remand to the clerk of the state court before jurisdiction attaches	15
II The lower court did not use the procedure set out in Rule 55, SCRCP	17
A Rule 55, SCRCP changed the procedures for default judgments	17
B The lower court erred in failing to inquire as to the truthfulness under Rule 55 regarding the press conference, the article itself, the website, and Hulseley's net worth	19

C	A new trial should be granted because the unduly restrictive procedure in the default damages hearing is inconsistent with Rule 55 and deprived the Appellants of their Due Process rights	21
III	The Trial Court failed to consider a Rule 60(b) motion after the hearing on damages	31
IV	The trial court erred in allowing evidence on damages to reputation when the alleged defamatory statement was about a corporation, which can only recover for pecuniary loss	33
V	The Award of Punitive Damages is founded on trial error and constitutes a denial of due process	38
	Conclusion	43
	Certificate of Counsel	46

Table of Authorities

Cases

<u>Abofreka v Alston Tobacco Co</u> , 288 S C 122 (1986)	36
<u>Ammons v Hood</u> , 288 S C 278, 341 S E 2d 816 (Ct App 1986)	17, 22
<u>Atkinson v Orkin Exterminating Co.</u> , 361 S C 156, 604 S E 2d 385 (2004)	38
<u>Austin v Specialty Transp Services, Inc.</u> , 358 S C 298, 594 S E 2d 867 (Ct App 2004)	39
<u>Bailey v Bailey</u> , 312 S C 454, 458 (1994)	34
<u>Blandon v Coleman</u> , 285 S C 472 (1985)	34
<u>BMW of North America, Inc v Gore</u> , 517 U S 559 (1996)	38, 42
<u>Bodygear Activewear, Inc v Counter Intelligence Services</u> , 946 So 2d 1148 (Fla App 4 Dist 2006)	23
<u>Bradley v Hullander</u> , 272 S C 6 (1978)	34
<u>Capps v Watts</u> , 271 S C 276 (1978)	36
<u>Catawba Indian Tribe v State</u> , 372 S C 519, 642 S E 2d 751(2007)	13
<u>Dauenhauer v Superior Court</u> , 149 Ca 2d 22, 307 P 2d 724 (1957)	14
<u>Davis v Hamm</u> , 300 S C 284 (S C App 1989)	34
<u>Doe v S B M</u> , 327 S C 352, 488 S E 2d 878 (Ct App 1997)	17, 22
<u>Downey v Dixon</u> , 362 S E 2d 317	26, 27
<u>Dymon, Inc v Hyman</u> , 305 S C 170, 406 S E 2d 388 (Ct App 1991)	19
<u>Flint v Coffin</u> , 176 F 872 (4th Cir 1910)	18
<u>Gadsden v Home Fertilizer & Chemical Co.</u> , 89 S C 483, 472 S E 15 (1911)	29
<u>Gamble v Stevenson</u> , 305 S C 104, 406 S E 2d 350 (1991)	38, 42
<u>Gillian v Gillian</u> , 65 S C 129, 132, 43 S E 386(1903)	29
<u>Hill v Dotts</u> , 345 S C 304, 547 S E 2d 894 (Ct App 2001)	11

<u>Hospital Care Corp v Commercial Casualty Ins Co</u> , 194 S C 370(1940)	33
<u>Howard v Holiday Inns, Inc</u> , 271 S C 238, 246 S E 2d 880 (1978)	17, 21, 22, 23, 26, 35
<u>Hunter v Spaulding</u> , 388 S E 2d 630 (N C App 1990)	24
<u>Jackson v Midlands Human Resources Center</u> , 296 S C 526, 374 S E 2d 505 (Ct App 1988)	30, 35, 36
<u>James v Horace Mann Ins Co</u> , 371 S C 187, 638 S E 2d 667, 670 (2006),	39
<u>Jenkins v Jenkins</u> , 545 S E 2d 531 (S C Ct App 2001)	36
<u>Johnson v Baldwin</u> , 221 S C 141 (1952)	34
<u>Lewis v Congress of Racial Equality and/or C O R E , Inc</u> , 275 S C 556, 560, 274 S E 2d 287 (1981)	22, 29, 30
<u>Loges v Mack Trucks, Inc</u> , 417 S E 2d 538 (1992)	36
<u>Lowe's of Georgia, Inc v Constantino</u> , 288 S C 106, 341 S E 2d 382 (Ct App 1986)	31, 32
<u>Mathews v Eldridge</u> , 424 U S 319 (1976)	23
<u>Maximino Flores, et al v Lawton Limehouse, Sr , et al</u> , C A No 2 04-1295-23	2
<u>Melton v Olenik</u> , 379 S C 45, 664 S E 2d 487 (Ct App 2008)	14
<u>Micronics, Inc v South Carolina Department of Revenue</u> , 345 S C 506, 548 S E 2d 223(Ct App 2001)	9
<u>Mitchell v Fortis Ins Co</u> , 385 S C 570, 686 S E 2d 176 (2009)	42
<u>Newman v Richland County Hist Preserv Com'n</u> , 325 S C 79 (1997)	34
<u>North Greenville Coll v Sherman Constr Co , Inc</u> , 243 S E 2d 441 (S C 1978)	26
<u>Pacific Mutual Life Ins v Haslip</u> , 499 U S 1 (1991)	38, 39
<u>Pinckney v Atkins</u> , 317 S C 340, 454 S E 2d 339 (Ct App 1995)	29
<u>Pond Place Partners, Inc v Poole</u> , 567 S E 2d 881, 892 (Ct App S C 2002)	41

<u>Ricks v Weinrauch</u> , 293 S C 372, 360 S E 2d 535 (Ct App 1987)	11
<u>River Road Co v Energy Master Products, Inc.</u> , 300, S C 316, 387 S E 2d 694 (Ct App 1989)	29
<u>Roche v Young Brothers, Inc of Florence</u> , 332 S C 75, 504 S E 2d 311 (1998)	17, 22
<u>Scott v Greenville Housing Authority</u> , 579 S E 2d 151 (S C Ct App 2003)	27
<u>Simpson Strong-Tie Company, Inc v Stewart, Estes & Donnell</u> , 232 S W 3d 18 (2007)	41
<u>Sloan v School Dist of Greenville County</u> , 342 S C 515 (S C App 2000)	34
<u>Smith v Smith</u> , 194 S C 247 (1940)	36
<u>South Carolina Farm Bureau Mut Ins Co v Love Chevrolet, Inc.</u> , 324 S C 149, 478 S E 2d 57(1996)	38
<u>Stark Truss Co , Inc v Superior Const Corp.</u> , 360 S C 503, 602 S E 2d 99 (Ct App 2004)	13, 18, 19
<u>State v Brewington</u> , 226 S E 2d 249, 250 (S C 1976)	26
<u>State v Petit</u> , 142 S E 725, 731 (S C 1928)	36
<u>Sundown Operating Co , Inc v Intedge Indus , Inc.</u> , 383 S C 601, 608, 681 S E 2d 885, 889 (S C 2009)	9, 12
<u>Thompson v Thompson</u> , 214 S C 61 (1948)	34
<u>Todd v Zaldo</u> , 304 S C 275, 278 (S C App 1991)	34
<u>Twohy v First Nat'l Bank</u> , 758 F 2d 1185 (7 th Cir 1985)	34
<u>United States v Palmer</u> , 578 F 2d 144(5th Cir 1978)	34
<u>Ward v Griffin</u> , 295 S C 219 (S C App 1988)	34
<u>Wardlaw v Peck</u> , 282 S C 199 (Ct App 1984)	36
<u>Whaley v CSX Transp , Inc.</u> , 609 S E 2d 286, 297 (S C 2005)	36
<u>Wham v Shearson Lehman Bros , Inc.</u> , 298 S C 462, 381 S E 2d 499 Ct App 1989)	9, 12

<u>Wiggins v Todd</u> , 296 S C 432, 373 S E 2d 704 (Ct App 1988)	29
<u>Williams v Watkins</u> , 384 S C 319, 681 S E 2d 914 (Ct App 2009)	33

Statutes

28 U S C A § 1446	15
28 U S C A § 1447	15, 44
S C Code Ann § 33-44-201 (1976)	34
S C Code Ann § 33-44-303 (1976)	34
N C G S § 1A-1, Rule 12	14
West's Ann Cal C C P § 430 90	14

Other Authorities

Rule 5, Ark R Civ Pro	14
Rule 54, SCRC P	29
Rule 55, SCRC P	8, 11, 12, 17, 18, 19, 20, 21, 22, 23, 31
Rule 60, SCRC P	9, 11, 12, 31, 32
Rule 104, SCRE	14
H Lightsey, J Flanagan, <i>South Carolina Civil Procedure</i> , 82 (2nd Ed 1985)	25
McCormick on Evidence, § 40, p 78 (1972)	26
10A Wright, Miller & Kane, <u>Federal Practice and Procedure Civil 3d</u> , § 2681	9
10A Wright, Miller & Kane, <u>Federal Practice and Procedure Civil 3d</u> , §2682	18
Restatement of Torts (Second)	41

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

- 1 Did the lower court err in failing to properly apply Rule 55, SCRCPP?
- 2 Did the lower court err in failing to use the procedure in Rule 55, SCRCPP?
- 3 Did the trial court improperly fail to consider a Rule 60(b) motion after the hearing on damages?
- 4 Did the lower court err in allowing evidence on damages to reputation, when the alleged defamatory statement was about a corporation?
- 5 Did the punitive damages award, which was founded on trial errors, constitute a denial of due process?

