

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable James O. Spence,  
Lexington County

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CASE NO. 2009-CP-32-5373

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Regions Bank .....Plaintiff

vs.

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

OF WHOM:

William S. Owens is.....Appellant  
and

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

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**FINAL BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in refusing to allow a late Answer?
- II. Did the trial court err in refusing to find Appellant proved good cause as is required under SCRCP 55(c)?
- III. Did the trial court's ruling lack evidentiary support as is required under SCRCP 55(c)?
- IV. Did the trial court err as matter of law by refusing to allow Appellant to answer under SCRCP 55(c)?

## STATEMENT OF THE CASE

This is a foreclosure of a mortgage action which was filed by Plaintiff on December 1, 2009. Owens was served on January 26, 2010. The Plaintiffs filed an affidavit of default as to Owens on March 19, 2010. No entry of default was entered. This case was subsequently referred to the Master-in-Equity on March 2, 2010 with a hearing set on July 19, 2010. The Order of Reference was signed without notice to Defendant Owens, and no civil motion/order coversheet appears in the records of the Clerk of Court. The trial court, after hearing arguments, denied Owens' motion to set aside default and/or leave to file an answer. Owens thereafter filed a motion for reconsideration which was heard on March 4, 2011 with the trial court denying Owens' motion. This appeal was timely filed. The issue in this case is whether or not the trial court erred in refusing to allow Owens to interpose a late answer or in the alternative to answer under SCRCP 55(c). Finally, the Master should have allowed a late answer under SCRCP 6(b).

## STANDARD OF REVIEW

This case involves an Affidavit of Default by Plaintiff's counsel (not an order or entry of default) against Owens. This court applied SCRCP 55(c) in its Order which provides in pertinent part:

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Appellant suggests that SCRCP 55(c) was not appropriate as the standard in this case because there was no entry of default or order of default. All Appellant sought to do was interpose a late Answer under SCRCP 6(b), which does not require a "good cause" showing. (SCRCP 6(b) states "for cause shown" as the standard not good cause as in SCRCP 55(c).) Accordingly, the Court's Order of Default was controlled by an error of law and lacked evidentiary support. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C.462, 465, 381 S.E.2d 499, 501 (Ct.App. 1989).

Further, if SCRCP 55(c) is to be considered in this case, it is to be liberally construed to "promote justice and dispose of cases on the merits." *Dixon v. Besco Eng., Inc.*, 320 S.C. 174, 463 S.E.2d 636, 638 (Ct.App. 1995).

For the reasons set forth below, Appellant submits the trial court's ruling was improper and was an error of law because no entry of default had been entered and Appellant was entitled to file a late answer as a matter of law. - Accordingly, the trial court should be reversed.

## ARGUMENT

### I. The Master-in-Equity improperly applied SCRCF 55 when there was no entry of default.

Appellate asserts that because there was no entry of default under SCRCF 55(c), the Court erred in finding and using the good cause standard when there was no default order or entry of default signed by the Clerk. Appellant has found no case law which applies in that situation and would assert to the Court that a motion for a late answer should be liberally construed by the Court. This is in keeping with this Court's lines of cases which hold that matters should be disposed of on their merits to promote justice. *Dixon v. Besco Eng., Inc.*, 320 S.C. 174, 463 S.E.2d 636, 638 (Ct.App. 1995).

In sum, Appellant suggests to this Court that it was an error of law for the Master-in-Equity to use the standard under SCRCF 55(c) because there was no entry of default. SCRCF 55(c) states in pertinent part:

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Here, there was no entry of default, which is the official recognition of the failure to appear or otherwise respond. Thus, the Court was without authority to consider the case under SCRCF 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535, 536 (Ct. App. 1987). (An entry of default is an official recognition of a failure to appear or otherwise respond.) It should be noted that there is no standard for the allowance of a late Answer and thus under the Rules of Civil Procedure it should be liberally allowed.

If the Court disagrees with Appellant's assessment, then in the alternative, Appellant argues that there was no good cause shown as is set forth hereinbelow under SCRCF 55(c).

**II. The Master-in-Equity erred in finding that Defendant had not demonstrated good cause.**

This section applies if the Court believes the good cause standard applies to a late Answer. It is settled in South Carolina that under SCRCF 55(c), an entry of default may be set aside for “good cause shown” which is a less stringent standard than the excusable neglect standard of SCRCF 60(b). The good cause standard of SCRCF 55(c) has a threshold burden and a party must put forth “an explanation of the default and give reasons why vacation of the default entry would serve the interest of justice.”

In the instant case Mr. Owens, a 79 year old high school graduate and welder, was served with the Summons and Complaint in this action at his welding business in Myrtle Beach, South Carolina. (Depo. of Owens, R. p. 390, lines 1-10). Owens immediately contacted Paddy who had previously convinced Owens to invest in the subject property. (Depo. of Owens, R. p. 396, lines 20-25). (Owens had previously given Paddy \$100,000 for investment since the property had drinkable water on it that Paddy planned to bottle and sell). (Depo. of Owens, R. p. 368, lines 10-20). Once suit was filed, Paddy told Owens that he had hired a lawyer in Columbia and that he would take care of the lawsuit. Paddy stated in his deposition that, “I was looking out for him and myself.” (Depo. of Paddy, R. p. 517, line. 3). Paddy also admitted that he told Owens that he had a lawyer in Columbia. (Depo. of Paddy, R. p. 515, lines 24-25). Owens asserts that Paddy told him that he “didn’t have to worry” and that he and his lawyer would “take care of it.” (Depo. of Owens, R. p. 394, line 25 and R. p. 395, line 1). More specifically, Owens has stated that Paddy indicated to him that he would have his attorney answer the Plaintiff’s Complaint on both their behalves. (Affidavit of William Owens, R. p. 49).

Owens subsequently contacted attorney Cheevin “Lex” Gardener about the possibility of recovering his \$100,000 investment from Paddy. Gardner quickly learned that Owens had been sued in a foreclosure action and that no one had filed an Answer on Owens’ behalf. Owens promptly hired Gardner and Attorney John M. Hilliard, III to jointly represent him in this case. In other words, Owens immediately sought his own legal counsel as soon as he realized that he was not represented by Paddy’s attorney. Indeed Owens was misled into believing Paddy, who had a power of attorney for Owens, had handled the matter for him.

During oral arguments in this case, the Court seemed to be confused as to proper standard it was to consider even though no entry or order of default had been entered. At the hearing on November 19, 2010, the trial judge repeatedly referred to the standard as excusable neglect. (See Trans. dated November 19, 2010, R. p. 147, lines 5) (“...what I’m trying to figure out is if our appellate courts have said it’s not excusable neglect when you rely on a lawyer that you ought to be able to rely on? (Trans. dated November 19, 2010, R. p. 149, lines 6-12).

Again after the court denied the motion to set aside the default a similar exchange took place with counsel:

Court: In that case, excusable neglect was allowed....  
(Trans. March 4, 2011, R. p. 270, lines 18-25).

Court: ...that made that says it’s excusable neglect in essence because these guys aren’t in the business of doing lawsuits....  
(Trans. March 4, 2011, R. p. 271, lines 1-4.

Court: ...by the teacher delivering it to him and thinking I’ve delivered it to the superintendent of the teacher, that’s excusable neglect...  
(Trans. March 4, 2011, R. p. 273, lines 12-20).

Court: ...I'm going to deny the motion to reconsider because I don't believe that -- A, I don't believe there was fraud shown. I don't believe that there was negligence shown and I don't believe, with the totality of the argument, that it was -- it was a justifiable reliance.  
(Trans. March 4, 2011, R. p. 290, lines 20-25; R. p. 291, lines 1-3).

The Court's comments demonstrate that it did not consider the "good cause" standard under SCRCP 55(c) or that the Defendant was not in default at all. Instead, the court committed an error of law in finding there had to be fraud, negligence or reliance. Because of this misapplication of the excusable neglect standard by the court, Appellant suggests that the Order of the Master must be reversed. While the Order cites the good cause standard, the court was clearly using the wrong standard in considering the motion. (If there even is a standard for a late Answer.)

In this case, Owens put forth a satisfactory explanation and accordingly the trial court was obliged to consider the *Wham* factors including the following:

- (1) the timing of the motion for relief;
- (2) whether defendant had a meritorious defense.
- (3) the degree of prejudice to the plaintiff if relief is granted.

**III. South Carolina Courts have allowed Defendants such as Owens to answer under SCRCP 55(c).**

This Court in *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280 (Ct.App. 1987) set aside a default judgment against a teacher for the Charleston County school system. A student brought an action after a chemistry experiment and the teacher was served with a summons and complaint. The defendant gave notice of the pleadings to the school

principal. The school failed to timely notify its attorney or its insurance company and the plaintiff obtained a default judgment against the teacher.<sup>1</sup>

The *Roberts* Court specifically noted that the defendant teacher would have no recourse against the state if a large verdict were rendered against her. The court also noted that the schools' business is education and not litigation. *Id.* at 151. (As is the case here since Owens is a welder).

Similarly, in the instant case, Owens would have no recourse if judgment were entered against him. The Court correctly contends that a defendant is liable when his attorney or insurance company fails to timely file an answer on his behalf. What the Court omits in its decision is the reason why attorneys and insurance companies are treated differently by our courts. Their business is litigation. *Id.* at 151. If an attorney fails to answer a complaint, the defendant has recourse through the attorney's malpractice insurance policy. Similarly, if an insurance company fails to answer a complaint, the defendant has recourse because the insurance companies own policy with the defendant will obligate it to pay the judgment within the policy limits. Additionally, insurance companies can be sued by defaulting defendants for breach of contract, negligence, and other torts connected to their failure to properly defend. Attorneys and insurance companies are treated differently because they both have a heightened duty and the defaulting defendant has recourse if they fail to live up to their obligations.

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<sup>1</sup> It should be noticed this case was a default judgment not an entry of default which requires a showing of excusable neglect. Further, in this case there is neither an entry of default nor an order of default.

