

STATE OF SOUTH CAROLINA
In the Supreme Court

On Appeal from Charleston County
Court of Common Pleas

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AUG 22 2011

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

S.C Supreme Court

Case No 06-CP-10-1577
Ct App Opinion No 4805, filed March 10, 2011
Withdrawn, Substituted and Refiled June 2, 2011
Withdrawn, Substituted and Refiled June 16, 2011

Lawton Limehouse, Sr

RESPONDENT,

v

Paul H Hulsey and The Hulsey
Litigation Group, LLC,

PETITIONERS

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lawton Limehouse, Sr , Respondent,

v

Paul H Hulsey and The Hulsey
Litigation Group, LLC, Appellants

Appeal From Charleston County
Daniel F Pieper, Circuit Court Judge
Roger M Young, Circuit Court Judge

Opinion No 4805
Heard April 13, 2010 – Filed March 10, 2011

AFFIRMED

A Camden Lewis, Ariail E King, of Columbia,
Robert H Hood, Deborah Harrison Sheffield, James
B Hood, and John K Weedon, of Charleston, for
Appellants

Frank M Cisa, of Mt Pleasant, for Respondent

THOMAS, J This is an appeal from an entry of default and the subsequent default damages trial based on a slander action against Paul Hulsey and the Hulsey Litigation Group, LLC (collectively Hulsey) Damages (actual and punitive) were found in excess of \$7.3 million. Hulsey now appeals, alleging the trial court erred in (1) granting entry of default without subject matter jurisdiction, (2) failing to grant a motion to set aside the entry of default, (3) allegedly depriving Hulsey of due process in the default damages trial, and (4) allowing an award of \$5 million in punitive damages. We affirm.

FACTS

In 2004, Hulsey filed a class action suit against Lawton Limehouse, Limehouse's son, and L&L Services, Inc., a staffing agency owned by the pair. The suit alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as other state and federal laws. Although the case eventually settled, during its pendency, Hulsey made allegedly slanderous statements that the "[Charleston] Post & Courier" published, including (1) Limehouse engaged in a classic racketeering scheme, (2) Limehouse's conduct set the community back 150 years, (3) Limehouse engaged in blatant indentured servitude, and (4) Limehouse created a perfect racketeering scheme just like Tony Soprano.¹

In response, Limehouse filed suit against Hulsey on April 19, 2006. Service was perfected upon the Hulsey Litigation Group, LLC on April 20, 2006, and Paul Hulsey personally on April 21, 2006. On May 5, 2006, Hulsey filed a notice of removal to federal district court without filing an answer to the complaint. On June 2, 2006, Limehouse filed a motion to remand to state court. A federal district judge remanded the case to state court by an order dated July 19, 2006, for lack of federal subject matter jurisdiction.² The federal court electronically transmitted this order to counsel on July 20. The Charleston County Clerk of Court also received an

¹ Tony Soprano is a fictional television character involved in organized crime.

² Hulsey did not answer the complaint in federal court.

uncertified copy and filed the order on July 21. The Charleston County Clerk of Court mailed notice of the filing to all parties on July 27.

On August 21, 2006, Limehouse filed a request for entry of default. The Charleston County Clerk of Court entered default on August 21, and filed the same on August 22. Subsequently, the clerk mailed a Form 4 to all parties on August 24, 2006, noticing entry of default. On August 29, upon receipt of the Form 4, Hulsey filed an answer and motion to set aside entry of default pursuant to Rule 55(c), SCRPC.

In December, 2006, a circuit judge denied Hulsey's motion to set aside entry of default, and in February 2008, a different circuit judge presided over a jury trial on the issue of damages. On February 6, 2008, the jury returned a verdict for actual damages in the amount of \$2.39 million and awarded punitive damages in the amount of \$5 million. Nine days later, on February 15, 2008, Hulsey filed a motion to dismiss for lack of subject matter jurisdiction, after discovering there was no certified copy of the remand order on file with the Charleston County Clerk of Court. The trial court denied the motion, as well as the accompanying motion for a new trial. This appeal follows.

ISSUES ON APPEAL

- I Did the trial court err in exercising jurisdiction over the case after remand?
- II Did the trial court err in failing to set aside the entry of default?
- III Did the trial court err in the manner in which the default damages trial was conducted?
- IV Did the trial court err in allowing an award of punitive damages?

LAW/ANALYSIS

I Jurisdiction

Hulsey argues the trial court was, and still is, without jurisdiction over this matter because the clerk of the federal court failed to mail a certified copy of the remand order to the Charleston County Clerk of Court. We disagree and find the mailing of the certified copy is not a jurisdictional requirement.

Upon removal, the federal court acquires jurisdiction over the case, for the limited purpose of determining jurisdiction. See Davis v Davis, 267 S C 508, 511, 229 S E 2d 847, 848 (1976). Once the federal court determines that federal jurisdiction is not appropriate, the case is remanded to state court, and the remand ends the federal court's jurisdiction. 28 U S C § 1446(d) (1996).

Congress has provided for a federal court's jurisdiction in section 1446(d): "Promptly after the filing of such notice of removal the defendant shall give written notice thereof to 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).

In addition, 28 U S C § 1447(c) (1996) provides for "Procedure[s] after removal generally," and states

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

In interpreting section 1447(c), a majority of federal circuits take the position that the finality of the remand and the accompanying loss of federal jurisdiction requires both entry of the order with the federal clerk of court *and* a certified copy being mailed to the state court See, e.g., Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 227 (3rd Cir. 1995), Hunt v. Acromed Corp., 961 F.2d 1079, 1081-82 (3rd Cir. 1992), Browning v. Navarro, 743 F.2d 1069, 1078-79 (5th Cir. 1984), Fed. Deposit Ins. Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979)

However, the Fourth Circuit takes a minority view, reasoning that because remands for lack of subject matter jurisdiction or defect in removal are unappealable, "the plain language of the statute[] support[s] the conclusion that §1447 divests a district court of jurisdiction upon the entry of its remand order" despite the federal clerk's duty to send a certified copy In re Lowe, 102 F.3d 731, 735 (4th Cir. 1996) (considering and declining the majority approach, holding "a federal court loses jurisdiction over [the] case as soon as its order to remand the case is entered[] [f]rom that point on, it cannot reconsider its ruling even if the district court clerk fails to mail a certified copy"),³ see also Bryan v. BellSouth Commc'ns, Inc., 492 F.3d 231, 235 n.1 (4th Cir. 2007) (recognizing "a remand is effective when the district court mails a certified copy see [1447(c)] *or* if the remand is based on the lack of subject-matter jurisdiction when the remand order is entered, see [Lowe]")⁴ (emphasis added)

³ The essence of our inquiry, as opposed to the federal court, is not whether the federal scheme provides for state court jurisdiction, but rather, whether it prohibits state court jurisdiction. See infra. Naturally, because a federal court does not determine state court jurisdiction, this distinction allays the dissent's concern that the question confronted in Lowe is different than the one we face here.

⁴ We do not rely on Bryan as dispositive of this case, nor do we find any reason to interpret this purely explanatory note – which specifically cites Lowe – to imply that Lowe does not stand for what it explicitly holds, i.e., a

Accordingly, the South Carolina Federal District Court lost jurisdiction when the order of remand was entered⁵ We believe this ends the inquiry However, because Hulsey's assertion that the state court also lacks subject matter jurisdiction seems to leave the case caught in jurisdictional limbo, or as other courts have dubbed it, on "a jurisdictional hiatus," for lack of the mailing, State v City of Albuquerque, 889 P 2d 204, 207 (N M Ct App 1993) aff'd 889 P 2d 185 (N M 1994), we therefore address whether the mailing is required for the South Carolina Circuit Court to exercise jurisdiction

We start with the premise that our state court's jurisdiction is general, derived exclusively from article V, section 11 of the South Carolina Constitution, not from federal law S C Const art V, § 11, see, e g, Fairfax Countywide Citizens Ass'n v Fairfax County, 571 F 2d 1299, 1304 (4th Cir 1978) (indicating that unlike federal courts, state courts are courts of general jurisdiction) On the other hand, the jurisdiction of federal courts is limited to

federal court loses jurisdiction upon entry of a remand for lack of subject matter jurisdiction

Although the dissent agrees the note is purely dicta, to the extent it is suggested the footnote bears on this matter, we note that the dissenting opinion ignores the second clause of the note, in which the Fourth Circuit reiterates the Lowe holding, presumably because its interpretation of the first clause is irreconcilable with Lowe Further, the interpretation of the first clause is premised on a presumption, allegedly from Bryan, that remands for reasons other than lack of subject matter jurisdiction or defect in removal are not subject to section 1447(c) However, neither the Fourth Circuit, nor any other circuit, has put forth such a ruling, and Bryan itself refutes this presumption by recognizing, in a case in which the remand was based upon a reason *other than* lack of subject matter jurisdiction or defect in removal, that the state court could continue upon receipt of the certified mailing, citing section 1447(c) See Bryan, 492 F 3d at 241

⁵ The exercise of mandamus power is, by its very nature, not an exercise of the court's jurisdiction over the case and controversy

that expressly authorized by the United States Constitution or statute enacted by Congress pursuant thereto Exxon Mobile Corp v Allapattah Servs , Inc , 545 U S 546, 553 (2005), Victory Carriers Inc v Law, 404 U S 202, 212 (1971) ("The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution ") (internal citation and quotation marks omitted), U S Const art III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish "), see The Federalist No 82, at 515-16 (Alexander Hamilton) (Wright ed , 2002) (considering the federal government has only the power exclusively delegated to it, it stands as a "rule" that "the State courts will retain jurisdiction[,] unless it appears to have been taken away in one of the enumerated modes"), Thus, unless otherwise prohibited by statute, a state court's jurisdiction is limited only by the federal court's proper exercise of jurisdiction over a case pursuant to Congressional act – which according to Fourth Circuit jurisprudence in Lowe, ceased upon entry of the remand order ⁶

In this regard, the distinction between the majority and minority views becomes significant Section 1446(d) provides a prohibition on state action in that once removal is properly effectuated, "the State court *shall proceed no further unless and until* the case is remanded " (emphasis added) Section 1447(c) states "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 " (emphasis added) Naturally, if a federal court takes the majority view, making the remand dependent upon the mailing, the case is remanded and the order is mailed at the same point in time Therefore, the mailing forecloses state court jurisdiction not because a state court should interpret section 1447(c) to provide the state may *only* proceed upon the mailing but because section 1446(d) prohibits state action until remanded However, under the minority view, this is not the case as a remand does not require the

⁶ For this reason, we disagree with the dissent's indication that we must interpret section 1447(c), as to do so in light of Lowe's interpretation of when federal jurisdiction ends under that section, we must invariably presume that our jurisdiction is derived from that federal statute rather than limited by it

mailing. Thus, in this circuit, a state court exercising jurisdiction over a case upon entry of remand neither imposes on federal jurisdiction nor violates these federal jurisdiction provisions.

Similarly, the states that have confronted this issue recognize the significance of the distinction between the majority and minority view.

In the cases applying the majority view, the revesting of jurisdiction occurs on the mailing because the finality of the remand and accompanying loss of federal jurisdiction requires the same. See, e.g., Nixon v. Moore, 108 S.W.3d 813, 817-18 (Mo. Ct. App. 2003) (adopting the majority approach that the mailing is the operative event at which jurisdiction switches, but recognizing the minority reaches a different result), Quaestor Invs., Inc. v. State of Chiapas, 997 S.W.2d 226, 228 (Tex. 1999) (noting that "[i]n answering the question of when a jurisdictional transfer occurs between federal and state court, most courts[] interpret[Section 1447(c)] to mean that the federal court loses jurisdiction once the federal court clerk has mailed a certified copy" but others, particularly the Fourth Circuit in Lowe, take an opposite view). However, the same rationale compels a different result under the minority view. See Nixon, 108 S.W.3d at 817 (citing Lowe for the proposition that a "few federal [circuits] have reached [a minority approach] holding that jurisdiction transfers back to the state as soon as an order of remand is entered"), Quaestor, 997 S.W.2d at 228 (stating that Lowe "hold[s] that jurisdiction returns to the state court when the district court enters the remand"). Thus, whether the mailing of the certified copy is required to revest jurisdiction is simply a product of what interpretation is employed to determine when the federal court loses jurisdiction.⁷

⁷ We are aware of no jurisdiction that has taken the position that neither the state nor federal court has jurisdiction over a case. Further, it is not inconsistent with our federalist form of government to allow a state court to exercise its general jurisdiction when a federal court has finally decided its Congressionally authorized jurisdiction has ceased. See Lowe, 102 F.3d at 735 ("Removal in diversity cases, to the prejudice of state court jurisdiction, is a privilege to be strictly construed[]") (quoting In re La Providencia Dev. Corp., 406 F.2d 251, 252 (1st Cir. 1969)).

Thus, the minority view accepts that the "require[ment that] the clerk of the district court [] mail a certified copy of the remand order to the clerk of the state court, is *not jurisdictional* " Int'l Lottery, Inc v Kerouac, 657 N E 2d 820, 823 (Ohio Ct App 1995) (emphasis added) (citing Van Ryn v Korean Air Line, 640 F Supp 284 (C D Cal 1985) (standing for the proposition that entry of remand divests the federal court of jurisdiction notwithstanding the failure of the clerk to send a certified copy)), see Albuquerque, 889 P 2d at 206 (holding "the actions of a federal judge in signing and entering a remand order authorize subsequent state court actions even when the federal court clerk fails to mail the remand order to the clerk of the state court"), see also Lowe, 102 F 3d at 735 ("Logic also indicates that it should be the action of a court (entering the order of remand) rather than the action of a clerk (mailing a certified copy) of the order that should determine *vesting* of jurisdiction") (quoting Van Ryn, 640 F Supp at 285) (emphasis added) In light of the Fourth Circuit having taken the minority approach, we must agree that the duty to send the mailing is not a jurisdictional requirement but a procedural one Therefore, we find the South Carolina Circuit Court did not act without subject matter jurisdiction

This is bolstered by the fact that even in jurisdictions requiring the mailing for finality of the remand, the same is not necessarily required for the state to exercise jurisdiction For instance, in Nixon the Missouri Court of Appeals recognized

The state court may not be immediately notified by the federal court of the order of remand Counsel, of course, are promptly notified of the order of remand, and often counsel will, in the interest of saving time, notify the state court and proceed in the interim with the state court action *There is nothing in the federal statutory scheme prohibiting the parties from proceeding at that point*

Nixon, 108 S W 3d at 817 (emphasis added) ⁸ Thus, although requiring the mailing to make the remand order final, the same is not an indispensable jurisdictional requirement See Bacon v Dir of Revenue, State of Mo, 948 S W 2d 266, 267 (Mo Ct App 1997) ("Subject matter jurisdiction cannot be conferred by consent, and the lack thereof cannot be waived ") With nothing in the federal statutory scheme to prohibit this, the same would hold true in South Carolina, supporting our disinclination to see the mailing requirement as jurisdictional See In re Nov 4, 2008 Bluffton Town Council Election, 385 S C 632, 636, 686 S E 2d 683, 686 (2009) ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties ")

Because we find the mailing requirement is procedural not jurisdictional, the issue is not properly before this court as a result of Hulsey's failure to timely object See Beaufort County v Butler, 316 S C 465, 467, 451 S E 2d 386, 387-88 (1994) (stating "a procedural right may be waived [and a] party who fails to object to the trial of a case cannot later assert the trial court erred in trying the case "), Doe v S B M, 327 S C 352, 356, 488 S E 2d 878, 880 (Ct App 1997) (stating that "[t]he duty is on the litigant to make a timely objection in order to preserve the right to review [and] [a] contemporaneous objection is required to properly preserve an error for appellate review"), In re Michael H, 360 S C 540, 546, 602 S E 2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court ") ⁹

⁸ This statement recognizes that a state court, as opposed to a federal court, confronts whether the exercise of jurisdiction is prohibited by federal statute, not proscribed by it Similarly it undermines the notion that the statement in section 1447(c) that once a certified copy is mailed "[t]he State court *may* thereupon proceed," operates as an absolute prohibition on state action (emphasis added)

⁹ The dissent posits that our distinction between a jurisdictional requirement and a procedural one is irrelevant and that we erroneously suggest the issue is not preserved for appeal because it was not raised before the judgment was entered To the contrary, it is precisely because of the rules of issue preservation that the distinction is not only relevant but imperative The only

Further, to warrant reversal a party must demonstrate the alleged procedural failure caused him prejudice. See Chastain v Hiltabidle, 381 S C 508, 519, 673 S E 2d 826, 831 (Ct App 2009) (stating in order to demonstrate prejudice from procedural non-compliance, a party must establish it "would have done something different" had procedure been followed). Hulsey has failed to demonstrate that he was prejudiced by the absence of the certified copy. Here, Hulsey cannot, and does not, maintain notice was insufficient. The record makes clear that the Charleston County Clerk of Court received notice of a final and unappealable order of remand on July 21, 2006, and that on July 27, 2006, she mailed notice that she received and entered this final and unappealable order to all parties, just as she would have done had she received of a certified copy of the order.

Moreover, Husley personally received notice. The notice sent to Hulsey from the Charleston County Clerk makes no indication of whether the notice of remand it received was certified or not. Consequently, Hulsey's notice was not impacted by the fact that the Charleston County Clerk did not receive a certified copy of the order. Further, pursuant to Section 5 of the Policies and Procedures for the electronic case filing system (ECF) employed

question we confront in this case is whether the action of the trial court is void for lack of jurisdiction, which can be raised at *any time*. However, the dissent elects not to squarely answer this question, instead finding the judgment void because the trial court lacked the "power to proceed" with the case under the federal statute. Because it is the only issue before this court, we must presume that this alleged powerlessness is due to a lack of subject matter jurisdiction. To the extent the dissent suggests the circuit court is powerless to proceed for any reason other than a lack of subject matter jurisdiction, the issue is not properly before this court. Further, the dissent's analogy to the bankruptcy code is misplaced. Notwithstanding the manifest dissimilarities between the realm of bankruptcy law and this case, the federal jurisdictional statutes at issue here do not provide for a stay. The concept is also not analogous to this case as a stay, by definition and nature, operates only as a suspension of jurisdiction, not a termination. Contra Davis, 267 S C at 511, 229 S E 2d at 848 ("[O]nce removal proceedings to federal court are fulfilled and requisite notice accomplished, the State court loses all jurisdiction in the matter.")

in the federal court, by removing the case Hulsey agreed to receive notice of entry of any order or judgment through electronic transmittal. Thus, in addition to notice from the state court, Hulsey had notice from the federal court of the entry of the final and unappealable remand order and consequently was not prejudiced.

Accordingly, the South Carolina Circuit Court did not act without subject matter jurisdiction, and Hulsey was not otherwise prejudiced by the Federal Clerk's failure to send a certified copy of the order of remand.¹⁰

II Entry of Default

Hulsey argues the trial court erred in failing to set aside entry of default because (a) the answer was timely or (b) good cause existed to set aside the entry of default under Rule 55(c), SCRCP. We disagree.

As to the issue of whether the answer was timely filed, Hulsey points out this is an issue of interpretation of a rule or statute and is therefore reviewed de novo. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (stating the interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court). Further, our standard of review leaves the decision to set aside an entry of default within the sound discretion of the trial court, which we will not reverse absent an abuse of discretion. Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 101 (Ct.

¹⁰ Respectfully, we disagree with the dissent's "summary of the rules that apply to remand in the Fourth Circuit." We find these conclusions irreconcilable with the holding of Lowe and contrary to the expressed rationale of both Lowe and Bryan. Similarly, we find these rules to be contrary to the reasoning and holdings of the state courts that have confronted the issue. Finally, from a practical perspective, we find the summary illogical as it proposes to create (1) a scenario in which a state court is permitted to resume action on a case even though the remand order is appealable and remains subject to the federal court's jurisdiction, and (2) a scenario that denies a state court jurisdiction over a matter in which federal jurisdiction has been terminated, and a final and unappealable order has been issued.

App 2004) Such an abuse of discretion occurs when the decision is based upon an error of law or when the order is without evidentiary support Id

a Timeliness of the Answer

In order to find the August 29 answer was timely Husley urges this court to adopt a rule that the thirty-day time period in which to answer starts over upon remand ¹¹ We are not inclined to adopt such a rule

Rule 12(a), SCRCF, provides "A defendant shall serve his answer within 30 days after the service of the complaint upon him[]" However, federal rules provide "[a] defendant who did not answer [in state court] before removal must answer within the longest of " (A) twenty days after being served or otherwise receiving the initial pleading or (B) within five days after notice of removal is filed Rule 81(c)(2), FRCP

In this case, Hulseley removed fourteen days after being served Thus, although under Rule 12(a), SCRCF, he was entitled to another sixteen days to answer, by choosing to remove the case to federal court, he willfully subjected himself to the shortened time period of Rule 81(c)(2), FRCP – providing he must answer within six days (twenty days after being served) However, in the seventy-six days between removal and the entry of remand, Hulseley neglected to answer

Initially, we find no authority in this state to support the position that a removing party is entitled to a fresh thirty days to answer a complaint upon remand Neither did the trial court Rather, looking at both the federal rules and state rules, in the exceptionally rare circumstance in which a case would be remanded to the state court before an answer was due pursuant to Federal Rule 81(c)(2), a plain reading of South Carolina Rule 12(a) would require an answer within thirty days of service However, seemingly giving Hulseley the benefit of the doubt, the trial court determined that because the state court is to proceed as if no removal had been attempted, removal to federal court tolls

¹¹ Hulseley avers jurisdiction has not yet revested in the state court and maintains this as an alternative position

the thirty day time period and therefore, upon remand Hulsey should be allowed the remainder of any unexpired time¹² See State v Columbia Ry, Gas & Elec, 112 S C 528, 537, 100 S E 355, 357 (1919) (stating that upon remand it is the duty of the state court to proceed as if no removal had been attempted)

In this case, because Hulsey failed to answer under the plain reading of either Rule 12(a), SCRCp, or Rule 81(c)(2), FRCP, or under the more liberal approach provided by the trial court, it is of no consequence which approach we would adopt. Therefore, we are not occasioned to opine on the more acceptable method¹³. It suffices that we find no indication that a party is entitled to a fresh thirty-day period upon remand. Accordingly, we are disinclined to adopt a rule allowing the same. Such action is not the province of this court, but that of our legislature or supreme court.

b Rule 55(c)

Hulsey next argues the trial court erred in failing to set aside the entry of default under Rule 55(c), SCRCp. We disagree.

The issue before this court is not whether we would find good cause, but whether the decision to deny the motion to set aside default is supportable by the evidence and not controlled by an error of law. Williams v Vanvolkenburg, 312 S C 373, 375, 440 S E 2d 408, 409 (Ct App 1994). A motion to set aside entry of default under Rule 55(c) is addressed to the sound discretion of the trial court. Id.

Under Rule 55(c), the entry of default may be set aside for "good cause shown," which is a less stringent standard than the excusable neglect standard

¹² This amounted to sixteen days after the remand because fourteen days had elapsed prior to removal.

¹³ The inquiry of whether failure to comply with Rule 81(c)(2), FRCP, would support entry of default in state court if the case is remanded unanswered appears novel in this state. However, we need not address it.

of Rule 60(b) Sundown Operating Co v Intedge Indus Inc, 383 S C 601, 607, 681 S E 2d 885, 888 (2009)¹⁴ The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice " Id "Once a party has put forth a satisfactory explanation the trial court must also consider [the Wham¹⁵ 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 " Id at 607-08, 681 S E 2d at 888 However, a trial court need not make specific findings of fact for each factor if sufficient evidence supports a trial court's determination that no reasonable explanation exists for vacation of default Id

In this case, the trial court held that because "there appears to be no reasonable basis for [Hulsey's] assumption that the [thirty] day time to file an answer starts completely anew upon remand[,] no good cause has been demonstrated " While we appreciate the trial court did not have the benefit of the Sundown opinion, we find Sundown did nothing to abate the discretion to which a trial court is entitled in ruling on a Rule 55(c) motion Nor did it change the standard this court applies when reviewing such a decision What constitutes a satisfactory explanation that serves the interests of justice remains within the sound discretion of the trial court¹⁶

¹⁴ Although the South Carolina Supreme Court decided this case during the pendency of this appeal, Hulsey notified this court via writing of the intent to rely on this authority

¹⁵ Wham v Shearson Lehman Bros, 298 S C 462, 465, 381 S E 2d 499, 502 (Ct App 1989)

¹⁶ As our colleague in the dissent points out and the trial court's ruling indicates in practice, both the bench and bar have been aware that the explanation for the default is significant See New Hampshire Ins Co v Bey Corp, 312 S C 47, 50, 435 S E 2d 377, 379 (Ct App 1993) (indicating the reason for failure to act is relevant under a Rule 55(c) analysis)

In South Carolina, negligence on the part of an attorney is imputable to the client and will not be the basis of finding good cause to set aside entry of default. See Vanvolkenburg, 312 S C at 375, 440 S E 2d at 410 (indicating, prior to Sundown, that the imputed negligence of an attorney to a defaulting litigant is not good cause). Similarly, our supreme court has recognized subsequent to Sundown that the good cause standard of Rule 55(c), encompasses a degree of reasonableness. See Richardson v P V, Inc., 383 S C 610, 618-19, 682 S E 2d 263, 267 (2009) (finding, after Sundown, that negligence on the part of an insurance company or attorney will be imputed to a defaulting litigant and negligence does not constitute good cause to relieve an appellant from entry of default), see also Black's Law Dictionary 1133 (9th ed 2009) (defining negligence as the failure to act reasonably under a specific set of circumstances). It stands, therefore, that because unreasonable conduct does not amount to good cause, an unreasonable explanation for defaulting is not a satisfactory explanation that serves a sufficient interest of justice.¹⁷

In the case at bar, although the supreme court had not yet issued the Sundown opinion, the trial court nonetheless addressed Hulse's explanation of default and specifically found it unreasonable. We find the record supports the finding that Hulse's explanation for default is unreasonable.¹⁸

¹⁷ We recognize the dissent's position that reasonableness is not required of the excuse itself but merely a factor to be considered in a "broader inquiry" of whether the vacation serves the interests of justice. While this is certainly a mode of analysis within the trial court's discretion, in light of our standard of review, whether the trial court finds vacation does not serve an interest of justice because the excuse is unreasonable or finds the excuse is unreasonable because vacation does not serve an interest of justice, so long as supported by the evidence, is a distinction without a consequence.

¹⁸ Notwithstanding, we respectfully disagree that good cause likely existed in this case. Hulse's contempt for the rules of procedure both in federal court and state court, indicates this was not a "failure at an attempt" but rather a "failure to attempt" an answer. This issue would not have arisen had the rules been followed. Thus, we suggest there is ample "guidance" for Hulse to know a party is not entitled to 130 days to answer.

Vanvolkenburg, 312 S C at 375, 440 S E 2d at 409 (stating the "issue before this [c]ourt is not whether we believe good cause existed [but] whether the trial court's determination is supported by the evidence") Further, we are aware of no authority either prior to or after Sundown that compels this court to find it is not within the trial court's discretion to deny a Rule 55(c) motion for an unreasonable failure to answer Accordingly, we find the trial court did not abuse its discretion

III Default Damages Trial

Hulsey's allegation of error as to the damages trial is threefold He argues (a) the process employed by South Carolina courts is unconstitutional and deprives a default defendant of due process, (b) specifically as to this case, the trial court erred in allowing introduction of new allegations during the damages hearing, in the form of testimony about a link on Hulsey's website to the slanderous article, and (c) the trial court erred by improperly commenting on the facts

This court's standard of review for the grant or denial of a motion for a new trial extends substantial deference to the trial court Vinson v Hartley, 324 S C 389, 404, 477 S E 2d 715, 723 (Ct App 1996) The trial court's decision will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law Stevens v Allen, 336 S C 439, 446, 520 S E 2d 625, 628-29 (Ct App 1999)

a South Carolina's default damages procedure

Hulsey argues the process employed by the State of South Carolina during a default damages hearing is unconstitutional We must disagree

During a default damages trial, the defendant's participation shall be limited to cross-examination and objection to the plaintiff's evidence Roche v Young Bros of Florence, 332 S C 75, 81-82, 504 S E 2d 311, 314 (1998), Howard v Holiday Inn, Inc., 271 S C 238, 241, 246 S E 2d 880, 882 (1978), Doe v SBM, 327 S C 352, 356, 488, S E 2d 878 881 (Ct App 1997), Ammons v Hood, 288 S C 278, 282, 341 S E 2d 816, 818 (Ct App 1986)

On appeal, Hulsey provides no controlling authority¹⁹ for his position that this court can, or should, diverge from longstanding rules established by our supreme court. Accordingly, we cannot and do not find the default damages hearing to be unconstitutional.

b Introduction of testimony about the website link

Hulsey maintains that the entry of default is tantamount to admission of the allegations of the complaint, but nothing more. See Wiggins v Todd, 296 S C 432, 435, 373 S E 2d 704, 705-06 (Ct App 1988) (stating that when a defendant is in default, the plaintiff's right to recover is circumscribed by the complaint drafted). Therefore, Hulsey alleges the trial court erred in allowing Limehouse to testify to new allegations outside the confines of the complaint, particularly about a link on Hulsey's website to the slanderous newspaper article. However, an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection. SBM, 327 S C at 356, 488 S E 2d at 881.

Here, Hulsey failed to object to any testimony regarding the publication or link on the website. Accordingly, this allegation of error is not preserved for our review.

c Trial court commenting on the facts

Generally a "trial [court] should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally." Sierra v Skelton, 307 S C 217, 225, 414 S E 2d 169, 174 (Ct App 1992).

In this case, during deliberations, the jury sent out a question inquiring whether "the link to the April 24, 2004, article [was] still on Hulsey's

¹⁹ Hulsey cites Mathews v Eldridge, 424 U S 319, 333-34 (1976), for the proposition that due process requires a meaningful opportunity to be heard. Hulsey also cites to two appellate decisions from the foreign jurisdictions of Florida and North Carolina to support his argument to change the default damages procedure in South Carolina, specifically as to punitive damages.

website? [And i]f not, when was it removed?" The trial court responded by informing the jury that there was testimony that as of the Monday of trial, the link remained on the website

Hulsey argues this "constitute[s] an improper comment on the facts " Further, Hulsey argues "even more inexplicably, Limehouse was allowed to testify that the link on the website was a violation of a court order while Hulsey was precluded from introducing the very court order which indisputably evidences that there was no prohibition from mentioning the case on the firm website " Initially, Hulsey made no objection to the testimony regarding the court order, and under the default damages procedure, would have been free to cross-examine Limehouse on this matter Furthermore, Hulsey does nothing to demonstrate how the trial court's answer to the jury's inquiry demonstrated an imparting of opinion on the facts of the case Accordingly, we find no error

IV Punitive Damages

Hulsey argues the award of punitive damages was founded on trial court error and constituted a denial of due process Hulsey presents four separate arguments on this issue (a) due process demands a default litigant be given an opportunity to defend punitive damages, (b) the jury should have been instructed that it could return an award of no punitive damages, (c) the trial court allowed and actually invited the jury to consider matters not proper for their consideration in awarding punitive damages, and (d) the trial court erred in confirming the award

Generally, the trial court's decision on a motion for a new trial will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law Stevens v Allen, 336 S C 439, 446, 520 S E 2d 625, 628-29 (Ct App 1999)

a Due Process

Hulsey maintains employing South Carolina's procedures for a default damages hearing in a case in which punitive damages are sought amounts to a constitutional due process violation Hulsey further argues this due process

violation was compounded by the facts that the trial court failed to exercise its obligation to independently make a threshold determination of whether the defendants' conduct rose to the level of warranting punitive damages, and that Limehouse was allowed to go into matters beyond the bounds of the complaint

Initially, Hulsey cites no authority to support the proposition that South Carolina should employ a different default damages procedure for punitive damages than for actual damages. See Roche, 332 S C 75, 504 S E 2d 311 (making no distinction on appeal between punitive damages and actual damages during a default damages trial)

As to the trial court's failure to make a threshold determination that Hulsey's conduct warranted punitive damages, this issue was specifically addressed when the trial court denied Hulsey's motion for a directed verdict on punitive damages. Although it is unclear from the briefs on appeal whether Hulsey challenges this ruling on appeal, to the extent that he may be alleging the trial court improperly denied the directed verdict on the issue of punitive damages, we briefly address the issue.