STATEMENT OF THE CASE

This is a slander action against an attorney and his practice, Paul H. Hulsey and the Hulsey Litigation Group, LLC (collectively referred to as “Hulsey” or “Appellants”), brought by Lawton Limehouse, Jr., a disgruntled defendant in a class action filed in federal court by Hulsey on behalf of former Limehouse employees.¹ The slander cause of action is predicated on statements made by Hulsey to a reporter during the course of the underlying RICO litigation, which allegedly included statements by Hulsey accusing Limehouse of “creating a perfect racketeering enterprise just like Tony Soprano.”

Limehouse filed a summons and complaint in this action on April 19, 2006, which was served on the Appellants on April 21, 2006 (as to Appellant Hulsey) and April 20, 2006 (as to the Appellant LLC) [R p. 35]. The Hulsey Appellants filed a notice of removal² to federal district court on May 5, 2006 [R p. 45]. On motion of Limehouse, the District Judge remanded the matter to state court.

The federal court order of remand was signed by U.S. District Court Judge Houck on July 19, 2006, and entered on the docket by the District Court Clerk on July 20, 2006 [R p. 22, 34]. A copy of the remand order was filed in the Charleston County Clerk of Court’s Office on July 21, 2006, and on July 27, 2006, the Charleston County Clerk of Court mailed a notice as to the filing of the remand order to counsel of record [R p. 31]. The remand order was not certified. Thereafter, on August 22, 2006, Limehouse filed a

¹ Maximino Flores, et al. v. Lawton Limehouse, Sr., et al., C.A. No. 204-1295-23 [R p. 67]

² Hulsey removed the case based on the pending RICO action in federal court which would be res judicata/dispositive of the truth of the allegations and a complete defense to the defamation claims [R p. 1081]

request for “entry of default,” along with affidavits of service and affidavits of default, in the Charleston County Clerk of Court’s Office [R p 132-137] Limehouse did not serve the Request for “entry of default” or the affidavits on Hulsey

The Charleston County of Clerk of Court entered default on August 22, 2006, and on August 24, 2006, the Clerk mailed a Form 4 order to all parties noting the entry of default [R p 30, 19] On receiving the notice of “entry of default,” Hulsey immediately filed an answer³ and made a motion to set aside the “entry of default” on August 29, 2006 [R p 234, 140] The motion to set aside the “entry of default” was denied by the Honorable Daniel F Pieper [R p 10]

The case then came before the Honorable Roger M Young, who presided over a jury trial on damages on November 9-13, 2008 The jury returned a verdict of \$1,000,000 in actual damages and \$2,600,000 in punitive damages against the Appellants, and judgment has been entered [R p 888, 5]

Hulsey made posttrial motions for judgment notwithstanding the jury’s verdict, and new trial, a Rule 60(b)(4) motion for relief from judgment based on the issue of subject matter jurisdiction, and a Rule 60(b)(1) motion for relief from judgment based on excusable neglect [R p 381, 410] Judge Young denied all of the motions [R p 4] Hulsey and the Hulsey firm timely served and filed a Notices of Appeal on January 27, 2010 and January 29, 2010, respectively [R p 420, 422] By order dated February 25, 2010, this Court consolidated the cases for appeal

³ Although by Hulsey’s calculation the answer was not yet due until August 31, 2006

STATEMENT OF THE FACTS

Respondent Lawton Limehouse, Jr (“Limehouse” or “Respondent”) and his father owned and operated an employment staffing agency, L & L Services, LLC, in Charleston County. In 2004, Hulsey filed a class action lawsuit in federal court on behalf of former L&L employees,⁴ alleging violations of RICO, Racketeer Influenced and Corrupt Organizations Act, and other federal and state laws (“the RICO case”).⁴ Limehouse, his father, and L & L Services were named as defendants. As described by the Honorable W. Weston Houck, “the plaintiffs alleged that to obtain cheap labor, the defendants hired unauthorized aliens and then exploited them under the threat of deportation.” [R p. 199]

While that case was still pending, Limehouse filed the complaint in this case, alleging that, on or about April 23, 2004, Hulsey “held a press conference or otherwise made false statements about the Plaintiff to certain news agencies including but not limited to a reporter from the [Charleston] “Post & Courier staff,” which statements included

- a) The Plaintiff had engaged in a classic racketeering scheme,
- b) The Plaintiff’s conduct set the community back 150 years,
- c) The Plaintiff engaged in a blatant case of indentured servitude, and
- d) The Plaintiff created a perfect racketeering enterprise just like Tony Soprano

[R p. 40] Respondent further alleged that these statements were published by the Charleston Post & Courier on April 24, 2004. [R p. 42] Limehouse sought actual and

⁴ Other federal and state causes of action included claims under the Fair Labor Standards Act and the South Carolina Payment of Wages Act, along with common law causes of action for breach of contract, unjust enrichment and disgorgement of profits, civil conspiracy and an accounting.

punitive damages, alleging that he had suffered general damages including embarrassment, humiliation, mental suffering, and special damages including the loss of his business and the legal costs of defending the underlying federal class action [R p 44]

The Complaint in this case was served on April 21, 2006 (as to Paul Hulsey) and April 20, 2006 (as to the Hulsey Litigation Group) [R p 132-133] Appellants filed a notice of removal to federal district court on May 5, 2006, which immediately divested the state court of jurisdiction over the case⁵ [R p 45] On motion of Limehouse, the District Judge remanded the matter to state court [R p 103, 22] In the meantime, in the RICO case, Hulsey's plaintiff clients survived the Limehouse defendants' motions to dismiss and for summary judgment, and the case was poised for class action certification [R p 199, 205]¹ Although Judge Houck found that there were issues for trial, [R p 199]m the case ultimately settled prior to trial

Upon the remand of this action, Hulsey calculated the answer date as 30 days, plus 5 days for mailing, from the date of the order of remand (though uncertified) However, on August 21, 2006, Limehouse submitted affidavits of default, without serving the same on Appellants, and on August 22, 2006, the clerk made the "entry of default" Hulsey filed an answer on August 29, 2006, and also moved to set aside the "entry of default," which was heard before the Honorable Daniel F Pieper [R p 234, 140] Judge Pieper held that the answer was late and would not allow it to stand even though even though the parties and the court took different views on when the answer

⁵ Hulsey removed the case to federal court on the grounds that the allegations fell within the jurisdiction of the still pending federal action [R p 47]

was actually due because it was -- as Judge Pieper himself noted -- a novel question of law [R p 12]

Although the matter before Judge Pieper only involved Appellants' Motion to set aside the entry of default, the order not only denied that motion, it granted a default judgment despite the fact that Respondent had made no such motion. The order also directed that a trial be held as to damages [R p 17-18]

On February 4-6, 2008, the trial of a related case involving Respondent's father took place. The complaints in the two cases were virtually identical. That case is currently on appeal.⁶ Hulsey also filed a motion to stay the trial in this case, pending a decision from the Court of Appeals, on the grounds that many of the issues on appeal, including the proper method for trial, would be determined by the appeal. The lower court denied this motion and set the matter for a damages trial.

In preparation for the damages trial, Hulsey served Interrogatories and Requests for Production on July 20, 2009 [R p 243]. Respondent took the position that he did not have to respond to discovery because Hulsey was in default. *Id.* Hulsey filed a motion for continuance, based on Respondent's failure to respond to discovery.⁷ At the hearing on the Motion for Continuance, Judge Young found "As far as discovery goes, I'm not aware you get discovery on that. I'm of the opinion that you don't." Tr of 11-14-09 hrg, 36 18-22 [Supp R p 36 18-22]

Hulsey also filed multiple pre-trial motions prior to the November 2009 trial. In one motion, Hulsey moved to dismiss the business damages on the grounds that

⁶ At the time this initial brief was prepared, that case had been argued to this Court, but no opinion had been issued.

⁷ Appellants had filed a Motion to Compel, but it had not been scheduled for a hearing prior to the filing of the Motion for Continuance.

Respondent lacked standing to assert any damages for the business and the business itself was not a party [R p 366, 318] The court denied this motion [R p 458, 460] Hulsey also sought to exclude damages to Respondent's reputation on the grounds that the allegedly defamatory statement was about the business, which, by law, cannot suffer injury to reputation [R p 338, 345] This motion, too, was denied [R p 459] The court also denied the motion in which Hulsey sought to exclude any testimony that the allegedly defamatory statement was about Respondent [R p 458,460] This basis for this motion was judicial estoppel, because Respondent's father, through the attorney in this case, had asserted the statements were about him in a previous trial [R p 306, 318] Finally, Hulsey asked the court exclude any negative comments about default, in an effort to limit Respondent from claiming that Hulsey was a "greedy lawyer" who "mocked justice" [R p 530, 334] The lower court denied this motion finding that "the only thing I thing I would limit you on at this point is to say he was deliberately in default If you said that, that would be incorrect" [R p 469] Without any other restrictions, Respondent opened his case by saying "This case is about a rich, hotshot lawyer" who made defamatory statements "to line his pockets" [R p 496] Hulsey's objections (and motion for mistrial) to such statements were overruled [R p 496]

Respondent filed a motion in limine to severely limit Appellants' cross examination [R p 439-441] Just prior to opening arguments, Judge Young ruled on the motion and set the method of trial, as he explained to Appellants "I'm not quite sure what it is you intend to offer You'll be allowed to talk about things on cross examination, but it's clear that you can cross-examine their witnesses, you can object to the plaintiff's evidence You're not allowed to offer evidence of your own" [R p