In the instant case those considerations do not apply. Owens was misled by the representations made to him by Co-Defendant Paddy who had Owens' power of attorney. (R. p. 418). Because Paddy is neither an attorney nor an insurance company, it would be a misapplication of the law to impute his actions to Owens.

Despite the general rule regarding the imputation of an insurance company's or attorney's negligence to a defaulting defendant, this Court has upheld a trial judge who relieved a defaulting defendant in the interests of justice, even when it was based upon the negligence of an insurance company. In *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987), the Defendant was served with a Summons and Complaint on December 2, 1985. The defendant called her attorney who told her to contact her insurance company. She hand delivered a copy of the pleadings to her insurance agent with a letter dated December 12, 1985 requesting that the complaint be forwarded to her carrier. After returning from a vacation on December 29, 1985, she learned that her insurance agent had closed and declared bankruptcy. The complaint was never forwarded to her carrier. She called her attorney again who instructed her to gather all the information she could. She had left her copy of the complaint in the trunk of her automobile. Because her car was being serviced she could not get access to the pleadings and was unable to file a timely answer. The trial judge applied the Rule 55(c) "good cause" standard and set aside the entry of default.<sup>2</sup>

This Court in *Ricks* also quoted a Georgia appellate court case, *Sears Roebuck & Company v. Ramey*, 170 GA. App. 873, 318 S.E.2d 740 (1984): "The law should not blindly impose standards which require individuals, in the conduct of their daily business, to distrust

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<sup>2</sup> This case is even better. Appellant was not in default and an order or entry of default was not entered of record. Thus, Appellant only sought to interpose a late Answer.

the parties with whom they deal. Likewise, a litigant should not unnecessarily be forced into default as a consequence of having reasonably relied upon the word of his fellow, particularly when no innocent party will suffer if the default is opened." *Id.* at 375, quoting *Sears Roebuck & Company v. Ramey*, 170 GA. App. 873, 318 S.E. 2d 740 (1984).

Just like in *Sears Roebuck & Company v. Ramey*, (*supra*), Owens trusted Paddy. Paddy told him he hired an attorney to answer for both of them (Depo. of Paddy, R. p. 470, lines 16-25); that he was completely surprised that Paddy had not hired the attorney to answer for him (Depo. of Owens, R. p. 395, lines 1-8); that Owens was unaware that he owned Regions Bank any money (Depo. of Owens, R. p. 395, lines 15-17); that the first notice Owens was aware that he owed any money was when the lawsuit was served upon him (Depo. of Owens, T. p. 395, lines 17-21); that Paddy had Owens' Power of Attorney and he trusted him and had the right to rely on him. (Depo. of Owens, R. p. 384, lines 9-14.

In this case, Owens, an elderly man, trusted Paddy and gave him \$100,000. (Depo. of Owens, R. p. 391, lines 1-20). Owens, a man of limited education, thought that the \$100,000 was to invest in the property in question. (Depo. of Owens, R. p. 367, lines 4-13). Owens was not aware that other monies were being borrowed from Regions Bank to purchase the property and that he may be responsible for these actions. (Depo. of Owens, R. p. 395, lines 15-17).

#### **IV. Public policy favors disposition on the merits.**

Because Owens was unaware that Paddy had not answered for him when he had been told so by his friend (who had his power of attorney), Owens has shown good cause. (Depo. of Owens, R. p. 395, lines 1-18). Also, public policy favors the disposition of cases on their merits rather than on mere technicalities. *Micronics, Inc. v. S. C. Dept. of Revenue*,

548 S.E.2d 223, 225 (Ct. App. 2001). See also *Dixon v. Bescoe Eng. Inc.*, 320 S.C. 174, 463 S.E.2d 636 (Ct.App. 1995) (SCRCP 55(c) should be liberally construed to promote justice and dispose of cases on their merits). See also *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E.2d 535 (Ct.App. 1987) (trial judge sets aside entry of default because defendant's car was being serviced and she could not get access to pleadings to file a timely answer). In so setting aside the default, this Court noted that the party requesting a judgment by default is not entitled to one as a right, even when the defendant is technically in default. (*Ricks*, 360 S.E.2d at 536).

It should also be noted that Owens' reason for asking that the technical default be set aside is valid and reasonable. While Appellant concedes that these reasons may not be appropriate under SCRCP 60(b), they are certainly valid under SCRCP 55(c) or under a request for a late Answer. See *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) (an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment). Thus, under the lesser standard of SCRCP 55(c) or that of a late Answer Appellant has shown good cause in relying on a person with a power of attorney to act for him.

**V. The Court's Order is erroneous because it cites *Pilgrim*.**

The Court in its Order denying Owens' motion to set aside the default filed January 1, 2010 erroneously cites *Pilgrim v. Miller*, 350 S.C. 637, 567 S.C.2d 529 (Ct.App. 2002) for the argument that Owens does not meet the "good cause standard." The Master in his Order uses the explanation in *Pilgrim* to find:

"If reliance on one's own attorney is insufficient to show 'good cause', the reliance on another defendant and his attorney is equally insufficient."  
(Order of Master dated November 30, 2010) (R. p. 1).

Appellant respectfully points out that this was an error of law in that the Supreme Court vacated *Pilgrim* on July 23, 2009. (See *Bage, LLC v. Southeastern Roofing Co. of Spartanburg, Inc.* holding “while the petition for certiorari to this court in *Pilgrim* was pending, the parties settled.” The settlement was accepted, and the *Pilgrim* opinion was vacated by Order of this Court. It appears however that the Order vacating the *Pilgrim* opinion was never published. See *Pilgrim v. Miller*, 2003-OR-00333 (S.C. Sup. Ct. dated April 25, 2003. To correct this oversight, we now reiterate that *Pilgrim v. Miller*, 350 S.C. 637, 642, 567 S.E.2d 527 (Ct.App. 2002), was vacated by this Court on April 25, 2003.)

Since this is the case, the Master- in-Equity erroneously cited *Pilgrim* as good law in South Carolina. In fact, the opinion had been vacated seven years prior to the issuing of the Order in this case. This constitutes an error of law under SCRCF 55(c) which requires this Court to reverse the Master-in-Equity. It is also an error of law to apply SCRCF 55(c) when there is no entry of default.

**VI. The Master-in-Equity erred in finding that Paddy did not corroborate Owens’ testimony.**

The Mater in Equity in his original Order of November 30, 2010 found Paddy did not corroborate Owens’ testimony that Paddy would hire an attorney for both Owens and Paddy. When Owens moved for reconsideration of the order, the court found: “The facts indicate Owens made a unilateral mistake in assumption that Paddy would file an Answer on Owens’ behalf.” (Order Denying Defendant’s Motion for Reconsideration dated March 9, 2011) (R. p. 18). Appellant suggests that a unilateral mistake by Owens constituted good cause or the allowance of a late Answer. Here, the Master’s original Order finding Paddy’s testimony did not corroborate Owens and the Order on reconsideration are inconsistent. The Order on reconsideration indicates a unilateral mistake was made by Owens and Appellant

suggests as a matter of law this was good cause and thus an error by the Master. Our courts have defined “good cause” as a less stringent standard than the excusable neglect standard of SCRCP 60(b). Owens put forth a reasonable explanation as to why the default occurred and the court agreed in its order denying reconsideration. Owens explanation that he relied on Paddy was backed up by testimony. (Depo. of Paddy, R. p. 517, line 3) (See Paddy’s previous statements.) See also *Limehouse v. Hulsey*, Opinion No. 4805 filed March 10, 2011. (Ct. App. 2011) (A party should give a reason why the vacation of the default entry would serve the interest of justice).<sup>3</sup> As has been previously stated there was no entry of default in this case.

Appellant again refers back to his Supplemental Memorandum In Support of his Motion to Set Aside Default and those portions of the testimony of Paddy when he stated that he had a lawyer in Columbia to handle it and had a lawyer to check on it. (Depo. of Paddy, R. p. 515, lines 15-25). Further Paddy, had Owens’ power of attorney and thus it was reasonable for Owens to expect Paddy to act on his behalf. (See Depo. of Paddy, R. p. 462, lines 1-25; R. p. 463, lines 1-25; R. p. 464, lines 1-25; R. p. 465, lines 1-25). Accordingly, it was appropriate for Owens to expect Paddy to handle all transactions regarding the property including this lawsuit. It was not a unilateral mistake, but a well-founded belief that Paddy would handle it. Only when Owens found out that a hearing was set did he realize that Paddy had not protected Owens’ interest.

It was entirely reasonable for Owens to expect that Paddy would act on his behalf. A Limited Power of Attorney executed May 24, 2007 specifically allowed Paddy to act on behalf of Owens regarding the property in question. (Depo. of Owens, Ex. 5, R. p. 418).

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<sup>3</sup> See also *ITC Commercial Funding, LLC v. Crerar*, Opinion No. 4844, S.C. Ct. App. filed June 15, 2011 (Appellants’ reason for not answering good under SCRCP 55(c) but not SCRCP 60(b).)

Owens had no reason to understand or believe that Paddy would not answer the lawsuit in question and when it became apparent that Paddy was not going to answer the lawsuit and a hearing was set, Owens immediately obtained other counsel. Owens' reliance on Paddy was reasonable under the circumstances and Owens did not revoke the power of attorney until June 30, 2010 well after this litigation was under way. (See Depo. of Owens, Ex. 5, (R. p. 418) Limited Power of Attorney provides in pertinent part):

I do authorize my aforesaid Attorney-in-Fact to perform all necessary acts in the execution of the aforesaid transaction with the same validity as I could effect if personally present. An act or thing lawfully done hereunder by my said attorney shall be binding on me and my heirs, legal and personal representatives and assigns.

Thus, good cause was shown by Owens to the Master and it was an error of law to not grant Owens' motion. (See also the Master's Order on Reconsideration finding that Owens and Paddy had no formal relationship when in fact a limited power of attorney was in existence between the parties at the time and presented to the lower court. (Order of Master on Reconsideration, R. p. 18).