In reviewing the denial of a motion for a directed verdict, this court applies the same standard as the trial court, viewing the evidence and the inferences in the light most favorable to the non-moving party, and will not reverse the denial unless there is no evidence to support the ruling. All Saints Parish Waccamaw v Protestant Episcopal Church in Diocese of S C, 385 S C 428, 441-42, 685 S E 2d 163, 170 (2009).

When viewed in the light most favorable to Limehouse, there exists evidence which supports submitting the issue of punitive damages to the jury for consideration, including the intentional nature of the action, Hulsey's degree of culpability, and his awareness of the conduct. Accordingly, to the extent Hulsey may be challenging this ruling, we find no error.

b No punitive damages as an option

Hulsey next argues the trial court erred by telling the jury it was required to award punitive damages. We find no such instruction.

Punitive damages may be awarded, in the interest of society in punishing or deterring the conduct, or vindicating a private right, when the plaintiff proves entitlement to such damages by clear and convincing evidence S C Code Ann § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence), Austin v Specialty Transp Servs, Inc., 358 S C 298, 312, 594 S E 2d 867, 874 (Ct App 2004) (indicating punitive damages may be awarded for various reasons)

Generally, this court will not reverse the decision of the trial court as to a particular jury instruction absent a prejudicial abuse of discretion Cole v Raut, 378 S C 398, 405, 663 S E 2d 30, 33 (2008) A trial court abuses its discretion in this regard when the ruling is not supported by the evidence, or based on an error of law Clark v Cantrell, 339 S C 369, 389, 529 S E 2d 528, 539 (2009)

Hulsey argues punitive damages should not be awarded simply as a matter of right, and suggests the trial court instructed the jury it had to award punitive damages However, Hulsey does not cite, or otherwise bring to this court's attention, any specific language used by the trial court to support this allegation

In this case, considering the whole of the trial court's instruction, the jury was not instructed that it *had* to award punitive damages Instead, the instructions indicated that only if the jury found Limehouse had established entitlement to punitive damages by clear and convincing evidence, should the jury then make a determination as to the amount of such damages The trial court specifically stated "[p]unitive damages may only be awarded where the plaintiff proves by clear and convincing evidence that the defendant's actions were willfull, wanton, and malicious [and only upon such a finding] would [it] be [the jury's] duty to include such damages in [the] verdict" Similarly, the instruction also demonstrates the trial court fully explained the verdict form to the jury Accordingly, the trial court did not abuse its discretion

c Matters not appropriate for consideration of punitive damages

Next, Hulsey alleges his constitutional due process rights were violated because of the trial court's and Limehouse's repeated references to the default, arguing this referencing insinuated that the jury should punish Hulsey for his failure to follow the procedural rules. Further, Hulsey alleges this error was compounded by the trial court allowing Limehouse's wife to testify as to the link on Hulsey's website, as well as to statements about how the ordeal affected Limehouse's family. Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the RICO case, and admitting testimony as to Hulsey's net worth. We disagree.

First, Hulsey does not cite any authority to support the position that discussion of the default would support a finding that due process had been denied. Further, we find no indication on the record that the trial court suggested or otherwise implied that Hulsey's failure to answer should support the imposition of punitive damages.

Second, as to the allegations pertaining to the website link, as noted Hulsey made no objection to this during the damages trial and consequently the issue is not preserved for our review. See SBM, 327 S.C. at 356, 488 S.E.2d at 881 (indicating an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection to the same).

Third, Hulsey contends it was error to allow Limehouse's wife to mention the impact of the slander on his family because pursuant to Philip Morris USA v. Williams, 127 S.Ct. 1057 (2007), punitive damages cannot be imposed to punish a defendant for harm visited upon others. However, at trial, this argument was specifically presented as one of relevance.

Evidence is relevant, and generally admissible, if it has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. Rules 401, 402, SCRE. The introduction of evidence is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Richardson v. Donald Hawkins Const., Inc., 381 S.C. 347, 352, 673 S.E.2d 808, 811 (2009),

Jamison v Ford Motor Co., 373 S C 248, 268, 644 S E 2d 755, 765 (Ct App 2007) In this case, the trial court found the testimony to be relevant because it was "within the scope of how it affected [Limehouse], and his family relationships " We agree that the impact on Limehouse's immediate family bears on the extent of the impact he suffered, and accordingly we find no abuse of discretion

Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the prior RICO case as well as erroneous testimony that Hulsey's net worth was in excess of \$81 million Initially, contrary to Hulsey's position that Limehouse was able to paint him as a "greedy hotshot lawyer," Limehouse's own witness, John Massalon, conceded he was aware Hulsey was pro bono counsel on the previous RICO case Furthermore, the record does not indicate any objection was made to the testimony of Bank of America employee Bernadette DeWitt when she testified as to Hulsey's net worth The evidence bears out the financial declaration on which she relied was certified as a true, complete, and accurate statement of Hulsey's financials and as such, any misinformation presented on this issue was the result of Hulsey's own misrepresentation Accordingly, we find no error

d Confirmation of punitive damages

Finally, Hulsey argues the trial court erred in confirming the award of punitive damages We disagree

Our supreme court recently indicated an appellate court's scope of review to be de novo Mitchell v Fortis Ins Co., 385 S C 570, 583, 686 S E 2d 176, 185, 183 (2009)

The Fortis, court consolidated the post judgment due process analysis for punitive damages In reviewing an award of punitive damages, we consider (1) the reprehensibility of the conduct, (2) the disparity or "ratio" between actual harm and the punitive damage award, and (3) the comparative penalties Fortis, 385 S C at 587-89, 686 S E 2d at 185-86

1 Reprehensibility

In considering reprehensibility, a court should consider whether

(i) the harm caused was physical as opposed to economic, (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others, (iii) the target of the conduct had financial vulnerability, (iv) the conduct involved repeated actions or was an isolated incident, and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident

Id. at 185, 686 S E 2d at 587 This encompasses the defendant's culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct Id. at 185, n 7, 686 S E 2d at 587, n 7

Although the harm here was not physical, and posed no threat to health or safety, the evidence indicates Hulsey, through involvement in the underlying RICO action, was aware of the nature and vulnerability of Limehouse's business Also, although the statements were made in a single incident, because the statements were made to the press, the evidence shows that the circumstances clearly indicated that the statements would be publicly reported and widely disseminated Finally, this conduct was not the result of accident or inadvertence The statements were contemplated, intentionally made, and coincided precisely with a filing of a lawsuit against Limehouse Accordingly, our review of the evidence convinces us that Hulsey's conduct was sufficiently reprehensible to support punitive damages²⁰

²⁰ The trial court specifically noted the statements were intentionally made, the award would deter similar conduct in the future, the award was just over twice actual damages and was thus reasonably related to the actual harm suffered The trial court also noted Hulsey was of the rare few who can afford to pay the award, and although South Carolina's procedure did not permit Hulsey to put forth evidence, the verdict remained reasonable

2 Ratio

The courts of this state have affirmed punitive damage awards in excess of six times actual damages. See James v Horace Mann Ins Co, 371 S C 187, 196, 638 S E 2d 667, 672 (2006) (affirming an award of punitive damages of 6.82 times actual damages), Cock-N-Bull Steak House, Inc v General Ins Co, 321 S C 1, 11, 466 S E 2d 727, 733 (1996) (affirming an award of punitive damages roughly twenty-eight times actual damages). Similarly, the supreme court has modified awards to reflect a 9:2:1 ratio. See Fortis, 385 S C at 594, 686 S E 2d at 188. Here, the punitive damage award was slightly above twice actual damages. Accordingly, we do not find such an award to violate due process.

3 Comparative Penalty

In looking to comparative cases, we find that in similar matters, our supreme court has upheld punitive damages which were over ten times that of actual damages. See, e.g., Weir v Citicorp Nat'l Servs Inc, 312, S C 511, 518, 435 S E 2d 864, 869 (1993) (affirming an award of \$275,000 in punitive damages, in a slander case, where actual damages were found to be \$25,000). Accordingly, we find no error here.

CONCLUSION

For the reasons above, the ruling of the trial court is

AFFIRMED

HUFF, J , concurs

FEW, C J , dissents

FEW, C J , dissenting I disagree with the majority's analysis of Issues I and II, and therefore dissent. Because my position on either Issue I or II would resolve this appeal, I would not reach Issues III and IV.

I Jurisdiction

Hulsey moved for a new trial and for relief from judgment on the ground that jurisdiction never re-vested in the state court after removal, and therefore federal law prohibited the state court from proceeding with the case. The plain language of 28 U.S.C. §§ 1446(d) and 1447(c) required that the motion be granted.

a The Plain Language of Sections 1446(d) and 1447(c)

Section 1446(d) provides that after an action has been removed to federal court "the State court shall proceed no further unless and until the case is remanded." A remand order based on a lack of subject matter jurisdiction, such as the remand order in this case, is governed by section 1447(c),²¹ which requires that "[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court." The next sentence of section 1447(c)—"The State court may thereupon proceed with such case"—is the key to this case. The word "thereupon" sets the point in time when the case is "remanded." Before a certified copy of the remand order is mailed, the state court may not proceed; afterwards, it may. The section 1446(d) prohibition of "shall proceed no further" remains in effect until the section 1447(c) requirement that a "certified copy of the order of remand shall be mailed" has been met. This plain language is all that is necessary to resolve this appeal. A certified copy of the order of remand was never mailed to the state court clerk. Under 28 U.S.C. §§ 1446(d) and 1447(c), therefore, the state court had no power to proceed. Because the state court acted when federal law prohibited it from doing so, the resulting judgment was void. The trial court's failure to grant relief from the judgment was error and must be reversed.

The majority takes the position that the mailing of a certified copy of the remand order does not determine the point in time when a state court may

²¹ Section 1447(c) states "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

proceed after remand. Their position is based primarily on two grounds. First, the majority argues that the mailing of a certified copy of the remand order is not required in the Fourth Circuit under the authority of In re Lowe, 102 F.3d 731 (4th Cir. 1996). Second, the majority argues that to the extent the requirement is applicable, it is procedural, and the right to enforce it has been waived in this case.

b In re Lowe

The question before the court in Lowe was different from the question we face. Thus, the rule announced there is not applicable here. The majority's argument that the mailing of a certified copy of the remand order is not required in the Fourth Circuit is based on the following passage from Lowe: "we hold that a federal court loses jurisdiction over a case as soon as its order to remand the case is entered. From that point on, it cannot reconsider its ruling even if the district court clerk fails to mail to the state court a certified copy of the remand order." 102 F.3d at 736. The majority has incorrectly framed the issue by relying on this passage.

The majority's argument begins by correctly recognizing that section 1446(d) allows the state court to proceed as soon as the case is "remanded." However, the majority incorrectly concludes that the above statement from Lowe answers the question of when that occurs. I agree that Lowe sets the point in time when the federal court may not reconsider a remand order. However, that ruling is based on the Fourth Circuit's interpretation of section 1447(d), not section 1446(d). Therefore, the majority is mistaken that Lowe sets the point in time when the case is remanded, and that it is not necessary to interpret section 1447(c) in order to determine when the state court may proceed. Rather, we are required to enforce the section 1447(c) requirement that a certified copy of the remand order be mailed before the state court may proceed.

A careful analysis of Lowe demonstrates that the question it answered was different. The plaintiff sued her employer and two of its managers in the state court of North Carolina. 102 F.3d at 732. After the defendants removed the case to federal court, the plaintiff moved to remand. Id. A federal magistrate judge granted the motion on the grounds that the federal court

lacked subject matter jurisdiction 102 F 3d at 732-33, 736 The federal clerk mailed the order to the clerk of the state court, but the copy mailed was not certified 102 F 3d at 733 Six months later, a different federal magistrate judge granted the defendants' motion to reconsider Id After the second magistrate denied two motions to remand, the plaintiff petitioned the Fourth Circuit for a writ of mandamus requiring the district court to return the case to the state court Id After concluding generally that remand orders issued for lack of subject matter jurisdiction are not reviewable, 102 F 3d at 733-34, the Fourth Circuit framed the specific issue before it as follows "[t]he only question remaining, then, is to identify when a court's decision to remand becomes unreviewable " 102 F 3d at 734

The court analyzed the question by focusing on 28 U S C § 1447(d), and in particular the word "order "

Subsection 1447(d) provides only that a remand "order" may not be reviewed, it does not condition reviewability on any other event Thus, the plain language of subsection (d) indicates that a court may not reconsider its decision to remand, as soon as it formalizes that decision in an "order "

102 F 3d at 734 The Lowe decision thus turns on the court's interpretation of the word "order" in section 1447(d) and not, as the majority claims, on the timing of "remanded" under section 1446(d) In fact, Lowe does not even mention section 1446 The court clarifies its reliance on section 1447(d) with the language "[1447(d)] does not condition reviewability on any other event " Id This statement makes it clear that Lowe is not based on sections 1446(d) or 1447(c), which refer respectively to the events of "remanded" and "mailed " Therefore, the majority's contention that Lowe defines "remanded" is not correct

Moreover, Lowe contemplates that the section 1447(c) requirement of a mailing remains a part of the process of remand Noting that it has read sections 1447(c) and (d) independently, 102 F 3d at 734 n 3, the court explains that section 1447(c) "directs the district court clerk to mail a 'copy' of the remand order to the state court, certainly implying that the order itself,

the document § 1447(d) tells us is unreviewable, is in existence before the time of the mailing " 102 F 3d at 734 If the Fourth Circuit's "minority" approach made the mailing required by section 1447(c) unnecessary, the Lowe court would have had no reason to provide this explanation that the section comes into play after the event of an "order" contemplated in section 1447(d)

The majority and I agree that the plain language "shall proceed no further" in section 1446(d) prohibits a state court from acting on a removed case until the case is "remanded " The question we face is when federal law sets that point in time, and thus removes the "shall proceed no further" prohibition The answer to that question is not found in Lowe's interpretation of section 1447(d), but in the plain language of sections 1446(d) and 1447(c)

c Waiver

The majority's second ground for its position is that the section 1447(c) requirement of mailing a certified copy is a procedural requirement rather than a jurisdictional one The distinction is irrelevant in this case Congress enacted a statute providing that when a case is removed to federal court the state court is prohibited from further action "unless and until the case is remanded " 28 U S C § 1446(d) This prohibition may not be avoided by labeling the mailing requirement procedural The prohibition is imposed by a federal statute and is likewise lifted only in accordance with federal statutes 28 U S C §§ 1446(d) and 1447(c) The question we face in this appeal requires us to interpret these statutes and apply their plain language to the facts of this case See Media Gen Commc'ns, Inc v S C Dep't of Revenue, 388 S C 138, 148, 694 S E 2d 525, 530 (2010) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to impose another meaning ")

The majority's ruling not only imposes another meaning on these statutes, but it also renders an entire sentence of the United States Code meaningless by eliminating the section 1447(c) requirement that the federal clerk mail a certified copy of the remand order This court is not permitted to interpret a statute so as to render a part of it meaningless See Coyne & Delany Co v Blue Cross & Blue Shield of Va , Inc., 102 F 3d 712, 715 (4th

Cir 1996) ("Absent clear congressional intent to the contrary, we will assume the legislature did not intend to pass vain or meaningless legislation"), Duvall v S C Budget & Control Bd, 377 S C 36, 42, 659 S E 2d 125, 128 (2008) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act ")

By characterizing the mailing requirement as procedural, the majority has converted section 1447(c) to a notice statute, so that the requirement of mailing a certified copy can be ignored because, as the majority states, "Hulsey cannot, and does not, maintain notice was insufficient " I do not believe this court is free to be so loose with the requirements of federal law If Congress intended that notice of a remand was sufficient to enable the state court to proceed, it could easily have drafted sections 1446(d) and 1447(c) accordingly

The majority's waiver argument also suggests that the issue is not preserved for appellate review because it was not raised to the trial court before judgment was entered The situation in which the federal removal statutes prohibit a state court from proceeding after a case is removed is analogous to the situation in which the federal bankruptcy stay prohibits a state court from taking action against a debtor who has filed a bankruptcy petition See 11 U S C § 362(a)(1) (2004 & Supp 2010) In that instance, as in this one, the validity of a judgment entered in state court during the time in which federal law prohibits it can be raised at any time See Ex Parte Reichlyn, 310 S C 495, 498-99, 427 S E 2d 661, 663-64 (1993) (declaring a judgment void when the judgment was entered during the pendency of the bankruptcy stay)

d Bryan v BellSouth Communications, Inc

In support of their respective positions, Appellants and Respondent cite different clauses in the same footnote from the Fourth Circuit's second opinion in Bryan v BellSouth Communications, Inc, 492 F 3d 231 (4th Cir 2007) (Bryan II)²² As I will explain, the footnote supports the position I

²² The first opinion was Bryan v BellSouth Communications, Inc, 377 F 3d 424 (4th Cir 2004) (Bryan I)

have taken in this dissent. To understand Bryan II, however, it is important to note that the remand order was not made pursuant to section 1447(c)²³. Instead, after dismissing two federal claims on the merits, the district court determined a third claim was not federal, declined to exercise supplemental jurisdiction over it, and remanded it to state court. Bryan II, 492 F.3d at 234-35; Bryan I, 377 F.3d at 425. Because the Bryan remand was not based on the lack of subject matter jurisdiction and therefore was not made pursuant to section 1447(c), any statement in Bryan II interpreting that subsection is technically dictum. However, both parties have cited Bryan II as authoritative, as has the majority. Mindful therefore of the admonition of former Chief Judge Sanders that "those who disregard dictum, either in law or in life, do so at their peril," I will give due regard to the footnote from Bryan II. Yeager v. Murphy, 291 S.Ct. 485, 490 n.2, 354 S.E.2d 393, 396 n.2 (Ct. App. 1987).

The footnote states

A remand is effective when the district court mails a certified copy of the remand order to the state court, *see* 28 U.S.C.A. § 1447(c) (West 2006), *or*, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered.

²³ Section 1447(c) applies to remands on the basis of a lack of subject matter jurisdiction or a defect in the removal procedure. As the Fourth Circuit pointed out in Bryan I, the district court "concluded that removal was proper because Bryan presented a federal question." 377 F.3d at 427. The Fourth Circuit's decision in Bryan I demonstrates that it agreed. "On appeal, we held that the remanded claim was a federal claim." Bryan II, 492 F.3d at 234 (citing Bryan I, 377 F.3d at 432). Because the federal court had subject matter jurisdiction over the federal claims, the remand was not made pursuant to section 1447(c).

Bryan II, 492 F 3d at 235 n 1 (emphasis added) The disjunctive word "or" indicates that the purpose of the footnote is to differentiate between the two types of remand those made pursuant to section 1447(c) and those made for some other reason In particular, the footnote differentiates between the points in time when each is "effective" to allow the state court to proceed ²⁴ Citing to section 1447(c), which applies only to remand orders such as the one in this case, the first clause states the rule that the "remand is effective when the district court mails a certified copy of the remand order to the state court " The only situation in which the first clause of the footnote can be an accurate statement of law is when the statement is made to answer the precise question we face in this appeal—When does federal law remove the "shall proceed no further" prohibition so that a state court may proceed with a case after a remand made pursuant to 28 U S C § 1447(c)?²⁵

Finally, the text of Bryan II contains a statement that is contrary to the majority's interpretation of the footnote Responding to a separate argument made by BellSouth, the court again described the point in time when the state court regained jurisdiction to proceed after the remand, and cited section 1447(c) In the parenthetical after the citation in which it explained the meaning of 1447(c), the court stated "providing that the state court may proceed with a case once the district court mails a certified copy of the remand order to the state court " 492 F 3d at 241 This is consistent with the plain language of the statutes and refutes the majority's interpretation of the footnote Therefore, I interpret the footnote to include in its first clause the rule applicable to the issue we face in this appeal, and thereby to support my

²⁴ The court makes this differentiation in order to explain how the remanded state court proceedings and the appeal of the remand order to the Fourth Circuit could proceed simultaneously 492 F 3d at 235 In fact, the footnote appears at the end of this sentence in the text of the opinion "While BellSouth's appeal was pending, Count A, which had been remanded to state court by the district court, was proceeding in state court " Id

²⁵ It is not possible to interpret the clause to apply to anything other than a section 1447(c) remand, not only because the clause cites to the section, but also because the mailing referred to is not required except when the remand is made pursuant to section 1447(c)

position that the federal clerk was required to mail a certified copy of the remand order to the state court clerk before the state court had jurisdiction to proceed

e Conclusion as to Jurisdiction

Limehouse argues that the result of a straightforward interpretation of sections 1446(d) and 1447(c) under the circumstances of this case "makes no sense " The majority refers to it as "jurisdictional limbo" and "jurisdictional hiatus " It is true that interpreting the statutes according to their plain meaning creates a scenario in which for some period of time neither the federal court nor the state court had the power to act In most cases, however, this period is very brief, in any case it is a situation required by the plain language of federal statutes Whenever the period becomes lengthy, as it did here, the federal court has the power to order its clerk to comply with the statute²⁶

²⁶ While the federal court's remand order becomes final and unreviewable upon its filing, that event does not deprive the federal court of the power to order its clerk to complete the ministerial task of mailing a certified copy of the order to the state court clerk See Peacock v Thomas, 516 U S 349, 354 (1996) ("[A] federal court may exercise ancillary jurisdiction to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees ") As a practical matter, an informal reminder to the federal clerk that a certified copy of the order had not been mailed would almost certainly have solved the problem As a technical matter, the district court has mandamus power to compel its clerk to complete this ministerial task This is, in fact, exactly what happened in Lowe After the district court concluded there was no federal subject matter jurisdiction, the Fourth Circuit granted a writ of mandamus with instructions that the district court return the case to state court 102 F 3d at 736 Given the substance of the Fourth Circuit's ruling that the district court's order remanding the case was unreviewable upon filing, the only task left to complete at that point was the ministerial task of sending a certified copy of the remand order to the state clerk

I acknowledge that the result I propose appears at first to be harsh on the facts of this case. However, the section 1446(d) prohibition of "shall proceed no further" is absolute and contemplates no exceptions, even in the face of a harsh result. When the Legislative branch sets forth plain and unambiguous language in a statute, the Judicial branch is constrained to follow it. If the results are harsh, the Legislature may change the statute but the courts may not.²⁷ However, the result I would reach is not harsh, nor even unfair. Limehouse's motion to remand to state court cites 28 U.S.C. § 1447(c) in its first sentence. Presumably his lawyers read the subsection, in which the requirement of mailing a certified copy of the remand order is plainly and unambiguously stated. Having cited the subsection to his advantage, it is not at all unfair that Limehouse be bound by the subsection when its plain terms work to his disadvantage.

In summary, the following rules apply to remand in the Fourth Circuit. A remand order based on some ground other than a lack of subject matter jurisdiction or a defect in the removal procedure, such as the decision not to exercise supplemental jurisdiction in Bryan, is reviewable, but the remand is effective allowing the state court to proceed as soon as the order is entered. On the other hand, a remand order which is based on a lack of subject matter jurisdiction, such as the order in this case and in Lowe, is unreviewable as soon as it is entered. However, this type of remand is effective such that the state court may proceed only after the federal clerk has complied with 28 U.S.C. § 1447(c) by mailing a certified copy of the remand order to the state court clerk. Because the federal clerk never complied with this requirement, the case was never "remanded," the state court had no power to proceed, and the resulting judgment entered in violation of federal law is void.

²⁷ Neither Limehouse nor the majority contends this is a situation in which the court may ignore a statute's plain meaning because to do so would yield an absurd result. See Harris v. Anderson Cnty. Sheriff's Office, 381 S.C. 357, 363 n.1, 673 S.E.2d 423, 426 n.1 (2009) ("One rule of statutory construction allows the Court to deviate from a statute's plain language when the result would be so patently absurd that it is clear that the Legislature could not have intended such a result.")

II Rule 55(c)

Hulsey moved for relief from default, which the trial court denied in an order filed February 7, 2007. In the subsequent decision of Sundown Operating Co v Intedge Industries, Inc., 383 S C 601, 681 S E 2d 885 (2009), our supreme court explained how the reasons for the default are to be analyzed in determining the existence of "good cause" under Rule 55(c). In light of Sundown, the analysis used by the trial court was controlled by an error of law. I would remand to the circuit court to reconsider the question of good cause under the standard set forth in Sundown.

a Good Cause under Rule 55(c) before Sundown

Our appellate courts have stated that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. See, e.g., In re Moore, 342 S C 1, 5 n 7, 536 S E 2d 367, 369 n 7 (2000), Melton v Olenik, 379 S C 45, 54, 664 S E 2d 487, 492 (Ct App 2008). In addition to this general guidance, our appellate courts have consistently listed three factors, which have become known as the Wham factors, that a trial court should consider in deciding whether good cause exists. See Wham v Shearson Lehman Bros., 298 S C 462, 465, 381 S E 2d 499, 501-02 (Ct App 1989). These factors, (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted, have been cited as the only factors to be considered in almost every opinion since Wham addressing good cause under Rule 55(c). See, e.g., Richardson v P V, Inc., 383 S C 610, 616, 682 S E 2d 263, 266 (2009) (decided after Sundown), Melton, 379 S C at 55, 664 S E 2d at 492.

Neither the general guidance to liberally construe Rule 55(c) in order to promote justice and dispose of cases on the merits nor the Wham factors instruct a trial court to require, or even to consider, the reason the party went into default. Nevertheless, trial courts and practicing lawyers have been generally aware that some explanation for the default is important to the analysis of good cause under Rule 55(c). In fact, in New Hampshire Insurance Co v Bey Corp., 312 S C 47, 435 S E 2d 377 (Ct App 1993), this court quoted Dean Lightsey and Professor Flanagan in listing four factors

"relevant under" Rule 55(c), including "the reasons for the failure to act promptly " 312 S C at 50, 435 S E 2d at 379 (quoting Harry M Lightsey & James F Flanagan, South Carolina Civil Procedure 82 (1985)) Until Sundown, Bey Corp was the only South Carolina appellate decision interpreting Rule 55(c) to have addressed the reasons for the default. However, other than to state it is a relevant factor, Bey Corp gives no explanation as to how this fits into the analysis of good cause.

Therefore, at the time of the hearing and order on Hulsey's motion for relief from default, South Carolina law provided that the party seeking relief from the default must show good cause, and that in deciding the motion the judge should consider four relevant factors in light of the general guidance that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. The factors were (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, (3) the degree of prejudice to the plaintiff if relief is granted, and (4) the reasons for the failure to act promptly.

b The Impact of Sundown

In Sundown, the supreme court began its analysis by discussing the reasons for the default. However, the Sundown court elevated that factor to a *requirement*, stating that the good cause standard "requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default " 383 S C at 607, 681 S E 2d at 888. The court went even further and also required that the moving party "give reasons why vacation of the default entry would serve the interests of justice " Id. Thus, the standard of good cause is now interpreted in two ways that are different from the law available to the trial court. First, the reason for the default is no longer merely a factor to be considered. Rather, the party seeking relief from default is required "to provide an explanation for the default ". Second, the party seeking relief must give "reasons why vacation of the default would serve the interests of justice ". The circuit court must consider all of this in determining whether or not the explanation for the default is satisfactory.²⁸

²⁸ The court went on to explain that the Wham factors come into play after the explanation is accepted by the court. "Once a party has put forth a

c The Sundown Analysis Applied to These Facts

In this case, Hulsey has complied with the requirement of providing an explanation for the default an attorney miscalculated the due date of the answer The next question posed by Sundown was never considered by the trial court Instead of considering whether vacating the default would serve the interests of justice, the trial court focused on whether the explanation was reasonable The court found "no good reason" was presented It also stated that there was "no reasonable basis" for the "assumption that the 30 day time to file an answer starts completely anew upon remand " (emphasis omitted) At one point the trial court called this "confusion " The reasonableness of the explanation is certainly a valid factor to consider However, Sundown requires a broader inquiry, namely that the reasonableness of the explanation be considered as a part of the analysis of whether vacating the default would serve the interests of justice

The facts of this case demonstrate the importance of the broader inquiry The conduct of the lawyer in this case was not "reasonable " First, he should have filed an answer in federal court before the remand order was entered See Rule 81(c)(2), FRCP Second, when he learned of the remand order, he should have raced to the county courthouse to file it A trial judge must consider the attorney's unreasonable failure to do this However, as to the specific question of whether excusing the unreasonable failure in this case serves the interests of justice, there are additional factors that are important to consider First, the lawyer was apparently attempting to correctly calculate the deadline for his answer Second, South Carolina law provides no guidance as to when the answer was actually due in state court Even the majority declines to define the due date for the answer, stating only that Hulsey failed to meet it, whatever it was

The fact that the lawyer was trying to correctly follow the rules is particularly relevant to "the interests of justice " Many of our appellate decisions have stated the principle that a lawyer's negligence in failing to file

satisfactory explanation for the default, the trial court must also consider [the Wham factors] " 383 S C at 607-08, 681 S E 2d at 888

an answer is imputable to the defaulting litigant, and thus weighs against granting relief from default. See generally Richardson, 383 S C at 618-19, 682 S E 2d at 267. In each of the cases citing this principle, the negligence was in *failing to attempt* to answer the complaint, not in *failing at an attempt* to serve a timely answer. This distinction is important to the interests of justice. Justice should not relieve a lawyer or litigant who makes no attempt to comply with the rules, or who negligently fails to comply with a rule that is clear. However, the interests of justice should protect a lawyer who attempts to comply with the rules, particularly when the lawyer is attempting to meet a deadline which is so *unclear* that no rule or court has ever defined it.

In my opinion, applying the newly-defined standard for good cause under Sundown is likely to yield a different result. In reaching this conclusion, I am influenced by the reasoning of our supreme court in affirming the trial court's order granting relief for a late answer in Lee v. Peek, 240 S C 203, 125 S E 2d 353 (1962). Though Lee is not controlling because it was decided before the Rules of Civil Procedure based on a standard other than good cause, the facts of Lee are strikingly similar to the facts presented here, and the court's analysis seems particularly relevant in light of Sundown.

Davis Lee sued the NAACP and six residents of Anderson County in the Court of Common Pleas of Abbeville County. 240 S C at 204, 125 S E 2d at 353. Three of the Anderson County residents retained a lawyer, who made a motion to change venue to Anderson. 240 S C at 205, 125 S E 2d at 353. Before the motion to change venue could be heard, the NAACP removed the case to federal court. Id. The three Anderson residents represented by the lawyer filed a motion to remand, which was granted. Id. The same attorney then refiled the motion to change venue. Id. During all of this time, the lawyer did not file an answer because "he was under the erroneous impression that it was not necessary for him to answer or demur in the State Court until the motion for change of venue had been decided." 240 S C at 205, 125 S E 2d at 354.