443 13-18] The court clarified that “to make a particular ruling, I’ll just have to wait until the question gets asked ” [R p 451 10-19] During the trial however, the court did in fact limit severely Appellant’s cross-examination The lower court would not allow Appellants to introduce the article which contained the allegedly defamatory statements or even cross-examine the witnesses about that article For example, Appellants wanted to cross examine witnesses Amy Limehouse Eager and Jean Limehouse on the article The lower court held

Just for the record, just before Mr Lewis was going to have a cross-examination of Ms Eager and Ms Limehouse, we had a bench conference where he would state that he—the only questions that he intended to ask her were to bring out the newspaper article, that there was not actual reference to the name Lawton Limehouse Junior, and I told him that I was not going to allow him to refer to any of the contents contained within the actual article since that was not in evidence and we were going to—that would, of course, in my opinion, go to the merits of liability, which, again, he’s not allowed to do on a default damages hearing

[R p 791 22-368 9] As a result, the jury was only presented with a one-sided view of the evidence even though such evidence went to both liability and damages

Ultimately, the jury returned a verdict of \$1,000,000 in actual damages and \$2,600,000 in punitive damages against Appellants

ARGUMENT

I The lower court did not properly apply Rule 55, SCRPC

A The lower court used the wrong standard in considering whether there was good cause to set aside the entry of default under Rule 55(c)

Rule 55(c) allows the circuit court to set aside an entry of default “for good cause shown ” In determining whether there is good cause set aside an entry of default, the court must weigh the following factors (1) the timing of the motion for relief, (2)

whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted Wham v Shearson Lehman Bros., Inc., 298 S C 462, 465, 381 S E 2d 499, 501-02 (Ct App 1989) The standard to set aside an entry of default is “broader, more liberal” than the standard for setting aside a default judgment under Rule 60(b), SCRCP The reason for such a liberal construction is that “[p]ublic policy favors the disposition of cases on their merits rather than on technicalities” Micronics, Inc v South Carolina Department of Revenue, 345 S C 506, 511, 548 S E 2d 223, 226 (Ct App 2001) South Carolina law is in line with federal law, which also disfavors defaults and generally resolves any doubts in favor of the defaulting party 10A Wright, Miller & Kane, Federal Practice and Procedure Civil 3d, § 2681 ⁸

Hulsey met the first factor of the “good cause” test regarding the timing of Appellants’ motion for relief, as he promptly answered and moved for relief from the entry of default The Charleston County of Clerk of Court entered default on August 22, 2006, and mailed a Form 4 order to all parties on August 24, 2006 [R p 19, 21, 30] Upon receiving the notice of entry of default in the mail, Hulsey filed an answer⁹ and made a motion to set aside default on August 29, 2006 [R p 140, 234] Clearly, the motion for relief, filed only 5 days after notice of the default, was timely ¹⁰

⁸Wright, Miller & Kane also note that default is especially disfavored in actions involving material issues of fact or where substantial amounts of money are involved Id

⁹ Although by Hulsey’s calculation the answer was not yet due until August 31, 2006

¹⁰ While Hulsey steadfastly maintains that the answer was timely filed, there is also good cause to set aside the entry of default under Rule 55(c), SCRCP As is clear from the order, there was no willful default in failing to timely answer Rather Hulsey’s supposed mistake in calculating the due date for the answer was based on a reasonable interpretation of the available law Judge Pieper even acknowledged that this was an issue of first impression as to the timing that the answer was due In fact, Respondent’s

As to the second factor, the record also shows that there were meritorious defenses asserted in the answer, which Hulsey himself signed. According to the answers, Hulsey asserted and would have proven the truth of the statements that appeared in the newspaper. Moreover, at the hearing on the Motion to Set Aside Entry of Default, Hulsey specifically argued that there were valid defenses to the claims, on both liability and damages [R p 1061, 1062, 1064]. As Hulsey explained, “We filed an in depth statement, racketeering statement showing the allegations of racketeering conduct in federal court. It was not opposed. Thereafter we, we successfully opposed the motion for summary judgment on the very issue of whether a racketeering scheme existed.” [R p 1077-1078]. Hulsey also indicated that he had an expert witness who had offered an opinion that racketeering was involved, which would support the truth of the statements [R p 1078-1080]. In addition, Hulsey asserted a good faith litigation privilege. Answer. Other meritorious defenses alleged in the answer, but which Hulsey was denied the opportunity to present to the jury, included lack of proximate cause in that Limehouse’s illegal operation of his business and prior associated bad publicity were the reason his business failed and the proceedings in the federal RICO action were res judicata as to the truth of the allegations [R p 234].

As to the final factor of the “good cause” analysis, there was no prejudice to Limehouse from the short delay in answering – which Plaintiff’s counsel expressly acknowledged at the hearing [R p 1071]. This admitted lack of prejudice means that

own counsel proffered yet a different variation of how to determine the time in which to answer. Even if Hulsey’s answer was untimely -- which Hulsey disputes -- good cause exists to set aside the entry of default because of the confusion surrounding the appropriate date for an answer and competing theories provided by both parties and the Court itself to this admittedly novel question of law.

there is no just reason for denying Hulsey relief from the entry of default. In striking contrast, Hulsey was severely prejudiced by the imposition of liability by default, and being forced to participate in a fundamentally unfair damages proceeding in which they were denied the right to dispute/challenge Limehouse's one-sided presentation and ultimately subjected to a judgment for an excessive amount of actual damages and punitive damages.

Hulsey easily met the three factors for "good cause" to set aside the entry of default under Rule 55(c). The lower court improperly applied the more stringent standard of Rule 60(b)(1) for "excusable neglect." The Rule 55(c) standard is more lenient than the standard for granting relief from a default judgment under Rule 60(b)(1), SCRCF, which provides that a "court may relieve a party or his legal representative from a final judgment, order, or proceeding for mistake, inadvertence, surprise, or excusable neglect." Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535, 536 (Ct. App. 1987) (citing H. Lightsey, J. Flanagan, *South Carolina Civil Procedure*, 82 (2nd Ed. 1985)). The factors to be considered in determining whether a default judgment should be set aside under the stricter Rule 60(b)(1) standard, are "[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant." Hill v. Dotts, 345 S.C. 304, 547 S.E.2d 894, 897 (Ct. App. 2001) (citations omitted).

While the Trial Court purported to consider the criteria for relief from entry of default under Rule 55(c), it actually used the more stringent standards set forth in Rule 60(b), SCRCF, and stated in its order that

The criteria for obtaining relief from a default judgment requires a showing of mistake, excusable neglect, newly discovered evidence, or

misconduct of a party Rule 60(b), SCRPC **As a practical matter, these factors are relevant under both rules**

[R p 16] Recently, the Supreme Court of South Carolina explicitly cautioned that this very language invites trial courts to apply the incorrect heightened standard of Rule 60(b) to Rule 55(c) motions Sundown Operating Co , Inc v Intedge Indus , Inc, 383 S C 601, 608, 681 S E 2d 885, 889 (S C 2009) (“However, we caution that this language invites trial courts to apply a heightened standard to Rule 55(c) motions”) The Trial Court not only used this language that the Supreme Court has cautioned against, but did in fact incorrectly apply the heightened standard instead of the “good cause” standard under Rule 55(c) The use of the improper standard requires that the Trial Court’s order be set aside

Here, the order refusing to grant [defendant] relief from an entry of default is controlled by an error of law and therefore must be vacated In deciding the question of whether to grant the motion by [defendant] for relief from the entry of default, the master did not employ the “good cause” standard Instead, the master erroneously applied the more rigorous standard of “excusable neglect,” a standard used under Rule 60(b) *Id* He did this even though he recognized the “good cause” standard was applicable

Wham v Shearson Lehman Bros , Inc, 381 S E 2d at 501

It is obvious that the lower court applied the more stringent factors because Hulseley provided an explanation for the timing of the answer¹¹ and each of the three factors for good cause under Rule 55 were so handily met a motion for relief was filed immediately upon the entry of default, meritorious defenses existed, and the Respondent admitted that there was no prejudice For these reasons, the Trial Court erred by refusing to allow Hulseley relief from the entry of default

¹¹ The lower court acknowledged that when an answer was due after remand was an issue of first impression in South Carolina [R p 12]

B The entry of default should be set aside because the answer was not late, or in the alternative, the confusion about the time to answer coupled with the admitted lack of prejudice constitutes good cause to aside the entry of default

On appeal, the denial of the motion to set aside entry of default generally is subject to review for abuse of discretion Stark Truss Co v Superior Constr Corp, 160 S C 503, 602 S E 2d 89 (2004) However, the question of whether the answer was untimely presents a question of law as to the proper counting rule, which question is subject to de novo review on appeal Catawba Indian Tribe v State, 372 S C 519, 524, 642 S E 2d 751, 753 (2007) (determining the proper interpretation of a statute [or rule] is a question of law subject to de novo review on appeal)

As Judge Pieper recognized and acknowledged, there is no provision in our South Carolina Rules of Civil Procedure that specifies how to calculate when an answer is due when the action has been removed to federal court and then remanded back to state court [R p 12] The parties disagreed about when the Appellants' answers were due Hulsey maintained that the answer was not due until August 31, 2006, because they had 30 days (plus 5 days allowed for service by mail) to answer which time began running from the Charleston Court Clerk of Court's mailing the notice of the remand (July 27, 2006) Whereas, Limehouse represented in his application for entry of default that that the answer was due 30 days from service of the summons and complaint, which would have made the answer late after May 21 or 22, 2006 – while the action was in federal court However, the issue of an answer never arose in Federal Court, and most notably, Limehouse never moved for entry of default in federal court