**VII. There are other reasons for granting Owens' motion.**

As has been stated above, Owens had given a written power of attorney to Paddy. Further, Owens had been told by Paddy that he would handle filing the answer to the foreclosure action. (Depo. of Owens, R. p. 389, lines 22-25; Depo. of Owens, R. p. 389, lines 1-10). When Owens became aware that Paddy had not protected his interests, Owens acted immediately. The Affidavit of Default was filed on March 19, 2010. Once it was apparent to Owens that a hearing was set, he hired counsel. This is entirely reasonable in light of the fact that Owens and Paddy had a business and legal relationship and Paddy was Owens Limited Power of Attorney. (Depo. of Paddy, Ex. 5, R. p. 418).

Owens also has a meritorious defense. Paddy came to Owens and asked him if he wanted to invest with him in the real property which is the subject of this suit. Paddy asked Owens for \$100,000 towards the purchase of investment in real property in Lexington, South Carolina. (Depo. of Paddy, R. p. 442, lines 11-12; Depo. of Owens, R. p. 368, lines 15-20). Owens provided the \$100,000 but was unaware that he was signing a note and mortgage. (Depo. of Owens, R. p. 373, lines 1-28; R. p. 374- lines 1-25; R. p. 375, lines 1-4). Owens is 79 years old with a limited education and runs a welding shop. Further, Owens' prima facie meritorious defense would also have been a crossclaim against Paddy for malfeasance in the handling of this transaction. Also, Owens representation that he did not believe he was signing a loan is a factual dispute since Paddy took Owens to Paddy's daughter who was the closing attorney in this transaction. (Depo. of Owens, R. p. 375, lines 1-12).

Finally, the degree of prejudice to Plaintiff is miniscule. There had been no entry of default by the Clerk. Owens signed a Limited Power of Attorney for Paddy to act on this property. (Depo. of Owens, Exhibit 5, R. 418). Paddy informed Owens he would handle hiring an attorney and filing an answer for the lawsuit and take care of whatever we had to do. (Depo. of Paddy, R. p. 472, lines 23-25). Owens was not aware when he went to Paddy's daughter's law office to sign documents that he was obtaining a loan from Regions Bank. Owens is 79 years old, has a limited education and is a welder by trade. Owens had just given Paddy his life savings of \$100,000 and thus had complete trust in Paddy that he would handle the lawsuit. (Depo. of Owens, R. p. 368, lines 15-21).

**VIII. Other courts have allowed Defendants to answer in similar situations.**

Our courts look to the federal rules and those federal cases interpreting them for guidance. In *Clark v. Swain*, the United States District Court for the Western District of New York granted the Defendant's Motion to vacate an entry of default and allow him to answer the Complaint. *Clark v. Swain*, 08-CV0637(Sr) (W.D.N.Y. 2010). In *Clark*, the Defendant was an employee of a private firm working at a county correctional facility. The Plaintiff was an inmate of the facility and sued the Defendant claiming that he denied him appropriate medical care following an injury. The Defendant was served in July of 2009. Employees of the county advised him that the county would respond to the complaint on his behalf. In October of 2009, the county advised the Defendant that they were taking the position that the private firm he worked for was responsible for his defense. An employee at his firm assured him that the company's insurance would pay for his legal defense. The owner of the firm told him that the company would "take care of it."<sup>4</sup> In December of 2009 the Defendant learned that there had been an entry of default against him. The Defendant immediately sought his own attorney.

In granting the Defendant's motion the court stated that, "...it is clear that the entry of default should be vacated. Defendant's affidavit demonstrates that his failure to answer the complaint was not willful, but the result of misrepresentations by both the County of Erie and defendant's employer." *Id.* The Court also noted that the Defendant moved promptly to hire his own counsel once he became aware that the County and his employer were not providing for his defense.

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<sup>4</sup> Similar to what Paddy told Owens. (Depo. of Paddy, R. p. 472, lines 22-25).

In the instant case Owens was similarly misled by the representations of the Defendant Paddy. Owens was told that they would, "take care of it." (See Depo. of Owens, R. p. 395, line 1; Depo. of Paddy, R. p. 472, lines 22-25). Owens relied on that representation and had a right to rely based on the power of attorney. And once he discovered that it had not been taken care of, he hired an attorney.

In *Allstate v. Hopfer*, the United States District Court for the Eastern District of the Pennsylvania granted the Defendants' motions to set aside an entry of default. *Allstate Ins. Co. v. Hopfer*, Civil Action No. 08-4549 (E.D. Pa. 2009). In that case the Defendants were initially sued in Pennsylvania state court for a wrongful death action. The Defendants were represented by legal counsel in the state court action. Allstate Insurance Company filed in federal court seeking a declaratory judgment that they had no duty to defend based on the inapplicability of their homeowner's insurance policy to the wrongful death action. The Defendants' attorney in their state court action told them that he would "take care of the matter" and "not to worry". *Id.*

The Court in *Allstate* noted that the Defendants' reliance on their attorney's statements, "explains their failure to respond in a timely manner, and it weighs against a finding they willfully disregarded the rules. I am also persuaded by the fact that the defendants acted promptly once they learned (their attorney) had not responded to the complaint." *Id.*

In the instant case, Owens relied on the representations of his self-proclaimed "close friend" (See Depo. of Paddy, R. p. 516, lines 23-24). Paddy's misrepresentations explain why no answer was filed on Owens' behalf. Similarly, Mr. Owens acted promptly in hiring his attorneys when he discovered that he was not represented by Paddy's attorney.

**IX. Owens has a meritorious defense**

Owens is seeking to assert the Affirmative Defense of the lack of a contract between himself and the Plaintiff. He is also seeking two counterclaims against the Plaintiff. One for negligence and one for a violation of the Unfair Trade Practices Act.

Owens asserts that he never knowingly and willingly entered into a loan with the Plaintiff. (See Affidavit of William Owens, R. p.49). He also asserts that he has never been contacted by the Bank concerning the loan alleged in the Complaint. (Owens' Depo., R. p. 389, lines 5-6; R. p. 395, lines 12-19, Ex. 5, R. p. 418). To the best of his knowledge, Paddy used Owens' name in order to obtain a loan with the Plaintiff Bank without his consent. (Owens' Depo. Ex. 5, R. p.418)

Owens alleges in his proposed counterclaims that the Plaintiff Bank was negligent and violated the Unfair Trade Practices Act when it loaned the money without ever investigating or contacting him about the default of the payments.

All of the above are issues of fact which must be decided by the trier of fact at a trial on the merits. The Court erred in refusing Owens to proceed with counterclaims which would allow full development of the case. (See *Dixon, supra*, 463 S.E.2d at 637 (Rule 55(c) is to be liberally construed to promote justice and dispose of cases on the merits.) Further, the promissory note in this case was signed by Paddy as attorney in fact for Williams Owens (Depo. of Owens, Ex. 7, R. p. 421). Also, the assignment of rents document was signed by Paddy as attorney in fact for Williams Owens, (Depo. of Owens, Ex. 8, R. p. 423). Thus, Owens had every reason to believe Paddy would defend him since he had given Paddy his power of attorney. Of course these documents raise issues of a meritorious defense against the Bank.

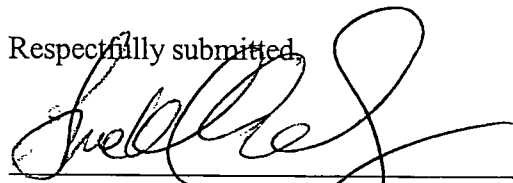
**X. The Plaintiff would not be prejudiced**

The Bank would not be prejudiced by having this case heard on the merits. The real property was sold at auction and the Plaintiff was the successful bidder. Further, Owens has always stated he did not own the property, he only invested his money. (R. p. 396, lines 15-19). Thus, at this point in the litigation there cannot be any prejudice since the Bank has obtained the real estate which was the collateral for the loan. Finally, there was no entry of default or order of default in this case, only a technical default and a request for a late Answer.

**CONCLUSION**

The Appellant asserts that the trial court erroneously applied SCRCP 55 when there was no entry of default by either the Clerk of Court or Order of Default signed by the Circuit Court. Further, if this Court holds that SCRCP 55 applies when an Affidavit of Default has been signed by Plaintiff's counsel, then Appellant would show that the good cause standard has been met. Under either, Appellant's request for a motion to allow late answer or under SCRCP 55; the Court should liberally overturn technical defaults and allow late answers to promote fair dispositions of cases.

Respectfully submitted,



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December 30, 2011.

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

James O. Spence, Master in Equity, Lexington County

---

CASE NO. 2009-CP-32-5373

---

Regions Bank .....Plaintiff

vs.

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

OF WHOM:

William S. Owens is .....Appellant  
and

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

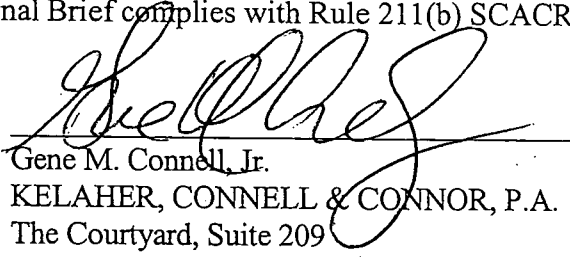
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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief complies with Rule 211(b) SCACR.

December 30, 2011

  
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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

James O. Spence, Master in Equity, Lexington County

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CASE NO. 2009-CP-32-5373

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Regions Bank .....Plaintiff

vs.

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OF WHOM:

William S. Owens is.....Appellant  
and

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

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PROOF OF SERVICE

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PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Final Brief of Appellant** on the Respondents, through their attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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DATE OF MAILING: December 30, 2011

Shelia Y. McCumbee  
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SWORN AND SUBSCRIBED before me,  
this 30<sup>th</sup> day of December, 2011.