The Lee attorney's failure to answer was unreasonable. The circuit judge "found as a matter of fact that counsel had misconceived the applicable

procedural law " 240 S C at 206, 125 S E 2d at 354 That finding is much like that of the trial court here that "there was no good reason presented by the defendants for their failure to file a timely answer, other than attorney confusion about the deadline for when an answer was due " However, the trial judge in Lee did not focus on the reasonableness of the lawyer's action Rather, focusing on what the Sundown court has now instructed trial courts to consider, the circuit judge in Lee held "that it was *in the furtherance of justice* that the respondents be relieved of any default " Id (emphasis added)

d Conclusion as to Rule 55(c)

Sundown changed the analysis of good cause by requiring for the first time that the trial court focus on "reasons why vacation of the default entry would serve the interests of justice " I believe that if the trial court had analyzed this question, rather than whether the attorney was reasonable in failing to file a timely answer, the outcome might have been different The supreme court recognized in Lee that the decision as to what is "in the furtherance of justice" is for the circuit court It is not the task of this court to answer the question posed by Sundown However, it is the duty of this court to see that the question gets answered I would reverse the judgment of the lower court, and remand the case for a determination of whether good cause exists under Sundown

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-10-1577
Opinion No 4805, filed March 10, 2011

Lawton Limehouse, Sr

RESPONDENT,

v

Paul H Hulsey and The Hulsey
Litigation Group, LLC,

APPELLANTS

APPELLANTS' PETITION FOR REHEARING
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SC Court of Appeals

PETITION FOR REHEARING AND REHEARING EN BANC

A split panel of the Court of Appeals has affirmed a multimillion dollar judgment entered by a court that did not have jurisdiction, and on a jury verdict, rendered after a default hearing in which the Defendants were denied their most basic due process rights. While changing the inquiry under Rule 55(c), SCRCp, the majority upheld a default. Despite a showing of “good cause,” the Court of Appeals has upheld the trial court’s refusal to set aside the entry of default and affirmed the award of \$7.3 million in actual and punitive damages rendered after a default hearing where the Defendants were precluded from defending against the Plaintiff’s allegations – even those which were beyond the scope of the complaint and those which related to punitive damages.

The Defendants petition this Court for rehearing en banc because this case raises numerous questions of exceptional importance regarding, *inter alia*

1 Whether the state court had the power to enter default and proceed with a default hearing where the case had been removed to federal court under 28 U.S.C.A. § 1446, and the federal court never mailed a certified copy of the order of remand as required by 28 U.S.C.A. § 1447(c) to revest the state court with jurisdiction? ~~is this~~

2 Whether good cause under Rule 55(c), S.C.R.Civ.P. has a new reasonableness standard, and whether justice requires that the entry of default be set aside because the Defendants’ calculation of the due date for the answer cannot be considered to be without good cause in the absence of any rule or case on how to calculate the due date for filing an answer in state court after a remand? Or, in the alternative, whether the entry of default should be set aside because the answer was not late?

3 Whether the Defendants were denied due process due to a) the unduly, restrictive limitations imposed during the default hearing, which did not comport with Rule 55(b), and effectively deprived them of their fundamental right to a fair hearing, b) the court's refusal to allow Defendants to deny new allegations not deemed admitted by the default, and c) the Trial Court's improper comments on the facts?

4 Whether Defendants were denied due process because they were not afforded a full and fair hearing on the punitive damages and the Trial Court charged the jury that it had a duty to make an award of punitive damages?

As will be demonstrated in the paragraphs that follow, the majority in this case overlooked and misapprehended key facts and controlling law that require the entry of judgment be reversed and the case remanded to allow the Defendants to answer and fully defend the merits of the claims lodged against them

THE PERTINENT PROCEDURAL HISTORY AND FACTUAL BACKGROUND

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"), brought by Lawton Limehouse, Sr , the disgruntled defendant in an underlying class action filed in federal court by Hulsey on behalf of former Limehouse employees ¹ The slander cause of action is predicated on alleged statements made by Hulsey in response to a phone call from 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 " [R p 37]

¹ Maximino Flores, et al v Lawton Limehouse, Sr , et al , C A No 2 04-1295-23 [R p 127, Class Action Complaint]

Lawton Limehouse, Sr and his son² 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 Limehouse employees, alleging violations of RICO, Racketeer Influenced and Corrupt Organizations Act, and other federal and state laws (“the RICO case”)³ Limehouse, his son, and L & L Services were named as defendants The core of the action was that, 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 182, Order, 5/11/06]

While the RICO case was still pending in federal court, Limehouse filed the complaint in this case in state court, alleging that, on or about April 23, 2004, Hulsey “held a press conference or otherwise made false statements about the Plaintiff to certain new 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

² Lawton Limehouse, Jr also filed a companion case against these Defendants based on the same allegations That case followed the same procedural course through the removal, remand, and default stages, and then proceeded to a damages trial while this case has been pending on appeal Limehouse Jr obtained a judgment against these Defendants in the amount of \$3,600,000 The appeal of that judgment is still pending before this court and it raises the some of the same questions

³ Other federal and state claims included 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 [R p 127]

[R p 37, Complaint ¶ 11] As further alleged, these statements were published by the Charleston Post & Courier on April 24, 2004 [R p 39, Complaint ¶ 18]

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) Hulsey filed a notice of removal to federal district court on May 5, 2006,⁴ which immediately divested the state court of jurisdiction over the case under the provisions of 28 U S C A §1446(d) [R p 47, Notice of Removal] Thereupon, Limehouse moved to remand, which motion was granted by Judge Houck ⁵ [R p 6, Order of Remand]

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 6, 29, Order, Federal Court docket sheet] 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 26, see Charleston County docket sheet] It is undisputed that the remand order mailed to state court was not certified as required by 28 U S C A §1447(c)

⁴ Hulsey removed the case on grounds that the allegations fell within the jurisdiction of the still pending federal action reasoning that 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 791, Notice of Removal ¶ 11, See 12-15-06 Hearing Tr 32]

⁵ Thereafter, in the federal 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 182, 188, 649, J Houck Order, 5/11/06, Motion for Class Action Certification, Tr 339] Although Judge Houck found that there were issues for trial, the case ultimately settled prior to trial [R p 644, Tr 333]

Upon receiving the order of remand (though uncertified), Hulsey calculated the answer due date as 30 days, plus 5 days for mailing, from the date of the order of remand – August 31, 2006. However, on August 22, 2006, Limehouse filed a 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 101-108, Request for entry of default, affidavits of service and default] 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 26, 109-110, Charleston County Docket Sheet, Form 4] On receiving the notice of “entry of default,” Hulsey immediately filed an answer and made a Rule 55(c) motion to set aside default on August 29, 2006, arguing that the answer was not late and showing good cause and/or excusable neglect [R p 111, 121, Answer, motion] The motion to set aside the entry of default was denied by the Honorable Daniel F. Pieper, who, in the same order, entered default judgment and ordered a damages hearing [R p 8, Order, filed February 7, 2007]⁶ Judge Pieper held that the answer was late and refused to set aside the entry of default stand even though even though the parties and the court took different views on when the answer was actually due because it was -- as Judge Pieper himself noted -- a novel question of law.

The case then came before the Honorable Roger M. Young, who presided over a jury trial on damages on February 4-6, 2008. Deprived of the ability to defend on the

⁶ Under Rule 55(b)(2), a motion or application must first be made for default judgment. Despite the absence of that request, Judge Pieper entered a default judgment. The absence of the application renders that judgment a nullity.

merits of liability by Judge Pieper's refusal to set aside the entry of default, the Trial Judge effectively denied the Defendants their due process rights even to defend on damages. Adhering to the outdated default procedure adopted by Howard v Holiday Inns, Inc., 271 S C 238, 241, 246 S E 2d 880, 882 (1978), which no longer comports with the Rules of Civil Procedure promulgated in 1985, the Trial Judge refused to allow the Defendants to put up any witnesses or evidence, and essentially restricted the defense to cross-examination without impeachment and objection to plaintiff's evidence. However, even beyond the basic strictures of the Howard default process, the Trial Judge erred by refusing to allow Hulsey to fully defend when the Plaintiff introduced new allegations that were not deemed admitted by the default, and by improperly commenting on facts.

The Trial Judge not only limited the defense as to actual damages, but also as to punitive damages, which Hulsey was, as a matter of due process, entitled to fully defend. Instead, the Trial Judge allowed Limehouse to go into matters beyond the bounds of the complaint while restricting Hulsey's ability respond and even allowed him to use the fact of Hulsey's default as a weapon to inflame the jury and inflate the punitive damages award. The Trial Judge also allowed Limehouse to present other evidence and arguments about issues that were not proper for the jury's consideration on punitive damages. Finally, in the charge and verdict form, the Trial Judge took away the jury's discretion to not award punitive damages by instructing them that they had the duty to impose punitive damages upon making a finding of malice.

Ultimately, at the culmination of this unconstitutional trial, the jury returned a verdict of \$2,390,000 in actual damages and \$5,000,000 in punitive damages against the Defendants [R p 17, 18, Jury Verdict, Judgment]

DISCUSSION OF THE EXCEPTIONAL QUESTIONS PRESENTED FOR REHEARING AND EN BANC REVIEW

I The majority opinion overlooks or misapprehends certain issues relating to the mandatory requirements of federal removal statutes 28 U S C A § 1446(d) and 1447(c), necessary to revest jurisdiction in the state court after remand

Section 1446(d) states that upon removal the state court “shall proceed no further unless and until the case is remanded ” Section 1447(c) states in equally plain language that once a certified copy of remand is mailed to 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, 2009,⁷ after judgment had been entered and while this appeal was already pending Thus, March 5, 2009 is the date jurisdiction revested in the state court under 28 U S C S § 1447(c)⁸ For this reason, the state court was without jurisdiction when the trial took place, and 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

⁷ This Court can take judicial notice of the filing of transmittal of the certified order

⁸ 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

In holding that the mailing of a certified order was not a jurisdictional requirement, the majority opinion overlooks the South Carolina rules of statutory construction, which bind the court to the plain language of the statute State v Landis, 362 S C 97, 102, 606 S E 2d 503, 505 (Ct App 2004) (‘The legislature’s intent should be ascertained primarily from the plain language of the statute ’) If “a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning ” Miller v Aiken, 364 S C 303, 307, 613 S E 2d 364, 366 (2005) (emphasis added) As the dissent points out, the plain language of § 1447(c) establishes when jurisdiction reverts in the state court

A remand order based on lack of subject matter jurisdiction, such as the remand order in this case, is governed by section 1447(c), which requires that ‘ [a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court ’ The next sentence of section 1447(c) – “The State court may thereupon proceed with the case”—is the key to this case The word “thereupon” sets the point in time in which the case is “remanded ” **Before the a certified copy of the remand order is mailed, the state court may not proceed, afterwards it may**

Hulsey v Limehouse, Judge Few’s Dissent (emphasis added)

While the majority recognizes that state courts have general jurisdiction “unless otherwise prohibited by federal statute,” it failed to apply the plain language prohibits state courts from proceeding until after a certified copy of the order of remand

To circumvent the plain language of § 1447(c), the majority erroneously relies upon the Fourth Circuit’s decision in In re Lowe, 102 F 3d 731 (4th Cir 1996), which concerns when federal jurisdiction divests, as opposed to when it reverts with the state court The majority holds that the determination of when jurisdiction reverts in the state court is determined by “what interpretation is employed to determine when the federal court loses jurisdiction ” However, the determination by the Fourth Circuit as to when

its federal jurisdiction divests, i.e., its orders become unreviewable, does not answer the question as to when jurisdiction revests in the state court

The revesting of jurisdiction in the present case in state court hinges upon § 1447(c), while the decision in Lowe was based upon § 1447(d), which defines when it loses jurisdiction under this separate provision. Id. at 734-35. The Lowe court relied upon § 1447(c) only in as much as it “supports this interpretation” of § 1447(d). Id. at 734. While the Fourth Circuit has ruled on the issue of jurisdiction divested under § 1447(d), the Court of Appeals must nonetheless apply the federal statute’s unequivocal plain meaning to the separate question regarding when jurisdiction revests in state court under § 1447(c). In fact, the Fourth Circuit itself has later commented on this very issue of when jurisdiction revests in state court by noting that remand is accomplished by mailing a certified order

it is just as clear that the state court regained jurisdiction when the district court remanded Count A to state court. See 28 U.S.C. § 1447(c) (West 2006) (providing that the state court may proceed with a case once the district court mails a certified copy of the remand order to the state court)

Bryan v. BellSouth Telecommunications, 492 F.3d 231, 241 (4th Cir. 2007). Thus, contrary to the majority’s position, even the Fourth Circuit has found that the state court may not proceed until the process described in § 1447(c) is followed.

The majority further holds that the requirement of § 1447(c) is procedural as opposed to jurisdictional and turns § 1447(c) into a statute requiring mere notice. As described above, the plain language of the statute requires mailing of a certified order of remand to return jurisdiction to the state court. As the dissent points out, if Congress intended that a notice of remand was sufficient, it could have drafted the statute accordingly. Instead, §1447(c) defines the jurisdictional limitations on the power of a

state to proceed. Under the majority's interpretation, these federal statutes are free to be ignored, so long as there is no prejudice. In effect, the majority effectively rewrites the statute and deletes the certification requirement.

The federal statute is clear, and strict compliance is mandatory. In view of the undisputable fact that the federal district court did not mail a certified copy of the remand order to the Charleston County Clerk of Court until after the judgment was on appeal, jurisdiction had not reverted in the state court, and the judgment should be vacated and the case remanded to allow Hulsey to fully defend on the merits.

II The majority opinion of the Court of Appeals overlooks or misapprehends the standard of relief from an entry of default

As stated above, Limehouse filed a request for entry of default judgment on August 21, 2006, without serving a copy upon Hulsey. The Charleston County Clerk of Court entered a default on August 22, 2006, which was mailed to the Hulsey on August 24, 2006. Hulsey had calculated the due date for their answer as 30 days (plus 5 days allowed for service by mail) from the Charleston Court Clerk of Court's mailing of the notice of remand. However, promptly upon receipt of the notice of entry of default (having not been earlier served by Limehouse with the request for entry of default or affidavit of default), Hulsey filed and served their answer on August 29, 2006, along with a motion to set aside entry of default under Rule 55(c). Judge Pieper held that the answer was late, and despite the fact that Limehouse conceded that there was no prejudice and that this was a novel issue, he denied the motion to set aside the entry of default.

A Appellants made a showing of good cause to set aside the entry of default under Rule 55(c)

The majority opinion misapprehends the law as to SCRCP Rule 55(c) in that the majority creates a never-before test ‘ [f]or good cause shown’ under Rule 55(c), which new test focuses on why there is a default rather than why a default should be vacated⁹

The majority incorrectly makes the good cause standard a strict two step process with the first step being an undefined step for the defaulting party to “put forth a satisfactory explanation,” in other words, explain why default occurred According to the majority opinion, if the Court does not accept the explanation as “satisfactory,” no relief under 55(c) can be given The majority opinion uses Sundown Operating Company, Inc v Intedge Industries, Inc, 383, S C 601 (2009) as its guide

Sundown simply holds

Although the presence of other factors, in the totality of the circumstances, may amount to a showing of “good cause,” a defendant may not be relieved from the entry of default *solely* because it relied to its detriment on a negligent insurance agent¹⁰

Id at 609

The Supreme Court in Sundown then cites to Ricks v Weinrauch, 293 S C 372 (Ct App 1987), in which good cause was shown in the totality of circumstances involving misplaced reliance on an insurance agent In Ricks, that court recognized the

⁹Since the lower court confused 55(c) requirements (why vacate default) with 60(b) requirements (why in default), this new concept is the only way to affirm the lower court

¹⁰The Supreme Court in *Sundown* also pointed out that a default was in order because the defendant “has put forth no explanation with regard to the fate of the summons and complaint served on Randy Adams on August 28, 2001 ” *Id* 383 S C at 609, 681 S E 2d at 889

overriding principle that the rules are liberally construed to see that justice is promoted and to strive for disposition of cases on their merits

Not once does the majority opinion mention that the totality of circumstances may amount to “good cause” or that 55(c) strives to have cases heard on their merits. Instead, the majority opinion strengthens its new rule by inserting an overriding reasonableness standard

It stands, therefore, that because unreasonable conduct does not amount to good cause, an unreasonable explanation for defaulting is not a satisfactory explanation that serves a sufficient interest of justice

Again, the inquiry examines the reason for a default rather than why default should be lifted

The Supreme Court, in Richardson v. P.V., Inc., 682 S.E.2d 263 (2009), again looked at “good cause to set aside the entry of default.” In Richardson, the Supreme Court stated

In deciding whether good cause exists, the trial court should consider the following factors: (1) the timing of the defendant’s 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., 298 S.C. 4621, 465, 381 S.E.2d 499, 502 (Ct. App. 1989)

Again, the Supreme Court in Richardson noted that negligence of an insurance agent alone “cannot constitute good cause.” However, the Supreme Court in Richardson went on to apply the Wham factors, finding that those factors did not weigh in favor of lifting the entry of default. In other words, the totality of circumstances was used to determine “good cause.”

The error by the majority is that it adopts a “reasonable explanation standard” as a threshold to a “good cause” inquiry. Without the Wham factors, there are no standards to a “good cause” inquiry.

Any reasonableness inquiry is a 60(b) concept, not a 55(c) inquiry. In Wright and Miller, Vol 11, § 2858, Rules 60(b) and 2858,¹¹ there are a legion of cases where reasonableness is the issue, more commonly called “mistake” or “inadvertence” issues.

A reading of Sundown and Richardson clearly shows that “in the interest of justice” requires a Rule 55(c) inquiry to include Wham consideration.¹² There is no pre-Wham inquiry, there is only a totality of circumstances inquiry. Again, the test set forth in Richardson are the Wham factors,¹³ even though the reason for the default was the insurance company’s negligence. Richardson 383 S C at ___, 682 S E 2d at 266.

A litigant already actively involved in a case makes a judgment call on a timing issue not covered by any rule or case law. The litigant is found to have made a wrong

¹¹ While Wright and Miller looks at FRCP, the FRCP are a guide for the SCRCF. See, Notes to Rule 55 (“Rule 55(c) [is] identical to the Federal Rules”). See also, S Carolina Tax Comm’n v Union County Treasurer, 295 S C 257, 260, 368 S E 2d 72, 74 (Ct App 1988) (“Because the South Carolina Rules of Civil Procedure clearly parallel the Federal Rules of Civil Procedure, it appropriate to look to the Federal Rules.”)

¹² It is apodictic that a just determination of every action is an overriding consideration SCRCF Rule 1.

¹³ The record in this case indicates that Hulsey handily met the Wham factors. Hulsey promptly moved for relief from the entry of default [R p 121]. The record also shows that there exists a meritorious defense to the defamation, including a good faith litigation privilege and lack of proximate cause in that Limehouse’s illegal operation of his business and prior associated bad publicity and bad reputation were the reason his business failed [R p 111, Answer]. Finally and foremost, there was no prejudice to Limehouse from the short delay in answering – which Plaintiff’s counsel acknowledged at the hearing [R p 781, 12/15/06 Hearing Tr 22].

judgment. In light of the desire to have a just determination and that cases be decided on the merits is that litigant to be punished with default?

B Even if reasonableness is the standard, the filing of the Answer was not unreasonable

The majority opinion overlooked or misapprehended the state of the law regarding when an answer is due after a case has been remanded from federal court and failed to consider laws from other states that provide specific guidance in these circumstances. While Hulsey maintains that his answer was timely, his interpretation of the deadline was the very least reasonable, given the status of the law. As Judge Pieper recognized and acknowledged, there is no provision in our South Carolina Rules of Civil Procedure that currently 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 10, J Pieper Order, p 3]

The majority opinion relies upon Rule 81(c)(2), FRCP, a statute that the federal judge did make a finding of default under, for its ruling that because Hulsey removed the case on the fourteenth day after service, he had to answer in federal court within 6 additional days—i.e. within twenty days of the removal. The majority noted that the lower court took a different approach, finding that the removal tolled the thirty time period under Rule 12, SCRCF, and upon remand, the time period began running again. However, neither Rule 12, SCRCF or Rule 81, FRCP specifically addresses how to calculate the time remaining in state court to answer a complaint after remand. In fact, the majority's own opinion fails to clarify when an answer is due and ignores the fact that the trial court based its ruling on a 1957 opinion from California, which is no longer good

law The majority simply states two options and then finds that since Hulsey picked neither, the Answer must be untimely

Current California rules follow the calculation used by Hulsey and allow a defendant 30 days (from the day the original court receives the case on remand) to answer on remand from federal court West's Ann Cal C C P § 430 90 Other states also utilize this method and provide a specific amount of time for filing an answer after remand that is not tied to how much time was remaining before removal 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 20 days from the receipt of such notice to file an answer In failing to consider these rulings from other states that specifically address when an answer is due in state court after remand, the majority overlooked or misapprehended the current status of the law and the reasonableness of Hulsey's calculation of the due date

The majority overlooks or misapprehends the nature of removal by considering the passage of time while the case was pending in federal court. While the case ~~was~~ = removed, the state court lost jurisdiction until the remand under § 1447(c) However, the majority counts the days for determining default as if the case was still proceeding in state court for the entirety of that time The ramifications of not answering in federal court must be determined by the federal court in its discretion The federal court never made any finding of default while the case was before it Instead, the federal court looked at the case, aware of any potential for default, and remanded the case with no mention of default Although Limehouse would have had to take some affirmative action

to secure a default in federal court, he intentionally chose not to raise it with the federal court. Had Limehouse raised the default issue, the federal court would have had discretion regarding whether default was proper.

The majority has determined that Hulsey was in default in federal court though the federal court never made that ruling and Limehouse never even raised it in federal court. Under the majority's theory and by considering the passage of time while the case was in federal court, it would have been impossible for Hulsey to file a timely answer in state court upon remand, as Limehouse has explicitly conceded. See Transcript of Oral Argument, April 13, 2010, pp. 18-19. Thus, the passage of time in the federal court should not have been considered by the state court because the state court lost jurisdiction during that time period, the federal court itself never ruled that the case was in default, and Limehouse chose not to raise the issue in federal court.

III The majority overlooked or misapprehended the due process requirements for default proceedings in South Carolina

A The unduly, restrictive limitations imposed upon the defense during the default hearing do not comport with Rule 55(b)(2), and otherwise denied the Defendants their fundamental rights to a fair trial

The majority states that there is no controlling authority that this court can, or should, diverge from longstanding rules established by our Supreme Court. 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 a defendant's participation to cross-examination and objection to plaintiff's evidence. However, the Howard decision predates passage of Rule 55, SCRPC, which first became effective on July 1, 1985. Rule 55 provides a mechanism for courts to investigate into matters to ensure that the jury hears the truth during a default 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

Our Supreme Court has “ 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 cases decided after Howard¹⁴ 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 In other words, courts have an obligation to investigate the truth under Rule 55(b)(2) A default does not sanction untruths Limiting a defaulting party to ~~restrictive~~ restrictive cross examination¹⁵ and objection to evidence does not comply with the Rule 55(b)(2) and does not constitute a meaningful opportunity to be heard on the issues of damages

¹⁴Ammons 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)

¹⁵In 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

Most other states permit the defaulting defendant to participate fully at the hearing on damages, including putting on its own witnesses and introducing admissible evidence. See e.g., Bashforth v. Zampini, 576 A.2d 1197 (R.I. 1990) (On a hearing on the question of damages, the defendant, even though in default, is entitled to full participation and should be permitted to engage in discovery), Rokina Optical Co., Inc. v. Camera King, Inc., 469 N.E.2d 518 (N.Y. 1984) (a defaulting defendant may give testimony in a damages hearing), Payne v. Dewitt, 995 P.2d 1088 (Okla. 1999) (a defaulting defendant may introduce evidence in his own behalf), O'Connor v. Brucker, 43 S.E. 731 (Ga. 1903) (defaulting defendant can contest damages through cross examination and the introduction of evidence), Ferri v. Braun, 366 S.W.2d 286 (Ark. 1963) (same).

Moreover, the lower court's procedure contravenes Rule 55(b)(2), which states that if it 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."

Wright Miller & Kane Default Judgments § 2688 (footnotes omitted). Additionally, 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)

The lower court refused to allow any testimony that would challenge the truth of the averments, despite being faced with a complaint that was inaccurate and untrue

The majority upheld the trial court's application of the restrictive default damages procedure, even though that procedure allowed Limehouse to present an exaggerated, one-sided story with half-truths and fabrications. For example, 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 371-375, 720-740]] Both Rule 55(b)(2) and due process allow a defaulting defendant to impeach a witness and provide the jury with **"the truth of any averment"**

Regardless of whether a defendant is allowed to present its own evidence or call its own witnesses, a defendant is at least 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

The method of restricted cross-examination allowed by the majority actually renders cross-examination ineffective First, Hulsey was prohibited from using any documents to impeach during cross-examination [R p 378 6-379, 15, 398 2-9] ~~Second,~~ although Plaintiff put honesty and his reputation in the community at issue, the trial court prohibited Hulsey from cross-examining Limehouse about subjects relating to his honesty or reputation, including that he provided substandard housing that was raided by the government [R p 398 23-399 4], that previous newspaper articles already had destroyed his reputation [R p 371-375, 720-740], and that a probate court had found that Limehouse had mishandled/misappropriated money from his father's estate [R p 460-466, 741] In essence, while Limehouse was declaring himself to be an upright, honest

business and family man whose reputation had been damaged, Hulsey was prevented from demonstrating on cross-examination that Limehouse had a terrible reputation from the outset and had acted dishonestly in other matters

B The Defendants were entitled to fully defend the new allegations introduced by the Plaintiff at trial because they were not deemed admitted by the default

Limehouse was allowed to present evidence of other allegations beyond those deemed admitted in the complaint, but the trial court did not allow 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)

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 Hulsey his due process rights to fully meet and contest the accusation

For example, Limehouse was allowed to testify that Hulsey had run the false statements on his Firm website for three years, though the complaint contained no allegations about the website (and thus none were deemed admitted) [R p 377] Hulsey was precluded from proving the true content of the web site and, more importantly, was not allowed to demonstrate that Limehouse was never mentioned on the web site [R p 403 17- 404 14] To compound this error, the Plaintiff's attorney was allowed to argue in closing that the website justified punitive damages [R p 682]

The majority overlooks or misapprehends Hulsey's argument regarding ~~the~~ = website when it summarily states that the issue is not preserved for review based upon a failure to object to testimony The majority limits its inquiry to the issue regarding whether the trial court erred in allowing Limehouse to testify about new allegations outside of the complaint and states that there was no contemporaneous objection However, once the website, an issue beyond the scope of complaint, was mentioned by Limehouse, Hulsey was not allowed prove up the content of the website to allow the jury to learn the truth about those allegations and the article – perhaps most critically, that

Limehouse was never mentioned on the website [R P 383, 404, Tr 74, 94-95] A contemporaneous objection was not required because Hulsey expected – and due process required – that he would be able to fully explore this issue, which was beyond the scope of the complaint, on cross-examination by introducing evidence of the website in question. Even if the court takes the restrictive view that the decision in Howard allows defaulting defendants only cross-examination and objection, this certainly only applies to those allegations admitted in the complaint. Each time Hulsey attempted to introduce evidence of the website on cross-examination to defend against these new allegations, the trial court precluded him from doing so.

Similarly, Limehouse offered testimony of Bank of America employee Bernadette DeWitt regarding Hulsey's alleged net worth (where there were no such allegations in the complaint) and Hulsey was not able to fully defend against those issues. The majority's finding that the failure to object renders this issue moot is not correct because Hulsey expected to be able to defend accordingly on cross-examination. Simply stated, although Limehouse opened the door regarding allegations beyond the complaint, the trial court treated those allegations as if they had been admitted in the complaint and ~~continued to~~ = hold Hulsey to the default procedures. It was error for the court to continue to adhere to the rigid strictures of Howard when Hulsey attempted to contest issues beyond the scope of the default admissions.

C The Trial Court improperly commented on the facts by answering the jury's question regarding the website link

The majority opinion overlooked or misconstrued the nature of the trial court's commenting on the facts and Hulsey's opportunity to cross-examine regarding the federal court order. The prejudice regarding the website was exacerbated when the jury

specifically asked about the website and whether the link to the article was still there. Even though the website had not been the subject on any of the allegations in the complaint, and despite the fact that Hulsey had been denied the right to present evidence or show the jury the actual website, [R p 711 19-22], the Trial Court told the jury that the article was still linked as of Monday of trial [R p 714 5-7]

While the majority recognizes that “[a] trial judge should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally,” Sierra v Skelton, 307 S C 217, 414 S E 2d 169, 174 (Ct App 1992), it holds that this was not imparting an opinion on the facts. In reality, the lower court went beyond offering and opinion and established a fact for the jury. Juries of South Carolina are to make their decisions on their own recollections of testimony. Here, the trial court recounted testimony from the trial and gave the jury a fact, which they used to assess millions of dollars in punitive damages.

Further, the majority held that, although Limehouse was allowed to testify that the link on the website was a violation of a court order, Hulsey could have cross-examined Limehouse on this matter. However, Hulsey was in fact precluded from introducing the very court order/proceedings from the federal class action which indisputably evidences that there was no prohibition from mentioning the case on the firm website [R p 815-816, Federal Court Transcript 8/18/04, tendered at 4-22-08 hearing on posttrial motions, see Tr 19-20] Under the trial court’s reading of Howard, all cross-examination in this case was so restricted as to render it ineffective. Even on matters such as this that were beyond the scope of the allegations admitted in the complaint, the trial court continued to confine Hulsey to the default procedures that are supposed to apply only to matters

deemed admitted. For these reasons, Hulsey had no opportunity to cross-examine and should have been allowed to introduce evidence on this matter since it was beyond the scope of the allegations deemed admitted.

IV The majority overlooked or misapprehended the due process requirements regarding punitive damages

A Punitive damages cannot be imposed where the Defendants were not allowed a full and fair opportunity to defend

The majority overlooked or misapprehended the due process requirements afforded to parties in default. The majority states that Hulsey provided no authority to support the proposition that South Carolina should employ a different default damages procedure for punitive damages than for actual damages. However, Hulsey has provided extensive authority to describe the protection afforded to any defendant in the context of punitive damages. See, e.g., James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667, 670 (2006). Indeed, the Supreme Court of South Carolina has recently increased appellate scrutiny of punitive damages adopting a de novo standard, as opposed to abuse of discretion. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 583, 686 S.E.2d 176, 182-183 (2009). Because courts scrutinize punitive damages so severely, a corollary of this protection is that a defendant be able to defend against the imposition of punitive damages, even in the default context.

Although the majority relies upon Roche v. Young Bros. of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998), for the proposition that there is no distinction between punitive damages and actual damages during a default damages trial, the issue was never addressed in Roche. With regard to punitive damages, the Roche court did not decide the due process issue and only determined whether evidence supported actual and punitive damages in that case.

Due process entitles a defaulting party to fully contest any claim for punitive damages, especially when allegations that were not in the Complaint (and thus not deemed admitted) were being presented as the foundation for punitive damages. Each time Hulsey attempted to confront the witnesses based upon these allegations beyond the complaint, the trial court restricted Hulsey to its interpretation of the Howard decision. However, Hulsey should have been allowed to not only confront those witnesses with his own evidence on cross-examination, but also to introduce his own witnesses and introduce evidence to fully defend against these allegations beyond the complaint.