Rejecting the arguments of both parties, Judge Pieper ruled that the time to answer should be tolled during the time that the case was removed to the District Court and it

resumed running from the entry of notice of remand in state court According to Judge Pieper's calculation the answer was due August 5, 2006 [R p 12]

In so holding, Judge Pieper cited to a 1957 opinion from California for the proposition that time to answer is suspended during removal, and a party has the unexpired time to answer or otherwise plead upon remand ¹² However, current California rules, West's Ann Cal C C P § 430 90, allows a defendant 30 days (from the day the original court receives the case on remand) to answer when a case is remanded from federal court Similarly, other states' rules specifically address the procedure upon remand See, e g , N C G S § 1A-1, Rule 12, which provides a party has thirty days after a certified order of remand is filed in state court in which to answer or otherwise plead, Rule 5, Ark R Civ Pro , which requires notice of the filing of a certified order to be provided, and permitting a party has 20 days from the receipt of such notice to file an answer

In the absence of any comparable Rule in our South Carolina Rules of Civil Procedure or any applicable state case law addressing the issue of how to count the time for answering after remand, the Appellants' interpretation is eminently reasonable and comports with the general policy consideration that our rules, in particularly, Rule 55(c), are to be "liberally construed to promote justice and dispose of cases on the merits" Melton v Olenik, 379 S C 45, 664 S E 2d 487, 492 (Ct App 2008) Thus, default should not have been entered against Appellants because their answers were timely

¹² Dauenhauer v Superior Court, 149 Ca 2d 22, 307 P 2d 724 (1957)

C Jurisdiction has not been revested in the state court because the remand from federal court is not complete under 28 U S C A §1447(c), which mandates that the District Court mail a certified copy of the order of remand to the clerk of the state court before jurisdiction attaches

In removed cases, Section 1446(d) and 1447(c) of Title 28 of the U S Code, read together prescribe the transfer of jurisdiction from state to federal court and the return of jurisdiction to the state court Section 1446(d) states that the state court cannot proceed until the case is remanded

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and ***the State court shall proceed no further unless and until the case is remanded*** (Emphasis added)

Section 1447(c) states that the state court may proceed after the federal court clerk mails a certified copy of the order of remand to the clerk of the state court

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a) If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal ***A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court The State court may thereupon proceed with such case*** (Emphasis added)

Section 1447(c) clearly mandates that the return of jurisdiction be accomplished by the mailing of a certified copy of the order of remand In this case, a certified copy of the order of remand was not transmitted to the state court until March 5, 2009, thus, that is the date jurisdiction revested in the state court under 28 U S C A § 1447(c) ¹³

¹³ An order was transmitted to the state court and filed by the Charleston County Clerk of Court on July 21, 2006 but it was not certified

It is undisputed that there is a physical process that the Clerk must utilize to duly “certify” the authenticity of copies of the documents that have been filed. The U S District Court for the District of South Carolina has made clear precisely what constitutes an effective certification, and it is equally clear that the order of remand was not so certified. Hulsey proffered to the Trial Court a notice from the Clerk of the District Court for the District of South Carolina that was circulated via electronic mail on February 17, 2008 [R p 1154] ¹⁴. The notice addresses the issue of affixing the seal of the court – as may be required by the rules [or statute] – in this “new” world of electronic filing. The new procedure dispenses with the court’s literal process of manually embossing the seal of the court on documents and substituting a new process (effective February 19, 2008) of utilizing an electronic seal. The notice provides that the electronic seal will also be used when certifying copies of documents filed in the court’s record. Accepting that the Clerk of Court has the discretion and authority to utilize an electronic seal, this notice highlights the fact that there is a physical process – whether manually embossing or electronic seal – that the Clerk must utilize to duly “certify” the authenticity of copies of the documents that have been filed with the clerk and can be found in the court’s record. Ultimately, the initiation of this new process, well after the improper remand in the present case, demonstrates that this uncertified copy was not proper under the rules that existed at the time of remand and was insufficient to re-vest jurisdiction in the state court. Since the mandatory certification requirement was not met until March of 2009, jurisdiction had not been re-vested in the state court until that time, and it was without jurisdiction to hold the Appellants in default or otherwise proceed with this litigation.

¹⁴ Defendants’ Posttrial Motion pursuant to Rule 60(b)(4) [R p 410]

Therefore, the judgment is void and should be vacated, as should be the entry of default and all other orders and proceedings in the state court since the case was removed on May 5, 2006

II The lower court did not use the procedure set out in Rule 55, SCRPC

A Rule 55, SCRPC changed the procedures for default judgments

The South Carolina Rules of Civil Procedure first became effective on July 1, 1985. Rule 55 now governs default. The case upon which the trial court relies, Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978), pre-dated Rule 55, SCRPC. The cases decided after Howard¹⁵ simply cite to Howard but fail to consider the significant changes to the default process made by the passage of Rule 55. In fact, no appellate case has examined the post-Rule procedure set forth in Rule 55 and its departure from the pre-Rule procedure used in the Howard case.

Rule 55(b)(2) states that if the party against whom default judgment is sought has appeared in the action, as here

the party **must** be served with written notice of the **motion or application for judgment** at least 3 days prior to the hearing on such application.¹⁶

(emphasis added) The Court of Appeals has explained the effect of an appearance on the request for default judgment

Rule 55(b) (2), entitled “All Other Cases,” provides, in pertinent part, that a party who has “appeared” in the action is entitled to notice and a hearing

¹⁵Ammons v Hood, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986), Doe v S B M, 327 S.C. 352, 488 S.E.2d 878 (Ct. App. 1997), and Roche v Young Brothers, Inc. of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998)

¹⁶No motion or application was filed in this case

before judgment by default may be entered ¹⁷

Stark Truss Co., Inc v Superior Const Corp., 360 S C 503, 510-511, 602 S E 2d 99,
103 (Ct App 2004)

Under Rule 55, an “entry of default” signed by the clerk is **not** the same as an entry of “default judgment.” An “entry of default” is simply a ministerial act that the clerk is required to perform upon receipt of an affidavit by the moving party, and is an interlocutory step taken in anticipation of the “default judgment.”¹⁸ Stark Truss, supra, 10A Wright, Miller & Kane, Federal Practice and Procedure Civil 3d, §2682 Under Rule 55, SCRC, the clerk has no authority to enter a “default judgment,” regardless of whether the defaulting party has appeared or not, the clerk can only enter a default upon the calendar or file book Rule 55(a), SCRC

In order to obtain a default judgment, not just an “entry of default,” the party seeking a default judgment must make a motion or application to the court ¹⁹ In this case, Hulse was entitled to receive an application or motion for default judgment and an opportunity to respond

Hulse initially made an appearance in the action by filing removal to the federal court Filing for removal to federal court constitutes a special appearance Flint v Coffin, 176 F 872 (4th Cir 1910) Appellants further appeared by filing an answer on

¹⁷The Trial Court treated the ministerial act of entry of default as default judgment

¹⁸Under the Federal Rules of Civil Procedure, a party must obtain an entry of default prior to seeking a default judgment 10A Wright, Miller & Kane, Federal Practice and Procedure Civil 3d, § 2682

¹⁹Under Rule 55(b)(2) a court can conduct any hearing “to establish the truth of any averment by evidence or to make an investigation of any other matter.”

August 29, 2006 South Carolina case law states that the filing of a late answer constitutes an appearance that triggers the notice provisions of Rule 55(b)(2) Stark Truss Co , supra (answer filed after motion for default judgment filed constituted appearance), Dymon, Inc v Hyman, 305 S C 170, 406 S E 2d 388 (Ct App 1991)(citing, with favor, other states' cases that held the filing of answer after the entry of default but prior to application for default judgment constitutes appearance) Instead of filing a motion for "default judgment" and providing Hulsey with notice, Respondent simply obtained an "entry of default," which the lower court then treated as a motion for default judgment Hulsey filed a motion to set aside that entry of default pursuant to Rule 55(c), SCRCP The lower court's action in skipping the step in which the plaintiff moves for default judgment is in error

B The lower court erred in failing to inquire as to the truthfulness under Rule 55 regarding the press conference, the article itself, the website, and Hulsey's net worth

In the default context, Rule 55 provides a mechanism for courts to investigate into matters to ensure that the jury hears the truth during a damages hearing Rule 55(b)(2) states that

If, in order to enable the court to enter judgment or to carry it in to effect, it is necessary to take an account or to determine the amount of damages **or to establish the truth of any averment by evidence or to make an investigation of any other matter**, the court may conduct such hearing or order such references as it deems necessary and proper

Rule 55(b)(2), SCRCP(emphasis added) Thus, Rule 55 specifically acknowledges that in a default damages hearing the court can consider the truth of the allegations and any other evidence, in addition to damages

In the present case, the trial court, after the request of Appellant, failed to inquire into the truthfulness of several “facts” that went before the jury. Respondent repeatedly stated that Hulsey called a press conference [R p 496-497, 827], but Hulsey was never permitted to inform the jury of the truth that he did not call a press conference, but only answered questions posed by a reporter that initiated a call to him. Respondent claims that he can make such a statement because it was contained in the complaint [R p 478-479], however, the presence of the statement does not give Respondent liberty to purposefully proclaim a known falsehood or relieve the Court of the obligation to investigate the truth under Rule 55(b)(2). Similarly, the lower court refused to allow the jury to see the actual defamatory statement or the article that contained it [R p 598]. Instead, Plaintiff rested on falsehoods describing the article that were contained in the Complaint. Again, the presence of these statements in the complaint does not permit Respondent to purposefully proclaim a known falsehood or relieve the Court of the obligation to investigate the truth under Rule 55(b)(2). A default does not sanction untruths.