Marie P. Freeman  
Notary Public for South Carolina  
My Commission Expires: 6/24/14

**STATE OF SOUTH CAROLINA  
IN THE  
COURT OF APPEALS**

---

Appeal from the Court of Common Pleas  
For Lexington County  
Honorable James O. Spence, Master in Equity  
Civil Action No.: 2009-CP-32-5373

---

Regions Bank,

Plaintiff,

v.

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

Defendants,

Of Whom William S. Owens is the

Appellant,

And Regions Bank; Roland G. Paddy; and Greer State  
Bank are the

Respondents.

---

**FINAL BRIEF OF THE RESPONDENT,  
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---

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## I. STATEMENT OF ISSUES ON APPEAL

- A. Did The Circuit Court Properly Deny The Appellant's Motion To Set Aside Entry Of Default, Leave To File An Answer, And For A Continuance?
- B. Did The Appellant Demonstrate "Good Cause" As Required By Rule 55(c) Of The South Carolina Rules Of Civil Procedure?
- C. Did The Circuit Court Properly Deny The Appellant's Motion For Reconsideration?

## II. STATEMENT OF THE CASE

The Respondent, Regions Bank, filed this mortgage foreclosure action on 1 December 2009. (R.p.1; R.p.23; R.pp.35-39; R.p.123, lines 5-9). The Appellant, William S. Owens ("Mr. Owens"), was personally served with a copy of the Summons and Complaint on 26 January 2010. (R.p.1; R.p.23; R.p.43; R.p.123, lines 8-11; R.p.393, line 21 – R.p.394, line 6; R.p.395, line 17 – R.p.396, line 11). Mr. Owens failed to answer or otherwise respond and, on 18 March 2010, Regions Bank sought an entry of default against him. (R.p.1; R.p.23; R.p.30; R.pp.44-45). The Circuit Court subsequently placed Mr. Owens in default<sup>1</sup> (R.p.1; R.p.20; R.p.23; R.pp.44-45) and referred the matter to the Master-In-Equity for final resolution. (R.pp.30-32). The Master-In-Equity scheduled a final hearing on the case for 19 July 2010. (R.p.23). Regions Bank notified Mr. Owens about the scheduled hearing by letter dated 22 June 2010. (R.p.23).

On 16 July 2010, Mr. Owens moved to set aside the default, for leave to file an answer, and for a continuance. (R.pp.23-24; R.pp.47048; R.p.49; R.pp.50-53). The Master-In-Equity held a hearing to consider Mr. Owens motion on 19 November 2010. (R.p.23; R.pp.120-161). He took the matter under advisement. (R.p.159, line 21 – R.p.160, line 24). By order dated 30 November 2010, and filed 1 December 2010,<sup>2</sup> the Master-In-Equity denied Mr. Owens' request and confirmed the entry of default against him. (R.pp.23-29).

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<sup>1</sup> Mr. Hostetler was also placed in default. (R.p.1).

<sup>2</sup> The Order states that it was filed on 1 January 2010, almost eleven months before it was issued. (R.p.23). Logically speaking, either the filed stamped date on the order

Mr. Owens then moved for reconsideration. (R.p.18; R.pp.111-119; R.p.165, line 21 – R.p.166, line 2). The Master-In-Equity initially considered the motion on 3 December 2010, and verbally denied it. (R.p.165, line 21 – R.p.167, line 4; R.p.231, line 19 – R.p.232, line 8). The Master-in-Equity again considered the motion on 4 March 2011 (R.p.23; R.p.266, line 1 – R.p.292, line 21), again verbally denied it (R.p.290, line 20 – R.p.291, line 14) and followed up with , a written order filed 11 March 2011, confirming that Mr. Owens was not entitled to any relief. (R.pp.18-22).

This appeal followed.<sup>3</sup>

### **III. STATEMENT OF THE FACTS**

#### **A. The Foreclosure Action**

On 24 June 2005, Regions Bank loaned Mr. Owens and the Defendants, Roland G. Paddy (“Mr. Paddy”), and David S. Hostetler (“Mr. Hostetler”), \$700,000.00 to purchase certain real property located in Lexington County, South Carolina and consisting of approximately 100 acres (the “Lexington County Property”). (R.pp.35-36, paras. 6, 8; R.p.129, p.10, lines 10-22). Mr. Owens and the others all contemporaneously executed a promissory note and mortgage to Regions Bank (R.p.36, paras. 9-10; R.pp.399-417; R.p.421-429). Thereafter, on

---

should have read “1 December 2010” or 1 January 2011”. Certainly the stated date of “1 January 2010” was incorrect.

<sup>3</sup> Prior to this appeal the Master-in-Equity conducted a hearing on the foreclosure action. (R.p.167, line 8 – R.p.231, line 17; R.p.292, line 24 – R.p.350, line 25). His final foreclosure and sale order was dated 11 April 2011, and filed 14 April 2011. (R.pp.1-17). Mr. Owens filed his Notice of Appeal thereafter.

31 March 2009, Mr. Owens and the others executed a second promissory and an assignment of rents to Regions Bank also covering the Lexington County Property. (R.pp.36-37, paras. 11-14; R.pp.399-417; R.p.421-429). Unfortunately, Messrs. Owens, Paddy, and Hostetler were unable to make the mortgage payments and the loan went into default. (R.p.38, paras. 15-16). They were afforded the opportunity to cure the default, but could not do so. (R.p.38, paras. 16-17). Regions Bank then filed this mortgage foreclosure action on 1 December 2009 (R.p.35), seeking to recover the outstanding debt of \$683,154.75, together with all collection costs and expenses, including reasonable attorneys' fees, as well as a deficiency judgment against all of the debtors. (R.pp.37-38, paas.18-21).<sup>4</sup>

#### **B. Challenge To The Service Of Pleadings**

Mr. Owens was served with the pleadings in the foreclosure action by process server – Timothy R. Hecker. (R.p.1; R.p.23; R.p.43; R.p.123, lines 8-11; R.p.393, line 21 – R.p.394, line 6; R.p.395, line 17 – R.p.396, line 11). He was personally served on 26 January 2010, at his business address – 808 Seaboard Street, Myrtle Beach, South Carolina.<sup>5</sup> (R.p.43). Based upon this service and

---

<sup>4</sup> Mr. Paddy timely filed and served his Answer on 15 January 2010. (R.p.42). Mr. Paddy admitted participating in the loan transaction and essentially admitted all of the material allegations except the amount of the outstanding loan and Regions Bank's entitlement to attorneys' fees, costs, etc. (R.pp.41-42). He did not assert any counterclaims or crossclaims. (R.pp.41-42).

<sup>5</sup> Mr. Owens is the proprietor of Owens Steel & Machine Works, Inc.. (R.p.365, lines 12-21). See generally <http://www.facebook.com/pages/Owens-Steel-Machine-Works-Inc/141912529182353>.

Mr. Owens' failure to respond, Mr. Owens was placed in default (R.p.1; R.p.18; R.p.23; R.p.30; R.p.43) and the case referred to the Master-In-Equity for final resolution. (R.pp.30-32).

Regions Bank advised Mr. Owens of the final foreclosure hearing by letter dated 22 June 2010. (R.p.23; R.pp.47-48; R.p.49; R.pp.50-53). Nevertheless, Mr. Owens waited until 16 July 2010 (three days before the hearing and months after being placed in default), before moving to set aside the default, for leave to answer, and for a continuance. (R.p.23; R.pp.47-48; R.p.49; R.pp.50-53).<sup>6</sup> In response to his default, Mr. Owens asserted that Mr. "Paddy induced [him] to not answer [the Summons and Complaint based upon the misrepresentation to Mr. Owens] that [Mr.] Paddy would answer on behalf of both of them." (R.p.47; R.p.49, para. 6; R.p.123, lines 8-23; R.p.388, line 23 – R.p.389, line 5; R.p.389, line 23 – R.p.390, line 4; R.p.394, line 15 – R.p.395, line 19). Mr. Paddy, however, "only submitted an answer [to the Summons and Complaint] for himself." (R.p.47; R.p.394, line 15 – R.p.395, line 7). Conversely, Mr. Paddy did not retain legal counsel to represent Mr. Hostetler, Mr. Owens, and himself even though the foreclosure covered all three of them, but simply to represent him in the action. (R.p.470, lines 8-16; R.p.472, line 20 – R.p.473, line 8).<sup>7</sup>

---

<sup>6</sup> Unlike Mr. Paddy's response (R.pp.41-42), Mr. Owens completely denied he participated in the loan transaction (R.pp.50-51, paras.6, 8-9), denied he signed the loan documents (R.p.51, paras.13-16), and alleged Regions Bank was negligent in processing the loan without his consent. (R.pp.51-52, paras.18-20). Mr. Owens also asserted a counterclaim for Regions Bank's alleged violation of the South Carolina Unfair Trade Practices Act, as codified in S.C. Code Ann. §§ 39-5-10, et. seq. (Thomson Reuters West 2010). (R.p.52, paras. 22-26).

<sup>7</sup> Mr. Paddy stated his lawyer, while representing him alone, certainly was keeping check regarding what was going on in the foreclosure action. (R.p.515, lines 21-25). He also noted

**C. Mr. Owens And The Regions Bank \$700,000.00 Loan**

In seeking to defeat Mr. Owens' attempt to set aside the entry of default, Regions Bank deposed Mr. Owens, Mr. Paddy, and the loan closing attorney - Michele Paddy Refosco ("Attorney Refosco"). (R.pp.24-25; R.pp.357-432; R.pp.433-540; R.pp.541-610). Interesting, Mr. Owens' recollections differed somewhat from those of Mr. Paddy and Attorney Refosco on many of the material issues.