Beyond depriving Hulsey of his due process rights to a meaningful opportunity to challenge the damages (actual and punitive) damages, Limehouse was allowed to use the fact of this procedural default and alleged injuries to family members as weapons to inflame the jury and inflate the punitive damages award.

For example, in the opening explanation to the jury, the trial court repeatedly told the jury that Hulsey failed to answer and the allegations were deemed admitted. [R p 316, lines 9-13, tr 317, lines 4-7, and 23-24, 318, lines] Then, during closing argument, the Limehouse's counsel started off by telling the jury that Hulsey didn't play by ~~the~~ rules when they failed to timely answer and concluded his closing with yet another accusation about Hulsey not playing by the rules.

Thank you all for listening to use over these past couple of days. You know, when we handle litigation, we handle trials of cases in this court and in state court, we play by certain rules. Everybody in this courtroom is bound by those rules. We're bound by the rules, the defendants are bound by the rules.

Now, the defendant's don't like the rules, but they're the rules, and they've got to abide by them. [R p 668, lines 15-22]

We all got to play by the rules We tried to play by the rules, but I'm not sure about the other side [R p 687, lines15-17]

Again, though raised by Hulsey on appeal, the majority does not even address Limehouse's statements to the jury that Hulsey did not "play by the rules," thus justifying punishment, and such comments were particularly unfair given that Judge Pieper had recognized that the "rule" was a novel question that had not been –and still has not been—answered

In addition, the majority overlooked or misapprehended the evidence regarding testimony from Limehouse's family about how they were affected Philip Morris USA v Williams, 127 S Ct 1057 (2007) (punitive damages cannot be awarded to punish defendant for harms visited on others) The majority only addressed one instance of this regarding testimony from Limehouse's wife and made no mention of the other instances raised by Hulsey Such testimony also included how the article upset Limehouse's pregnant daughter and sent her into premature labor and how his grandchildren were suffering because he could not afford to help with their education [R p 626-627, 677-641] The majority held, with regard to the wife's testimony, that it was relevant because it was within the scope of how it affected Limehouse and his family relationships However, even if such evidence were permissible, which it is not under Philip Morris, the trial court did not sufficiently explain it so that the jury understood the evidence's purpose Instead, the jury used this evidence of harm visited on others to support a \$5 million award of punitive damages

The majority also overlooks or misapprehends testimony beyond the scope of the complaint that Limehouse was permitted to present regarding the underlying RICO case, which he used to falsely portray Hulsey as a greedy, "hotshot" attorney, [ROA 384, 450-

451, 672, Tr 75, 141-42, 362]¹⁶ However, Hulsey was prohibited from presenting evidence that a press conference never took place, that he in fact took that case pro bono, he did not need any more clients to proceed with the class action because he already had his representative plaintiffs, he did not receive any fee from that settlement, any and all of which certainly would have refuted the accusation that Hulsey was “greedy ” [ROA 651, 819, Tr 341, 4/22/08 Hearing Tr 23] Further, in the face of the accusation of greed, Hulsey was not allowed to present any evidence of his considerable charitable donations and work for the homeless and hungry [ROA 450-451, Tr 141-142]

Similarly, the majority overlooks or misapprehends the allegations of error with regard to testimony of his net worth by Bank of America employee, Bernadette DeWitt. This testimony grossly misstated the true status of Hulsey’s net worth and ability to pay based upon an outdated financial statement, and failing to allow Hulsey to contest this evidence that was beyond the scope of the complaint was a highly prejudicial, denial of due process¹⁷. Hulsey could not demonstrate that this financial statement was not current that the majority of his net worth is tied up in a structured legal fee that is paid

¹⁶ The majority summarily rejects Hulsey’s claims of error based upon its assertion that one witness, John Massalon, conceded he was aware that Hulsey was pro bono counsel on that case. In fact, Mr. Massalon never made such a concession and said he did not know and did not recall [ROA 651-652, Tr 341-42]. Even assuming such a concession did take place, it could not negate all of the other false and prejudicial testimony the jury heard about the prior RICO lawsuit, which Limehouse used on numerous occasions to call Hulsey a greedy, hotshot attorney.

¹⁷ The majority found that Hulsey made no objection to the testimony by Ms. DeWitt, but an objection is irrelevant because Hulsey was entitled to fully defend on such issues beyond the scope of the complaint when Limehouse opened the door. The majority also states that any misinformation in the financial statement was a result of Hulsey’s own misrepresentation. However, Hulsey was not able to place this financial statement into context by introducing the any evidence, calling witnesses, or cross-examining and impeaching the witness with other documents.

quarterly for the next twenty years and is subject to future uncertainties. Moreover, the fee is not liquid, and Hulsey cannot accelerate his payments nor presently obtain those payments to pay a judgment.

Finally, the Trial Court's review under Gamble and Gore was also infected by the procedural violations/defects. An appellate court's review of an award of punitive damages is de novo.¹⁸ Mitchell, 385 S C at 583, 686 S E 2d at 183. Under Mitchell, a review of punitive damage begins with reprehensibility. Under this review, the court should consider whether

- (i) the harm caused was physical as opposed to economic,
- (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others,
- (iii) the target of the conduct had financial vulnerability,
- (iv) the conduct involved repeated actions or was an isolated incident,
- (v) and the harm was a result of intentional malice, trickery, or deceit, rather than mere accident.

385 S C at 587, 686 S E 2d at 185. Of course, there can be no true review of reprehensibility or any other factor when the defendant cannot present any testimony or evidence and the plaintiff can present all of its evidence. Hulsey was never able to effectively defend against any of the allegations raised in the lawsuit, whether regarding = allegations in the complaint or not. In the punitive damages context, due process required that Hulsey be allowed to fully defend himself, especially against those allegations never admitted in the complaint.

B The Trial Court erred in charging the jury that it had to make an award of punitive damages

The majority overlooked or misapprehended the trial court's instruction to the

¹⁸ The fact that the review is de novo belies the majority's opinion that there is no distinction between actual and punitive damages.

jury that it had to award punitive damages and submission of a verdict form that required the jury to make an award of punitive damages. The majority states “Hulsey next argues the trial court erred by telling the jury it was required to award punitive damages. We find no such instruction.”¹⁹ The majority is in error. The trial court stated, “It is not only the right, but the duty of the jury to award punitive damages,” and the verdict form itself provided no indication that the jury had an option not to award punitive damages. [Id.] Indeed, the verdict form itself made it appear that an award of punitive damages was the only option. [R p. 17]

The majority adds words into the trial court’s jury instruction that simply are not there. The majority adds words into the trial court’s jury instruction that simply are not there.

The trial court specifically stated “[p]unitive damages may only be awarded where the plaintiff proves by clear and convincing evidence that the defendant’s actions were willful, wanton, and malicious. [an only upon such a finding] would [it] be [the jury’s] duty to include such damages in a verdict.”

The majority has added in the phrase “and only upon such a finding.” Those words are not in the trial court’s instruction and were not provided to the jury. Further, ~~even if~~ those words were provided in the trial court’s instruction, punitive damages are quintessentially a question of discretion, not right. Even under after a finding of clear and convincing evidence of malice, the jury has no “duty” to award punitive damages. The U.S. Supreme Court held, in Smith v. Wade, 361 U.S. 30, (1983), that a finding of recklessness or malice or conscious disregard does not mandate an award of punitive damages.

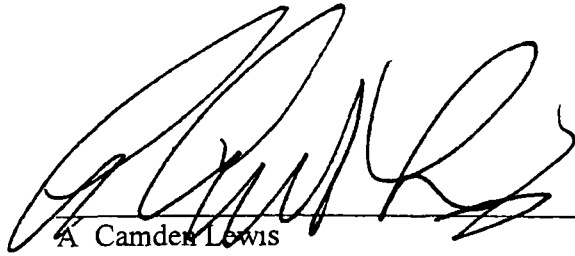
¹⁹ However, Hulsey made specific citations to the record in its brief regarding the trial court’s instructions and the verdict form. [R p. 705, 707, lines 16-22, 17,]

A key feature of punitive damages – that they are never awarded of right, no matter how egregious the defendant’s conduct “If the plaintiff proves sufficiently serious misconduct on the defendant’s part, the question whether to award punitive damages is left to the jury which may or may not make such an award” D Dobbs, Handbook of the Law of Remedies 204 (1973)

Smith at 52 See also, Kuznik v Bees Ferry Associates, 342 S C 579, 538 S E 2d 15, 32 (Ct App 2000) (master did not abuse discretion in declining to award punitive damages “where an examination of the totality of the evidence in the record does not justify the imposition of punitive damages”), see also Hunter v Spaulding, 388 S E 2d 630 (N C App 1990) (‘ Punitive damages, in contrast, are not recoverable as a matter of right but are always within the discretion of the trier of fact See Harris v Queen City Coach Co 220 N C 67, 16 S E 2d 464, 465 (1941)”) For this reason, the majority overlooked or misapprehended the law regarding punitive damages by affirming where the trial court instructed the jury that it was their “duty” to award punitive damages and provided no other option on the verdict form

CONCLUSION

This case raises questions of exceptional importance because, as it stands, the majority has upheld a judgment in excess of \$7 3 million against a defendant in a default where the state court lacked jurisdiction, where a new reasonableness standard under Rule 55(c) was created, and where the trial on actual and punitive damages was an unquestionable denial of due process Thus, the Court should grand rehearing en banc and reverse the judgment so that this matter can be considered, as is the well- recognized policy of this state, on the merits



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Attorneys for the Appellants

Paul H. Hulsey and The Hulsey Litigation Group

March 25, 2011

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-10-1577

Lawton Limehouse, Sr

RESPONDENT,

v

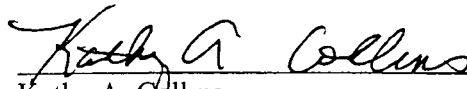
Paul H Hulsey and The Hulsey
Litigation Group, LLC,

APPELLANTS

CERTIFICATE OF SERVICE

I, Kathy A Collins, an employee of the law firm of Lewis & Babcock, L L P , do hereby certify that I have this 25th day of March, 2011, served the Appellants' Petition for Rehearing En Banc 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



Kathy A Collins

Columbia South Carolina

March 25, 2011



The South Carolina Court of Appeals

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June 1, 2011

A Camden Lewis, Esq
Ariail E King, Esq
Lewis & Babcock, LLP
P O Box 11208
Columbia, SC 29211

Re Limehouse, Lawton v Hulsey, Paul (2)

Dear Counsel

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing in the above case

Your Petition for Rehearing En Banc was distributed to the judges but it has been rejected See Rule 219, SCACR(amended April 28, 2011)

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b)

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case Also enclose a check payable to the S C Court of Appeals, in the amount of \$7 50, to cover mailing costs If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of

Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson".

Renee S Johnson
Administrative Specialist

 TAG/rj

cc Robert H Hood, Esquire
Deborah Harrison Sheffield, Esquire
James B Hood, Esquire
John K Weedon, Esquire
Frank M Cisa, Esquire

The South Carolina Court of Appeals

Lawton Limehouse, Sr ,

Respondent,

v

Paul H Hulsey and The Hulsey
Litigation Group, LLC,

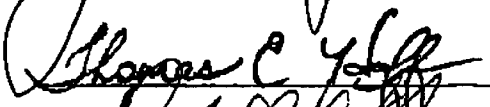
Appellants

The Honorable Daniel F Pieper
The Honorable Roger M Young
Charleston County
Trial Court Case No
2006-CP 10-01577
2006-CP-10-01577

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded. Hence, there is no basis for granting a rehearing, and it is ordered that the Petition for Rehearing be denied. We hereby substitute the attached opinion for Opinion No 4805, filed March 10, 2011.



C J


J


J

Columbia, South Carolina

FILED

JUN 01 2011

App-76



The South Carolina Court of Appeals

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June 2, 2011

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P O Box 11208
Columbia, SC 29211

Re Limehouse, Lawton v Hulsey, Paul (2)

Dear Counsel

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing and Substituting and Refiling the enclosed opinion in the above case

I apologize for the inconvenience. The time limits start with the date of this letter.

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S C Court of Appeals, in the amount of \$750, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson", is written over the typed name.

Renee S Johnson
Administrative Specialist

Vet
TAG/tj

cc Robert H. Hood, Esquire
Deborah Harrison Sheffield, Esquire
James B Hood, Esquire
John K Weedon, Esquire
Frank M Cisa, Esquire

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

Lawton Limehouse, Sr , Respondent,

v

Paul H Hulsey and The Hulsey
Litigation Group, LLC, Appellants

Appeal From Charleston County
Daniel F Pieper, Circuit Court Judge
Roger M Young, Circuit Court Judge

Opinion No 4805
Heard April 13, 2010 – Filed March 10, 2011
Withdrawn, Substituted and Refiled June 2, 2011

AFFIRMED

A Camden Lewis, Ariail E King, of Columbia,
Robert H Hood, Deborah Harrison Sheffield, James
B Hood, and John K Weedon, of Charleston, for
Appellants

Frank M Cisa, of Mt Pleasant, for Respondent

THOMAS, J.: This is an appeal from an entry of default and the subsequent default damages trial based on a slander action against Paul Hulsey and the Hulsey Litigation Group, LLC (collectively Hulsey) Damages (actual and punitive) were found in excess of \$7.3 million. Hulsey now appeals, alleging the trial court erred in (1) granting entry of default without subject matter jurisdiction, (2) failing to grant a motion to set aside the entry of default, (3) allegedly depriving Hulsey of due process in the default damages trial, and (4) allowing an award of \$5 million in punitive damages. We affirm.

FACTS

In 2004, Hulsey filed a class action suit against Lawton Limehouse, Limehouse's son, and L&L Services, Inc., a staffing agency owned by the pair. The suit alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as other state and federal laws. Although the case eventually settled, during its pendency, Hulsey made allegedly slanderous statements that the "[Charleston] Post & Courier" published, including (1) Limehouse engaged in a classic racketeering scheme, (2) Limehouse's conduct set the community back 150 years, (3) Limehouse engaged in blatant indentured servitude, and (4) Limehouse created a perfect racketeering scheme just like Tony Soprano.¹

In response, Limehouse filed suit against Hulsey on April 19, 2006. Service was perfected upon the Hulsey Litigation Group, LLC on April 20, 2006, and Paul Hulsey personally on April 21, 2006. On May 5, 2006, Hulsey filed a notice of removal to federal district court without filing an answer to the complaint. On June 2, 2006, Limehouse filed a motion to remand to state court. A federal district judge remanded the case to state court by an order dated July 19, 2006, for lack of federal subject matter jurisdiction.² The federal court electronically transmitted this order to

¹ Tony Soprano is a fictional television character involved in organized crime.

² Hulsey did not answer the complaint in federal court.

counsel on July 20. The Charleston County Clerk of Court also received an uncertified copy and filed the order on July 21. The Charleston County Clerk of Court mailed notice of the filing to all parties on July 27.

On August 21, 2006, Limehouse filed a request for entry of default. The Charleston County Clerk of Court entered default on August 21, and filed the same on August 22. Subsequently, the clerk mailed a Form 4 to all parties on August 24, 2006, noticing entry of default. On August 29, upon receipt of the Form 4, Hulsey filed an answer and motion to set aside entry of default pursuant to Rule 55(c), SCRCP.

In December, 2006, a circuit judge denied Hulsey's motion to set aside entry of default, and in February 2008, a different circuit judge presided over a jury trial on the issue of damages. On February 6, 2008, the jury returned a verdict for actual damages in the amount of \$2.39 million and awarded punitive damages in the amount of \$5 million. Nine days later, on February 15, 2008, Hulsey filed a motion to dismiss for lack of subject matter jurisdiction, after discovering there was no certified copy of the remand order on file with the Charleston County Clerk of Court. The trial court denied the motion, as well as the accompanying motion for a new trial. This appeal follows.

ISSUES ON APPEAL

- I Did the trial court err in exercising jurisdiction over the case after remand?
- II Did the trial court err in failing to set aside the entry of default?
- III Did the trial court err in the manner in which the default damages trial was conducted?
- IV Did the trial court err in allowing an award of punitive damages?

LAW/ANALYSIS

I. Jurisdiction

Hulsey argues the trial court was, and still is, without jurisdiction over this matter because the clerk of the federal court failed to mail a certified copy of the remand order to the Charleston County Clerk of Court. We disagree and find the mailing of the certified copy is not a jurisdictional requirement.

Upon removal, the federal court acquires jurisdiction over the case, for the limited purpose of determining jurisdiction. See Davis v. Davis, 267 S.C. 508, 511, 229 S.E.2d 847, 848 (1976). Once the federal court determines that federal jurisdiction is not appropriate, the case is remanded to state court, and the remand ends the federal court's jurisdiction. 28 U.S.C. § 1446(d) (1996).

Congress has provided for a federal court's jurisdiction in section 1446(d): "Promptly after the filing of such notice of removal, the defendant shall give written notice thereof to 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).

In addition, 28 U.S.C. § 1447(c) (1996) provides for "Procedure[s] after removal generally," and states

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

In interpreting section 1447(c), a majority of federal circuits take the position that the finality of the remand and the accompanying loss of federal jurisdiction requires both entry of the order with the federal clerk of court *and* a certified copy being mailed to the state court. See, e.g., Trans Penn Wax Corp v McCandless, 50 F 3d 217, 227 (3rd Cir 1995), Hunt v Acromed Corp, 961 F 2d 1079, 1081-82 (3rd Cir 1992), Browning v Navarro, 743 F 2d 1069, 1078-79 (5th Cir 1984), Fed Deposit Ins Corp v Santiago Plaza, 598 F 2d 634, 636 (1st Cir 1979)

However, the Fourth Circuit takes a minority view, reasoning that because remands for lack of subject matter jurisdiction or defect in removal are unappealable, "the plain language of the statute[] support[s] the conclusion that §1447 divests a district court of jurisdiction upon the entry of its remand order" despite the federal clerk's duty to send a certified copy. In re Lowe, 102 F 3d 731, 735 (4th Cir 1996) (considering and declining the majority approach, holding "a federal court loses jurisdiction over [the] case as soon as its order to remand the case is entered[] [f]rom that point on, it cannot reconsider its ruling even if the district court clerk fails to mail a certified copy"),³ see also Bryan v BellSouth Commc'ns, Inc., 492 F 3d 231, 235 n 1 (4th Cir 2007) (recognizing "a remand is effective when the district court mails a certified copy see [1447(c)] or if the remand is based on the lack of subject-matter jurisdiction when the remand order is entered, see [Lowe]")⁴ (emphasis added)

³ The essence of our inquiry, as opposed to the federal court, is not whether the federal scheme provides for state court jurisdiction, but rather, whether it prohibits state court jurisdiction. See *infra*. Naturally, because a federal court does not determine state court jurisdiction, this distinction allays the dissent's concern that the question confronted in Lowe is different than the one we face here

⁴ We do not rely on Bryan as dispositive of this case, nor do we find any reason to interpret this purely explanatory note – which specifically cites Lowe – to imply that Lowe does not stand for what it explicitly holds, i.e., a

Accordingly, the South Carolina Federal District Court lost jurisdiction when the order of remand was entered⁵. We believe this ends the inquiry. However, because Hulsey's assertion that the state court also lacks subject matter jurisdiction seems to leave the case caught in jurisdictional limbo, or as other courts have dubbed it, on "a jurisdictional hiatus," for lack of the mailing, State v. City of Albuquerque, 889 P 2d 204, 207 (NM Ct App 1993) aff'd 889 P 2d 185 (NM 1994), we therefore address whether the mailing is required for the South Carolina Circuit Court to exercise jurisdiction.

We start with the premise that our state court's jurisdiction is general, derived exclusively from article V, section 11 of the South Carolina Constitution, not from federal law. S C Const art V, § 11, see, e.g., Fairfax Countywide Citizens Ass'n v Fairfax County, 571 F 2d 1299, 1304 (4th Cir 1978) (indicating that unlike federal courts, state courts are courts of general jurisdiction). On the other hand, the jurisdiction of federal courts is limited to

federal court loses jurisdiction upon entry of a remand for lack of subject matter jurisdiction.

Although the dissent agrees the note is purely dicta, to the extent it is suggested the footnote bears on this matter, we note that the dissenting opinion ignores the second clause of the note, in which the Fourth Circuit reiterates the Lowe holding, presumably because its interpretation of the first clause is irreconcilable with Lowe. Further, the interpretation of the first clause is premised on a presumption, allegedly from Bryan, that remands for reasons other than lack of subject matter jurisdiction or defect in removal are not subject to section 1447(c). However, neither the Fourth Circuit, nor any other circuit, has put forth such a ruling, and Bryan itself refutes this presumption by recognizing, in a case in which the remand was based upon a reason *other than* lack of subject matter jurisdiction or defect in removal, that the state court could continue upon receipt of the certified mailing, citing section 1447(c). See Bryan, 492 F 3d at 241.

⁵ The exercise of mandamus power is, by its very nature, not an exercise of the court's jurisdiction over the case and controversy.

that expressly authorized by the United States Constitution or statute enacted by Congress pursuant thereto Exxon Mobile Corp v Allapattah Servs , Inc , 545 U S 546, 553 (2005), Victory Carriers Inc v Law, 404 U S 202, 212 (1971) ("The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution ") (internal citation and quotation marks omitted), U S Const art III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish "), see The Federalist No 82, at 515-16 (Alexander Hamilton) (Wright ed , 2002) (considering the federal government has only the power exclusively delegated to it, it stands as a "rule" that "the State courts will retain jurisdiction[,] unless it appears to have been taken away in one of the enumerated modes"), Thus, unless otherwise prohibited by statute, a state court's jurisdiction is limited only by the federal court's proper exercise of jurisdiction over a case pursuant to Congressional act – which according to Fourth Circuit jurisprudence in Lowe, ceased upon entry of the remand order ⁶

In this regard, the distinction between the majority and minority views becomes significant Section 1446(d) provides a prohibition on state action in that once removal is properly effectuated, "the State court *shall proceed no further unless and until* the case is remanded " (emphasis added) Section 1447(c) states "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 " (emphasis added) Naturally, if a federal court takes the majority view, making the remand dependent upon the mailing, the case is remanded and the order is mailed at the same point in time Therefore, the mailing forecloses state court jurisdiction not because a state court should interpret section 1447(c) to provide the state may *only* proceed upon the mailing but because section 1446(d) prohibits state action until remanded However, under the minority view, this is not the case as a remand does not require the

⁶ For this reason, we disagree with the dissent's indication that we must interpret section 1447(c), as to do so in light of Lowe's interpretation of when federal jurisdiction ends under that section, we must invariably presume that our jurisdiction is derived from that federal statute rather than limited by it

mailing Thus, in this circuit, a state court exercising jurisdiction over a case upon entry of remand neither imposes on federal jurisdiction nor violates these federal jurisdiction provisions

Similarly, the states that have confronted this issue recognize the significance of the distinction between the majority and minority view

In the cases applying the majority view, the revesting of jurisdiction occurs on the mailing because the finality of the remand and accompanying loss of federal jurisdiction requires the same See, e.g., Nixon v Moore, 108 S W 3d 813, 817-18 (Mo Ct App 2003) (adopting the majority approach that the mailing is the operative event at which jurisdiction switches, but recognizing the minority reaches a different result), Quaestor Invs, Inc v State of Chiapas, 997 S W 2d 226, 228 (Tex 1999) (noting that "[i]n answering the question of when a jurisdictional transfer occurs between federal and state court, most courts[] interpret[Section 1447(c)] to mean that the federal court loses jurisdiction once the federal court clerk has mailed a certified copy" but others, particularly the Fourth Circuit in Lowe, take an opposite view) However, the same rationale compels a different result under the minority view See Nixon, 108 S W 3d at 817 (citing Lowe for the proposition that a "few federal [circuits] have reached [a minority approach] holding that jurisdiction transfers back to the state as soon as an order of remand is entered"), Quaestor, 997 S W 2d at 228 (stating that Lowe "hold[s] that jurisdiction returns to the state court when the district court enters the remand") Thus, whether the mailing of the certified copy is required to revest jurisdiction is simply a product of what interpretation is employed to determine when the federal court loses jurisdiction⁷

⁷ We are aware of no jurisdiction that has taken the position that neither the state nor federal court has jurisdiction over a case Further, it is not inconsistent with our federalist form of government to allow a state court to exercise its general jurisdiction when a federal court has finally decided its Congressionally authorized jurisdiction has ceased See Lowe, 102 F 3d at 735 ("Removal in diversity cases, to the prejudice of state court jurisdiction, is a privilege to be strictly construed[]") (quoting In re La Providencia Dev Corp., 406 F 2d 251, 252 (1st Cir 1969))

Thus, the minority view accepts that the "require[ment that] the clerk of the district court [] mail a certified copy of the remand order to the clerk of the state court, is *not jurisdictional*" Int'l Lottery, Inc v Kerouac, 657 NE 2d 820, 823 (Ohio Ct App 1995) (emphasis added) (citing Van Ryn v Korean Air Line, 640 F Supp 284 (C D Cal 1985) (standing for the proposition that entry of remand divests the federal court of jurisdiction notwithstanding the failure of the clerk to send a certified copy)), see Albuquerque, 889 P 2d at 206 (holding "the actions of a federal judge in signing and entering a remand order authorize subsequent state court actions even when the federal court clerk fails to mail the remand order to the clerk of the state court"), see also Lowe, 102 F 3d at 735 ("Logic also indicates that it should be the action of a court (entering the order of remand) rather than the action of a clerk (mailing a certified copy) of the order that should determine *vesting* of jurisdiction") (quoting Van Ryn, 640 F Supp at 285) (emphasis added) In light of the Fourth Circuit having taken the minority approach, we must agree that the duty to send the mailing is not a jurisdictional requirement but a procedural one Therefore, we find the South Carolina Circuit Court did not act without subject matter jurisdiction

This is bolstered by the fact that even in jurisdictions requiring the mailing for finality of the remand, the same is not necessarily required for the state to exercise jurisdiction For instance, in Nixon the Missouri Court of Appeals recognized

The state court may not be immediately notified by the federal court of the order of remand Counsel, of course, are promptly notified of the order of remand, and often counsel will, in the interest of saving time, notify the state court and proceed in the interim with the state court action *There is nothing in the federal statutory scheme prohibiting the parties from proceeding at that point*

Nixon, 108 S W 3d at 817 (emphasis added)⁸ Thus, although requiring the mailing to make the remand order final, the same is not an indispensable jurisdictional requirement See Bacon v Dir of Revenue, State of Mo., 948 S W 2d 266, 267 (Mo Ct App 1997) ("Subject matter jurisdiction cannot be conferred by consent, and the lack thereof cannot be waived") With nothing in the federal statutory scheme to prohibit this, the same would hold true in South Carolina, supporting our disinclination to see the mailing requirement as jurisdictional See In re Nov 4, 2008 Bluffton Town Council Election, 385 S C 632, 636, 686 S E 2d 683, 686 (2009) ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties")

Because we find the mailing requirement is procedural not jurisdictional, the issue is not properly before this court as a result of Hulsey's failure to timely object See Beaufort County v Butler, 316 S C 465, 467, 451 S E 2d 386, 387-88 (1994) (stating "a procedural right may be waived [and a] party who fails to object to the trial of a case cannot later assert the trial court erred in trying the case"), Doe v S B M, 327 S C 352, 356, 488 S E 2d 878, 880 (Ct App 1997) (stating that "[t]he duty is on the litigant to make a timely objection in order to preserve the right to review [and] [a] contemporaneous objection is required to properly preserve an error for appellate review"), In re Michael H., 360 S C 540, 546, 602 S E 2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court")⁹

⁸ This statement recognizes that a state court, as opposed to a federal court, confronts whether the exercise of jurisdiction is prohibited by federal statute, not proscribed by it Similarly it undermines the notion that the statement in section 1447(c) that once a certified copy is mailed "[t]he State court *may* thereupon proceed," operates as an absolute prohibition on state action (emphasis added)

⁹ The dissent posits that our distinction between a jurisdictional requirement and a procedural one is irrelevant and that we erroneously suggest the issue is not preserved for appeal because it was not raised before the judgment was entered To the contrary, it is precisely because of the rules of issue preservation that the distinction is not only relevant but imperative The only

Further, to warrant reversal a party must demonstrate the alleged procedural failure caused him prejudice. See Chastain v Hiltabiddle, 381 S C 508, 519, 673 S E 2d 826, 831 (Ct App 2009) (stating in order to demonstrate prejudice from procedural non-compliance, a party must establish it "would have done something different" had procedure been followed). Hulsey has failed to demonstrate that he was prejudiced by the absence of the certified copy. Here, Hulsey cannot, and does not, maintain notice was insufficient. The record makes clear that the Charleston County Clerk of Court received notice of a final and unappealable order of remand on July 21, 2006, and that on July 27, 2006, she mailed notice that she received and entered this final and unappealable order to all parties, just as she would have done had she received of a certified copy of the order.

Moreover, Husley personally received notice. The notice sent to Hulsey from the Charleston County Clerk makes no indication of whether the notice of remand it received was certified or not. Consequently, Hulsey's notice was not impacted by the fact that the Charleston County Clerk did not receive a certified copy of the order. Further, pursuant to Section 5 of the Policies and Procedures for the electronic case filing system (ECF) employed

question we confront in this case is whether the action of the trial court is void for lack of jurisdiction, which can be raised at *any time*. However, the dissent elects not to squarely answer this question, instead finding the judgment void because the trial court lacked the "power to proceed" with the case under the federal statute. Because it is the only issue before this court, we must presume that this alleged powerlessness is due to a lack of subject matter jurisdiction. To the extent the dissent suggests the circuit court is powerless to proceed for any reason other than a lack of subject matter jurisdiction, the issue is not properly before this court. Further, the dissent's analogy to the bankruptcy code is misplaced. Notwithstanding the manifest dissimilarities between the realm of bankruptcy law and this case, the federal jurisdictional statutes at issue here do not provide for a stay. The concept is also not analogous to this case as a stay, by definition and nature, operates only as a suspension of jurisdiction, not a termination. Contra Davis, 267 S C at 511, 229 S E 2d at 848 ("[O]nce removal proceedings to federal court are fulfilled and requisite notice accomplished, the State court loses all jurisdiction in the matter.")

in the federal court, by removing the case Hulsey agreed to receive notice of entry of any order or judgment through electronic transmittal. Thus, in addition to notice from the state court, Hulsey had notice from the federal court of the entry of the final and unappealable remand order and consequently was not prejudiced.

Accordingly, the South Carolina Circuit Court did not act without subject matter jurisdiction, and Hulsey was not otherwise prejudiced by the Federal Clerk's failure to send a certified copy of the order of remand.¹⁰

II Entry of Default

Hulsey argues the trial court erred in failing to set aside entry of default because (a) the answer was timely or (b) good cause existed to set aside the entry of default under Rule 55(c), SCRCP. We disagree.

As to the issue of whether the answer was timely filed, Hulsey points out this is an issue of interpretation of a rule or statute and is therefore reviewed de novo. See Catawba Indian Tribe of S C v State, 372 S C 519, 524, 642 S E 2d 751, 753 (2007) (stating the interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court). Further, our standard of review leaves the decision to set aside an entry of default within the sound discretion of the trial court, which we will not reverse absent an abuse of discretion. Stark Truss Co v Superior Const Corp., 360 S C 503, 508, 602 S E 2d 99, 101 (Ct

¹⁰ Respectfully, we disagree with the dissent's "summary of the rules that apply to remand in the Fourth Circuit." We find these conclusions irreconcilable with the holding of Lowe and contrary to the expressed rationale of both Lowe and Bryan. Similarly, we find these rules to be contrary to the reasoning and holdings of the state courts that have confronted the issue. Finally, from a practical perspective, we find the summary illogical as it proposes to create (1) a scenario in which a state court is permitted to resume action on a case even though the remand order is appealable and remains subject to the federal court's jurisdiction, and (2) a scenario that denies a state court jurisdiction over a matter in which federal jurisdiction has been terminated, and a final and unappealable order has been issued.