Additionally, the jury was permitted to hear that Paul Hulsey’s net worth was \$81,556,986.51 based on a financial statement from May 6, 2006, [R p 286, 910] but Hulsey was prohibited from showing that Respondent knew, as a result of requests for admission, that the most recent financial statement of June 6, 2007 reflected a net worth of \$32,802,776.27 [R p 932]. Hulsey was prohibited from explaining that the majority of his individual net worth is represented by his indivisible share of his former firm’s so-called “Tobacco Receivable.” This is a structured legal fee owned by Ness Motley, n/k/a Motley Rice. The fee is paid quarterly for the next twenty years and is subject to offsets.

for administrative expenses and claims of others to the extent that there are contingent liabilities of the former firm. Because the fee is owned by Motley Rice, Defendant Hulsey cannot accelerate his payments. Further, the figure of \$32,802,776²⁷ represents the present value of Defendant Hulsey's interest in the structured fee which he cannot presently obtain. This fee is not liquid and would not be available to enable Defendant to pay a judgment. The Tobacco industry has no obligation other than to make quarterly payments based on a calculation that takes into consideration a myriad of factors which could reduce the amount. The present value of this twenty year payout is not liquid and not available to the Defendant, either. Limehouse objected to Hulsey's proffer regarding his net worth and the lower court wrongly sustained the objection. [R p 726-798]

In summary, the jury heard falsehoods regarding the setting in which the statements were made, the content of the newspaper article, and Hulsey's net worth, when the trial court should have invoked Rule 55(b)(2) to make an investigation into the truth of the matters.

C A new trial should be granted because the unduly restrictive procedure in the default damages hearing deprived the Appellants of their Due Process rights

As recently as just 30 years ago, the South Carolina Supreme Court had never addressed the question of the procedure to be followed in a default damages hearing. In the absence of any applicable statutory provisions, in Howard v. Holiday Inns, Inc., 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978), the Court summarily decided to adopt a default damages procedure that limits defendant's participation to cross-examination and objection to plaintiff's evidence. However, the Supreme Court has also stated that "It is generally recognized that courts should closely scrutinize default judgments to prevent

harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits.” Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc., 275 S. C. 556, 560, 274 S. E. 2d 287, 289 (1981)

The lower court followed the procedure in Howard v. Holiday Inns, Inc., supra. However, that case was decided years before the passage of the South Carolina Rules of Civil Procedure, and no appellate court in South Carolina has analyzed Howard in light of the later issued procedure set forth in Rule 55, SCRCP. The other cases cited, Ammons v. Hood, supra, Doe v. S. B. M., supra, and Roche v. Young Brothers, supra, simply cite Howard, but fail to consider the procedure set forth in Rule 55(b)(2).

Generally, to the extent it has been addressed,²⁰ the vast majority of states permit the defaulting defendant to participate **fully** at the hearing on damages, including putting on its own witnesses and introducing admissible evidence. [R. p. 397]. However, the lower court’s procedural limitations place South Carolina in the minority of states. Moreover, the lower court’s procedure contravenes Rule 55(b)(2), which states that if it is necessary “to establish the truth of any averment of evidence or make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper. A noted treatise explains that

it may not be necessary to present testimony to obtain a judgment on the liability issue, although liability is not deemed established simply because of the default and the court, in its discretion, may require some proof of the facts that must be established in order to determine liability.” *Id.* (footnotes omitted)

Id. (footnotes omitted)

The lower court refused to allow any testimony that would establish the truth of

²⁰ Most entries of default are set aside under the good cause standard of Rule 55(c), and thus the courts do not have to conduct any further on default proceedings.

the averments, despite being faced with a complaint that was inaccurate and untrue

According to the lower court judge, he was not allowed to deviate from Howard

The thing—and I went back and looked at this again this morning in Howard v Holiday Inn They discussed the fact that there were three avenues that they could take They adopted the procedure of allowing the defense counsel to participate in cross-examination and objection to the plaintiff's evidence

[R p 444] The judge also stated I didn't make the rules up but you well know that I'm bound by what their [the Court of Appeals] rules are ” [R p 443 19-23]

The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner Mathews v Eldridge, 424 U S 319, 333-34 (1976) Even in default settings, a defaulting party still is entitled to due process which includes notice and an opportunity to be heard on the matter of unliquidated damages See Bodygear Activewear, Inc v Counter Intelligence Services 946 So 2d 1148, 1150 (Fla App 4 Dist 2006) As the Rule noted,

If, in order to enable the court to enter judgment or to carry it in to effect, it is necessary to take an account or **to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter**, the court may conduct such hearing or order such references as it deems necessary and proper

Rule 55(b)(2), SCRCP(emphasis added)

Limiting a defaulting party to restrictive cross examination²¹ and objection to evidence does not constitute a meaningful opportunity to be heard on the issues of damages, even where liability is deemed admitted Apart from limited/restricted

²¹ In this case, the Trial Court's restriction on cross examination also included a constrictive interpretation of the rules on impeachment which made cross examination virtually powerless

participation in the hearing for determination of actual damages, Hulsey was entitled to fully contest the award of punitive damages by presenting evidence of his own See Hunter v Spaulding, 388 S E 2d 630 (N C App 1990) (“error for the judge to submit the punitive damages issue to the jury without first allowing Mr Spaulding an opportunity to present evidence addressed to that issue Conducting the trial in this way deprived Mr Spaulding of his rights to be heard and a trial of the punitive-damages claim and contravened his due process rights”)

The Trial Court’s application of the restrictive default damages procedure allowed Limehouse to present an exaggerated, one-sided story with half-truths and fabrications For example, Limehouse attempted to demonstrate that he had a sterling reputation that was severely damaged, but Hulsey was not allowed to prove that his reputation had already been irreparably impaired Limehouse painted a picture of himself as an honest, trustworthy businessman, and a wonderful, devoted family man, but Hulsey was prevented from presenting any extrinsic evidence that would have proven to the jury that Limehouse had violated numerous state and federal laws in the conduct of his business, including

- withholding over \$60,000 in overtime legally due to his employees, violations,
- housing his employees in overcrowded, substandard conditions in violation of local zoning and building code violations,
- failing to carry worker’s compensation insurance as required by state law,
- failing to pay federal taxes, and

- that the article itself was not about Respondent, nor did it identify Respondent as a mobster

[R p 908-909, 941-942, 952, 986]

Similarly, Limehouse testified that he supposedly lost his business within days of the April 24, 2004, Post & Courier article, however, Hulsey was prevented from offering evidence to show that numerous other articles prior to the April 24, 2004 article had destroyed his reputation and his business with reports of the violations listed above, and further reports that he was trafficking in illegal immigrant labor and selling phony green cards and social security cards²². And, while Limehouse's accountant was allowed to testify that L&L was worth \$13 million based on the booked profit for the first four months of 2004 (because L&L had never shown a profit from 1999 – 2003)²³, Hulsey was not allowed to offer any expert evidence as to the real value of L&L in light of the impact of all violations and bad press which predated the April 24th article or to demonstrate the faults in the methodology that Limehouse's expert employed²⁴.

Due process and fundamental justice demands that even where, as here, a defendant is deemed to have admitted liability based on a procedural default, the jury should be provided with the truth of the whole story in order to fairly determine the extent of any injury to the plaintiff and properly award damages within the bounds of the applicable legal standard.

²² See R p 908-909, 941-942, 952-986

²³ R p 659-661

²⁴ Based upon this faulty methodology alone, Limehouse's expert should have been stricken under Rule 104(a), SCRE. However, the lower court denied Hulsey's motion to strike and the proffer of Hulsey's own expert [R p 732-742, 813-817]

The lower court also erred in not allowing Hulsey to conduct pretrial discovery, not allowing Hulsey to engage in complete cross-examination, and not allowing Hulsey to explain the entry of default

Regardless of whether a defendant is allowed to present its own evidence or call its own witnesses, a defendant is allowed to participate in the damages hearing through cross-examination. See Howard, 246 S E 2d at 882. “On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality’ of the witness.” State v. Brewington, 226 S E 2d 249, 250 (S C 1976) (internal citations omitted). “Considerable latitude is generally allowed in the cross-examination of an adverse witness for possible bias.” North Greenville Coll v Sherman Constr Co., Inc., 243 S E 2d 441, 442 (S C 1978). “The law recognizes the slanting effect upon human testimony of the emotions or feelings of the witness toward the parties or the self-interest of the witness in the outcome of the case. Partiality, or any acts, relationships or motives reasonably likely to produce it, may be proved to impeach credibility.” McCormick on Evidence, § 40, p 78 (1972). North Greenville, 243 S E 2d at 442. Because cross-examination allows a jury to assess the credibility of witnesses and the weight to give their testimony, “as a general rule, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.” Brewington, 226 S E 2d at 250.

South Carolina courts have emphasized that a party cannot prepare for an effective cross-examination without discovery. See Downey v Dixon, 362 S E 2d 317 (S C Ct App 1987). In Downey, the defendant never answered interrogatories or allowed the plaintiff to take his deposition. The judge sanctioned the defendant \$50 but

allowed him to testify at trial. The Court of Appeals reversed and remanded for a new trial, stating that, even though the plaintiff anticipated that the defendant would testify at trial, “there is no indication that she knew what he was going to say when he testified.” Id. at 319. The Court cited authority that “[o]n cross-examination, you should never ask a question to which you do not already know the answer.” Id. (emphasis in original). Thus, the discovery rules “give the trial lawyer the means to be prepared for trial” and specifically cross-examination. Id. Indeed, the purpose of discovery is to prevent trial by ambush. Scott v. Greenville Housing Authority, 579 S.E.2d 151 (S.C. Ct. App. 2003). The Scott court states that

The gist and gravamen of the discovery rules mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party. Essentially, the rights of discovery articulated by the rules give the attorney the means to prepare for trial. Discovery is the quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed.