**1. Mr. Owens' Recollections**

Mr. Owens and Mr. Paddy were acquaintances who often ate lunch together on Saturday afternoons. (R.p.366, line 23 – R.p.367, line 6). On one of those occasions, Mr. Paddy indicated "he might have something coming up and if [Mr. Owens] had a little extra money, [he] might want [to] invest in the [deal]." (R.p.367, lines 6-10). Later on, Mr. Paddy contacted Mr. Owens seeking to have Mr. Owens invest \$100,000.00 in the "deal" which Mr. Owens understood to involve the Lexington County Property. (R.p.367, line 10 – R.p.368, line 20).<sup>8</sup> Mr. Owens recalled Mr. Paddy and he discussed the "deal" for several months (R.p.373, lines 7-20) before Mr. Owens gave Mr. Paddy the \$100,000.00 to invest. (R.p.369, lines 12-17; R.p.370, line 16 – R.p.371, line 22; R.p.372, lines

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that since he and Mr. Owens were close friends, he (Mr. Paddy) "was looking out for him (Mr. Owens) and myself." (R.p.516, line 21 – R.p.517, line 3).

<sup>8</sup> Mr. Owens was not really sure what Mr. Paddy was going to do with the Lexington County Property, but understood he was likely going to sell it to a water bottling company. (R.p.368, line 21 – R.p.369, line 1). There was no contractual agreement or partnership agreement between them. (R.p.369, lines 9-11). Mr. Owens stated he and Mr. Paddy discussed this "deal" for several months. (R.p.373, p.17, lines 7-20).

19-23; R.pp.430-431; R.p.507, line 14 – R.p.508, line 17). Mr. Owens denied knowing the money he invested was to be used to purchase the Lexington County Property. (R.p.372, line 19 – R.p.373, line 6).<sup>9</sup>

Mr. Owens believed Mr. “Paddy [had] used [Mr. Owens’] name in order to obtain a loan with [Regions Bank] without [Mr. Owens’] consent. (R.p.49, para. 7). Mr. Owens also said he “never knowingly and willingly entered into the loan with Plaintiff” (R.p.24; R.p.49, para. 2) and he had “never been contacted by [Regions Bank] concerning the loan [which] is the subject of [the foreclosure action].” (R.p.24; R.p.49, para. 5). Moreover, in his proposed Answer to the Complaint, Mr. Owens “denie[d] being a borrower of [the \$700,000.00 Regions Bank] loan . . .” (R.p.24; R.pp.50-51, paras. 8-9; R.p.374, line 13 – R.p.375, line 1; R.p.375, line 24 – R.p.377, line 11; R.p.378, line 21 – R.p.379, line 13; R.p.380, line 15 – R.p.382, line 12; R.pp.399-417; R.pp.421-429), as well as, denied signing the “loan contract,” or alternatively, “denie[d] knowingly [entering] into a loan contract with [Regions Bank].” (R.p.24; R.p.51, para. 14; R.p.374, line 13 – R.p.375, line 1; R.p.375, line 24 – R.p.377, line 11; R.p.378, line 21 – R.p.379, line 13;

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<sup>9</sup> Mr. Owens has never seen the Lexington County Property and does not know the property’s address. (R.p.366, lines 10-22; R.p.373, lines 21-22). Nevertheless, apparently Mr. Paddy “assured” Mr. Owens he would obtain a significant return on his investment. (R.p.368, lines 10-20; R.p.372, line 24 – R.p.373, line 6). Unfortunately, as the “economy started going downhill” (R.p.384, lines 10-11), Mr. Owens’ promised substantial return on investment (“ROI”) periodically decreased at time passed from “about [300,000.00] . . . to, like, [200,000.00]” and ultimately, by May 2007, down to \$160,000.00. (R.p.384, line 5 – R.p.387, line 9). Mr. Paddy stated he met with Mr. Owens on a weekly basis – sometime with good news and sometimes with bad news depending on the then-prospects of selling the Lexington County Property. (R.p.466, line 12 – R.p.467, line 4).

R.p.380, line 15 – R.p.382, line 12; R.pp.399-417; R.pp.421-429).<sup>10</sup> Finally, Mr. Owens alleged Regions Bank ostensibly breached some unspecified standard of care by allegedly failing to “investigate or contact [him] to determine if [he] had any intention to participate in the loan.” (R.p.24; R.p.52; R.p.390, lines 14-25).

Notwithstanding the documentary evidence, Mr. Owens strongly denied any involvement in either the Regions Bank or Greer State Bank loan transactions. (R.p.373, line 23 – R.p.374, line 10; R.p.374, line 13 – R.p.375, line 1; R.p.375, lines 9-12; R.p.375, line 24 – R.p.377, line 11; R.p.378, line 18 – R.p.379, line 13; R.p.380, line 15 – R.p.382, line 12). In addition, Mr. Owens further denied:

- (a) knowing the location or address of the Lexington County Property, or being an owner of the Lexington County Property, or purchasing the Lexington County Property, or agreeing to participate in any financing for the Lexington County Property, or owing any money to any financial institution related to the Lexington County Property. (R.p.366, lines 10-22; R.p.372, line 19 – R.p.373, line 6; R.p.373, lines 21-22; R.p.375, lines 20-23; R.p.382, line 13 – R.p.383, line 23; R.p.389, lines 14-22; R.p.395, lines 14-16; R.p.396, lines 12-20);
- (b) any knowledge of, ever seeing, reviewing, and/or of signing the deed in which D&E of Myrtle Beach<sup>11</sup> sold the Lexington County Property to Mr. Paddy, Mr. Hostetler, and himself. (R.p.373, line 23 – R.p.374, line 10; R.pp.410-417);
- (c) any knowledge of D&E of Myrtle Beach. (R.p.374, lines 11-12);

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<sup>10</sup> Mr. Paddy said Mr. Owens, once he was served with the foreclosure action, never expressed any concern about allegedly being “listed on bank documents or included in a foreclosure that he had no notice of.” (R.p.475, lines 5-8).

<sup>11</sup> Mr. Hostetler owned D&E of Myrtle Beach. (R.p.549, lines 20-24; R.p.577, lines 16-24).

- (d) ever discussing any type of loan transaction with any Regions Bank representative concerning the Lexington County Property. (R.p.375, lines 6-8; R.p.384, lines 2-4),
- (e) any knowledge that either Mr. Paddy and/or Mr. Hostetler were going to take out a loan to purchase the Lexington County Property from Regions Bank or any other financial institution. (R.p.375, lines 2-5; R.p.375, lines 20-23; R.p.382, lines 6-17);
- (f) ever going to Attorney Refusco's office or any attorneys' office to sign any documents either in June 2005, or in May 2007, relating to the Lexington County Property or his \$100,000.00 investment with Mr. Paddy. (R.p.375, lines 6-8; R.p.378, lines 9-13; R.p.383, lines 19-23; R.p.384, lines 2-4),
- (g) ever seeking, reviewing, and/or signing/executing any loan transaction documents concerning the Lexington County Property with any financial institution. (R.p.373, line 23 – R.p.374, line 10; R.p.374, line 13 – R.p.375, line 1; R.p.375, lines 9-12; R.p.375, line 24 – R.p.377, line 11; R.p.378, line 18 – R.p.379, line 13; R.p.380, line 15 – R.p.382, line 12; R.p.389, lines 14-17; R.pp.399-429);
- (h) ever giving anyone, including Mr. Paddy, permission or authority to sign/execute any loan transaction documents concerning the Lexington County Property. (R.p.373, line 23 – R.p.374, line 10; R.p.374, line 13 – R.p.375, line 1; R.p.375, lines 9-12; R.p.375, line 24 – R.p.377, line 11; R.p.378, line 18 – R.p.379, line 13; R.p.380, line 15 – R.p.382, line 12; R.p.389, lines 14-17; R.pp.399-429);
- (i) ever discussing with Messrs. Paddy and/or Hostetler the purchase of the Lexington County Property through use of a loan and mortgage from Regions Bank, Greer State Bank, or any other financial institution. (R.p.375, lines 20-23; R.p.382, lines 13-23);
- (j) ever knowing the existence of one or more loans on the Lexington County Property held by Regions Bank and/or any other financial institution. (R.p.378, lines 14-17; R.p.382, lines 13-23; R.pp.399-429);
- (k) ever seeing, reviewing, and/or signing/executing the Power of Attorney Revocation. (R.p.379, line 14 – R.p.380, line 3; R.p.380, lines 12-14; R.pp.419-420),

- (l) ever being an owner of the Lexington County Property in any manner or being involved in the financing of the Lexington County Property. (R.pp.382, line 24 – R.p.383, line 18),
- (m) ever seeing the Lexington County Property 2009 sales proposal and distribution calculations form. (R.p.388, lines 3-22; R.p.432),
- (n) having any knowledge of or signing the Power of Attorney Revocation.<sup>12</sup> (R.p.379, line 14 – R.p.380, line 5; R.p.418); and
- (o) claiming any interest whatsoever in the Lexington County Property. (R.p.389, lines 18-22).

On the other hand, the fairly extensive documentation<sup>13</sup> shows that

Messrs. Owens, Paddy, and Hostetler:

- (1) purchased the Lexington County Property from D&E of Myrtle Beach on 24 June 2005. (R.p.373, line 23 – R.p.374, line 12; R.pp.399-400; R.p.453, line 18 – R.p.454, line 21; R.p.463, lines 7-21; R.p.473, lines 9-21; R.p.547, line 20 – R.p.562, line 25),
- (2) signed the initial promissory note to Regions Bank on 24 June 2005. (R.p.374, line 13 – R.p.375, line 1; R.pp.401-402; R.p.453, p.21, line 18 – R.p.454, line 21; R.p.463, lines 7-21; R.p.473, lines 9-21; R.p.547, line 20 – R.p.562, line 25),
- (3) executed a mortgage and other documents to Regions Bank for the Lexington County Property on 24 June 2005. (R.p.375, line 24 – R.p.376, line 20; R.pp.403-409; R.p.453, line 18 – R.p.454, line 21; R.p.463, lines 7-21; R.p.473, lines 9-21; R.p.492, line 18 – R.p.493, line 6; R.p.547, line 20 – R.p.562, line 25), and

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<sup>12</sup> Mr. Owens subsequently admitted he signed the Revocation of Power of Attorney at his attorneys' insistence. (R.p.392, line 18 – R.p.393, line 16).