App 2004) Such an abuse of discretion occurs when the decision is based upon an error of law or when the order is without evidentiary support Id

a. Timeliness of the Answer

In order to find the August 29 answer was timely Husley urges this court to adopt a rule that the thirty-day time period in which to answer starts over upon remand ¹¹ We are not inclined to adopt such a rule

Rule 12(a), SCRCF, provides "A defendant shall serve his answer within 30 days after the service of the complaint upon him[]" However, federal rules provide "[a] defendant who did not answer [in state court] before removal must answer within the longest of " (A) twenty days after being served or otherwise receiving the initial pleading or (B) within five days after notice of removal is filed Rule 81(c)(2), FRCP

In this case, Hulsey removed fourteen days after being served Thus, although under Rule 12(a), SCRCF, he was entitled to another sixteen days to answer, by choosing to remove the case to federal court, he willfully subjected himself to the shortened time period of Rule 81(c)(2), FRCP – providing he must answer within six days (twenty days after being served) However, in the seventy-six days between removal and the entry of remand, Husley neglected to answer

Initially, we find no authority in this state to support the position that a removing party is entitled to a fresh thirty days to answer a complaint upon remand Neither did the trial court Rather, looking at both the federal rules and state rules, in the exceptionally rare circumstance in which a case would be remanded to the state court before an answer was due pursuant to Federal Rule 81(c)(2), a plain reading of South Carolina Rule 12(a) would require an answer within thirty days of service However, seemingly giving Hulsey the benefit of the doubt, the trial court determined that because the state court is to proceed as if no removal had been attempted, removal to federal court tolls

¹¹ Hulsey avers jurisdiction has not yet revested in the state court and maintains this as an alternative position

the thirty day time period and therefore, upon remand Hulsey should be allowed the remainder of any unexpired time¹² See State v Columbia Ry, Gas & Elec, 112 S C 528, 537, 100 S E 355, 357 (1919) (stating that upon remand it is the duty of the state court to proceed as if no removal had been attempted)

In this case, because Hulsey failed to answer under the plain reading of either Rule 12(a), SCRCP, or Rule 81(c)(2), FRCP, or under the more liberal approach provided by the trial court, it is of no consequence which approach we would adopt. Therefore, we are not occasioned to opine on the more acceptable method¹³. It suffices that we find no indication that a party is entitled to a fresh thirty-day period upon remand. Accordingly, we are disinclined to adopt a rule allowing the same. Such action is not the province of this court, but that of our legislature or supreme court.

b Rule 55(c)

Hulsey next argues the trial court erred in failing to set aside the entry of default under Rule 55(c), SCRCP. We disagree.

The issue before this court is not whether we would find good cause, but whether the decision to deny the motion to set aside default is supportable by the evidence and not controlled by an error of law. Williams v Vanvolkenburg, 312 S C 373, 375, 440 S E 2d 408, 409 (Ct App 1994). A motion to set aside entry of default under Rule 55(c) is addressed to the sound discretion of the trial court. Id.

Under Rule 55(c), the entry of default may be set aside for "good cause shown," which is a less stringent standard than the excusable neglect standard.

¹² This amounted to sixteen days after the remand because fourteen days had elapsed prior to removal.

¹³ The inquiry of whether failure to comply with Rule 81(c)(2), FRCP, would support entry of default in state court if the case is remanded unanswered appears novel in this state. However, we need not address it.

of Rule 60(b) Sundown Operating Co v Intedge Indus Inc, 383 S C 601, 607, 681 S E 2d 885, 888 (2009)¹⁴ The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice" Id "Once a party has put forth a satisfactory explanation the trial court must also consider [the Wham¹⁵ 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" Id at 607-08, 681 S E 2d at 888 However, a trial court need not make specific findings of fact for each factor if sufficient evidence supports a trial court's determination that no reasonable explanation exists for vacation of default Id

In this case, the trial court held that because "there appears to be no reasonable basis for [Hulsey's] assumption that the [thirty] day time to file an answer starts completely anew upon remand[.]" no good cause has been demonstrated " While we appreciate the trial court did not have the benefit of the Sundown opinion, we find Sundown did nothing to abate the discretion to which a trial court is entitled in ruling on a Rule 55(c) motion Nor did it change the standard this court applies when reviewing such a decision What constitutes a satisfactory explanation that serves the interests of justice remains within the sound discretion of the trial court¹⁶

¹⁴ Although the South Carolina Supreme Court decided this case during the pendency of this appeal, Hulsey notified this court via writing of the intent to rely on this authority

¹⁵ Wham v Shearson Lehman Bros, 298 S C 462, 465, 381 S E 2d 499, 502 (Ct App 1989)

¹⁶ As our colleague in the dissent points out and the trial court's ruling indicates in practice, both the bench and bar have been aware that the explanation for the default is significant See New Hampshire Ins Co v Bey Corp, 312 S C 47, 50, 435 S E 2d 377, 379 (Ct App 1993) (indicating the reason for failure to act is relevant under a Rule 55(c) analysis)

In South Carolina, negligence on the part of an attorney is imputable to the client and will not be the basis of finding good cause to set aside entry of default. See Vanvolkenburg, 312 S C at 375, 440 S E 2d at 410 (indicating, prior to Sundown, that the imputed negligence of an attorney to a defaulting litigant is not good cause). Similarly, our supreme court has recognized subsequent to Sundown that the good cause standard of Rule 55(c), encompasses a degree of reasonableness. See Richardson v P V, Inc., 383 S C 610, 618-19, 682 S E 2d 263, 267 (2009) (finding, after Sundown, that negligence on the part of an insurance company or attorney will be imputed to a defaulting litigant and negligence does not constitute good cause to relieve an appellant from entry of default), see also Black's Law Dictionary 1133 (9th ed 2009) (defining negligence as the failure to act reasonably under a specific set of circumstances). It stands, therefore, that because unreasonable conduct does not amount to good cause, an unreasonable explanation for defaulting is not a satisfactory explanation that serves a sufficient interest of justice.¹⁷

In the case at bar, although the supreme court had not yet issued the Sundown opinion, the trial court nonetheless addressed Hulsey's explanation of default and specifically found it unreasonable. We find the record supports the finding that Husley's explanation for default is unreasonable.¹⁸

¹⁷ We recognize the dissent's position that reasonableness is not required of the excuse itself but merely a factor to be considered in a "broader inquiry" of whether the vacation serves the interests of justice. While this is certainly a mode of analysis within the trial court's discretion, in light of our standard of review, whether the trial court finds vacation does not serve an interest of justice because the excuse is unreasonable or finds the excuse is unreasonable because vacation does not serve an interest of justice, so long as supported by the evidence, is a distinction without a consequence.

¹⁸ Notwithstanding, we respectfully disagree that good cause likely existed in this case. Hulsey's contempt for the rules of procedure both in federal court and state court, indicates this was not a "failure at an attempt" but rather a "failure to attempt" an answer. This issue would not have arisen had the rules been followed. Thus, we suggest there is ample "guidance" for Hulsey to know a party is not entitled to 130 days to answer.

Vanvolkenburg, 312 S C at 375, 440 S E 2d at 409 (stating the "issue before this [c]ourt is not whether we believe good cause existed [but] whether the trial court's determination is supported by the evidence") Further, we are aware of no authority either prior to or after Sundown that compels this court to find it is not within the trial court's discretion to deny a Rule 55(c) motion for an unreasonable failure to answer Accordingly, we find the trial court did not abuse its discretion

III. Default Damages Trial

Hulsey's allegation of error as to the damages trial is threefold He argues (a) the process employed by South Carolina courts is unconstitutional and deprives a default defendant of due process, (b) specifically as to this case, the trial court erred in allowing introduction of new allegations during the damages hearing, in the form of testimony about a link on Hulsey's website to the slanderous article, and (c) the trial court erred by improperly commenting on the facts

This court's standard of review for the grant or denial of a motion for a new trial extends substantial deference to the trial court Vinson v Hartley, 324 S C 389, 404, 477 S E 2d 715, 723 (Ct App 1996) The trial court's decision will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law Stevens v Allen, 336 S C 439, 446, 520 S E 2d 625, 628-29 (Ct App 1999)

a South Carolina's default damages procedure

Hulsey argues the process employed by the State of South Carolina during a default damages hearing is unconstitutional We must disagree

During a default damages trial, the defendant's participation shall be limited to cross-examination and objection to the plaintiff's evidence Roche v Young Bros of Florence, 332 S C 75, 81-82, 504 S E 2d 311, 314 (1998), Howard v Holiday Inn, Inc., 271 S C 238, 241, 246 S E 2d 880, 882 (1978), Doe v SBM, 327 S C 352, 356, 488, S E 2d 878 881 (Ct App 1997), Ammons v Hood, 288 S C 278, 282, 341 S E 2d 816, 818 (Ct App 1986)

On appeal, Hulsey provides no controlling authority¹⁹ for his position that this court can, or should, diverge from longstanding rules established by our supreme court. Accordingly, we cannot and do not find the default damages hearing to be unconstitutional.

b Introduction of testimony about the website link

Hulsey maintains that the entry of default is tantamount to admission of the allegations of the complaint, but nothing more. See Wiggins v Todd, 296 S C 432, 435, 373 S E 2d 704, 705-06 (Ct App 1988) (stating that when a defendant is in default, the plaintiff's right to recover is circumscribed by the complaint drafted). Therefore, Hulsey alleges the trial court erred in allowing Limehouse to testify to new allegations outside the confines of the complaint, particularly about a link on Hulsey's website to the slanderous newspaper article. However, an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection. SBM, 327 S C at 356, 488 S E 2d at 881.

Here, Hulsey failed to object to any testimony regarding the publication or link on the website. Accordingly, this allegation of error is not preserved for our review.

c Trial court commenting on the facts

Generally a "trial [court] should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally." Sierra v Skelton, 307 S C 217, 225, 414 S E 2d 169, 174 (Ct App 1992).

In this case, during deliberations, the jury sent out a question inquiring whether "the link to the April 24, 2004, article [was] still on Hulsey's

¹⁹ Hulsey cites Mathews v Eldridge, 424 U S 319, 333-34 (1976), for the proposition that due process requires a meaningful opportunity to be heard. Hulsey also cites to two appellate decisions from the foreign jurisdictions of Florida and North Carolina to support his argument to change the default damages procedure in South Carolina, specifically as to punitive damages.

website? [And i]f not, when was it removed?" The trial court responded by informing the jury that there was testimony that as of the Monday of trial, the link remained on the website

Hulsey argues this "constitute[s] an improper comment on the facts " Further, Hulsey argues "even more inexplicably, Limehouse was allowed to testify that the link on the website was a violation of a court order while Hulsey was precluded from introducing the very court order which indisputably evidences that there was no prohibition from mentioning the case on the firm website " Initially, Hulsey made no objection to the testimony regarding the court order, and under the default damages procedure, would have been free to cross-examine Limehouse on this matter Furthermore, Hulsey does nothing to demonstrate how the trial court's answer to the jury's inquiry demonstrated an imparting of opinion on the facts of the case Accordingly, we find no error

IV Punitive Damages

Hulsey argues the award of punitive damages was founded on trial court error and constituted a denial of due process Hulsey presents four separate arguments on this issue (a) due process demands a default litigant be given an opportunity to defend punitive damages, (b) the jury should have been instructed that it could return an award of no punitive damages, (c) the trial court allowed and actually invited the jury to consider matters not proper for their consideration in awarding punitive damages, and (d) the trial court erred in confirming the award

Generally, the trial court's decision on a motion for a new trial will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law Stevens v. Allen, 336 S C 439, 446, 520 S E 2d 625, 628-29 (Ct App 1999)

a. Due Process

Hulsey maintains employing South Carolina's procedures for a default damages hearing in a case in which punitive damages are sought amounts to a constitutional due process violation Hulsey further argues this due process

violation was compounded by the facts that the trial court failed to exercise its obligation to independently make a threshold determination of whether the defendants' conduct rose to the level of warranting punitive damages, and that Limehouse was allowed to go into matters beyond the bounds of the complaint

Initially, Hulsey cites no authority to support the proposition that South Carolina should employ a different default damages procedure for punitive damages than for actual damages. See Roche, 332 S C 75, 504 S E 2d 311 (making no distinction on appeal between punitive damages and actual damages during a default damages trial)

As to the trial court's failure to make a threshold determination that Hulsey's conduct warranted punitive damages, this issue was specifically addressed when the trial court denied Hulsey's motion for a directed verdict on punitive damages. Although it is unclear from the briefs on appeal whether Hulsey challenges this ruling on appeal, to the extent that he may be alleging the trial court improperly denied the directed verdict on the issue of punitive damages, we briefly address the issue.

In reviewing the denial of a motion for a directed verdict, this court applies the same standard as the trial court, viewing the evidence and the inferences in the light most favorable to the non-moving party, and will not reverse the denial unless there is no evidence to support the ruling. All Saints Parish Waccamaw v Protestant Episcopal Church in Diocese of S C, 385 S C 428, 441-42, 685 S E 2d 163, 170 (2009)

When viewed in the light most favorable to Limehouse, there exists evidence which supports submitting the issue of punitive damages to the jury for consideration, including the intentional nature of the action, Hulsey's degree of culpability, and his awareness of the conduct. Accordingly, to the extent Hulsey may be challenging this ruling, we find no error.

b Instruction on punitive damages

Hulsey next argues the trial court erred by telling the jury it was required to award punitive damages. We find no such instruction.

Punitive damages may be awarded, in the interest of society in punishing or deterring the conduct, or vindicating a private right, when the plaintiff proves entitlement to such damages by clear and convincing evidence S C Code Ann § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence), Austin v Specialty Transp Servs, Inc, 358 S C 298, 312, 594 S E 2d 867, 874 (Ct App 2004) (indicating punitive damages may be awarded for various reasons)

Generally, this court will not reverse the decision of the trial court as to a particular jury instruction absent a prejudicial abuse of discretion Cole v Raut, 378 S C 398, 405, 663 S E 2d 30, 33 (2008) A trial court abuses its discretion in this regard when the ruling is not supported by the evidence or is based on an error of law Clark v Cantrell, 339 S C 369, 389, 529 S E 2d 528, 539 (2009)

Hulsey argues the trial court instructed the jury it had to award punitive damages and submitted a jury verdict form that required an award of punitive damages However, upon review of the verdict form we see nothing that required the jury to return punitive damages Furthermore, Hulsey does not cite, or otherwise bring to this court's attention, any specific language used by the trial court to support that it instructed the jury it *had* to award punitive damages

Initially, the trial court instructed the jury "Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that the defendant's actions were willful, wanton, malicious, or in reckless disregard for the plaintiff's rights " Although not specified, the basis for Hulsey's allegation of error is presumably premised upon the use of the word "duty" in a single statement in an otherwise lengthy and thorough instruction in which the trial court stated "Under proper allegations, a [sic] plaintiff proves by clear and convincing evidence a willful, wanton, reckless, and malicious violation of his rights It is not only the right, but the duty of the jury to award punitive damages " However, the trial court's very next sentence clarified the use of this term, stating "Accordingly, *if* you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your

verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances " (emphasis added)

Upon review of the record we find the trial court properly instructed the jury on the law See S C Code Ann § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence) The trial court did not instruct the jury it *had* to award punitive damages, but simply instructed the jury that *if* it found the plaintiff entitled to punitive damages it was their duty to determine the amount to which the Limehouse was entitled Therefore, we find no error

c Matters not appropriate for consideration of punitive damages

Next, Hulsey alleges his constitutional due process rights were violated because of the trial court's and Limehouse's repeated references to the default, arguing this referencing insinuated that the jury should punish Hulsey for his failure to follow the procedural rules Further, Hulsey alleges this error was compounded by the trial court allowing Limehouse's wife to testify as to the link on Hulsey's website, as well as to statements about how the ordeal affected Limehouse's family Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the RICO case, and admitting testimony as to Hulsey's net worth We disagree

First, Hulsey does not cite any authority to support the position that discussion of the default would support a finding that due process had been denied Further, we find no indication on the record that the trial court suggested or otherwise implied that Hulsey's failure to answer should support the imposition of punitive damages

Second, as to the allegations pertaining to the website link, as noted Hulsey made no objection to this during the damages trial and consequently the issue is not preserved for our review See SBM, 327 S C at 356, 488 S E 2d at 881 (indicating an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection to the same)

Third, Hulsey contends it was error to allow Limehouse's wife to mention the impact of the slander on his family because pursuant to Philip Morris USA v Williams, 127 S Ct 1057 (2007), punitive damages cannot be imposed to punish a defendant for harm visited upon others. However, at trial, this argument was specifically presented as one of relevance.

Evidence is relevant, and generally admissible, if it has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. Rules 401, 402, SCRE. The introduction of evidence is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Richardson v Donald Hawkins Const., Inc., 381 S C 347, 352, 673 S E 2d 808, 811 (2009), Jamison v Ford Motor Co., 373 S C 248, 268, 644 S E 2d 755, 765 (Ct App 2007). In this case, the trial court found the testimony to be relevant because it was "within the scope of how it affected [Limehouse], and his family relationships." We agree that the impact on Limehouse's immediate family bears on the extent of the impact he suffered, and accordingly we find no abuse of discretion.

Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the prior RICO case as well as erroneous testimony that Hulsey's net worth was in excess of \$81 million. Initially, contrary to Hulsey's position that Limehouse was able to paint him as a "greedy hotshot lawyer," Limehouse's own witness, John Massalon, conceded he was aware Hulsey was pro bono counsel on the previous RICO case. Furthermore, the record does not indicate any objection was made to the testimony of Bank of America employee Bernadette DeWitt when she testified as to Hulsey's net worth. The evidence bears out the financial declaration on which she relied was certified as a true, complete, and accurate statement of Hulsey's financials and as such, any misinformation presented on this issue was the result of Hulsey's own misrepresentation. Accordingly, we find no error.

d. Confirmation of punitive damages

Finally, Hulsey argues the trial court erred in confirming the award of punitive damages. We disagree.

Our supreme court recently indicated an appellate court's scope of review to be de novo Mitchell v Fortis Ins Co., 385 S C 570, 583, 686 S E 2d 176, 185, 183 (2009)

The Fortis, court consolidated the post judgment due process analysis for punitive damages. In reviewing an award of punitive damages, we consider (1) the reprehensibility of the conduct, (2) the disparity or "ratio" between actual harm and the punitive damage award, and (3) the comparative penalties Fortis, 385 S C at 587-89, 686 S E 2d at 185-86

1 Reprehensibility

In considering reprehensibility, a court should consider whether

(i) the harm caused was physical as opposed to economic, (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others, (iii) the target of the conduct had financial vulnerability, (iv) the conduct involved repeated actions or was an isolated incident, and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident

Id. at 185, 686 S E 2d at 587. This encompasses the defendant's culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct. Id. at 185, n 7, 686 S E 2d at 587, n 7

Although the harm here was not physical, and posed no threat to health or safety, the evidence indicates Hulsey, through involvement in the underlying RICO action, was aware of the nature and vulnerability of Limehouse's business. Also, although the statements were made in a single incident, because the statements were made to the press, the evidence shows that the circumstances clearly indicated that the statements would be publicly reported and widely disseminated. Finally, this conduct was not the result of

accident or inadvertence. The statements were contemplated, intentionally made, and coincided precisely with a filing of a lawsuit against Limehouse. Accordingly, our review of the evidence convinces us that Hulsey's conduct was sufficiently reprehensible to support punitive damages.²⁰

2. Ratio

The courts of this state have affirmed punitive damage awards in excess of six times actual damages. See James v Horace Mann Ins Co, 371 S C 187, 196, 638 S E 2d 667, 672 (2006) (affirming an award of punitive damages of 6.82 times actual damages), Cock-N-Bull Steak House, Inc v Generali Ins Co, 321 S C 1, 11, 466 S E 2d 727, 733 (1996) (affirming an award of punitive damages roughly twenty-eight times actual damages). Similarly, the supreme court has modified awards to reflect a 9:2:1 ratio. See Fortis, 385 S C at 594, 686 S E 2d at 188. Here, the punitive damage award was slightly above twice actual damages. Accordingly, we do not find such an award to violate due process.

3. Comparative Penalty

In looking to comparative cases, we find that in similar matters, our supreme court has upheld punitive damages which were over ten times that of actual damages. See, e.g., Weir v Citicorp Nat'l Servs Inc, 312, S C 511, 518, 435 S E 2d 864, 869 (1993) (affirming an award of \$275,000 in punitive damages, in a slander case, where actual damages were found to be \$25,000). Accordingly, we find no error here.

²⁰ The trial court specifically noted the statements were intentionally made, the award would deter similar conduct in the future, the award was just over twice actual damages and was thus reasonably related to the actual harm suffered. The trial court also noted Hulsey was of the rare few who can afford to pay the award, and although South Carolina's procedure did not permit Hulsey to put forth evidence, the verdict remained reasonable.

CONCLUSION

For the reasons above, the ruling of the trial court is

AFFIRMED.

HUFF, J , concurs

FEW, C.J , dissents

FEW, C J , dissenting I disagree with the majority's analysis of Issues I and II, and therefore dissent Because my position on either Issue I or II would resolve this appeal, I would not reach Issues III and IV

I Jurisdiction

Hulsey moved for a new trial and for relief from judgment on the ground that jurisdiction never re-vested in the state court after removal, and therefore federal law prohibited the state court from proceeding with the case The plain language of 28 U S C §§ 1446(d) and 1447(c) required that the motion be granted

a The Plain Language of Sections 1446(d) and 1447(c)

Section 1446(d) provides that after an action has been removed to federal court "the State court shall proceed no further unless and until the case is remanded " A remand order based on a lack of subject matter jurisdiction, such as the remand order in this case, is governed by section 1447(c),²¹ which requires that "[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court " The next sentence of section 1447(c)—"The State court may thereupon proceed with such case"—is the key to this case The word "thereupon" sets the point in time when the

²¹ Section 1447(c) states "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded "

case is "remanded " Before a certified copy of the remand order is mailed, the state court may not proceed, afterwards, it may The section 1446(d) prohibition of "shall proceed no further" remains in effect until the section 1447(c) requirement that a "certified copy of the order of remand shall be mailed" has been met This plain language is all that is necessary to resolve this appeal A certified copy of the order of remand was never mailed to the state court clerk. Under 28 U S C §§ 1446(d) and 1447(c), therefore, the state court had no power to proceed Because the state court acted when federal law prohibited it from doing so, the resulting judgment was void The trial court's failure to grant relief from the judgment was error and must be reversed

The majority takes the position that the mailing of a certified copy of the remand order does not determine the point in time when a state court may proceed after remand Their position is based primarily on two grounds First, the majority argues that the mailing of a certified copy of the remand order is not required in the Fourth Circuit under the authority of In re Lowe, 102 F 3d 731 (4th Cir 1996) Second, the majority argues that to the extent the requirement is applicable, it is procedural, and the right to enforce it has been waived in this case

b In re Lowe

The question before the court in Lowe was different from the question we face Thus, the rule announced there is not applicable here The majority's argument that the mailing of a certified copy of the remand order is not required in the Fourth Circuit is based on the following passage from Lowe "we hold that a federal court loses jurisdiction over a case as soon as its order to remand the case is entered From that point on, it cannot reconsider its ruling even if the district court clerk fails to mail to the state court a certified copy of the remand order " 102 F 3d at 736 The majority has incorrectly framed the issue by relying on this passage

The majority's argument begins by correctly recognizing that section 1446(d) allows the state court to proceed as soon as the case is "remanded " However, the majority incorrectly concludes that the above statement from Lowe answers the question of when that occurs I agree that Lowe sets the

point in time when the federal court may not reconsider a remand order. However, that ruling is based on the Fourth Circuit's interpretation of section 1447(d), not section 1446(d). Therefore, the majority is mistaken that Lowe sets the point in time when the case is remanded, and that it is not necessary to interpret section 1447(c) in order to determine when the state court may proceed. Rather, we are required to enforce the section 1447(c) requirement that a certified copy of the remand order be mailed before the state court may proceed.

A careful analysis of Lowe demonstrates that the question it answered was different. The plaintiff sued her employer and two of its managers in the state court of North Carolina. 102 F.3d at 732. After the defendants removed the case to federal court, the plaintiff moved to remand. Id. A federal magistrate judge granted the motion on the grounds that the federal court lacked subject matter jurisdiction. 102 F.3d at 732-33, 736. The federal clerk mailed the order to the clerk of the state court, but the copy mailed was not certified. 102 F.3d at 733. Six months later, a different federal magistrate judge granted the defendants' motion to reconsider. Id. After the second magistrate denied two motions to remand, the plaintiff petitioned the Fourth Circuit for a writ of mandamus requiring the district court to return the case to the state court. Id. After concluding generally that remand orders issued for lack of subject matter jurisdiction are not reviewable, 102 F.3d at 733-34, the Fourth Circuit framed the specific issue before it as follows: "[t]he only question remaining, then, is to identify when a court's decision to remand becomes unreviewable." 102 F.3d at 734.

The court analyzed the question by focusing on 28 U.S.C. § 1447(d), and in particular the word "order."

Subsection 1447(d) provides only that a remand "order" may not be reviewed; it does not condition reviewability on any other event. Thus, the plain language of subsection (d) indicates that a court may not reconsider its decision to remand, as soon as it formalizes that decision in an "order."

102 F 3d at 734 The Lowe decision thus turns on the court's interpretation of the word "order" in section 1447(d) and not, as the majority claims, on the timing of "remanded" under section 1446(d) In fact, Lowe does not even mention section 1446 The court clarifies its reliance on section 1447(d) with the language "[1447(d)] does not condition reviewability on any other event " Id This statement makes it clear that Lowe is not based on sections 1446(d) or 1447(c), which refer respectively to the events of "remanded" and "mailed " Therefore, the majority's contention that Lowe defines "remanded" is not correct

Moreover, Lowe contemplates that the section 1447(c) requirement of a mailing remains a part of the process of remand Noting that it has read sections 1447(c) and (d) independently, 102 F 3d at 734 n 3, the court explains that section 1447(c) "directs the district court clerk to mail a 'copy' of the remand order to the state court, certainly implying that the order itself, the document § 1447(d) tells us is unreviewable, is in existence before the time of the mailing " 102 F 3d at 734 If the Fourth Circuit's "minority" approach made the mailing required by section 1447(c) unnecessary, the Lowe court would have had no reason to provide this explanation that the section comes into play after the event of an "order" contemplated in section 1447(d)

The majority and I agree that the plain language "shall proceed no further" in section 1446(d) prohibits a state court from acting on a removed case until the case is "remanded " The question we face is when federal law sets that point in time, and thus removes the "shall proceed no further" prohibition The answer to that question is not found in Lowe's interpretation of section 1447(d), but in the plain language of sections 1446(d) and 1447(c)

c Waiver

The majority's second ground for its position is that the section 1447(c) requirement of mailing a certified copy is a procedural requirement rather than a jurisdictional one The distinction is irrelevant in this case Congress enacted a statute providing that when a case is removed to federal court the state court is prohibited from further action "unless and until the case is remanded " 28 U S C § 1446(d) This prohibition may not be avoided by

labeling the mailing requirement procedural. The prohibition is imposed by a federal statute and is likewise lifted only in accordance with federal statutes 28 U S C §§ 1446(d) and 1447(c). The question we face in this appeal requires us to interpret these statutes and apply their plain language to the facts of this case. See Media Gen Commc'ns, Inc v S C Dep't of Revenue, 388 S C 138, 148, 694 S E 2d 525, 530 (2010) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to impose another meaning.")

The majority's ruling not only imposes another meaning on these statutes, but it also renders an entire sentence of the United States Code meaningless by eliminating the section 1447(c) requirement that the federal clerk mail a certified copy of the remand order. This court is not permitted to interpret a statute so as to render a part of it meaningless. See Coyne & Delany Co v Blue Cross & Blue Shield of Va, Inc, 102 F 3d 712, 715 (4th Cir 1996) ("Absent clear congressional intent to the contrary, we will assume the legislature did not intend to pass vain or meaningless legislation"), Duvall v S C Budget & Control Bd, 377 S C 36, 42, 659 S E 2d 125, 128 (2008) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act.")

By characterizing the mailing requirement as procedural, the majority has converted section 1447(c) to a notice statute, so that the requirement of mailing a certified copy can be ignored because, as the majority states, "Hulsey cannot, and does not, maintain notice was insufficient." I do not believe this court is free to be so loose with the requirements of federal law. If Congress intended that notice of a remand was sufficient to enable the state court to proceed, it could easily have drafted sections 1446(d) and 1447(c) accordingly.