Id. at 158 (internal citations omitted).

In the present case, the lower court did not permit Hulsey to conduct any pretrial discovery, so there was no way of knowing what witnesses would say before they were on the stand or to obtain documents for impeachment. In fact, Limehouse called an expert witness to testify at trial, but Hulsey had never been provided with an expert report from this expert or any of the underlying data upon which he relied. Because Hulsey was not permitted discovery to adequately prepare for cross-examination, “prejudice must be presumed” and the judgment reversed. Scott, *supra*.

Further, the lower court erred in restricting this cross-examination throughout the trial in such a way as to make the cross-examination ineffective. First, Hulsey was prohibited from using any documents to impeach during cross-examination, based on the

trial court's ruling that this would be considered admitting evidence contrary to the Howard decision [R p 583-588, 598-599, 612, 614, 718] Second, although Plaintiff put his reputation in the community at issue, the trial court prohibited Hulseley from cross-examining witnesses about subjects relating to this reputation, including government investigations against Limehouse [R p 590, 637], fines against him by North Charleston [R p 606], problems with the United States Department of Labor [R p 607], the previous articles containing negative content about Limehouse [R p 765-766], and the readership of other negative articles about Limehouse [R p 704] In essence, while Limehouse was claiming damages to his reputation, Hulseley was prevented from demonstrating on cross-examination that Limehouse had a terrible reputation from the outset

In addition, the trial court erred in prohibiting Hulseley from explaining the entry of default to the jury In Hulseley's opening, he attempted to provide the jury with such an explanation, but was strictly prohibited from doing so [R p 505-506] Because Hulseley was never permitted to explain the entry of default, the jury was left with the impression that Hulseley had deliberately thumbed his nose at the court rules, when in fact, a good faith dispute existed as to the date the answer was due Further, as will be explained below, Respondent was allowed to claim that Hulseley's default was in itself a ground to award punitive damages because Hulseley does not "play by the rules" Because the jury never received a complete explanation regarding the nature of default and the good faith dispute about the timing that the answer was due, Hulseley was unfairly prejudiced and the entire trial was tainted by the inference of intentional wrongdoing

Compounding the other errors described above, Respondent was allowed to present evidence of other allegations beyond those contained in the Complaint without allowing Hulsey to fully contest the new allegations. This did not comport with current practice and constituted a separate violation of due process.

One of the fundamental principles of default is that, upon entry of default, the defendant is deemed to have admitted the well-pleaded allegations of the complaint.

The defendant, by waiving a contest and suffering a default to be taken against him, admits the truth of the allegations, set out in the plaintiff's declaration or complaint. Hence the default authorizes the entry of any judgment warranted by the facts alleged.

[A]s the effect of the confession is limited to the material issuable facts well pleaded in the declaration or complaint. Nor does it admit an allegation which constitutes a mere conclusion of law.

Gadsden v Home Fertilizer & Chemical Co, 89 S C 483, 487-88, 72 S E 15, 17 (1911)(quoting Gillian v Gillian, 65 S C 129, 132, 43 S E 386, 387 (1903))

A corollary principal is that the trial judge may not grant relief beyond that which is demanded in the pleadings. Pinckney v Atkins, 317 S C 340, 343, 454 S E 2d 339, 341 (Ct App 1995) (citing River Road Co v Energy Master Products, Inc 300 S C 316, 387 S E 2d 694 (Ct App 1989), SCRCP Rule 54(c)). When a defendant is in default, the plaintiff's right to recover is not unlimited and is circumscribed by the complaint he drafted. Wiggins v Todd 296 S C 432, 435, 373 S E 2d 704, 705 - 706 (Ct App 1988). In Lewis, the Supreme Court was so concerned by an excessive default damages award that it raised the issue on its own accord, declaring

In the case of unliquidated damages a defendant, though in default as to liability, has a right to expect that the judgment of the court, or the verdict of the jury, will be in keeping not only with the allegations of the complaint and the prayer for relief, but also the proof which has been submitted. Even though the evidence used as a basis for procuring the \$250,000.00 judgment here is not before us, this award is patently so

grossly out-of-proportion to the delicts alleged in the complaint that this court, as a matter of common law and independent of § 15-27-130, should not allow the same to stand

Id See also Jackson v Midlands Human Resources Center, 296 S C 526, 529, 374 S E 2d 505, 506 - 507 (Ct App 1988) (“Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted ”)

The lower court allowed the jury to impose actual and punitive damages based on alleged defamatory (and other alleged wrongful) acts introduced into evidence by the Plaintiff that were not pled in the Complaint, and thus not deemed admitted, without allowing Hulseley his due process rights to fully meet and contest the accusation

The allegations of the complaint are

¶ 9 Hulseley filed a class action against Plaintiff and his companies which alleged improper acts and conduct

¶ 10 On or about April 23, 2004, Hulseley “held a press conference or otherwise made false statements about the Plaintiff to certain news agencies including but not limited to a reporter from the Post & Courier staff ”

¶ 11 During the news conference, Hulseley “made false and defamatory statements”

- a that the Plaintiff engaged in classic racketeering scheme,
- b that the Plaintiff’s conduct set the community back 150 years,
- c that the Plaintiff engaged in a blatant case of indentured servitude,
- d that the Plaintiff created a perfect racketeering enterprise just like Tony Soprano

[R p 40] However, the Trial Court improperly allowed Limehouse to make additional accusations beyond those in the complaint, without allowing Hulseley to

fully defend. For example, Limehouse was allowed to testify that Hulsey had run the false statements on his Firm web site for three years, though the complaint contained no allegations about the website (and thus none were deemed admitted), [R p 569-577, 580-581]. Hulsey was precluded from proving the true content of the web site and, more importantly, as not allowed to demonstrate that Limehouse was never mentioned on the web site. [R p 894]. To compound this error, the Plaintiff's attorney was allowed to argue in closing that the website justified punitive damages. [R p 838-839].

III The Trial Court failed to consider a Rule 60(b) motion after the hearing on damages

Hulsey has met the standards for excusable neglect under the Rule 60(b)(1) standard. At a hearing held on November 4, 2009, the Court stated that once the trial on damages has been completed, it would be proper to consider a Rule 60(b)(1) motion based upon honest/reasonable mistake and/or excusable neglect. [Supp R p 13]. The inquiry based upon Rule 60(b)(1) is separate and distinct from that of Rule 55(c). Thus, the prior ruling refusing to set aside the entry of default under Rule 55(c) would not be binding upon the inquiry under Rule 60(b)(1). While the Court was obligated to make its own determination of whether the standard under Rule 60(b)(1) had been met, it simply denied the Motion with no explanation. [R p 4].

Under Rule 60(b), the kind of neglect that is not excusable is "forgetfulness, carelessness, indifference, or inattention." Lowe's of Georgia, Inc v Constantino, 288 S C 106, 341 S E 2d 382 (Ct App 1986). In that case, the court found the defendants were not forgetful, careless, indifferent, or inattentive, and noted that they had "neither idly ignored the summons to defend the action nor willfully disregarded it. They treated

the matter seriously and were reasonably prompt in seeking relief on discovering the default” Id at 110, 341 S E 2d 384 Here, both honest mistake and/or excusable neglect in calculating the due date warrant setting aside the default judgment Like the defendants in Constantino, Hulsey was not indifferent or willful in failing to timely answer Hulsey had appeared in the case by removing it to federal court and opposing Limehouse’s motion for remand After the matter was remanded, Hulsey’s supposed mistake in calculating the due date for the answer was based on a reasonable interpretation of the available law In the alternative, the confusion regarding the due date constitutes excusable neglect, particularly since Judge Pieper acknowledged that this was an issue of first impression and that the Plaintiff’s own counsel proffered yet a different variation of how to count the allowable time Appellants had for answering upon remand Thus, there was both reasonable mistake and/or excusable neglect in calculating the due date under these unique circumstances

Of course, the other factors under Rule 60(b) also weigh in Hulsey’s favor Regarding the promptness with which relief is sought, Hulsey filed the Rule 60(b) motion within ten days of the entry of judgment Hulsey also asserted meritorious defenses as required to set aside under Rule 60, in that Hulsey had asserted defenses in his Answer, and could present evidence and witnesses to testify that there was no press conference, that Limehouse’s reputation had already been irreparably damaged by previously published news articles, and that Limehouse lacked standing to assert damages However, the lower court refused to allow Hulsey to introduce this evidence or call witnesses in defending the case [R p 443, 445, 795-798, 813-817] Finally, the degree of prejudice to Limehouse is not so high as to outweigh the other factors See e g ,

Williams v Watkins, 384 S C 319, 681 S E 2d 914 (Ct App 2009)(Relief based on mistake was warranted and degree of prejudice not so high as to outweigh other factors where plaintiff was on notice of defendant's denial of allegations)

IV The trial court erred in allowing evidence on damages to reputation when the alleged defamatory statement was about a corporation, which can only recover for pecuniary loss

The alleged defamatory statements were not about Limehouse Jr. Instead, the actual language in the Post & Courier article clearly demonstrates that any defamatory statements were about the LLC that Respondent and his father owned, not an individual.²⁵ Because a corporation or business does not have a reputation or character in the personal sense, it cannot suffer humiliation and its recovery is limited to the pecuniary loss to the business. Hospital Care Corp v Commercial Casualty Ins Co, 194 S C 370, 374 (1940). Any alleged damages that could have resulted by Hulsey's statements would be limited to the pecuniary losses suffered by the business. Thus, Respondent could not recover for damage to his reputation because the alleged defamatory statement was solely about the LLC and not him individually. For this reason, all of the evidence that Respondent introduced regarding damage to his reputation was improperly admitted, and the jury verdict based upon damage to his reputation must be overturned.