<sup>13</sup> Mr. Owens conceded that Regions Bank had the right to rely on the signatures set forth on the loan documents (R.p.391, lines 1-6) and admitted he had "signed a bunch of papers" which Mr. Paddy had brought to him at his (Mr. Owens') business while Mr. Owens was working. (R.p.391, p.35, lines 1-10). Moreover, Mr. Owens admitted since he was friends with Mr. Paddy, he simply signed the documents and "didn't read them." (R.p.391, p.35, lines 1-11).

- (4) executed a mortgage and other documents to Greer State Bank for the Lexington County Property on 21 November 2006. (R.p.376, line 21 – R.p.377, line 11; R.pp.410-417; R.p.453, line 18 – R.p.454, line 21; R.p.463, lines 7-21; R.p.473, lines 9-21; R.p.547, line 20 – R.p.562, line 25).

Mr. Owens does, however, admit he signed a Limited Power of Attorney<sup>14</sup> in favor of Mr. Paddy on or about 24 May 2007.<sup>15</sup> (R.p.377, lines 12-20; R.p.385, lines 21-25; R.p.418).<sup>16</sup> Nevertheless, Mr. Owens asserts that the Limited POA was solely for the purpose of allowing Mr. Paddy to pick up Mr. Owens' alleged \$200,000.00 share of the Lexington County Property's sale proceeds in Lexington County which would, in turn, save Mr. Owens having to leave work to do so. (R.p.377, line 21 – R.p.378, line 2; R.p.385, lines 7-25). Mr. Paddy told Mr. Owens the Lexington County Property was being sold to some "Brazilian purchasers". (R.p.386, lines 4-14). Mr. Owens did not, at the time, receive a

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<sup>14</sup> Mr. Owens did not read the Limited POA. (R.p.378; lines 3-8). Pursuant to the terms of the Limited POA, Mr. Owens authorized Mr. Paddy to "[e]xecute in [Mr. Owens'] name the HUD-1 Settlement Statement, Deed, Disbursement Authorizations, and any and all other closing documents in connection with the sale of [the Lexington County Property]." (R.p.418).

<sup>15</sup> Mr. Paddy did not disagree with Mr. Owens' characterization, but stated the Power of Attorney was also for the purpose of allowing him to make decisions related to the Lexington County Property and to sign documents associated with the land and its financing. (R.p.462, line 14 – R.p.463, line 6). He stated Mr. Owens understood why Mr. Paddy needed the Limited POA. (R.p.463, lines 9-21). Mr. Paddy also stated he told Mr. Owens about all of the transactions in which Mr. Paddy was signing some documents for Mr. Owens using the Limited POA. (R.p.463, line 7 – R.p.464, line 19; R.p.465, line 4 – R.p.466, line 20; R.p.473, line 15 – R.p.474, line 13). Moreover, Mr. Owens never told Mr. Paddy he was revoking the Limited POA. (R.p.464, lines 20-25).

<sup>16</sup> He states he did not go to an attorney's office to have the Limited POA witnessed. (R.p.378, lines 9-13). The Limited POA was ostensibly executed before Attorney Refosco in her capacity as a South Carolina Notary Public. (R.p.418).

check since Mr. Paddy said the Brazilians were, in essence. "reworking" the deal and further decreasing Mr. Owens' share of the proceeds. (R.p.386, p.30, lines 1-14).

Mr. Owens, however, conceded that Regions Bank had the right to rely on the signatures set forth on the loan documents (R.p.391, lines 1-6) and admitted he had "signed a bunch of papers" which Mr. Paddy had brought to him at Mr. Owens' steel business while Mr. Owens was working. (R.p.391, lines 1-10). Mr. Owens admitted since he was friends with Mr. Paddy, he simply signed the documents and "didn't read them." (R.p.391, lines 1-11).

## 2. Mr. Paddy's and Attorney Refosco's Recollections

### (a) Mr. Paddy's Recollections

Mr. Paddy<sup>17</sup> stated he first became involved with the Lexington County Property in 2004 when Mr. Hostetler approached him seeking investors. (R.p.439, line 17 – R.p.441, line 3; R.p.441, lines 20-24). Mr. Paddy, in late 2004, contacted Mr. Owens<sup>18</sup> and they put up \$200,000.00 to invest in the Lexington County Property – each investing \$100,000.00.<sup>19</sup> (R.p.441, line 20 – R.p.442, line 12; R.p.443, lines 18-20; R.pp.479, lines 1-16; R.p.507, line 14 –

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<sup>17</sup> Mr. Paddy, originally from Baltimore, Maryland, owns a construction/development company named Paddy-Son Development Company, Inc. (R.p.371, lines 12-16; R.p.438, line 15 – R.p.439, line 16).

<sup>18</sup> Mr. Paddy and Mr. Owens had been doing business together for many, many years, since approximately 1974. (R.p.442, lines 3-7; R.p.472, lines 20-25).

<sup>19</sup> Mr. Paddy characterized the investment as a loan to Mr. Hostetler "which was supposed to bring [Messrs. Paddy and Owens] \$200,000.00 apiece." (R.p.443, line 21 – R.p.444, line 1). Messrs. Paddy, Owens, and Hostetler entered into a Promissory Note securing the \$200,000.00 loan. (R.p.445, line 14 – R.p.446, line 14; R.pp.524-525; R.pp.528-529). Mr. Owens was admittedly a passive investor in the Lexington County Property. (R.p.480, line 15 – R.p.481, line 12).

R.p.508; R.p.513, lines 6-10).<sup>20</sup> With this \$200,000.00, together with the \$700,000.00 Regions Bank loan (R.pp.401-402; R.p.452, line 18 – R.p.453, line 21, line 17) and credit for some earlier payments, they all three purchased the Lexington County Property for \$1,020,000.00. (R.pp.399-400; R.p.448, line 4 – R.p.450, line 9).

Mr. Paddy recalled the loan closing taking place at Attorney Refosco's office, recalled signing the loan documents, recalled Mr. Owens attending, and recognized Mr. Owens' signature on the loan documents. (R.p.452, line 18 – R.p.454, line 21; R.p.463, lines 7-21; R.p.473, lines 9-21). He also recalled Attorney Refosco, as was her usual custom, explaining the contents of each of the loan transaction documents Messrs. Paddy, Owens, and Hostetler were preparing to sign. (R.pp.403-409; R.p.455, line 25 – R.p.458, line 7).

Once Mr. Paddy was served with the foreclosure action, he went to see Mr. Owens who, like Mr. Hostetler, had yet to be served. (R.p.474, lines 14-21; R.p.515, lines 4-20). Once Mr. Owens was served, Mr. Paddy noted he was understandably very upset with the situation since he was likely out his \$100,000.00 investment and possibly "on the hook" for any deficit on the mortgage. (R.p.474, line 22 – R.p.475, line 4).

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<sup>20</sup> Messrs. Owens and Paddy were originally supposed to only be investors in the Lexington County Property (R.p.450, lines 5-13). Nevertheless, after a transaction involving Mr. Hostetler and a third-party fell through, Messrs. Paddy and Owens "moved up" to hold ownership positions. (R.p.450, line 14 – R.p.451, line 6). Mr. Paddy discussed this changed position with Mr. Owens and he (Mr. Owens) seemed to understand he was going to be a part owners of the land and that they were obtaining financing from Regions Bank. (R.p.451, line 23 – R.p.452, line 13; R.p.455, lines 14-20).

Contrary to Mr. Owens' misconceptions and even though the foreclosure covered Mr. Hostetler, Mr. Owens and Mr. Paddy, he did not retain legal counsel to represent anyone but himself. (R.p.470, lines 8-16; R.p.472, line 20 – R.p.473, line 8). Mr. Paddy further stated his lawyer, while representing him alone, certainly was keeping check regarding what was going on in the foreclosure action. (R.p.515, lines 21-25). He also noted that since he and Mr. Owens were close friends, he (Mr. Paddy) "was looking out for him (Mr. Owens) and myself." (R.p.516, line 21 – R.p.517, line 3).

**(b) Attorney Refosco's Recollections**

Attorney Refosco<sup>21</sup> is a sole practitioner real estate/transactional lawyer who has been practicing in the Myrtle Beach area since 2003. (R.p.546, line 14 – R.p.547, line 11). She was the closing attorney for all of the real estate loan transactions involving the Lexington County Property. (R.p.547, line 20 – R.p.562, line 25). Attorney Refosco stated the real estate transactions transferred the Lexington County Property from D&E of Myrtle Beach to Messrs. Paddy, Owens, and Hostetler. (R.p.548, line 13 – R.p.550, line 4; R.p.551, lines 2-9). Moreover, she stated that Messrs. Paddy, Owens, and Hostetler all signed the loan transaction documents in her presence while in her law office<sup>22</sup> (R.p.554, line 3 – R.p.559, line 2; R.p.559, line 15 – R.p.562, line 5; R.p.570,

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<sup>21</sup> Attorney Refosco is Mr. Paddy's daughter. (R.p.547, lines 17-19).

<sup>22</sup> Attorney Refosco stated she was very familiar with Mr. Owens and had met him many times. (R.p.563, lines 6-20). She had worked for her father in his construction business and Paddy-Son Development used Mr. Owens' steel company almost exclusively. (R.p.573, lines 10-21). Mr. Paddy concurred. (R.p.442, lines 3-7)

lines 4-21) and Mr. Owens came to her office at least twice regarding the Lexington County Property real estate transaction<sup>23</sup> (R.p.573, line 20 – R.p.574, line 1) for the sole purpose of signing the loan documents. (R.p.574, lines 8-21).<sup>24</sup>

#### **IV. ARGUMENT AND CITATION OF AUTHORITY**

##### **A. The Master-In-Equity Properly Applied The Rule 55, SCRCivP “Good Cause” Standard To Mr. Owens’ Motion To Set Aside Entry Of Default**<sup>25</sup>

Mr. Owens argues that the Master-In-Equity improperly used the Rule 55, SCRCP, standard of “good cause” when considering Mr. Owens’ Motion to Set Aside Entry of Default since “there was no entry of default under [Rule 55, SCRCP]. (*Appellant’s Brief*, p.1). Mr. Owens misinterprets the law and his argument should be dismissed as meritless.