The majority's waiver argument also suggests that the issue is not preserved for appellate review because it was not raised to the trial court before judgment was entered. The situation in which the federal removal statutes prohibit a state court from proceeding after a case is removed is analogous to the situation in which the federal bankruptcy stay prohibits a state court from taking action against a debtor who has filed a bankruptcy petition. See 11 U S C § 362(a)(1) (2004 & Supp 2010). In that instance, as

in this one, the validity of a judgment entered in state court during the time in which federal law prohibits it can be raised at any time See Ex Parte Reichlyn, 310 S C 495, 498-99, 427 S E 2d 661, 663-64 (1993) (declaring a judgment void when the judgment was entered during the pendency of the bankruptcy stay)

d Bryan v. BellSouth Communications, Inc

In support of their respective positions, Appellants and Respondent cite different clauses in the same footnote from the Fourth Circuit's second opinion in Bryan v BellSouth Communications, Inc., 492 F 3d 231 (4th Cir 2007) (Bryan II)²² As I will explain, the footnote supports the position I have taken in this dissent To understand Bryan II, however, it is important to note that the remand order was not made pursuant to section 1447(c)²³ Instead, after dismissing two federal claims on the merits, the district court determined a third claim was not federal, declined to exercise supplemental jurisdiction over it, and remanded it to state court Bryan II, 492 F 3d at 234-35, Bryan I, 377 F 3d at 425 Because the Bryan remand was not based on the lack of subject matter jurisdiction and therefore was not made pursuant to section 1447(c), any statement in Bryan II interpreting that subsection is technically dictum However, both parties have cited Bryan II as authoritative, as has the majority Mindful therefore of the admonition of former Chief Judge Sanders that "those who disregard dictum, either in law

²² The first opinion was Bryan v BellSouth Communications, Inc., 377 F 3d 424 (4th Cir 2004) (Bryan I)

²³ Section 1447(c) applies to remands on the basis of a lack of subject matter jurisdiction or a defect in the removal procedure As the Fourth Circuit pointed out in Bryan I, the district court "concluded that removal was proper because Bryan presented a federal question " 377 F 3d at 427 The Fourth Circuit's decision in Bryan I demonstrates that it agreed "On appeal, we held that the remanded claim was a federal claim " Bryan II, 492 F 3d at 234 (citing Bryan I, 377 F 3d at 432) Because the federal court had subject matter jurisdiction over the federal claims, the remand was not made pursuant to section 1447(c)

or in life, do so at their peril," I will give due regard to the footnote from Bryan II Yeager v. Murphy, 291 S C 485, 490 n 2, 354 S E 2d 393, 396 n 2 (Ct App 1987)

The footnote states

A remand is effective when the district court mails a certified copy of the remand order to the state court, *see* 28 U S C A § 1447(c) (West 2006), *or*, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered

Bryan II, 492 F 3d at 235 n 1 (emphasis added) The disjunctive word "or" indicates that the purpose of the footnote is to differentiate between the two types of remand those made pursuant to section 1447(c) and those made for some other reason In particular, the footnote differentiates between the points in time when each is "effective" to allow the state court to proceed ²⁴ Citing to section 1447(c), which applies only to remand orders such as the one in this case, the first clause states the rule that the "remand is effective when the district court mails a certified copy of the remand order to the state court " The only situation in which the first clause of the footnote can be an accurate statement of law is when the statement is made to answer the precise question we face in this appeal—When does federal law remove the "shall proceed no further" prohibition so that a state court may proceed with a case after a remand made pursuant to 28 U S C § 1447(c)?²⁵

²⁴ The court makes this differentiation in order to explain how the remanded state court proceedings and the appeal of the remand order to the Fourth Circuit could proceed simultaneously 492 F 3d at 235 In fact, the footnote appears at the end of this sentence in the text of the opinion "While BellSouth's appeal was pending, Count A, which had been remanded to state court by the district court, was proceeding in state court " Id

²⁵ It is not possible to interpret the clause to apply to anything other than a section 1447(c) remand, not only because the clause cites to the section, but

Finally, the text of Bryan II contains a statement that is contrary to the majority's interpretation of the footnote. Responding to a separate argument made by BellSouth, the court again described the point in time when the state court regained jurisdiction to proceed after the remand, and cited section 1447(c). In the parenthetical after the citation in which it explained the meaning of 1447(c), the court stated "providing that the state court may proceed with a case once the district court mails a certified copy of the remand order to the state court." 492 F.3d at 241. This is consistent with the plain language of the statutes and refutes the majority's interpretation of the footnote. Therefore, I interpret the footnote to include in its first clause the rule applicable to the issue we face in this appeal, and thereby to support my position that the federal clerk was required to mail a certified copy of the remand order to the state court clerk before the state court had jurisdiction to proceed.

e Conclusion as to Jurisdiction

Limehouse argues that the result of a straightforward interpretation of sections 1446(d) and 1447(c) under the circumstances of this case "makes no sense." The majority refers to it as "jurisdictional limbo" and "jurisdictional hiatus." It is true that interpreting the statutes according to their plain meaning creates a scenario in which for some period of time neither the federal court nor the state court had the power to act. In most cases, however, this period is very brief, in any case it is a situation required by the plain language of federal statutes. Whenever the period becomes lengthy, as it did here, the federal court has the power to order its clerk to comply with the statute.²⁶

also because the mailing referred to is not required except when the remand is made pursuant to section 1447(c).

²⁶ While the federal court's remand order becomes final and unreviewable upon its filing, that event does not deprive the federal court of the power to order its clerk to complete the ministerial task of mailing a certified copy of the order to the state court clerk. See Peacock v. Thomas, 516 U.S. 349, 354 (1996) ("[A] federal court may exercise ancillary jurisdiction to enable a court to function successfully, that is, to manage its proceedings, vindicate its

I acknowledge that the result I propose appears at first to be harsh on the facts of this case. However, the section 1446(d) prohibition of "shall proceed no further" is absolute and contemplates no exceptions, even in the face of a harsh result. When the Legislative branch sets forth plain and unambiguous language in a statute, the Judicial branch is constrained to follow it. If the results are harsh, the Legislature may change the statute but the courts may not.²⁷ However, the result I would reach is not harsh, nor even unfair. Limehouse's motion to remand to state court cites 28 U.S.C. § 1447(c) in its first sentence. Presumably his lawyers read the subsection, in which the requirement of mailing a certified copy of the remand order is plainly and unambiguously stated. Having cited the subsection to his advantage, it is not at all unfair that Limehouse be bound by the subsection when its plain terms work to his disadvantage.

authority, and effectuate its decrees") As a practical matter, an informal reminder to the federal clerk that a certified copy of the order had not been mailed would almost certainly have solved the problem. As a technical matter, the district court has mandamus power to compel its clerk to complete this ministerial task. This is, in fact, exactly what happened in Lowe. After the district court concluded there was no federal subject matter jurisdiction, the Fourth Circuit granted a writ of mandamus with instructions that the district court return the case to state court. 102 F.3d at 736. Given the substance of the Fourth Circuit's ruling that the district court's order remanding the case was unreviewable upon filing, the only task left to complete at that point was the ministerial task of sending a certified copy of the remand order to the state clerk.

²⁷ Neither Limehouse nor the majority contends this is a situation in which the court may ignore a statute's plain meaning because to do so would yield an absurd result. See Harris v. Anderson Cnty. Sheriff's Office, 381 S.C. 357, 363 n.1, 673 S.E.2d 423, 426 n.1 (2009) ("One rule of statutory construction allows the Court to deviate from a statute's plain language when the result would be so patently absurd that it is clear that the Legislature could not have intended such a result.")

In summary, the following rules apply to remand in the Fourth Circuit. A remand order based on some ground other than a lack of subject matter jurisdiction or a defect in the removal procedure, such as the decision not to exercise supplemental jurisdiction in Bryan, is reviewable, but the remand is effective allowing the state court to proceed as soon as the order is entered. On the other hand, a remand order which is based on a lack of subject matter jurisdiction, such as the order in this case and in Lowe, is unreviewable as soon as it is entered. However, this type of remand is effective such that the state court may proceed only after the federal clerk has complied with 28 U.S.C. § 1447(c) by mailing a certified copy of the remand order to the state court clerk. Because the federal clerk never complied with this requirement, the case was never "remanded," the state court had no power to proceed, and the resulting judgment entered in violation of federal law is void.

II Rule 55(c)

Hulsey moved for relief from default, which the trial court denied in an order filed February 7, 2007. In the subsequent decision of Sundown Operating Co. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), our supreme court explained how the reasons for the default are to be analyzed in determining the existence of "good cause" under Rule 55(c). In light of Sundown, the analysis used by the trial court was controlled by an error of law. I would remand to the circuit court to reconsider the question of good cause under the standard set forth in Sundown.

a Good Cause under Rule 55(c) before Sundown

Our appellate courts have stated that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. See, e.g., In re Moore, 342 S.C. 1, 5 n.7, 536 S.E.2d 367, 369 n.7 (2000), Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008). In addition to this general guidance, our appellate courts have consistently listed three factors, which have become known as the Wham factors, that a trial court should consider in deciding whether good cause exists. See Wham v. Shearson Lehman Bros., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). These factors, (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of

prejudice to the plaintiff if relief is granted, have been cited as the only factors to be considered in almost every opinion since Wham addressing good cause under Rule 55(c) See, e.g., Richardson v. P.V., Inc., 383 S.C. 610, 616, 682 S.E.2d 263, 266 (2009) (decided after Sundown), Melton, 379 S.C. at 55, 664 S.E.2d at 492.

Neither the general guidance to liberally construe Rule 55(c) in order to promote justice and dispose of cases on the merits nor the Wham factors instruct a trial court to require, or even to consider, the reason the party went into default. Nevertheless, trial courts and practicing lawyers have been generally aware that some explanation for the default is important to the analysis of good cause under Rule 55(c). In fact, in New Hampshire Insurance Co. v. Bey Corp., 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993), this court quoted Dean Lightsey and Professor Flanagan in listing four factors "relevant under" Rule 55(c), including "the reasons for the failure to act promptly." 312 S.C. at 50, 435 S.E.2d at 379 (quoting Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)). Until Sundown, Bey Corp. was the only South Carolina appellate decision interpreting Rule 55(c) to have addressed the reasons for the default. However, other than to state it is a relevant factor, Bey Corp. gives no explanation as to how this fits into the analysis of good cause.

Therefore, at the time of the hearing and order on Hulsey's motion for relief from default, South Carolina law provided that the party seeking relief from the default must show good cause, and that in deciding the motion the judge should consider four relevant factors in light of the general guidance that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. The factors were (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, (3) the degree of prejudice to the plaintiff if relief is granted, and (4) the reasons for the failure to act promptly.

b. The Impact of Sundown

In Sundown, the supreme court began its analysis by discussing the reasons for the default. However, the Sundown court elevated that factor to a

requirement, stating that the good cause standard "requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default " 383 S C at 607, 681 S E 2d at 888 The court went even further and also required that the moving party "give reasons why vacation of the default entry would serve the interests of justice " *Id* Thus, the standard of good cause is now interpreted in two ways that are different from the law available to the trial court First, the reason for the default is no longer merely a factor to be considered Rather, the party seeking relief from default is required "to provide an explanation for the default " Second, the party seeking relief must give "reasons why vacation of the default would serve the interests of justice " The circuit court must consider all of this in determining whether or not the explanation for the default is satisfactory²⁸

c. The Sundown Analysis Applied to These Facts

In this case, Hulsey has complied with the requirement of providing an explanation for the default an attorney miscalculated the due date of the answer The next question posed by Sundown was never considered by the trial court Instead of considering whether vacating the default would serve the interests of justice, the trial court focused on whether the explanation was reasonable The court found "no good reason" was presented It also stated that there was "no reasonable basis" for the "assumption that the 30 day time to file an answer starts completely anew upon remand " (emphasis omitted) At one point the trial court called this "confusion " The reasonableness of the explanation is certainly a valid factor to consider However, Sundown requires a broader inquiry, namely that the reasonableness of the explanation be considered as a part of the analysis of whether vacating the default would serve the interests of justice

The facts of this case demonstrate the importance of the broader inquiry The conduct of the lawyer in this case was not "reasonable " First, he should have filed an answer in federal court before the remand order

²⁸ The court went on to explain that the Wham factors come into play after the explanation is accepted by the court "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider [the Wham factors] " 383 S C at 607-08, 681 S E 2d at 888

was entered See Rule 81(c)(2), FRCP. Second, when he learned of the remand order, he should have raced to the county courthouse to file it. A trial judge must consider the attorney's unreasonable failure to do this. However, as to the specific question of whether excusing the unreasonable failure in this case serves the interests of justice, there are additional factors that are important to consider. First, the lawyer was apparently attempting to correctly calculate the deadline for his answer. Second, South Carolina law provides no guidance as to when the answer was actually due in state court. Even the majority declines to define the due date for the answer, stating only that Hulsey failed to meet it, whatever it was.

The fact that the lawyer was trying to correctly follow the rules is particularly relevant to "the interests of justice." Many of our appellate decisions have stated the principle that a lawyer's negligence in failing to file an answer is imputable to the defaulting litigant, and thus weighs against granting relief from default. See generally Richardson, 383 S C at 618-19, 682 S E 2d at 267. In each of the cases citing this principle, the negligence was in *failing to attempt* to answer the complaint, not in *failing at an attempt* to serve a timely answer. This distinction is important to the interests of justice. Justice should not relieve a lawyer or litigant who makes no attempt to comply with the rules, or who negligently fails to comply with a rule that is clear. However, the interests of justice should protect a lawyer who attempts to comply with the rules, particularly when the lawyer is attempting to meet a deadline which is so *unclear* that no rule or court has ever defined it.

In my opinion, applying the newly-defined standard for good cause under Sundown is likely to yield a different result. In reaching this conclusion, I am influenced by the reasoning of our supreme court in affirming the trial court's order granting relief for a late answer in Lee v. Peek, 240 S C 203, 125 S E 2d 353 (1962). Though Lee is not controlling because it was decided before the Rules of Civil Procedure based on a standard other than good cause, the facts of Lee are strikingly similar to the facts presented here, and the court's analysis seems particularly relevant in light of Sundown.

Davis Lee sued the NAACP and six residents of Anderson County in the Court of Common Pleas of Abbeville County 240 S C at 204, 125 S E 2d at 353 Three of the Anderson County residents retained a lawyer, who made a motion to change venue to Anderson 240 S C at 205, 125 S E 2d at 353 Before the motion to change venue could be heard, the NAACP removed the case to federal court Id The three Anderson residents represented by the lawyer filed a motion to remand, which was granted Id The same attorney then refiled the motion to change venue Id During all of this time, the lawyer did not file an answer because "he was under the erroneous impression that it was not necessary for him to answer or demur in the State Court until the motion for change of venue had been decided " 240 S C at 205, 125 S E 2d at 354

The Lee attorney's failure to answer was unreasonable The circuit judge "found as a matter of fact that counsel had misconceived the applicable procedural law " 240 S C at 206, 125 S E 2d at 354 That finding is much like that of the trial court here that "there was no good reason presented by the defendants for their failure to file a timely answer, other than attorney confusion about the deadline for when an answer was due " However, the trial judge in Lee did not focus on the reasonableness of the lawyer's action Rather, focusing on what the Sundown court has now instructed trial courts to consider, the circuit judge in Lee held "that it was *in the furtherance of justice* that the respondents be relieved of any default " Id (emphasis added)

d. Conclusion as to Rule 55(c)

Sundown changed the analysis of good cause by requiring for the first time that the trial court focus on "reasons why vacation of the default entry would serve the interests of justice " I believe that if the trial court had analyzed this question, rather than whether the attorney was reasonable in failing to file a timely answer, the outcome might have been different The supreme court recognized in Lee that the decision as to what is "in the furtherance of justice" is for the circuit court It is not the task of this court to answer the question posed by Sundown However, it is the duty of this court to see that the question gets answered I would reverse the judgment of the lower court, and remand the case for a determination of whether good cause exists under Sundown

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-10-1577
Opinion No. 4805 filed March 10, 2011
Withdrawn, Substituted and Refiled June 2, 2011

Lawton Limehouse, Sr.

v

Paul H. Hulsey and The Hulsey
Litigation Group, LLC,

RESPONDENT

APPELLANTS

P E T I T I O N F O R R E H E A R I N G

The majority of the Court of Appeals panel has affirmed a \$7.3 million judgment entered by a state circuit court that did not have jurisdiction and did not follow the letter or the spirit of the state rules governing civil and trial procedure and denied these Defendants their most basic due process rights. These Defendants petitioned the Court for rehearing en banc raising certain questions of exceptional importance which the panel had overlooked or misapprehended. The petition for rehearing en banc was rejected and the Panel denied the petition for rehearing by order dated, June 1, 2011. However, on June 2, 2011, the Panel also withdrew its prior opinion, and substituted and refiled a new

opinion Now wherefore in compliance with Rule 242(d)(2) SCACR,¹ Defendants respectfully submit this renewed petition for rehearing.

The substituted opinion filed on June 2, 2011, differs only as to the Court's reasoning on the question of whether the Trial Court erred in charging the jury that it had to award punitive damages and submitted a jury verdict form that required an award of punitive damages.

b. Instruction on punitive damages

Hulsev next argues the trial court erred by telling the jury it was required to award punitive damages. We find no such instruction.

Punitive damages may be awarded in the interest of society in punishing or deterring the conduct or vindicating a private right when the plaintiff proves entitlement to such damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence); Austin v. Specialty Transp. Servs. Inc., 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004) (indicating punitive damages may be awarded for various reasons).

Generally, this court will not reverse the decision of the trial court as to a particular jury instruction absent a prejudicial abuse of discretion. Cole v. Raul, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008). A trial court abuses its discretion in this regard when the ruling is not supported by the evidence or is based on an error of law. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2009).

Hulsev argues the trial court instructed the jury it had to award punitive damages and submitted a jury verdict form that required an award of punitive damages. However, upon review of the verdict form we see nothing that required the jury to return punitive damages. Furthermore, Hulsev does not cite or otherwise bring to this court's attention any specific language used by the trial court to support that it instructed the jury it *had* to award punitive damages.

¹ Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.

Initially, the trial court instructed the jury "Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that the defendant's actions were willful wanton malicious or in reckless disregard for the plaintiff's rights " Although not specified, the basis for Hulsey's allegation of error is presumably premised upon the use of the word 'duty' in a single statement in an otherwise lengthy and thorough instruction in which the trial court stated "Under proper allegations a [sic] plaintiff proves by clear and convincing evidence a willful, wanton reckless and malicious violation of his rights It is not only the right but the duty of the jury to award punitive damages " However, the trial court's very next sentence clarified the use of this term stating "Accordingly if you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances " (emphasis added)

Upon review of the record we find the trial court properly instructed the jury on the law See S C Code Ann § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence) The trial court did not instruct the jury it *had* to award punitive damages but simply instructed the jury that *if* it found the plaintiff entitled to punitive damages it was their duty to determine the amount to which the Limehouse was entitled Therefore we find no error

In so holding the majority has overlooked or misapprehended the full context of the trial court's instruction to the jury along with the verdict form The trial court's instruction that the jury had a duty to award punitive damages connotes an obligation on their part which negated any implied option that they could decline to make an award of punitive damages The majority's reliance on the phrase 'if' overlooks and misapprehends the nature of the trial as a default hearing where liability was never an issue for the jury and the verdict form did not give the jury an option not to award punitive damages rather the verdict form contains a blank for the jury to fill in an amount for punitive damages

We the jury find for the Plaintiff against the Defendants in the amount of _____ punitive damages [R0A 17]

Further the concept of a *duty* to award clearly equates to 'had to' which in either wording, does not comport with controlling constitutional precedent that a jury has the discretion to decline to award punitive damages. In this regard the majority has overlooked or misapprehended the law as stated in such cases as the U.S. Supreme Court's holding in Smith v. Wade 461 U.S. 30-52 (1983), that a finding of recklessness or malice or conscious disregard does not mandate an award of punitive damages.

A key feature of punitive damages – that they are never awarded of right, no matter how egregious the defendant's conduct. "If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury which may or may not make such an award." D. Dobbs, *Handbook of the Law of Remedies* 204 (1973).

See also, Kuznik v. Bees Ferry Associates, 342 S.C. 579, 538 S.E.2d 15-32 (Ct. App. 2000) (master did not abuse discretion in declining to award punitive damages where an examination of the totality of the evidence in the record does not justify the imposition of punitive damages').

There was no opportunity for the jury to exercise discretion to decline to award punitive damages. For these reasons the majority overlooked or misapprehended the law regarding punitive damages by affirming where the trial court instructed the jury that it was their duty to award punitive damages and provided no other option on the verdict form.

Defendants also respectfully renew each and all of the other questions and issues as fully stated in the prior petition which is attached hereto and fully incorporated herein. As fully demonstrated and discussed in that prior petition the majority in this case overlooked and misapprehended key facts and controlling law that require the entry of

judgment be reversed and the case remanded to allow the Defendants to answer and fully defend the merits of the claims lodged against them

Respectfully submitted



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June 17 2011

Certificate of Service

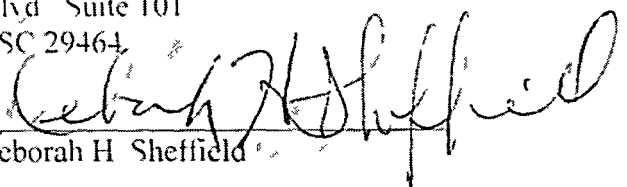
I, Deborah H. Sheffield, counsel for the Appellants do hereby certify that I have this 17th day of June 2011 served the foregoing Petition for Rehearing upon opposing counsel for the Respondent by mailing a copy of same postage prepaid and return address clearly indicated to said counsel as follows:

Frank M. Cisa

Cisa & Dodds LLP

858 Lowcountry Blvd Suite 101

Mt Pleasant SC 29464



Deborah H. Sheffield

June 17 2011

Attachment

Petition for Rehearing
filed March 25, 2011

Printed Above at Page 30-63



The South Carolina Court of Appeals

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V. CLAIRE ALLEN
DEPUTY CLERK

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Re Limehouse, Lawton v. Hulsey, Paul (2)

Dear Counsel

Enclosed is a copy of an Order of the Court Withdrawing, Substituting and Refiling the enclosed opinion in the above case

Sincerely,

A handwritten signature in black ink, appearing to read "Renee S. Johnson", is written over a horizontal line.

Renee S. Johnson
Administrative Specialist

TAG/rj

The South Carolina Court of Appeals

Lawton Limehouse, Sr ,

Respondent,

v

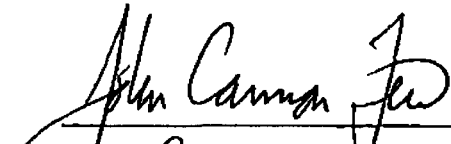
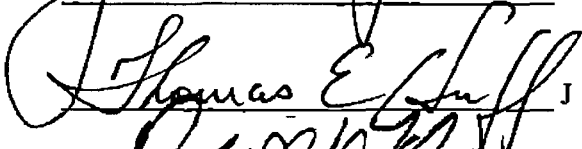
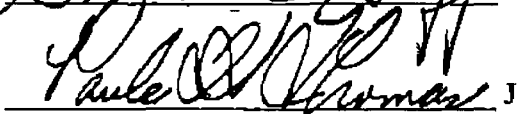
Paul H Hulsey and The Hulsey
Litigation Group, LLC,

Appellants

The Honorable Daniel F Pieper
The Honorable Roger M Young
Charleston County
Trial Court Case No
2006 CP-10-01577
2006 CP-10-01577

ORDER WITHDRAWING AND SUBSTITUTING OPINION

This Court hereby withdraws opinion number 4805, filed June 2, 2011, and substitutes the attached opinion to correct a scrivener's error in the paragraph following the sixth footnote


CJ

J

J

Columbia, South Carolina

FILED

JUN 16 2011

The South Carolina Court of Appeals

Lawton Limehouse, Sr ,

Respondent,

v

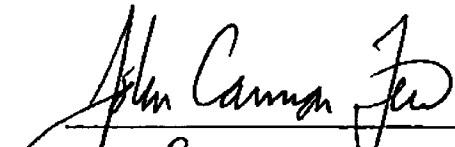
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Litigation Group, LLC,

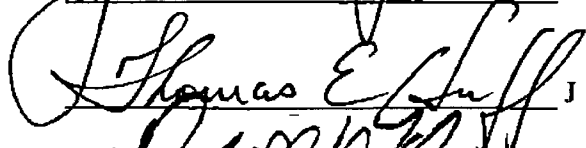
Appellants

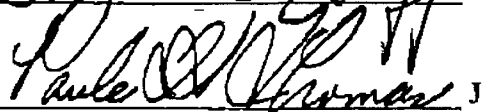
The Honorable Daniel F. Pieper
The Honorable Roger M. Young
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2006 CP-10-01577
2006 CP-10-01577

ORDER WITHDRAWING AND SUBSTITUTING OPINION

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CJ


J


J

Columbia, South Carolina

FILED

JUN 16 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Lawton Limehouse, Sr , Respondent,

v

Paul H Hulsey and The Hulsey
Litigation Group, LLC, Appellants

Appeal From Charleston County
Daniel F Pieper, Circuit Court Judge
Roger M Young, Circuit Court Judge

Opinion No 4805
Heard April 13, 2010 – Filed March 10, 2011
Withdrawn, Substituted and Refiled June 2, 2011
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AFFIRMED

A Camden Lewis and Ariail E King, of Columbia,
and Robert H Hood, Deborah Harrison Sheffield,
James B Hood, and John K Weedon, of Charleston,
for Appellants

Frank M Cisa, of Mt Pleasant, for Respondent

THOMAS, J This is an appeal from an entry of default and the subsequent default damages trial based on a slander action against Paul Hulsey and the Hulsey Litigation Group, LLC (collectively Hulsey) Damages (actual and punitive) were found in excess of \$7.3 million. Hulsey now appeals, alleging the trial court erred in (1) granting entry of default without subject matter jurisdiction, (2) failing to grant a motion to set aside the entry of default, (3) allegedly depriving Hulsey of due process in the default damages trial, and (4) allowing an award of \$5 million in punitive damages. We affirm.

FACTS

In 2004, Hulsey filed a class action suit against Lawton Limehouse, Limehouse's son, and L&L Services, Inc., a staffing agency owned by the pair. The suit alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), as well as other state and federal laws. Although the case eventually settled, during its pendency, Hulsey made allegedly slanderous statements that the "[Charleston] Post & Courier" published, including (1) Limehouse engaged in a classic racketeering scheme, (2) Limehouse's conduct set the community back 150 years, (3) Limehouse engaged in blatant indentured servitude, and (4) Limehouse created a perfect racketeering scheme just like Tony Soprano.¹

In response, Limehouse filed suit against Hulsey on April 19, 2006. Service was perfected upon the Hulsey Litigation Group, LLC on April 20, 2006, and Paul Hulsey personally on April 21, 2006. On May 5, 2006, Hulsey filed a notice of removal to federal district court without filing an answer to the complaint. On June 2, 2006, Limehouse filed a motion to remand to state court. A federal district judge remanded the case to state court by an order dated July 19, 2006, for lack of federal subject matter

¹ Tony Soprano is a fictional television character involved in organized crime.

jurisdiction² The federal court electronically transmitted this order to counsel on July 20 The Charleston County Clerk of Court also received an uncertified copy and filed the order on July 21 The Charleston County Clerk of Court mailed notice of the filing to all parties on July 27

On August 21, 2006, Limehouse filed a request for entry of default The Charleston County Clerk of Court entered default on August 21, and filed the same on August 22 Subsequently, the clerk mailed a Form 4 to all parties on August 24, 2006, noticing entry of default On August 29, upon receipt of the Form 4, Hulsey filed an answer and motion to set aside entry of default pursuant to Rule 55(c), SCRCF

In December, 2006, a circuit judge denied Hulsey's motion to set aside entry of default, and in February 2008, a different circuit judge presided over a jury trial on the issue of damages On February 6, 2008, the jury returned a verdict for actual damages in the amount of \$2.39 million and awarded punitive damages in the amount of \$5 million Nine days later, on February 15, 2008, Hulsey filed a motion to dismiss for lack of subject matter jurisdiction, after discovering there was no certified copy of the remand order on file with the Charleston County Clerk of Court The trial court denied the motion, as well as the accompanying motion for a new trial This appeal follows

ISSUES ON APPEAL

- I Did the trial court err in exercising jurisdiction over the case after remand?
- II Did the trial court err in failing to set aside the entry of default?
- III Did the trial court err in the manner in which the default damages trial was conducted?
- IV Did the trial court err in allowing an award of punitive damages?

² Hulsey did not answer the complaint in federal court

LAW/ANALYSIS

I Jurisdiction

Hulsey argues the trial court was, and still is, without jurisdiction over this matter because the clerk of the federal court failed to mail a certified copy of the remand order to the Charleston County Clerk of Court. We disagree and find the mailing of the certified copy is not a jurisdictional requirement.

Upon removal, the federal court acquires jurisdiction over the case, for the limited purpose of determining jurisdiction. See Davis v. Davis, 267 S. Ct. 508, 511, 229 S. E. 2d 847, 848 (1976). Once the federal court determines that federal jurisdiction is not appropriate, the case is remanded to state court, and the remand ends the federal court's jurisdiction. 28 U.S.C. § 1446(d) (1996).

Congress has provided for a federal court's jurisdiction in section 1446(d): "Promptly after the filing of such notice of removal the defendant shall give written notice thereof to 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).

In addition, 28 U.S.C. § 1447(c) (1996) provides for "Procedure[s] after removal generally," and states

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.

In interpreting section 1447(c), a majority of federal circuits take the position that the finality of the remand and the accompanying loss of federal jurisdiction requires both entry of the order with the federal clerk of court *and* a certified copy being mailed to the state court. See, e.g., Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 227 (3rd Cir. 1995), Hunt v. Acromed Corp., 961 F.2d 1079, 1081-82 (3rd Cir. 1992), Browning v. Navarro, 743 F.2d 1069, 1078-79 (5th Cir. 1984), Fed. Deposit Ins. Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979).

However, the Fourth Circuit takes a minority view, reasoning that because remands for lack of subject matter jurisdiction or defect in removal are unappealable, "the plain language of the statute[] support[s] the conclusion that §1447 divests a district court of jurisdiction upon the entry of its remand order" despite the federal clerk's duty to send a certified copy. In re Lowe, 102 F.3d 731, 735 (4th Cir. 1996) (considering and declining the majority approach, holding "a federal court loses jurisdiction over [the] case as soon as its order to remand the case is entered[] [f]rom that point on, it cannot reconsider its ruling even if the district court clerk fails to mail a certified copy"),³ see also Bryan v. BellSouth Commc'ns, Inc., 492 F.3d 231, 235 n.1 (4th Cir. 2007) (recognizing "a remand is effective when the district court mails a certified copy see [1447(c)] or if the remand is

³ The essence of our inquiry, as opposed to the federal court, is not whether the federal scheme provides for state court jurisdiction, but rather, whether it prohibits state court jurisdiction. See *infra*. Naturally, because a federal court does not determine state court jurisdiction, this distinction allays the dissent's concern that the question confronted in Lowe is different than the one we face here.

based on the lack of subject-matter jurisdiction when the remand order is entered, see [Lowe]")⁴ (emphasis added)

Accordingly, the South Carolina Federal District Court lost jurisdiction when the order of remand was entered.⁵ We believe this ends the inquiry. However, because Hulse's assertion that the state court also lacks subject matter jurisdiction seems to leave the case caught in jurisdictional limbo, or as other courts have dubbed it, on "a jurisdictional hiatus," for lack of the mailing, State v. City of Albuquerque, 889 P.2d 204, 207 (N.M. Ct. App. 1993) aff'd 889 P.2d 185 (N.M. 1994), we therefore address whether the mailing is required for the South Carolina Circuit Court to exercise jurisdiction.

⁴ We do not rely on Bryan as dispositive of this case, nor do we find any reason to interpret this purely explanatory note – which specifically cites Lowe – to imply that Lowe does not stand for what it explicitly holds, i.e., a federal court loses jurisdiction upon entry of a remand for lack of subject matter jurisdiction.

Although the dissent agrees the note is purely dicta, to the extent it is suggested the footnote bears on this matter, we note that the dissenting opinion ignores the second clause of the note, in which the Fourth Circuit reiterates the Lowe holding, presumably because its interpretation of the first clause is irreconcilable with Lowe. Further, the interpretation of the first clause is premised on a presumption, allegedly from Bryan, that remands for reasons other than lack of subject matter jurisdiction or defect in removal are not subject to section 1447(c). However, neither the Fourth Circuit, nor any other circuit, has put forth such a ruling, and Bryan itself refutes this presumption by recognizing, in a case in which the remand was based upon a reason *other than* lack of subject matter jurisdiction or defect in removal, that the state court could continue upon receipt of the certified mailing, citing section 1447(c). See Bryan, 492 F.3d at 241.

⁵ The exercise of mandamus power is, by its very nature, not an exercise of the court's jurisdiction over the case and controversy.