Moreover, Respondent cannot recover for the pecuniary loss suffered by his limited liability companies because he lacks standing to do so. A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing

²⁵ The article states "This is a blatant case of indentured servitude. L&L Services took advantage of the complexity of the system. They have created a perfect racketeering enterprise, just like Tony Soprano." [R p 941]

Blandon v. Coleman, 285 S C 472 (1985), Sloan v. School Dist. of Greenville County, 342 S C 515, 518 (S C App, 2000) “Standing is ‘a personal stake in the subject matter of a lawsuit’ ” Newman v. Richland County Hist. Preserv. Com'n, 325 S C 79, 82 (1997) (quoting Bailey v. Bailey, 312 S C 454, 458 (1994)) Since a corporation is a distinct legal entity, it is a well established principle that the assets of a corporation belong to the corporation and not the individual stockholders Thompson v. Thompson, 214 S C 61 (1948) Johnson v. Baldwin, 221 S C 141 (1952), Davis v. Hamm, 300 S C 284, 288 (S C App 1989) It is also a general precept of corporate law that a shareholder of a corporation does not have a personal or individual right of action for damages based solely on an injury to the corporation and a suit for damages arising from an injury to the corporation can only be brought by the corporation itself 19 Am. Jur. 2d *Corporations* § 1870 (2009), Twohy v. First Nat'l Bank, 758 F.2d 1185, 1194 (7th Cir 1985), United States v. Palmer, 578 F.2d 144, 145-46 (5th Cir 1978) South Carolina Courts recognize this principle See Johnson, 221 S C at 141 (1952), Bradley v. Hullander, 272 S C 6, 41 (1978), Ward v. Griffin, 295 S C 219, 221 (S C App 1988), Todd v. Zaldo, 304 S C 275, 278 (S C App 1991)

Just like a corporation, a limited liability company is a legal entity distinct from its members S C Code Ann § 33-44-201 (1976) Accordingly, members are not proper parties to suits involving the company unless an object of the proceeding is to enforce members' rights against the company or to enforce their liability to the company See Id. at Comment Because it is a separate legal entity, the LLC provides its members and/or managers the same protections provided by a corporation to its shareholders See S C Code Ann § 33-44-303(1976)(the debts, obligations, and liabilities of a limited liability

company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company) South Carolina law treats limited liability companies the same as corporations in regard to the protection of its members and as to a member's ability to bring a personal suit for the damages suffered by the LLC Thus, any cause of action based upon injury to a LLC would belong to the company as opposed to the individual member

In order to recover for the pecuniary losses suffered by the business, the LLCs needed bring any such claims on their own behalf Plaintiff does not have a right of action to recover for the damages to the LLC Plaintiff failed to name either of his limited liability companies as parties to the lawsuit Thus, Plaintiff lacks standing to bring any claims to recover the business losses suffered by L&L Services, LLC and/or WLL, LLC The lower court erred in denying Hulse's motion to exclude the business damages, and the judgment must be overturned

Furthermore, Plaintiffs did not show, by competent evidence, whether the alleged defamatory statement caused any damages In a damages hearing after a default, "[t]he plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence" Howard v Holiday Inns, Inc., 246 S E 2d 880, 881 (S C 1978) "If the plaintiff's proof is speculative, uncertain, or otherwise insufficient to permit calculation of his special damages, his claims should be denied" Jackson v Midlands Human Res Ctr., 374 S E 2d 505, 506 (S C Ct App 1988) "Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted" Jackson, 374 S E 2d at 506 "A judgment for

money damages must be warranted by the proof of the party in whose favor it is rendered ” Jackson, 374 S E 2d at 507

The Supreme Court of South Carolina has stated that “competent evidence” is “[t]hat which the very nature of the thing to be proven requires, as the production of a writing when its contents are the subject of inquiry” and that evidence is not competent if it is “not the character of proof which the law permits in the particular case ” State v. Petit, 142 S E 725, 731 (S C 1928) “Competent evidence” is not “mere beliefs, opinions, and conclusions of the witnesses ” See Whaley v CSX Transp , Inc , 609 S E 2d 286, 297 (S C 2005) Arguments of counsel do not constitute “competent evidence” of the amount of damages Jenkins v Jenkins, 545 S E 2d 531, 540 (S C Ct App 2001)

At trial, Respondent was not able to show whether the alleged statements by Hulsey about Tony Soprano were in fact the cause of any damage to his reputation²⁶ Defamation is not actionable unless the defamatory statement has caused or has a natural and direct tendency to cause damage to plaintiff’s reputation Capps v Watts, 271 S C 276 (1978), see also Loges v Mack Trucks, Inc , 417 S E 2d 538 (1992), Wardlaw v Peck, 282 S C 199 (Ct App 1984) Injury to reputation is a necessary element of damages in a libel or slander case Abofreka v Alston Tobacco Co , 288 S C 122 (1986), Smith v Smith, 194 S C 247 (1940) Thus, Respondent had the burden of showing that his reputation was, in fact, harmed by the alleged defamatory statements

²⁶ As previously argued, Respondent cannot recover for injury to reputation, However, even if reputation damages are available, Respondent failed to show any damages from the alleged defamation

Respondent failed to establish that the defamatory statements were in fact the cause of any damages. For over three months prior to the article of April 24, 2004, the Post and Courier ran a series of articles involving Plaintiff and/or L&L Services, LLC and/or WLL, LLC, a fact that was acknowledged by Limehouse [R p 600]. Those articles establish what the community already knew about Plaintiff – that the businesses he and his father owned had been responsible for housing violations and the fines resulting from them, condemnation of previous L&L Services, LLC boarding houses, trafficking and employment of illegal immigrant labor and the manufacturing of false papers or credentials for employees, wage and hour violations of Federal laws, and failure to maintain workers compensation insurance [R p 894, 908, 952]. In addition, less than a week before the article, the United States Department of Labor found that Plaintiff's companies owed over 22,000 hours of overtime pay to their workers [R p 98]. It is not clear if the damages Respondent allegedly suffered were caused by the statements of Hulsey, the RICO class action complaint filed against him and his companies the day before the article, the previous articles written about him and his business or the subsequent investigation by the United States Postal Inspectors. Thus, at this point it is impossible to tell whether Hulsey's statement was the actual cause of the alleged damage to Respondent's reputation, or whether his reputation was already permanently tarnished when the comments were made. It is telling, that even with the procedural posture of the case, which has Appellants in a straight jacket, Plaintiff has not been able to meet his burden of proof.

V The Award of Punitive Damages is founded on trial error and constitutes a denial of due process

The process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and the topic of punitive damages has been a relatively frequent subject of decisions from U S Supreme Court and the South Carolina Appellate Courts over last two decades Pacific Mutual Life Ins v Haslip, 499 U S 1 (1991), BMW of North America, Inc v Gore, 517 U S 559, 568 (1996) (“The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor ”), see also Gamble v Stevenson, 305 S C 104, 406 S E 2d 350 (1991), S C Farm Bureau Mut Ins v Love Chevrolet, 324 S C 149, 478 S E 2d 57 (1996), Atkinson v Orkin Exterminating Co 361 S C 156, 164, 604 S E 2d 385, 389 (2004)

As a threshold matter, the trial court must assess the culpability of a defendant's conduct to determine whether punitive damages should even be submitted to the jury South Carolina Farm Bureau Mut Ins Co v Love Chevrolet, Inc., 324 S C 149, 478 S E 2d 57, 58 (1996) While the jury has broad discretion in awarding punitive damages (or not), any award is subject to review by the trial court

In Gamble, this Court developed an eight- factor (now ten factor) post-verdict review that trial courts are required to conduct to determine if a punitive damages award comports with due process In Gore, the United States Supreme Court has also set forth three guideposts that trial courts must apply to an award of punitive damages to determine whether the award violates due process

Under state and federal constitutional due process standards, the jury and the Trial Court must consider the following factors in awarding/reviewing punitive damages

- (1) the character of the defendant's acts,
- (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause,
- (3) defendant's degree of culpability,
- (4) the punishment that should be imposed,
- (5) duration of the conduct,
- (6) defendant's awareness or concealment,
- (7) the existence of similar past conduct,
- (8) likelihood the award will deter the defendant or others from like conduct,
- (9) whether the award is reasonably related to the harm likely to result from such conduct, and
- (10) defendant's wealth or ability to pay

Austin v Specialty Transp Services, Inc., 358 S C 298, 594 S E 2d 867, 875 (Ct App 2004)

Under Gore, 517 U S at 575, the Trial Court must review the constitutionality of a punitive damages award by determining whether the award was reasonable under the following guideposts (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases See also James v Horace Mann Ins Co., 371 S C 187, 638 S E 2d 667, 670 (2006) Notwithstanding the impact of a procedural default on the question of liability and the assessment of actual damages, due process entitles a defaulting party to fully contest any claim for punitive damages

Here, the lower court erred in allowing Limehouse to go into matters beyond the bounds of the complaint while restricting Hulsey's ability respond and directing the jury to impose punitive damages based on default without exercising the trial court's

obligation to independently make the threshold determination of whether the Appellants' conduct rises to the level of culpability to justify imposition of punitive damages. Among the other errors, the lower court improperly allowed Limehouse to use the fact of this procedural default as a weapon to inflame the jury and inflate the punitive damages award. Obviously, the Trial Court had to explain to the jury about the default and the procedure for the trial, however, the jury was improperly led to believe and allowed to consider Hulsey's default as wrongful conduct warranting punitive damages. The transcript shows that the Trial Court's explanation and repeated commentary to the jury about Hulsey's default and deemed admissions was unjustified and unfairly prejudiced Hulsey by inferring to the jury that Hulsey had done something "wrong" which could be "punished" by an award of punitive damages.