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<sup>23</sup> Attorney Refosco notarized some of the documents and she would not have done that had the signatory and/or signatories, including Mr. Owens, not been there at the time of signing. (R.p.557, lines 12-24; R.p.559, line 20 – R.p.560, line 7). In addition, Attorney Refosco’s assistant and an attorney sharing space with her witnessed some of the documents. (R.p.492, line 18 – R.p.493, line 6; R.p.557, lines 12-24; R.p.559, line 20 – R.p.560, line 7; R.p.570, lines 13-21).

<sup>24</sup> Attorney Refosco noted her father – Mr. Paddy – signed a number of documents for Mr. Owens pursuant to the Power of Attorney he held from Mr. Owens. (R.p.561, line 25 – R.p.562, line 25).

<sup>25</sup> This argument does not appear to have been preserved for review and this Court of Appeals should not consider it as Mr. Owens (a) has first raised this issue on appeal, (b) failed to timely raise it before the Master-in-Equity and have the Master-in-Equity rule on this issue, and (c) did not argue the issue in a Rule 59(e), SCRCP, motion. See generally Atlantic Coast Builders & Contractors, LLC v. Lewis, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (2011) (2011 WL 4444173 \*2, filed 26 September 2011); Sullivan v. Hawker Beechcraft Corp., \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (Ct.App. 2011) (2011 WL 4444085 \*4, filed 21 September 2011); Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 171, 714 S.E.2d 869, 878 (2011); Elam v. South Carolina Department of Transportation, 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004).

As this Court of Appeals is aware, after Mr. Owens was served with the foreclosure action pleadings and failed to answer or otherwise respond, Regions Bank sought an entry of default. (R.pp.44-45). The South Carolina Rules of Civil Procedure provide, in pertinent part, that “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book).”<sup>26</sup> Contrary to Mr. Owens’ arguments, the fact a clerk of court has failed to affirmatively enter the default on the court record does not constitute grounds for granting the defaulting party relief from default.

This Court of Appeals, in Thynes v. Lloyd,<sup>27</sup> considered this very issue, noting “[i]t does not appear that the clerk actually entered default in the instant case. However, whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit of Mrs. Thynes.”<sup>28</sup> Our Supreme Court has defined the term “ministerial act” as an “act or duty . . . which a person performs because of a legal mandate which is

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<sup>26</sup> See Rule 55(a), SCRCP. See generally Stark Truss Co. v. Superior Construction Co., 360 S.C. 503, 508-509, 602 S.E.2d 99, 102 (Ct.App. 2004) (citing Thynes v. Lloyd, 294 S.C. 152, 153-154, 363 S.E.2d 122, 123 (Ct.App. 1997)).

<sup>27</sup> Thynes v. Lloyd, 294 S.C. 152, 363 S.E.2d 122.

<sup>28</sup> Thynes v. Lloyd, 294 S.C. 152, 153-154, 363 S.E.2d 122, 123. This proposition was later followed in Stark Truss Co. v. Superior Construction Co., 360 S.C. 503, 508-509, 602 S.E.2d 99, 102.

defined with such precision as to leave nothing to the exercise of discretion.”<sup>29</sup> Furthermore, the Supreme Court has noted that a “duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts [or] if [the act] is defined by law with such precision as to leave nothing to the exercise of discretion.”<sup>30</sup>

Whether the clerk of court in Stark Truss Co. or Thynes or the Lexington County Clerk of Court in this case actually made an entry of default in the court record against the party in default is really of no matter. Effectively, once a claimant demonstrates, by affidavit or otherwise that a party is in default, that party has an entry of default against it as a matter of law. Consequently, once Regions Bank demonstrated Mr. Owens was in default through the Affidavit of Default, there was an entry of default against him - regardless of any affirmative action by the clerk of court.

Mr. Owens position is without merit and should be dismissed in all respects.

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<sup>29</sup> Edwards v. State, 383 S.C. 82, 96, 678 S.E.2d 412, 419 (2009) (citing Wilson v. Preston, 378 S.C. 348, 354, 662 S.E.2d 580, 583 (2008)).

<sup>30</sup> Wilson v. Preston, 378 S.C. 348, 354, 662 S.E.2d 580, 583 (citing Redmond v. Richland County School District No. Four, 314 S.C. 431, 445 S.E.2d 441 1973)).

**B. The Master-In-Equity Correctly Denied Mr. Owens' Motion To Set Aside Entry Of Default As He Had Not Demonstrated The Required Element Of "Good Cause"**

The Master-in-Equity could only have set aside the entry of default against Mr. Owens' if he believed Mr. Owens had demonstrated "good cause" by "put[ting] forth 'an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.'" <sup>31</sup> Furthermore, "[w]hat constitutes a satisfactory explanation that serves the interests of justice remains within the sound discretion of the trial court."<sup>32</sup>

No one disputes Mr. Owens was served with the Summons and Complaint. (R.p.389, line 23 – R.p.390, line 10; R.p.393, line 21 – R.p.394, line 6). He admits as much in his brief. (*Appellant's Brief*, p.5). Once served, however, Mr. Owens asserts he immediately telephoned Mr. Paddy who came over to Mr. Owen's shop to discuss the situation. (R.p.388, line 23 – R.p.389, line 7). Mr. Owen's gave Mr. Paddy the documents and "understood" (*i.e.*; assumed) Mr. Paddy and Mr. Paddy's attorney would take care of them. (R.p.388, line 23 – R.p.389, line 7). Mr. Paddy, on the other hand, disputes this characterization, noting, even though the foreclosure covered Mr. Hostetler, Mr.

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<sup>31</sup> See *Limehouse v. Hulsey*, \_\_\_ S.C. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (Ct.App 2011) (2011 WL 2447100 \*7, filed 16 June 2011) (*quoting Sundown Operating Co. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009)). See generally *New Hampshire Insurance Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct.App.1993) (noting that the reason for the defaulting party's failure to act is relevant in analyzing Rule 55(c), SCRCivP, cases).

<sup>32</sup> See *Limehouse v. Hulsey*, \_\_\_ S.C. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (2011 WL 2447100 \*8).

Owens and himself, his lawyer did not represent anyone but him. (R.p.478, lines 8-16; R.p.472, line 20 – R.p.473, line 8). Mr. Paddy also noted that since he and Mr. Owens were close friends, he “was looking out for him (Mr. Owens) and myself” (R.p.516, line 21 – R.p.517, line 3), but thought he (Mr. Owens) would take the appropriate steps to protect himself in the litigation. (R.p.472, line 20 – R.p.473, line 8).

Rule 55(c), SCRCivP, establishes the standard for determining whether a trial court should set aside an entry of default noting that “for good cause shown the court may set aside an entry of default . . . .”<sup>33</sup> “[A] plain reading of Rule 55(a)[, SCRCivP,] allows entry of default when a pleading or defense is asserted in a manner noncompliant with the [South Carolina]Rules of Civil Procedure.”<sup>34</sup> Moreover, a “holding to the contrary would render the requirements of Rule 12(a)[, SCRCivP,] irrelevant.”<sup>35</sup>

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<sup>33</sup> Rule 55(c), SCRCivP.

<sup>34</sup> Stark Truss Co., Inc. v. Superior Construction Corp., 360 S.C. 503, 509, 602 S.E.2d 99, 102.

<sup>35</sup> Stark Truss Co., Inc. v. Superior Construction Corp., 360 S.C. 503, 509, 602 S.E.2d 99, 102.

**1. Mr. Owens Failed To Demonstrate “Good Cause” For Not Responding To The Complaint And, Therefore, Did Not Meet Rule 55(c), SCRCivP’s, Standard For Relief**

The Master-in-Equity properly concluded Mr. Owens, without any “good cause”,<sup>36</sup> failed to timely answer or otherwise respond to the foreclosure action Complaint and, in turn, was not entitled to any relief. The Master-in-Equity’s decision should be affirmed.

Mr. Owens supported his Motion to Set Aside Entry of Default with his affidavit and certain of his deposition testimony. (R.pp.47-48; R.p.49). He sought to use both the affidavit and the deposition testimony to somehow “explain” his failure to respond to the Complaint. Mr. Owens “justifies” his lack of response by asserting he “understood” Mr. Paddy was going to have his attorney put in a response to the foreclosure action for both he and Mr. Owens. (R.p.49, para. 6; R.p.388, line 23 – R.p.389, line 7). Conversely, Mr. Paddy disputes Mr. Owens’ position, noting, while the foreclosure covered Mr. Hostetler, Mr. Owens and himself, his lawyer did not represent anyone but him. (R.p.470, lines 8-16; R.p.472, line 20 – R.p.473, line 8).

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**36** Mr. Owens asserts the Master-in-Equity used an incorrect review standard (*i.e.* “excusable neglect”) in concluding Mr. Owens was not entitled to any relief. (Appellant’s Brief, pp.6-7). He cites certain statements the Master-in-Equity made during the 4 March 2011, hearing (Appellant’s Brief, pp.6-7) and was his “third bite at the apple” for the same motion. Mr. Owens’ ignores the fact his own attorney “planted the seed” of “excusable neglect” to the Circuit Court. (R.p.124, lines 7-20). Mr. Owens also ignores the fact the Master-in-Equity discussed application of the “good cause” standard in the hearing to address the Motion to Set Aside Entry of Default. (R.p.156, line 21 – R.p.158, line 13). Furthermore, as Mr. Owens’ conceded (Appellant’s Brief, p.7), the Master-in-Equity’s written decision clearly was based upon the “good cause” standard. (R.pp.25-27; R.p.122, line 21 – R.p.123, line 4). That is one of the orders which Mr. Owens appealed. Mr. Owens’ argument is without merit.