We start with the premise that our state court's jurisdiction is general, derived exclusively from article V, section 11 of the South Carolina Constitution, not from federal law S C Const art V, § 11, see, e.g., Fairfax Countywide Citizens Ass'n v Fairfax County, 571 F 2d 1299, 1304 (4th Cir 1978) (indicating that unlike federal courts, state courts are courts of general jurisdiction) On the other hand, the jurisdiction of federal courts is limited to that expressly authorized by the United States Constitution or statute enacted by Congress pursuant thereto Exxon Mobile Corp v Allapattah Servs., Inc., 545 U S 546, 553 (2005), Victory Carriers Inc v Law, 404 U S 202, 212 (1971) ("The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution ") (internal citation and quotation marks omitted), U S Const art III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish "), see The Federalist No 82, at 515-16 (Alexander Hamilton) (Wright ed , 2002) (considering the federal government has only the power exclusively delegated to it, it stands as a "rule" that "the State courts will retain jurisdiction[,] unless it appears to have been taken away in one of the enumerated modes"), Thus, unless otherwise prohibited by statute, a state court's jurisdiction is limited only by the federal court's proper exercise of jurisdiction over a case pursuant to Congressional act – which according to Fourth Circuit jurisprudence in Lowe, ceased upon entry of the remand order ⁶

In this regard, the distinction between the majority and minority views becomes significant Section 1446(d) provides a prohibition on state action in that once removal is properly effectuated, "the State court *shall proceed no further unless and until* the case is remanded " (emphasis added) Section 1447(c) states "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 " (emphasis added) Naturally, if a federal court takes the majority

⁶ For this reason, we disagree with the dissent's indication that we must interpret section 1447(c), as to do so in light of Lowe's interpretation of when federal jurisdiction ends under that section, we must invariably presume that our jurisdiction is derived from that federal statute rather than limited by it

view, making the remand dependent upon the mailing, the case is remanded and the order is mailed at the same point in time. Therefore, the lack of a mailing forecloses state court jurisdiction not because a state court should interpret section 1447(c) to provide the state may *only* proceed upon the mailing but because section 1446(d) prohibits state action until remanded. However, under the minority view, this is not the case as a remand does not require the mailing. Thus, in this circuit, a state court exercising jurisdiction over a case upon entry of remand neither imposes on federal jurisdiction nor violates these federal jurisdiction provisions.

Similarly, the states that have confronted this issue recognize the significance of the distinction between the majority and minority view.

In the cases applying the majority view, the revesting of jurisdiction occurs on the mailing because the finality of the remand and accompanying loss of federal jurisdiction requires the same. See, e.g., Nixon v. Moore, 108 S.W.3d 813, 817-18 (Mo. Ct. App. 2003) (adopting the majority approach that the mailing is the operative event at which jurisdiction switches, but recognizing the minority reaches a different result), Quaestor Invs., Inc. v. State of Chiapas, 997 S.W.2d 226, 228 (Tex. 1999) (noting that "[i]n answering the question of when a jurisdictional transfer occurs between federal and state court, most courts[] interpret[Section 1447(c)] to mean that the federal court loses jurisdiction once the federal court clerk has mailed a certified copy" but others, particularly the Fourth Circuit in Lowe, take an opposite view). However, the same rationale compels a different result under the minority view. See Nixon, 108 S.W.3d at 817 (citing Lowe for the proposition that a "few federal [circuits] have reached [a minority approach] holding that jurisdiction transfers back to the state as soon as an order of remand is entered"), Quaestor, 997 S.W.2d at 228 (stating that Lowe "hold[s] that jurisdiction returns to the state court when the district court enters the remand"). Thus, whether the mailing of the certified copy is required to revest jurisdiction is simply a product of what interpretation is employed to determine when the federal court loses jurisdiction.⁷

⁷ We are aware of no jurisdiction that has taken the position that neither the state nor federal court has jurisdiction over a case. Further, it is not inconsistent with our federalist form of government to allow a state court to

Thus, the minority view accepts that the "require[ment that] the clerk of the district court [] mail a certified copy of the remand order to the clerk of the state court, is *not jurisdictional* " Int'l Lottery, Inc v Kerouac, 657 N E 2d 820, 823 (Ohio Ct App 1995) (emphasis added) (citing Van Ryn v Korean Air Line, 640 F Supp 284 (C D Cal 1985) (standing for the proposition that entry of remand divests the federal court of jurisdiction notwithstanding the failure of the clerk to send a certified copy)), see Albuquerque, 889 P 2d at 206 (holding "the actions of a federal judge in signing and entering a remand order authorize subsequent state court actions even when the federal court clerk fails to mail the remand order to the clerk of the state court"), see also Lowe, 102 F 3d at 735 ("Logic also indicates that it should be the action of a court (entering the order of remand) rather than the action of a clerk (mailing a certified copy) of the order that should determine *vesting* of jurisdiction") (quoting Van Ryn, 640 F Supp at 285) (emphasis added) In light of the Fourth Circuit having taken the minority approach, we must agree that the duty to send the mailing is not a jurisdictional requirement but a procedural one Therefore, we find the South Carolina Circuit Court did not act without subject matter jurisdiction

This is bolstered by the fact that even in jurisdictions requiring the mailing for finality of the remand, the same is not necessarily required for the state to exercise jurisdiction For instance, in Nixon the Missouri Court of Appeals recognized

The state court may not be immediately notified by the federal court of the order of remand Counsel, of course, are promptly notified of the order of remand, and often counsel will, in the interest of saving time, notify the state court and proceed in the interim with the state court action *There is nothing in the federal*

exercise its general jurisdiction when a federal court has finally decided its Congressionally authorized jurisdiction has ceased See Lowe, 102 F 3d at 735 ("Removal in diversity cases, to the prejudice of state court jurisdiction, is a privilege to be strictly construed[]") (quoting In re La Providencia Dev Corp., 406 F 2d 251, 252 (1st Cir 1969)

statutory scheme prohibiting the parties from proceeding at that point

Nixon, 108 S W 3d at 817 (emphasis added)⁸ Thus, although requiring the mailing to make the remand order final, the same is not an indispensable jurisdictional requirement See Bacon v Dir of Revenue, State of Mo, 948 S W 2d 266, 267 (Mo Ct App 1997) ("Subject matter jurisdiction cannot be conferred by consent, and the lack thereof cannot be waived ") With nothing in the federal statutory scheme to prohibit this, the same would hold true in South Carolina, supporting our disinclination to see the mailing requirement as jurisdictional See In re Nov 4, 2008 Bluffton Town Council Election, 385 S C 632, 636, 686 S E 2d 683, 686 (2009) ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties ")

Because we find the mailing requirement is procedural not jurisdictional, the issue is not properly before this court as a result of Hulsey's failure to timely object See Beaufort County v Butler, 316 S C 465, 467, 451 S E 2d 386, 387-88 (1994) (stating "a procedural right may be waived [and a] party who fails to object to the trial of a case cannot later assert the trial court erred in trying the case "), Doe v S B M, 327 S C 352, 356, 488 S E 2d 878, 880 (Ct App 1997) (stating that "[t]he duty is on the litigant to make a timely objection in order to preserve the right to review [and] [a] contemporaneous objection is required to properly preserve an error for appellate review"), In re Michael H, 360 S C 540, 546, 602 S E 2d 729, 732 (2004) ("In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court ")⁹

⁸ This statement recognizes that a state court, as opposed to a federal court, confronts whether the exercise of jurisdiction is prohibited by federal statute, not proscribed by it Similarly it undermines the notion that the statement in section 1447(c) that once a certified copy is mailed "[t]he State court *may* thereupon proceed," operates as an absolute prohibition on state action (emphasis added)

⁹ The dissent posits that our distinction between a jurisdictional requirement and a procedural one is irrelevant and that we erroneously suggest the issue is

Further, to warrant reversal a party must demonstrate the alleged procedural failure caused him prejudice. See Chastain v Hiltabidle, 381 S C 508, 519, 673 S E 2d 826, 831 (Ct App 2009) (stating in order to demonstrate prejudice from procedural non-compliance, a party must establish it "would have done something different" had procedure been followed). Hulsey has failed to demonstrate that he was prejudiced by the absence of the certified copy. Here, Hulsey cannot, and does not, maintain notice was insufficient. The record makes clear that the Charleston County Clerk of Court received notice of a final and unappealable order of remand on July 21, 2006, and that on July 27, 2006, she mailed notice that she received and entered this final and unappealable order to all parties, just as she would have done had she received of a certified copy of the order.

Moreover, Husley personally received notice. The notice sent to Hulsey from the Charleston County Clerk makes no indication of whether the notice of remand it received was certified or not. Consequently, Hulsey's

not preserved for appeal because it was not raised before the judgment was entered. To the contrary, it is precisely because of the rules of issue preservation that the distinction is not only relevant but imperative. The only question we confront in this case is whether the action of the trial court is void for lack of jurisdiction, which can be raised at *any time*. However, the dissent elects not to squarely answer this question, instead finding the judgment void because the trial court lacked the "power to proceed" with the case under the federal statute. Because it is the only issue before this court, we must presume that this alleged powerlessness is due to a lack of subject matter jurisdiction. To the extent the dissent suggests the circuit court is powerless to proceed for any reason other than a lack of subject matter jurisdiction, the issue is not properly before this court. Further, the dissent's analogy to the bankruptcy code is misplaced. Notwithstanding the manifest dissimilarities between the realm of bankruptcy law and this case, the federal jurisdictional statutes at issue here do not provide for a stay. The concept is also not analogous to this case as a stay, by definition and nature, operates only as a suspension of jurisdiction, not a termination. Contra Davis, 267 S C at 511, 229 S E 2d at 848 ("[O]nce removal proceedings to federal court are fulfilled and requisite notice accomplished, the State court loses all jurisdiction in the matter.")

notice was not impacted by the fact that the Charleston County Clerk did not receive a certified copy of the order. Further, pursuant to Section 5 of the Policies and Procedures for the electronic case filing system (ECF) employed in the federal court, by removing the case Hulsey agreed to receive notice of entry of any order or judgment through electronic transmittal. Thus, in addition to notice from the state court, Hulsey had notice from the federal court of the entry of the final and unappealable remand order and consequently was not prejudiced.

Accordingly, the South Carolina Circuit Court did not act without subject matter jurisdiction, and Hulsey was not otherwise prejudiced by the Federal Clerk's failure to send a certified copy of the order of remand.¹⁰

II Entry of Default

Hulsey argues the trial court erred in failing to set aside entry of default because (a) the answer was timely or (b) good cause existed to set aside the entry of default under Rule 55(c), SCRCP. We disagree.

As to the issue of whether the answer was timely filed, Hulsey points out this is an issue of interpretation of a rule or statute and is therefore reviewed de novo. See Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (stating the interpretation of a statute is a question of law, which the appellate court is free to decide with no particular deference to the trial court). Further, our standard of review leaves the

¹⁰ Respectfully, we disagree with the dissent's "summary of the rules that apply to remand in the Fourth Circuit." We find these conclusions irreconcilable with the holding of Lowe and contrary to the expressed rationale of both Lowe and Bryan. Similarly, we find these rules to be contrary to the reasoning and holdings of the state courts that have confronted the issue. Finally, from a practical perspective, we find the summary illogical as it proposes to create (1) a scenario in which a state court is permitted to resume action on a case even though the remand order is appealable and remains subject to the federal court's jurisdiction, and (2) a scenario that denies a state court jurisdiction over a matter in which federal jurisdiction has been terminated, and a final and unappealable order has been issued.

decision to set aside an entry of default within the sound discretion of the trial court, which we will not reverse absent an abuse of discretion Stark Truss Co v Superior Const Corp, 360 S C 503, 508, 602 S E 2d 99, 101 (Ct App 2004) Such an abuse of discretion occurs when the decision is based upon an error of law or when the order is without evidentiary support Id

a Timeliness of the Answer

In order to find the August 29 answer was timely Husley urges this court to adopt a rule that the thirty-day time period in which to answer starts over upon remand ¹¹ We are not inclined to adopt such a rule

Rule 12(a), SCRPC, provides "A defendant shall serve his answer within 30 days after the service of the complaint upon him[]" However, federal rules provide "[a] defendant who did not answer [in state court] before removal must answer within the longest of " (A) twenty days after being served or otherwise receiving the initial pleading or (B) within five days after notice of removal is filed Rule 81(c)(2), FRCP

In this case, Hulseley removed fourteen days after being served Thus, although under Rule 12(a), SCRPC, he was entitled to another sixteen days to answer, by choosing to remove the case to federal court, he willfully subjected himself to the shortened time period of Rule 81(c)(2), FRCP – providing he must answer within six days (twenty days after being served) However, in the seventy-six days between removal and the entry of remand, Hulseley neglected to answer

Initially, we find no authority in this state to support the position that a removing party is entitled to a fresh thirty days to answer a complaint upon remand Neither did the trial court Rather, looking at both the federal rules and state rules, in the exceptionally rare circumstance in which a case would be remanded to the state court before an answer was due pursuant to Federal Rule 81(c)(2), a plain reading of South Carolina Rule 12(a) would require an

¹¹ Hulseley avers jurisdiction has not yet revested in the state court and maintains this as an alternative position

answer within thirty days of service. However, seemingly giving Hulsey the benefit of the doubt, the trial court determined that because the state court is to proceed as if no removal had been attempted, removal to federal court tolls the thirty day time period and therefore, upon remand Hulsey should be allowed the remainder of any unexpired time.¹² See State v. Columbia Ry., Gas & Elec., 112 S. C. 528, 537, 100 S. E. 355, 357 (1919) (stating that upon remand it is the duty of the state court to proceed as if no removal had been attempted).

In this case, because Hulsey failed to answer under the plain reading of either Rule 12(a), SCRCp, or Rule 81(c)(2), FRCP, or under the more liberal approach provided by the trial court, it is of no consequence which approach we would adopt. Therefore, we are not occasioned to opine on the more acceptable method.¹³ It suffices that we find no indication that a party is entitled to a fresh thirty-day period upon remand. Accordingly, we are disinclined to adopt a rule allowing the same. Such action is not the province of this court, but that of our legislature or supreme court.

b Rule 55(c)

Hulsey next argues the trial court erred in failing to set aside the entry of default under Rule 55(c), SCRCp. We disagree.

The issue before this court is not whether we would find good cause, but whether the decision to deny the motion to set aside default is supportable by the evidence and not controlled by an error of law. Williams v. Vanvolkenburg, 312 S. C. 373, 375, 440 S. E. 2d 408, 409 (Ct. App. 1994). A motion to set aside entry of default under Rule 55(c) is addressed to the sound discretion of the trial court. Id.

¹² This amounted to sixteen days after the remand because fourteen days had elapsed prior to removal.

¹³ The inquiry of whether failure to comply with Rule 81(c)(2), FRCP, would support entry of default in state court if the case is remanded unanswered appears novel in this state. However, we need not address it.

Under Rule 55(c), the entry of default may be set aside for "good cause shown," which is a less stringent standard than the excusable neglect standard of Rule 60(b) Sundown Operating Co v Intedge Indus Inc, 383 S C 601, 607, 681 S E 2d 885, 888 (2009) ¹⁴ The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice " Id "Once a party has put forth a satisfactory explanation the trial court must also consider [the Wham¹⁵ 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 " Id at 607-08, 681 S E 2d at 888 However, a trial court need not make specific findings of fact for each factor if sufficient evidence supports a trial court's determination that no reasonable explanation exists for vacation of default Id

In this case, the trial court held that because "there appears to be no reasonable basis for [Hulsey's] assumption that the [thirty] day time to file an answer starts completely anew upon remand[,] no good cause has been demonstrated " While we appreciate the trial court did not have the benefit of the Sundown opinion, we find Sundown did nothing to abate the discretion to which a trial court is entitled in ruling on a Rule 55(c) motion Nor did it change the standard this court applies when reviewing such a decision What constitutes a satisfactory explanation that serves the interests of justice remains within the sound discretion of the trial court ¹⁶

¹⁴ Although the South Carolina Supreme Court decided this case during the pendency of this appeal, Hulsey notified this court via writing of the intent to rely on this authority

¹⁵ Wham v Shearson Lehman Bros, 298 S C 462, 465, 381 S E 2d 499, 502 (Ct App 1989)

¹⁶ As our colleague in the dissent points out and the trial court's ruling indicates in practice, both the bench and bar have been aware that the explanation for the default is significant See New Hampshire Ins Co v Bey

In South Carolina, negligence on the part of an attorney is imputable to the client and will not be the basis of finding good cause to set aside entry of default. See Vanvolkenburg, 312 S C at 375, 440 S E 2d at 410 (indicating, prior to Sundown, that the imputed negligence of an attorney to a defaulting litigant is not good cause). Similarly, our supreme court has recognized subsequent to Sundown that the good cause standard of Rule 55(c), encompasses a degree of reasonableness. See Richardson v P V, Inc., 383 S C 610, 618-19, 682 S E 2d 263, 267 (2009) (finding, after Sundown, that negligence on the part of an insurance company or attorney will be imputed to a defaulting litigant and negligence does not constitute good cause to relieve an appellant from entry of default), see also Black's Law Dictionary 1133 (9th ed 2009) (defining negligence as the failure to act reasonably under a specific set of circumstances). It stands, therefore, that because unreasonable conduct does not amount to good cause, an unreasonable explanation for defaulting is not a satisfactory explanation that serves a sufficient interest of justice.¹⁷

In the case at bar, although the supreme court had not yet issued the Sundown opinion, the trial court nonetheless addressed Hulsey's explanation of default and specifically found it unreasonable. We find the record supports the finding that Husley's explanation for default is unreasonable.¹⁸

Corp., 312 S C 47, 50, 435 S E 2d 377, 379 (Ct App 1993) (indicating the reason for failure to act is relevant under a Rule 55(c) analysis)

¹⁷ We recognize the dissent's position that reasonableness is not required of the excuse itself but merely a factor to be considered in a "broader inquiry" of whether the vacation serves the interests of justice. While this is certainly a mode of analysis within the trial court's discretion, in light of our standard of review, whether the trial court finds vacation does not serve an interest of justice because the excuse is unreasonable or finds the excuse is unreasonable because vacation does not serve an interest of justice, so long as supported by the evidence, is a distinction without a consequence.

¹⁸ Notwithstanding, we respectfully disagree that good cause likely existed in this case. Hulsey's contempt for the rules of procedure both in federal court and state court, indicates this was not a "failure at an attempt" but rather a

Vanvolkenburg, 312 S C at 375, 440 S E 2d at 409 (stating the "issue before this [c]ourt is not whether we believe good cause existed [but] whether the trial court's determination is supported by the evidence") Further, we are aware of no authority either prior to or after Sundown that compels this court to find it is not within the trial court's discretion to deny a Rule 55(c) motion for an unreasonable failure to answer Accordingly, we find the trial court did not abuse its discretion

III Default Damages Trial

Hulsey's allegation of error as to the damages trial is threefold He argues (a) the process employed by South Carolina courts is unconstitutional and deprives a default defendant of due process, (b) specifically as to this case, the trial court erred in allowing introduction of new allegations during the damages hearing, in the form of testimony about a link on Hulsey's website to the slanderous article, and (c) the trial court erred by improperly commenting on the facts

This court's standard of review for the grant or denial of a motion for a new trial extends substantial deference to the trial court Vinson v Hartley, 324 S C 389, 404, 477 S E 2d 715, 723 (Ct App 1996) The trial court's decision will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law Stevens v Allen, 336 S C 439, 446, 520 S E 2d 625, 628-29 (Ct App 1999)

a South Carolina's default damages procedure

Hulsey argues the process employed by the State of South Carolina during a default damages hearing is unconstitutional We must disagree

During a default damages trial, the defendant's participation shall be limited to cross-examination and objection to the plaintiff's evidence Roche v Young Bros of Florence, 332 S C 75, 81-82, 504 S E 2d 311, 314 (1998),

"failure to attempt" an answer This issue would not have arisen had the rules been followed Thus, we suggest there is ample "guidance" for Hulsey to know a party is not entitled to 130 days to answer

Howard v Holiday Inn, Inc., 271 S C 238, 241, 246 S E 2d 880, 882 (1978),
Doe v SBM, 327 S C 352, 356, 488, S E 2d 878 881 (Ct App 1997),
Ammons v Hood, 288 S C 278, 282, 341 S E 2d 816, 818 (Ct App 1986)

On appeal, Hulsey provides no controlling authority¹⁹ for his position that this court can, or should, diverge from longstanding rules established by our supreme court. Accordingly, we cannot and do not find the default damages hearing to be unconstitutional.

b Introduction of testimony about the website link

Hulsey maintains that the entry of default is tantamount to admission of the allegations of the complaint, but nothing more. See Wiggins v Todd, 296 S C 432, 435, 373 S E 2d 704, 705-06 (Ct App 1988) (stating that when a defendant is in default, the plaintiff's right to recover is circumscribed by the complaint drafted). Therefore, Hulsey alleges the trial court erred in allowing Limehouse to testify to new allegations outside the confines of the complaint, particularly about a link on Hulsey's website to the slanderous newspaper article. However, an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection. SBM, 327 S C at 356, 488 S E 2d at 881.

Here, Hulsey failed to object to any testimony regarding the publication or link on the website. Accordingly, this allegation of error is not preserved for our review.

¹⁹ Hulsey cites Mathews v Eldridge, 424 U S 319, 333-34 (1976), for the proposition that due process requires a meaningful opportunity to be heard. Hulsey also cites to two appellate decisions from the foreign jurisdictions of Florida and North Carolina to support his argument to change the default damages procedure in South Carolina, specifically as to punitive damages.

c Trial court commenting on the facts

Generally a "trial [court] should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally " Sierra v Skelton, 307 S C 217, 225, 414 S E 2d 169, 174 (Ct App 1992)

In this case, during deliberations, the jury sent out a question inquiring whether "the link to the April 24, 2004, article [was] still on Hulsey's website? [And i]f not, when was it removed?" The trial court responded by informing the jury that there was testimony that as of the Monday of trial, the link remained on the website

Hulsey argues this "constitute[s] an improper comment on the facts " Further, Hulsey argues "even more inexplicably, Limehouse was allowed to testify that the link on the website was a violation of a court order while Hulsey was precluded from introducing the very court order which indisputably evidences that there was no prohibition from mentioning the case on the firm website " Initially, Hulsey made no objection to the testimony regarding the court order, and under the default damages procedure, would have been free to cross-examine Limehouse on this matter Furthermore, Hulsey does nothing to demonstrate how the trial court's answer to the jury's inquiry demonstrated an imparting of opinion on the facts of the case Accordingly, we find no error

IV Punitive Damages

Hulsey argues the award of punitive damages was founded on trial court error and constituted a denial of due process Hulsey presents four separate arguments on this issue (a) due process demands a default litigant be given an opportunity to defend punitive damages, (b) the jury should have been instructed that it could return an award of no punitive damages, (c) the trial court allowed and actually invited the jury to consider matters not proper for their consideration in awarding punitive damages, and (d) the trial court erred in confirming the award

Generally, the trial court's decision on a motion for a new trial will not be disturbed on appeal unless the finding is wholly unsupported by the evidence or based on an error of law Stevens v Allen, 336 S C 439, 446, 520 S E 2d 625, 628-29 (Ct App 1999)

a Due Process

Hulsey maintains employing South Carolina's procedures for a default damages hearing in a case in which punitive damages are sought amounts to a constitutional due process violation. Hulsey further argues this due process violation was compounded by the facts that the trial court failed to exercise its obligation to independently make a threshold determination of whether the defendants' conduct rose to the level of warranting punitive damages, and that Limehouse was allowed to go into matters beyond the bounds of the complaint.

Initially, Hulsey cites no authority to support the proposition that South Carolina should employ a different default damages procedure for punitive damages than for actual damages. See Roche, 332 S C 75, 504 S E 2d 311 (making no distinction on appeal between punitive damages and actual damages during a default damages trial).

As to the trial court's failure to make a threshold determination that Hulsey's conduct warranted punitive damages, this issue was specifically addressed when the trial court denied Hulsey's motion for a directed verdict on punitive damages. Although it is unclear from the briefs on appeal whether Hulsey challenges this ruling on appeal, to the extent that he may be alleging the trial court improperly denied the directed verdict on the issue of punitive damages, we briefly address the issue.

In reviewing the denial of a motion for a directed verdict, this court applies the same standard as the trial court, viewing the evidence and the inferences in the light most favorable to the non-moving party, and will not reverse the denial unless there is no evidence to support the ruling. All Saints Parish Waccamaw v Protestant Episcopal Church in Diocese of S C, 385 S C 428, 441-42, 685 S E 2d 163, 170 (2009).

When viewed in the light most favorable to Limehouse, there exists evidence which supports submitting the issue of punitive damages to the jury for consideration, including the intentional nature of the action, Hulsey's degree of culpability, and his awareness of the conduct. Accordingly, to the extent Hulsey may be challenging this ruling, we find no error.

b Instruction on punitive damages

Hulsey next argues the trial court erred by telling the jury it was required to award punitive damages. We find no such instruction.

Punitive damages may be awarded, in the interest of society in punishing or deterring the conduct, or vindicating a private right, when the plaintiff proves entitlement to such damages by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence), Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004) (indicating punitive damages may be awarded for various reasons).

Generally, this court will not reverse the decision of the trial court as to a particular jury instruction absent a prejudicial abuse of discretion. Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008). A trial court abuses its discretion in this regard when the ruling is not supported by the evidence or is based on an error of law. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2009).

Hulsey argues the trial court instructed the jury it had to award punitive damages and submitted a jury verdict form that required an award of punitive damages. However, upon review of the verdict form we see nothing that required the jury to return punitive damages. Furthermore, Hulsey does not cite, or otherwise bring to this court's attention, any specific language used by the trial court to support that it instructed the jury it *had* to award punitive damages.

Initially, the trial court instructed the jury "Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that the defendant's actions were willful, wanton, malicious, or in reckless

disregard for the plaintiff's rights " Although not specified, the basis for Hulsey's allegation of error is presumably premised upon the use of the word "duty" in a single statement in an otherwise lengthy and thorough instruction in which the trial court stated "Under proper allegations, a [sic] plaintiff proves by clear and convincing evidence a willful, wanton, reckless, and malicious violation of his rights It is not only the right, but the duty of the jury to award punitive damages " However, the trial court's very next sentence clarified the use of this term, stating "Accordingly, *if* you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances " (emphasis added)

Upon review of the record we find the trial court properly instructed the jury on the law See S C Code Ann § 15-33-135 (2005) (stating punitive damages must be proved by clear and convincing evidence) The trial court did not instruct the jury it *had* to award punitive damages, but simply instructed the jury that *if* it found the plaintiff entitled to punitive damages it was their duty to determine the amount to which the Limehouse was entitled Therefore, we find no error

c Matters not appropriate for consideration of punitive damages

Next, Hulsey alleges his constitutional due process rights were violated because of the trial court's and Limehouse's repeated references to the default, arguing this referencing insinuated that the jury should punish Hulsey for his failure to follow the procedural rules Further, Hulsey alleges this error was compounded by the trial court allowing Limehouse's wife to testify as to the link on Hulsey's website, as well as to statements about how the ordeal affected Limehouse's family Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the RICO case, and admitting testimony as to Hulsey's net worth We disagree

First, Hulsey does not cite any authority to support the position that discussion of the default would support a finding that due process had been denied Further, we find no indication on the record that the trial court

suggested or otherwise implied that Hulsey's failure to answer should support the imposition of punitive damages

Second, as to the allegations pertaining to the website link, as noted Hulsey made no objection to this during the damages trial and consequently the issue is not preserved for our review See SBM, 327 S C at 356, 488 S E 2d at 881 (indicating an allegation of error as to the introduction of evidence during a default damages proceeding will not be preserved for appellate review absent a contemporaneous objection to the same)

Third, Hulsey contends it was error to allow Limehouse's wife to mention the impact of the slander on his family because pursuant to Philip Morris USA v Williams, 127 S Ct 1057 (2007), punitive damages cannot be imposed to punish a defendant for harm visited upon others. However, at trial, this argument was specifically presented as one of relevance

Evidence is relevant, and generally admissible, if it has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. Rules 401, 402, SCRE. The introduction of evidence is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Richardson v Donald Hawkins Const., Inc., 381 S C 347, 352, 673 S E 2d 808, 811 (2009), Jamison v Ford Motor Co., 373 S C 248, 268, 644 S E 2d 755, 765 (Ct App 2007). In this case, the trial court found the testimony to be relevant because it was "within the scope of how it affected [Limehouse], and his family relationships." We agree that the impact on Limehouse's immediate family bears on the extent of the impact he suffered, and accordingly we find no abuse of discretion.

Finally, Hulsey argues the trial court erred in allowing the jury to consider the settlement of the prior RICO case as well as erroneous testimony that Hulsey's net worth was in excess of \$81 million. Initially, contrary to Hulsey's position that Limehouse was able to paint him as a "greedy hotshot lawyer," Limehouse's own witness, John Massalon, conceded he was aware Hulsey was pro bono counsel on the previous RICO case. Furthermore, the record does not indicate any objection was made to the testimony of Bank of America employee Bernadette DeWitt when she testified as to Hulsey's net

worth. The evidence bears out the financial declaration on which she relied was certified as a true, complete, and accurate statement of Hulsey's financials and as such, any misinformation presented on this issue was the result of Hulsey's own misrepresentation. Accordingly, we find no error.

d Confirmation of punitive damages

Finally, Hulsey argues the trial court erred in confirming the award of punitive damages. We disagree.

Our supreme court recently indicated an appellate court's scope of review to be de novo. Mitchell v. Fortis Ins. Co., 385 S.C. 570, 583, 686 S.E.2d 176, 185, 183 (2009).

The Fortis court consolidated the post judgment due process analysis for punitive damages. In reviewing an award of punitive damages, we consider (1) the reprehensibility of the conduct, (2) the disparity or "ratio" between actual harm and the punitive damage award, and (3) the comparative penalties. Fortis, 385 S.C. at 587-89, 686 S.E.2d at 185-86.

1 Reprehensibility

In considering reprehensibility, a court should consider whether

(i) the harm caused was physical as opposed to economic, (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others, (iii) the target of the conduct had financial vulnerability, (iv) the conduct involved repeated actions or was an isolated incident, and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Id. at 185, 686 S E 2d at 587. This encompasses the defendant's culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct. Id. at 185, n. 7, 686 S E 2d at 587, n. 7.

Although the harm here was not physical, and posed no threat to health or safety, the evidence indicates Hulsey, through involvement in the underlying RICO action, was aware of the nature and vulnerability of Limehouse's business. Also, although the statements were made in a single incident, because the statements were made to the press, the evidence shows that the circumstances clearly indicated that the statements would be publicly reported and widely disseminated. Finally, this conduct was not the result of accident or inadvertence. The statements were contemplated, intentionally made, and coincided precisely with a filing of a lawsuit against Limehouse. Accordingly, our review of the evidence convinces us that Hulsey's conduct was sufficiently reprehensible to support punitive damages.²⁰

2 Ratio

The courts of this state have affirmed punitive damage awards in excess of six times actual damages. See James v. Horace Mann Ins. Co., 371 S C 187, 196, 638 S E 2d 667, 672 (2006) (affirming an award of punitive damages of 6.82 times actual damages), Cock-N-Bull Steak House, Inc. v. General Ins. Co., 321 S C 1, 11, 466 S E 2d 727, 733 (1996) (affirming an award of punitive damages roughly twenty-eight times actual damages). Similarly, the supreme court has modified awards to reflect a 9:2:1 ratio. See Fortis, 385 S C at 594, 686 S E 2d at 188. Here, the punitive damage award

²⁰ The trial court specifically noted the statements were intentionally made, the award would deter similar conduct in the future, the award was just over twice actual damages and was thus reasonably related to the actual harm suffered. The trial court also noted Hulsey was of the rare few who can afford to pay the award, and although South Carolina's procedure did not permit Hulsey to put forth evidence, the verdict remained reasonable.

was slightly above twice actual damages. Accordingly, we do not find such an award to violate due process.

3 Comparative Penalty

In looking to comparative cases, we find that in similar matters, our supreme court has upheld punitive damages which were over ten times that of actual damages. See, e.g., Weir v Citicorp Nat'l Servs. Inc., 312, S.C. 511, 518, 435 S.E.2d 864, 869 (1993) (affirming an award of \$275,000 in punitive damages, in a slander case, where actual damages were found to be \$25,000). Accordingly, we find no error here.