Throughout the damages hearing, the Trial Court repeatedly told the jury that Hulsey failed to answer and the allegations were deemed admitted [R p 484 21-25, 506 6-8, 507 8-17, 590 13-16, 825 2-4]. Then, during closing argument, the Respondent began by telling the jury that the Hulsey didn't play by the rules when he failed to timely answer and concluded his closing with yet another accusation about the Hulsey not playing by the rules.

As Judge Young has told you, the defendants didn't answer in time so they are in default. They're in default because they didn't follow the court rules. They're not my court rules, they're the Court's rules. [R p 782 15-22.]

Finally, in the instructions to the jury, the Trial Court again commented on the fact that Hulsey did not "timely" answer [R p 874 3-7]. The irony is that despite the good faith dispute amongst counsel and the court over the actual appropriate timing of the answer, Respondent was allowed to insinuate Hulsey overtly and intentionally refused to play the

rules and thumbed his nose at the system, which was absolutely untrue. Hulsey had already been punished by the process of deeming the allegations admitted. Due process cannot countenance the imposition of further punishment by allowing the jury to consider a procedural default as a basis for imposition of punitive damages.

The Trial Court also allowed Limehouse to present other improper evidence and arguments, such as the argument that the web site link to the article showed lack of remorse and a continuing duration of conduct, while Hulsey was not allowed to demonstrate the true contents of the website. [R p 569-577, 580-581, 838-839] Further, the website information referring to a different case is covered by the litigation privilege. See e.g., Pond Place Partners, Inc v Poole, 567 S E 2d 881, 892 (Ct App S C 2002), Simpson Strong-Tie Company, Inc v Stewart, Estes & Donnell, 232 S W 3d 18, 26 (2007), Restatement (Second) of Torts § 586. Neither Plaintiff nor his companies are mentioned in the website. Allowing Plaintiff to argue that the website mentioned him directly, that it contained the article and that it is evidence of malice or reckless disregard of Plaintiff's rights, would be a fraud upon the court as those statements that were not true and were not even in the Complaint. The article was already out in the public domain. Whether it was linked to Appellants' website or not, the article was still available to anybody who wished to read it in the Post & Courier website, newspaper archives at the local library or anywhere else where newspapers are stored. Under this theory, any statement that is published in the public domain would be considered "continuing conduct" for purposes of punitive damages for all eternity. Hulsey made the statement on April 24, 2004. The conduct started and stopped on that date.

The Trial Court's review under Gamble and Gore was also infected by the procedural violations/defects. The trial court's determination of the constitutionality of punitive damages awards is subject to a de novo review. Mitchell v Fortis Ins Co., 385 S C 570, 686 S E 2d 176, 183 (2009). Under the unduly restrictive default damages procedure enforced by the Trial Court, any consideration beyond the allegations renders the Trial Court's consideration on these factors an error of law.

As to the question of Hulsey's degree of culpability, the Trial Court found that there was clear and convincing evidence that Hulsey intentionally defamed the Plaintiff by holding a press conference. [R p 2]. However, there was no "evidence" presented that Hulsey called a press conference. Rather, as discussed above, Limehouse pled in the alternative, and Hulsey was denied the opportunity to present evidence that he did not call the press conference and only answered questions posed by a reporter that initiated the call to him.

Even more inexplicably, the Trial Court reached beyond the "admitted" allegations of the complaint and the evidence submitted at trial to make a "finding" as to duration of the conduct. On this point, the Trial Court found that "[T]here was clear and convincing evidence presented at the damages hearing that the allegations made were not spontaneous in that the press conference and the allegations were planned as part of the filing of a lawsuit against the Plaintiff, and that such planning necessarily took place over a period of weeks if not months." [R p 1-2]. Again, there was no "admission" or evidence of any press conference. But more incredibly, there was no evidence of any weeks or months of planning.

As to other “appropriate” factors, the Trial Court stated that he had considered the fact that Hulsey was not able to present mitigating evidence due to the constraints of the default damages hearing [R p 3] However, that was a token, hollow gesture because in the next sentence, the Trial Court stated that he was “privy to most if not all of the evidence the Appellants wished to present” and he considered the jury’s verdict reasonable in light of that evidence Despite the Trial Court’s bold assertion, the record shows that Hulsey was only able to make generalized arguments with bare proffers from which the Trial Court could not fairly speculate how the jury would have reacted Furthermore, the lower court’s attempt to usurp the jury’s role by claiming that the additional evidence would not have affected the verdict is not proper in a court’s review of a punitive damages award

Finally, any award of punitive damages in the present case should be reduced by the punitive damages award to Respondent’s father, Limehouse Sr , based on the exact same conduct and identical complaints To uphold a punitive damages award in the instant case would be to doubly punish for the same conduct and would amount to a denial of due process

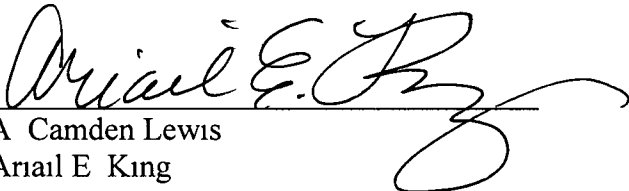
CONCLUSION

At the threshold, Hulsey Appellants submit that the state court did not have jurisdiction make an entry of default or proceed to judgment because jurisdiction been not yet revested in the state court because the District Court has not mailed a certified copy of the order of remand to the clerk of the state court as required by 28 U S C A §1447(c)

The Hulsey Appellants further submit that the Trial Court erred in refusing to set aside the entry of default because the answer was not late, or in the alternative, there was good cause under Rule 55(c) because any miscalculation of the due date was excusable given the absence of any state rule or appellate opinion addressing the issue, and Plaintiff conceded there was no prejudice. Thus, Appellants respectfully request that this Court reverse the lower court's denial of the motion to set aside the default.

Even if this Court were to find that jurisdiction has reverted in the state court and the Trial Court did not err or abuse its discretion in refusing to set aside the default, the Hulsey Appellants were denied their due process rights in the conduct of the damages trial which did not allow them a meaningful opportunity to meet the issue of damages (both actual and punitive) or defend on allegations beyond the complaint.

And, finally, the jury's award of punitive damages as reviewed and confirmed by the Trial Court constituted a violation of due process because the Appellants were not afforded a meaningful opportunity to defend on punitive damages, and the jury was allowed (in fact, required) to award punitive damages based on improper arguments, "admissions" beyond the complaint, and speculation not even in evidence. For these reasons, the Appellants respectfully request that the Court reverse the judgment and remand the case to allow the Appellants to defend the claims against them on the merits in a trial that comports with the due process requirements of the State and Federal Constitutions.



A Camden Lewis
Ariail E King
LEWIS & BABCOCK, LLP
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000
Fax (803) 733-3534

Robert H Hood
HOOD LAW FIRM, LLC
James B Hood
John K Weedon
Deborah Harrison Sheffield, *Of Counsel*
172 Meeting Street ~ Post Office Box 1508
Charleston, SC 29402
Phone (843) 577-4435 ~ Fax (843) 722-1630

Attorneys for the Appellants
Paul H Hulsey and The Hulsey Litigation Group

December 6, 2010

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

On Appeal from Charleston County
Court of Common Pleas

The Honorable Roger M Young, Circuit Judge
The Honorable Daniel F Pieper, Circuit Judge

Case No 06-CP-10-1578

Lawton Limehouse, Jr

RESPONDENT,

v

Paul H Hulsey and The Hulsey
Litigation Group, LLC,

APPELLANTS

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211, SCACR,
and with the August 13, 2007 Order of the South Carolina Supreme Court which requires
redaction of certain personal identifying information

Robert H Hood
James B Hood
John K Weedon
HOOD LAW FIRM, LLC
Post Office Box 1508
Charleston, SC 29402
(843) 577-4435

A Camden Lewis
Ariall E King
LEWIS & BABCOCK, LLP
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

By 
Ariall E King

ATTORNEYS FOR APPELLANTS

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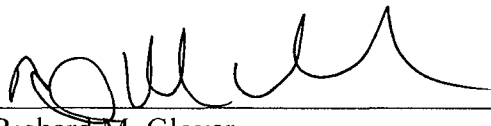
Paul H Hulsey and The Hulsey
Litigation Group, LLC,

APPELLANTS

CERTIFICATE OF SERVICE

I, Richard M Glover, paralegal to the law firm of Lewis & Babcock, L L P , do hereby certify that I have served the Appellants' Final Brief upon opposing counsel by mailing a copy of same, postage prepaid and return address clearly indicated, to said counsel as follows

Frank M Cisa, Esquire
Cisa & Dodds LLP
858 Lowcountry Blvd , Suite 101
Mt Pleasant, South Carolina 29464


Richard M Glover

This 6th day of December, 2010