CONCLUSION

For the reasons above, the ruling of the trial court is

AFFIRMED

HUFF, J., concurs

FEW, C.J., dissents

FEW, C.J., dissenting. I disagree with the majority's analysis of Issues I and II, and therefore dissent. Because my position on either Issue I or II would resolve this appeal, I would not reach Issues III and IV.

I Jurisdiction

Hulsey moved for a new trial and for relief from judgment on the ground that jurisdiction never re-vested in the state court after removal, and therefore federal law prohibited the state court from proceeding with the case. The plain language of 28 U.S.C. §§ 1446(d) and 1447(c) required that the motion be granted.

a The Plain Language of Sections 1446(d) and 1447(c)

Section 1446(d) provides that after an action has been removed to federal court "the State court shall proceed no further unless and until the case is remanded " A remand order based on a lack of subject matter jurisdiction, such as the remand order in this case, is governed by section 1447(c),²¹ which requires that "[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court " The next sentence of section 1447(c)—"The State court may thereupon proceed with such case"—is the key to this case The word "thereupon" sets the point in time when the case is "remanded " Before a certified copy of the remand order is mailed, the state court may not proceed, afterwards, it may The section 1446(d) prohibition of "shall proceed no further" remains in effect until the section 1447(c) requirement that a "certified copy of the order of remand shall be mailed" has been met This plain language is all that is necessary to resolve this appeal A certified copy of the order of remand was never mailed to the state court clerk Under 28 U S C §§ 1446(d) and 1447(c), therefore, the state court had no power to proceed Because the state court acted when federal law prohibited it from doing so, the resulting judgment was void The trial court's failure to grant relief from the judgment was error and must be reversed

The majority takes the position that the mailing of a certified copy of the remand order does not determine the point in time when a state court may proceed after remand Their position is based primarily on two grounds First, the majority argues that the mailing of a certified copy of the remand order is not required in the Fourth Circuit under the authority of In re Lowe, 102 F 3d 731 (4th Cir 1996) Second, the majority argues that to the extent the requirement is applicable, it is procedural, and the right to enforce it has been waived in this case

²¹ Section 1447(c) states "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded "

b In re Lowe

The question before the court in Lowe was different from the question we face. Thus, the rule announced there is not applicable here. The majority's argument that the mailing of a certified copy of the remand order is not required in the Fourth Circuit is based on the following passage from Lowe: "we hold that a federal court loses jurisdiction over a case as soon as its order to remand the case is entered. From that point on, it cannot reconsider its ruling even if the district court clerk fails to mail to the state court a certified copy of the remand order." 102 F.3d at 736. The majority has incorrectly framed the issue by relying on this passage.

The majority's argument begins by correctly recognizing that section 1446(d) allows the state court to proceed as soon as the case is "remanded." However, the majority incorrectly concludes that the above statement from Lowe answers the question of when that occurs. I agree that Lowe sets the point in time when the federal court may not reconsider a remand order. However, that ruling is based on the Fourth Circuit's interpretation of section 1447(d), not section 1446(d). Therefore, the majority is mistaken that Lowe sets the point in time when the case is remanded, and that it is not necessary to interpret section 1447(c) in order to determine when the state court may proceed. Rather, we are required to enforce the section 1447(c) requirement that a certified copy of the remand order be mailed before the state court may proceed.

A careful analysis of Lowe demonstrates that the question it answered was different. The plaintiff sued her employer and two of its managers in the state court of North Carolina. 102 F.3d at 732. After the defendants removed the case to federal court, the plaintiff moved to remand. Id. A federal magistrate judge granted the motion on the grounds that the federal court lacked subject matter jurisdiction. 102 F.3d at 732-33, 736. The federal clerk mailed the order to the clerk of the state court, but the copy mailed was not certified. 102 F.3d at 733. Six months later, a different federal magistrate judge granted the defendants' motion to reconsider. Id. After the second magistrate denied two motions to remand, the plaintiff petitioned the Fourth Circuit for a writ of mandamus requiring the district court to return the case to the state court. Id. After concluding generally that remand orders

issued for lack of subject matter jurisdiction are not reviewable, 102 F 3d at 733-34, the Fourth Circuit framed the specific issue before it as follows "[t]he only question remaining, then, is to identify when a court's decision to remand becomes unreviewable " 102 F 3d at 734

The court analyzed the question by focusing on 28 U S C § 1447(d), and in particular the word "order "

Subsection 1447(d) provides only that a remand "order" may not be reviewed, it does not condition reviewability on any other event Thus, the plain language of subsection (d) indicates that a court may not reconsider its decision to remand, as soon as it formalizes that decision in an "order "

102 F 3d at 734 The Lowe decision thus turns on the court's interpretation of the word "order" in section 1447(d) and not, as the majority claims, on the timing of "remanded" under section 1446(d) In fact, Lowe does not even mention section 1446 The court clarifies its reliance on section 1447(d) with the language "[1447(d)] does not condition reviewability on any other event " Id This statement makes it clear that Lowe is not based on sections 1446(d) or 1447(c), which refer respectively to the events of "remanded" and "mailed " Therefore, the majority's contention that Lowe defines "remanded" is not correct

Moreover, Lowe contemplates that the section 1447(c) requirement of a mailing remains a part of the process of remand Noting that it has read sections 1447(c) and (d) independently, 102 F 3d at 734 n 3, the court explains that section 1447(c) "directs the district court clerk to mail a 'copy' of the remand order to the state court, certainly implying that the order itself, the document § 1447(d) tells us is unreviewable, is in existence before the time of the mailing " 102 F 3d at 734 If the Fourth Circuit's "minority" approach made the mailing required by section 1447(c) unnecessary, the Lowe court would have had no reason to provide this explanation that the section comes into play after the event of an "order" contemplated in section 1447(d)

The majority and I agree that the plain language "shall proceed no further" in section 1446(d) prohibits a state court from acting on a removed case until the case is "remanded " The question we face is when federal law sets that point in time, and thus removes the "shall proceed no further" prohibition The answer to that question is not found in Lowe's interpretation of section 1447(d), but in the plain language of sections 1446(d) and 1447(c)

c Waiver

The majority's second ground for its position is that the section 1447(c) requirement of mailing a certified copy is a procedural requirement rather than a jurisdictional one The distinction is irrelevant in this case Congress enacted a statute providing that when a case is removed to federal court the state court is prohibited from further action "unless and until the case is remanded " 28 U S C § 1446(d) This prohibition may not be avoided by labeling the mailing requirement procedural The prohibition is imposed by a federal statute and is likewise lifted only in accordance with federal statutes 28 U S C §§ 1446(d) and 1447(c) The question we face in this appeal requires us to interpret these statutes and apply their plain language to the facts of this case See Media Gen Commc'ns, Inc v S C Dep't of Revenue, 388 S C 138, 148, 694 S E 2d 525, 530 (2010) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the court has no right to impose another meaning ")

The majority's ruling not only imposes another meaning on these statutes, but it also renders an entire sentence of the United States Code meaningless by eliminating the section 1447(c) requirement that the federal clerk mail a certified copy of the remand order This court is not permitted to interpret a statute so as to render a part of it meaningless See Coyne & Delany Co v Blue Cross & Blue Shield of Va , Inc , 102 F 3d 712, 715 (4th Cir 1996) ("Absent clear congressional intent to the contrary, we will assume the legislature did not intend to pass vain or meaningless legislation"), Duvall v S C Budget & Control Bd , 377 S C 36, 42, 659 S E 2d 125, 128 (2008) ("The Court must presume the Legislature intended its statutes to accomplish something and did not intend a futile act ")

By characterizing the mailing requirement as procedural, the majority has converted section 1447(c) to a notice statute, so that the requirement of mailing a certified copy can be ignored because, as the majority states, "Hulsey cannot, and does not, maintain notice was insufficient " I do not believe this court is free to be so loose with the requirements of federal law If Congress intended that notice of a remand was sufficient to enable the state court to proceed, it could easily have drafted sections 1446(d) and 1447(c) accordingly

The majority's waiver argument also suggests that the issue is not preserved for appellate review because it was not raised to the trial court before judgment was entered The situation in which the federal removal statutes prohibit a state court from proceeding after a case is removed is analogous to the situation in which the federal bankruptcy stay prohibits a state court from taking action against a debtor who has filed a bankruptcy petition See 11 U S C § 362(a)(1) (2004 & Supp 2010) In that instance, as in this one, the validity of a judgment entered in state court during the time in which federal law prohibits it can be raised at any time See Ex Parte Reichlyn, 310 S C 495, 498-99, 427 S E 2d 661, 663-64 (1993) (declaring a judgment void when the judgment was entered during the pendency of the bankruptcy stay)

d Bryan v BellSouth Communications, Inc

In support of their respective positions, Appellants and Respondent cite different clauses in the same footnote from the Fourth Circuit's second opinion in Bryan v BellSouth Communications, Inc, 492 F 3d 231 (4th Cir 2007) (Bryan II)²² As I will explain, the footnote supports the position I have taken in this dissent To understand Bryan II, however, it is important to note that the remand order was not made pursuant to section 1447(c)²³

²² The first opinion was Bryan v BellSouth Communications, Inc, 377 F 3d 424 (4th Cir 2004) (Bryan I)

²³ Section 1447(c) applies to remands on the basis of a lack of subject matter jurisdiction or a defect in the removal procedure As the Fourth Circuit pointed out in Bryan I, the district court "concluded that removal was proper

Instead, after dismissing two federal claims on the merits, the district court determined a third claim was not federal, declined to exercise supplemental jurisdiction over it, and remanded it to state court Bryan II, 492 F 3d at 234-35, Bryan I, 377 F 3d at 425. Because the Bryan remand was not based on the lack of subject matter jurisdiction and therefore was not made pursuant to section 1447(c), any statement in Bryan II interpreting that subsection is technically dictum. However, both parties have cited Bryan II as authoritative, as has the majority. Mindful therefore of the admonition of former Chief Judge Sanders that "those who disregard dictum, either in law or in life, do so at their peril," I will give due regard to the footnote from Bryan II. Yeager v Murphy, 291 S C 485, 490 n 2, 354 S E 2d 393, 396 n 2 (Ct App 1987).

The footnote states

A remand is effective when the district court mails a certified copy of the remand order to the state court, *see* 28 U S C A § 1447(c) (West 2006), *or*, if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process, when the remand order is entered

Bryan II, 492 F 3d at 235 n 1 (emphasis added). The disjunctive word "or" indicates that the purpose of the footnote is to differentiate between the two types of remand: those made pursuant to section 1447(c) and those made for some other reason. In particular, the footnote differentiates between the points in time when each is "effective" to allow the state court to proceed.²⁴

because Bryan presented a federal question." 377 F 3d at 427. The Fourth Circuit's decision in Bryan I demonstrates that it agreed. "On appeal, we held that the remanded claim was a federal claim." Bryan II, 492 F 3d at 234 (citing Bryan I, 377 F 3d at 432). Because the federal court had subject matter jurisdiction over the federal claims, the remand was not made pursuant to section 1447(c).

²⁴ The court makes this differentiation in order to explain how the remanded state court proceedings and the appeal of the remand order to the Fourth

Citing to section 1447(c), which applies only to remand orders such as the one in this case, the first clause states the rule that the "remand is effective when the district court mails a certified copy of the remand order to the state court " The only situation in which the first clause of the footnote can be an accurate statement of law is when the statement is made to answer the precise question we face in this appeal—When does federal law remove the "shall proceed no further" prohibition so that a state court may proceed with a case after a remand made pursuant to 28 U S C § 1447(c)?²⁵

Finally, the text of Bryan II contains a statement that is contrary to the majority's interpretation of the footnote Responding to a separate argument made by BellSouth, the court again described the point in time when the state court regained jurisdiction to proceed after the remand, and cited section 1447(c) In the parenthetical after the citation in which it explained the meaning of 1447(c), the court stated "providing that the state court may proceed with a case once the district court mails a certified copy of the remand order to the state court " 492 F 3d at 241 This is consistent with the plain language of the statutes and refutes the majority's interpretation of the footnote Therefore, I interpret the footnote to include in its first clause the rule applicable to the issue we face in this appeal, and thereby to support my position that the federal clerk was required to mail a certified copy of the remand order to the state court clerk before the state court had jurisdiction to proceed

Circuit could proceed simultaneously 492 F 3d at 235 In fact, the footnote appears at the end of this sentence in the text of the opinion "While BellSouth's appeal was pending, Count A, which had been remanded to state court by the district court, was proceeding in state court " Id

²⁵ It is not possible to interpret the clause to apply to anything other than a section 1447(c) remand, not only because the clause cites to the section, but also because the mailing referred to is not required except when the remand is made pursuant to section 1447(c)

e Conclusion as to Jurisdiction

Limehouse argues that the result of a straightforward interpretation of sections 1446(d) and 1447(c) under the circumstances of this case "makes no sense " The majority refers to it as "jurisdictional limbo" and "jurisdictional hiatus " It is true that interpreting the statutes according to their plain meaning creates a scenario in which for some period of time neither the federal court nor the state court had the power to act In most cases, however, this period is very brief, in any case it is a situation required by the plain language of federal statutes Whenever the period becomes lengthy, as it did here, the federal court has the power to order its clerk to comply with the statute²⁶

I acknowledge that the result I propose appears at first to be harsh on the facts of this case However, the section 1446(d) prohibition of "shall

²⁶ While the federal court's remand order becomes final and unreviewable upon its filing, that event does not deprive the federal court of the power to order its clerk to complete the ministerial task of mailing a certified copy of the order to the state court clerk See Peacock v Thomas, 516 U S 349, 354 (1996) ("[A] federal court may exercise ancillary jurisdiction to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees ") As a practical matter, an informal reminder to the federal clerk that a certified copy of the order had not been mailed would almost certainly have solved the problem As a technical matter, the district court has mandamus power to compel its clerk to complete this ministerial task This is, in fact, exactly what happened in Lowe After the district court concluded there was no federal subject matter jurisdiction, the Fourth Circuit granted a writ of mandamus with instructions that the district court return the case to state court 102 F 3d at 736 Given the substance of the Fourth Circuit's ruling that the district court's order remanding the case was unreviewable upon filing, the only task left to complete at that point was the ministerial task of sending a certified copy of the remand order to the state clerk

proceed no further" is absolute and contemplates no exceptions, even in the face of a harsh result. When the Legislative branch sets forth plain and unambiguous language in a statute, the Judicial branch is constrained to follow it. If the results are harsh, the Legislature may change the statute but the courts may not.²⁷ However, the result I would reach is not harsh, nor even unfair. Limehouse's motion to remand to state court cites 28 U.S.C. § 1447(c) in its first sentence. Presumably his lawyers read the subsection, in which the requirement of mailing a certified copy of the remand order is plainly and unambiguously stated. Having cited the subsection to his advantage, it is not at all unfair that Limehouse be bound by the subsection when its plain terms work to his disadvantage.

In summary, the following rules apply to remand in the Fourth Circuit. A remand order based on some ground other than a lack of subject matter jurisdiction or a defect in the removal procedure, such as the decision not to exercise supplemental jurisdiction in Bryan, is reviewable, but the remand is effective allowing the state court to proceed as soon as the order is entered. On the other hand, a remand order which is based on a lack of subject matter jurisdiction, such as the order in this case and in Lowe, is unreviewable as soon as it is entered. However, this type of remand is effective such that the state court may proceed only after the federal clerk has complied with 28 U.S.C. § 1447(c) by mailing a certified copy of the remand order to the state court clerk. Because the federal clerk never complied with this requirement, the case was never "remanded," the state court had no power to proceed, and the resulting judgment entered in violation of federal law is void.

²⁷ Neither Limehouse nor the majority contends this is a situation in which the court may ignore a statute's plain meaning because to do so would yield an absurd result. See Harris v. Anderson Cnty. Sheriff's Office, 381 S.C. 357, 363 n.1, 673 S.E.2d 423, 426 n.1 (2009) ("One rule of statutory construction allows the Court to deviate from a statute's plain language when the result would be so patently absurd that it is clear that the Legislature could not have intended such a result.")

II Rule 55(c)

Hulsey moved for relief from default, which the trial court denied in an order filed February 7, 2007. In the subsequent decision of Sundown Operating Co v Intedge Industries, Inc., 383 S C 601, 681 S E 2d 885 (2009), our supreme court explained how the reasons for the default are to be analyzed in determining the existence of "good cause" under Rule 55(c). In light of Sundown, the analysis used by the trial court was controlled by an error of law. I would remand to the circuit court to reconsider the question of good cause under the standard set forth in Sundown.

a Good Cause under Rule 55(c) before Sundown

Our appellate courts have stated that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. See, e.g., In re Moore, 342 S C 1, 5 n 7, 536 S E 2d 367, 369 n 7 (2000), Melton v Olenik, 379 S C 45, 54, 664 S E 2d 487, 492 (Ct App 2008). In addition to this general guidance, our appellate courts have consistently listed three factors, which have become known as the Wham factors, that a trial court should consider in deciding whether good cause exists. See Wham v Shearson Lehman Bros., 298 S C 462, 465, 381 S E 2d 499, 501-02 (Ct App 1989). These factors, (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted, have been cited as the only factors to be considered in almost every opinion since Wham addressing good cause under Rule 55(c). See, e.g., Richardson v P V, Inc., 383 S C 610, 616, 682 S E 2d 263, 266 (2009) (decided after Sundown), Melton, 379 S C at 55, 664 S E 2d at 492.

Neither the general guidance to liberally construe Rule 55(c) in order to promote justice and dispose of cases on the merits nor the Wham factors instruct a trial court to require, or even to consider, the reason the party went into default. Nevertheless, trial courts and practicing lawyers have been generally aware that some explanation for the default is important to the analysis of good cause under Rule 55(c). In fact, in New Hampshire Insurance Co v Bey Corp., 312 S C 47, 435 S E 2d 377 (Ct App 1993),

this court quoted Dean Lightsey and Professor Flanagan in listing four factors "relevant under" Rule 55(c), including "the reasons for the failure to act promptly " 312 S C at 50, 435 S E 2d at 379 (quoting Harry M Lightsey & James F Flanagan, South Carolina Civil Procedure 82 (1985)) Until Sundown, Bey Corp was the only South Carolina appellate decision interpreting Rule 55(c) to have addressed the reasons for the default. However, other than to state it is a relevant factor, Bey Corp gives no explanation as to how this fits into the analysis of good cause.

Therefore, at the time of the hearing and order on Hulsey's motion for relief from default, South Carolina law provided that the party seeking relief from the default must show good cause, and that in deciding the motion the judge should consider four relevant factors in light of the general guidance that Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits. The factors were (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, (3) the degree of prejudice to the plaintiff if relief is granted, and (4) the reasons for the failure to act promptly.

b The Impact of Sundown

In Sundown, the supreme court began its analysis by discussing the reasons for the default. However, the Sundown court elevated that factor to a *requirement*, stating that the good cause standard "requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default " 383 S C at 607, 681 S E 2d at 888. The court went even further and also required that the moving party "give reasons why vacation of the default entry would serve the interests of justice " Id. Thus, the standard of good cause is now interpreted in two ways that are different from the law available to the trial court. First, the reason for the default is no longer merely a factor to be considered. Rather, the party seeking relief from default is required "to provide an explanation for the default ". Second, the party seeking relief must give "reasons why vacation of the default would serve the

interests of justice " The circuit court must consider all of this in determining whether or not the explanation for the default is satisfactory ²⁸

c The Sundown Analysis Applied to These Facts

In this case, Hulsey has complied with the requirement of providing an explanation for the default an attorney miscalculated the due date of the answer The next question posed by Sundown was never considered by the trial court Instead of considering whether vacating the default would serve the interests of justice, the trial court focused on whether the explanation was reasonable The court found "no good reason" was presented It also stated that there was "no reasonable basis" for the "assumption that the 30 day time to file an answer starts completely anew upon remand " (emphasis omitted) At one point the trial court called this "confusion " The reasonableness of the explanation is certainly a valid factor to consider However, Sundown requires a broader inquiry, namely that the reasonableness of the explanation be considered as a part of the analysis of whether vacating the default would serve the interests of justice

The facts of this case demonstrate the importance of the broader inquiry The conduct of the lawyer in this case was not "reasonable " First, he should have filed an answer in federal court before the remand order was entered See Rule 81(c)(2), FRCP Second, when he learned of the remand order, he should have raced to the county courthouse to file it A trial judge must consider the attorney's unreasonable failure to do this However, as to the specific question of whether excusing the unreasonable failure in this case serves the interests of justice, there are additional factors that are important to consider First, the lawyer was apparently attempting to correctly calculate the deadline for his answer Second, South Carolina law provides no guidance as to when the answer was actually due in state court Even the majority declines to define the due date for the answer, stating only that Hulsey failed to meet it, whatever it was

²⁸ The court went on to explain that the Wham factors come into play after the explanation is accepted by the court "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider [the Wham factors] " 383 S C at 607-08, 681 S E 2d at 888

The fact that the lawyer was trying to correctly follow the rules is particularly relevant to "the interests of justice " Many of our appellate decisions have stated the principle that a lawyer's negligence in failing to file an answer is imputable to the defaulting litigant, and thus weighs against granting relief from default See generally Richardson, 383 S C at 618-19, 682 S E 2d at 267 In each of the cases citing this principle, the negligence was in *failing to attempt* to answer the complaint, not in *failing at an attempt* to serve a timely answer This distinction is important to the interests of justice Justice should not relieve a lawyer or litigant who makes no attempt to comply with the rules, or who negligently fails to comply with a rule that is clear However, the interests of justice should protect a lawyer who attempts to comply with the rules, particularly when the lawyer is attempting to meet a deadline which is so *unclear* that no rule or court has ever defined it

In my opinion, applying the newly-defined standard for good cause under Sundown is likely to yield a different result In reaching this conclusion, I am influenced by the reasoning of our supreme court in affirming the trial court's order granting relief for a late answer in Lee v. Peek, 240 S C 203, 125 S E 2d 353 (1962) Though Lee is not controlling because it was decided before the Rules of Civil Procedure based on a standard other than good cause, the facts of Lee are strikingly similar to the facts presented here, and the court's analysis seems particularly relevant in light of Sundown

Davis Lee sued the NAACP and six residents of Anderson County in the Court of Common Pleas of Abbeville County 240 S C at 204, 125 S E 2d at 353 Three of the Anderson County residents retained a lawyer, who made a motion to change venue to Anderson 240 S C at 205, 125 S E 2d at 353 Before the motion to change venue could be heard, the NAACP removed the case to federal court Id The three Anderson residents represented by the lawyer filed a motion to remand, which was granted Id The same attorney then refiled the motion to change venue Id During all of this time, the lawyer did not file an answer because "he was under the erroneous impression that it was not necessary for him to answer or demur in

the State Court until the motion for change of venue had been decided " 240 S C at 205, 125 S E 2d at 354

The Lee attorney's failure to answer was unreasonable. The circuit judge "found as a matter of fact that counsel had misconceived the applicable procedural law " 240 S C at 206, 125 S E 2d at 354. That finding is much like that of the trial court here that "there was no good reason presented by the defendants for their failure to file a timely answer, other than attorney confusion about the deadline for when an answer was due ". However, the trial judge in Lee did not focus on the reasonableness of the lawyer's action. Rather, focusing on what the Sundown court has now instructed trial courts to consider, the circuit judge in Lee held "that it was *in the furtherance of justice* that the respondents be relieved of any default ". Id. (emphasis added)

d Conclusion as to Rule 55(c)

Sundown changed the analysis of good cause by requiring for the first time that the trial court focus on "reasons why vacation of the default entry would serve the interests of justice ". I believe that if the trial court had analyzed this question, rather than whether the attorney was reasonable in failing to file a timely answer, the outcome might have been different. The supreme court recognized in Lee that the decision as to what is "in the furtherance of justice" is for the circuit court. It is not the task of this court to answer the question posed by Sundown. However, it is the duty of this court to see that the question gets answered. I would reverse the judgment of the lower court, and remand the case for a determination of whether good cause exists under Sundown.

**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-10-1577
Opinion No. 4805, filed March 10, 2011
Withdrawn, Substituted and Refiled June 2, 2011
Withdrawn, Substituted and Refiled June 16, 2011

RECEIVED

JUN 24 2011

SC Court of Appeals

Lawton Limehouse, Sr.

RESPONDENT,

v

Paul H. Hulsey and The Hulsey
Litigation Group, LLC,

APPELLANTS

PETITION FOR REHEARING

The majority of the Court of Appeals panel has affirmed a \$7.3 million judgment entered by a state circuit court that did not have jurisdiction and did not follow the letter or the spirit of the state rules governing civil and trial procedure, and denied these Defendants their most basic due process rights. These Defendants petitioned the Court for rehearing en banc raising certain questions of exceptional importance which the Panel had overlooked or misapprehended. The petition for rehearing en banc was rejected, and the Panel denied the petition for rehearing by order dated, June 1, 2011. However, on June 2, 2011, the Panel also withdrew its prior opinion, and substituted and refiled a new

opinion. To comply with Rule 242(d)(2), SCACR, the Defendants submitted a renewed petition for rehearing on June 17, 2011. However, on June 17, 2011, the Defendants also received a copy of another order from the Court, withdrawing the substituted opinion, filed on June 2, 2011, and substituting a new opinion, refiled on June 16, 2011. Now, wherefore, once again, to ensure compliance with Rule 242(d)(2), SCACR, Defendants respectfully submit this second renewed petition for rehearing.

It appears that the only change in this new substituted opinion is found in the majority's Section I discussion addressing the Defendants' argument that the state trial court lacked jurisdiction to enter default or to proceed with the default hearing and judgment in this matter because the clerk of the federal court failed to mail a certified copy of the remand order to the Charleston County Clerk of Court as required by 28 U.S.C. §1447(c) to re-vest the state court with jurisdiction. As indicated in the Court's order, the substituted opinion filed on June 16, 2011, corrects a scrivener's error in the first paragraph after footnote 6.

Original "Therefore, the mailing forecloses state court jurisdiction not because a state court should interpret section 1447(c) to provide the state may *only* proceed upon the mailing but because section 1446(d) prohibits state action until remanded."

Substituted "Therefore, the *lack of a* mailing forecloses state court jurisdiction not because a state court should interpret section 1447(c) to provide the state may *only* proceed upon the mailing but because section 1446(d) prohibits state action until remanded" (Emphasis added.)

The Defendants have no objection per se to the Court's correction of the scrivener's error. However, for each and all of the grounds and arguments fully asserted and discussed in the prior petitions, the Defendants continue to maintain that the majority overlooked the mandatory language of the federal statutes that provide that the state court was divested of jurisdiction when the notice of removal is filed in federal court, and could not proceed until after a certified copy of the order of remand was been mailed to the state court.

28 U.S.C. §1446(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.)

28 U.S.C. § 1447(c) -- 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.)

In holding that the mailing of a certified order is not a jurisdictional requirement, the majority opinion overlooks the South Carolina rules of statutory construction, which bind the court to the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004), Miller v. Aiken, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005). The Panel also misapprehends the Fourth Circuit's holdings in In re Lowe, 102 F.3d 731 (4th Cir. 1996), and Bryan v. BellSouth Telecommunications, 492 F.3d 231, 241 (4th Cir. 2007), as following their analysis of a "minority view" that a federal court loses jurisdiction upon the filing/entry of the remand order which simultaneously reverts jurisdiction in the state court. The Fourth Circuit has never held that reverting jurisdiction in the state court happens simultaneously with the filing of the remand order that divests the federal court of jurisdiction.

To the extent that *Lowe* held that federal jurisdiction *divests* upon the *filing* of the remand order under §1446(d), the Fourth Circuit did not rule on the question of when jurisdiction *revests* in the state court under §1447(c). However, the Fourth Circuit did later state in *Bryan* that the state court *regains* jurisdiction when the district court *mails* a certified copy of the remand order as required by § 1447(c). Finally, the majority has overlooked or misapprehended that it has no legal basis to rewrite the federal statute by holding that the mailing requirement is a mere notice requirement that must be preserved by objection when an uncertified order is mailed, and may be ignored where there is no prejudice.

Section 1447(c), with its clear and plain language requiring mailing of a certified order, is a congressional mandate that defines when the state court is revested with jurisdiction. Jurisdiction is not subject to waiver, and no showing of prejudice need be shown from the failure to comply with a jurisdictional requirement. See State v. Langford, 223 S C 20, 73 S E 2d 854, 860 (1953) ¹ (citing State v. Brockhaus, 72 Conn [109] 117, 43 A 850), see also Carroll v. U.S., 354 U.S. 394, 406 (1957). Thus, the failure to mail a certified copy can be raised at any time. Edwards v. State, 372 S C 493, 642 S E 2d 738, 739 (2007) (“Issues related to subject matter jurisdiction may be raised at any time”), Eldridge v. City of Greenwood, 331 S C 398, 508 S E 2d 191, 196 (Ct. App. 1998) (“Claims of lack of subject matter jurisdiction may be raised at any time, and subject matter jurisdiction may not be waived by filing responsive pleadings or otherwise consenting to the jurisdiction of a particular court”), Rule 12(h), SCRCP (“(h)

¹ Overruled to the extent it might combine the concept of the sufficiency of an indictment and the concept of subject matter jurisdiction. State v. Gentry, 363 S C 93, 610 S E 2d 494 (2005).

Warver or Preservation of Certain Defenses - (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action ")

The federal statute is clear, and strict compliance is mandatory. In view of the undisputable fact that the federal district court did not mail a certified copy of the remand order to the Charleston County Clerk of Court until after the judgment was on appeal, jurisdiction had not reverted in the state court, and the judgment should be vacated and the case remanded to allow Hulsey to fully defend on the merits.

The Defendants also respectfully renew each and all of the other questions and issues as fully stated in the prior petitions, which are attached hereto and fully incorporated herein. As fully demonstrated and discussed in those prior petitions, the majority in this case overlooked and misapprehended key facts and controlling law that require the entry of judgment be reversed and the case remanded to allow the Defendants to answer and fully defend the merits of the claims lodged against them.

Respectfully submitted,



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June 22, 2011

Certificate of Service

I Robert H Hood, counsel for the Appellants do hereby certify that I have this 22 day of June, 2011, served the foregoing Petition for Rehearing upon opposing counsel for the Respondent by mailing a copy of same, postage prepaid, and return address clearly indicated, to said counsel as follows

Frank M. Cisa
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Mt Pleasant, SC 29464

June 22, 2011

Robert H Hood
Robert H Hood

Attachment

Petition for Rehearing
filed March 25, 2011

Printed Above at Page 30-63

Attachment

Petition for Rehearing,
filed June 17, 2011

Printed Above at Page 108-112

The South Carolina Court of Appeals

Lawton Limehouse, Sr ,

Respondent,

v

Paul H Hulsey and The Hulsey
Litigation Group, LLC,

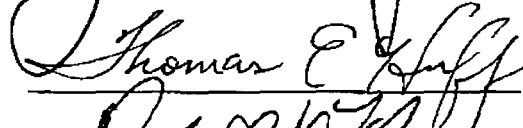
Appellants

The Honorable Daniel F Pieper
The Honorable Roger M Young
Charleston County
Trial Court Case No
2006-CP-10-01577
2006-CP-10-01577

ORDER

After a careful consideration of the Petitions for Rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. It is therefore ordered that the Petitions for Rehearing be denied.



CJ


J


J

FILED

AUG 12 2011