Based on this unilaterally assumed reliance, Mr. Owens **did not** retain legal counsel in order to protect his interests, **did not** file a pro se answer or other response to the Complaint in order to protect his interests, and **did not** check with either Mr. Paddy or Mr. Paddy's attorney or, apparently, anyone to see if an answer had been filed on Mr. Owens' behalf in order to protect his interests.<sup>37</sup> Mr. Owens did not allege or present any evidence showing he contacted either Mr. Paddy or Mr. Paddy's attorney to confirm the attorney would file a joint response to the foreclosure action for both Mr. Paddy and Mr. Owens. Additionally, Mr. Owens did not present any evidence showing why Mr. Paddy or his attorney failed to include Mr. Owens in the response to the Complaint.

Furthermore, based on the interpretation of some of Mr. Paddy's testimony,<sup>38</sup> Court of Appeals may assume Mr. Paddy was rather "equivocal" regarding his alleged "agreement" with Mr. Owens for his attorney to represent both Mr. Owens and him. Nevertheless, given the facts and circumstances of this case,

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<sup>37</sup> See Goodson v. American Bankers Insurance Co. of Florida, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct.App. 1988) (citing Harry M. Lightsey, Jr. and James Flanagan, South Carolina Civil Procedure, 400 (2nd Ed.1985); McCall v. A-T-O, Inc., 276 S.C. 143, 276 S.E.2d 529 (1981)). ("[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney.").

<sup>38</sup> Mr. Paddy stated since he and Mr. Owens were close friends, he (Mr. Paddy) "was looking out for him (Mr. Owens) and myself" (R.p.516, line 21 – R.p.517, line 3). In addition, Mr. Paddy stated he "told Mr. Owens that [he] hired a lawyer in [Columbia] to take care of whatever we had to do on this foreclosure and to keep [him (Mr. Paddy)] abreast of what was going on." (R.p.472, line 20 – R.p.473, line 1). He also stated that he "hired [legal counsel] to keep track of the foreclosure to give us time. And, of course, the foreclosure [involved] all three of us. [He] was just hiring [legal counsel] for [his]self, but it covered all three of us anyway. A foreclosure is a foreclosure, anyway; you know, it had to be only the three of us." (R.p.470, lines 8-16).

as well as, the significant negative consequences of a party not responding to judicial process, it was not prudent or reasonable for Mr. Owens to sit back, do absolutely nothing (including following up), and simply assume Mr. Paddy would take care of responding for him.<sup>39</sup>

As the Master-in-Equity properly concluded (R.pp.26-27), Mr. Owens' mistaken and unreasonable belief that Mr. Paddy - a fellow defendant - would answer on his behalf does not rise to or meet Rule 55(c), SCRCivP's, "good cause" standard. This Court of Appeals, in Pilgrim v. Miller,<sup>40</sup> stated:

The courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant. In this case, Allstate's failure to answer the complaint is imputed to Miller. Accordingly, because no explanation was offered for

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<sup>39</sup> As noted previously, Mr. Paddy's response to the foreclosure action was direct and straightforward. (R.pp.41-42). He admitted participating in the loan transaction and essentially admitted all of the material allegations except the amount of the outstanding loan and Regions Bank's entitlement to attorneys' fees, costs, etc. (R.pp.41-42). He did not assert any counterclaims or crossclaims. (R.pp.41-42). On the other hand, Mr. Owens completely denied he participated in the loan transaction (R.pp.50-51, paras.6, 8-9), denied he signed the loan documents (R.p.51, paras.13-16), and alleged Regions Bank was negligent in processing the loan without his consent. (R.pp.51-20, paras.18-20). Mr. Owens also asserted a UTPA counterclaim against Regions Bank. (R.p.52, paras. 22-26). As Mr. Paddy's attorney noted at the hearing to consider Mr. Owens' Motion to Set Aside Default, "Mr. Owens is alleging a defense [to the foreclosure action] completely different than Mr. Paddy's defense, so I don't understand exactly how one attorney would be able to represent [the] both of them anyway . . ." (R.p.128, lines 5-9). Importantly, Mr. Owens "defense" to Regions Bank's claims necessarily involved allegations that Mr. Paddy conned and/or tricked him into the loan transaction. Consequently, Mr. Paddy's and Mr. Owens' positions and defenses were diametrically opposed. Mr. Paddy's attorney could not have represented both Mr. Paddy and Mr. Owens as there was an inherent and unavoidable conflict in the representation.

<sup>40</sup> Pilgrim v. Miller, 350 S.C. 637, 567 S.E.2d 527 (Ct.App. 2002), *opinion vacated on certiorari* (2003). See Bage, LLC v. Southeastern Roofing Co. of Spartanburg, Inc., 383 S.C. 489, 490, 681 S.E.2d 867, 867 (2009). All references to Pilgrim v. Miller are for illustrative purposes.

Allstate's failure to respond to the complaint, we find no abuse of discretion here and affirm the trial court's refusal to set aside the default.<sup>41</sup>

Mr. Owen's misplaced and unreasonable reliance<sup>42</sup> his fellow defendant – Mr. Paddy – is far worse than a litigant's reliance on his or her own attorney or insurer as constituting grounds for relief from an entry of default. This Court of Appeals soundly rejected reliance on an insurer, concluding an insurance company, once given a copy of a Summons and Complaint "had an obligation to act diligently, [and] an obligation to take up th[e] matter."<sup>43</sup> Likewise, this Court of Appeals has rejected a litigant's reliance on his or her own attorney as grounds for granting relief from default.<sup>44</sup>

Like the *Pilgrim* defendant, Mr. Owens failed to offer any reasonable no explanation for his failure to answer the foreclosure complaint other than his "reliance", albeit completely unreasonable, on Mr. Paddy to handle the situation.

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<sup>41</sup> *Pilgrim v. Miller*, 350 S.C. 637, 642, 567 S.E.2d 527, 529 (quoting *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct.App. 1997); and citing *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App. 1994); *Ledford v. Pennsylvania Life Insurance Co.*, 267 S.C. 671, 230 S.E.2d 900 (1976)). (Emphasis added).

<sup>42</sup> As noted, Mr. Paddy's attorney would have had an unavoidable inherent conflict if he was representing both Mr. Paddy and Mr. Owens due to their completely divergent defenses to the foreclosure action.

<sup>43</sup> *Pilgrim v. Miller*, 350 S.C. 637, 641, 567 S.E.2d 527, 529. See also *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281.

<sup>44</sup> *Ledford v. Pennsylvania Life Insurance Co.*, 267 S.C. 671, 675-676, 230 S.E.2d 900, 902. See also *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281; *Paul Davis Systems, Inc. v. Deepwater of Hilton Head, LLC*, 362 S.C. 220, 225-227, 607 S.E.2d 358, 361 (Ct.App. 2004) (using Rule 60(b), *SCRCivP*, "excusable neglect" standard); *Greenville Income Partners v. Holman*, 308 S.C. 105, 107, 417 S.E.2d 107, 108 (Ct.App.1992) (same); *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 163-64, 375 S.E.2d 321, 323 (Ct.App.1988) ("[N]eglect of the attorney is the neglect of the client, and . . . no mistake, inadvertence[,] or neglect attributable to an attorney can be successfully used as a ground for relief unless it would have been excusable if attributable to the client.").

As such, this Court of Appeals should affirm the Master-in-Equity's decision to uphold the entry of default. If reliance on one's own attorney and/or one's own liability insurance company is insufficient to show "good cause," then Mr. Owens' unreasonable reliance on another co-defendant (Mr. Paddy) and Mr. Paddy's attorney is, at worst, equally insufficient.

This Court of Appeals decision in Stark Truss Co., Inc. v. Superior Construction Corp.,<sup>45</sup> is instructive. In Stark Truss, the plaintiff sued two defendants for, in essence, breach of contract. After the first defendant was served it gave the pleadings to the second defendant, "apparently intending for [the second defendant] to answer on its behalf."<sup>46</sup> When neither defendant answered the Complaint, the plaintiff filed an affidavit of default and the clerk entered default against them both.<sup>47</sup> The only explanation offered by defaulting defendants' attorneys was that the second defendant's "president was 'struggling with some depression and a lot of things slipped through his fingers.'"<sup>48</sup> This Court of Appeals upheld the entry of default concluding the defendants did not meet the Rule 55(c), SCRCivP, "good cause" standard since they did not have a

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<sup>45</sup> Stark Truss Co., Inc. v. Superior Construction Corp., 360 S.C. 503, 602 S.E.2d 99.

<sup>46</sup> Stark Truss Co., Inc. v. Superior Construction Corp., 360 S.C. 503, 506, 602 S.E.2d 99, 101.

<sup>47</sup> Stark Truss Co., Inc. v. Superior Construction Corp., 360 S.C. 503, 506-507, 602 S.E.2d 99, 101.

<sup>48</sup> Stark Truss Co., Inc. v. Superior Construction Corp., 360 S.C. 503, 507, 602 S.E.2d 99, 101.

reasonable explanation for failing to file an answer in compliance with Rule 12(a), SCRCivP.<sup>49</sup> Similarly here, Mr. Owens has not offered either a good or a reasonable explanation for failing to timely answer the Complaint.

Furthermore, in Dixon v. Besco Engineering, Inc.,<sup>50</sup> this Court of Appeals addressed a situation where the defendant's employee received the summons and complaint and then forwarded it to the defendant's Florida counsel who, in turn, obtained a 15-day extension in which to respond.<sup>51</sup> Florida counsel then advised the defendant's employee to retain South Carolina counsel, but the employee failed to timely do so, mistakenly believing he had an unlimited extension of time within which to retain counsel and answer the Complaint.<sup>52</sup> Unfortunately, no response for the employee was submitted until some seven months after the extension had expired.<sup>53</sup> This Court of Appeals summarily "reviewed the record and agree[d] with the [trial] judge that [the defendants] failed to establish entitlement to relief under Rule 55(c)[, SCRCivP]."<sup>54</sup>

Similarly, in this case, Mr. Owens failed to establish entitlement to any relief from the entry of default under Rule 55(c), SCRCivP. The Master-in-Equity's decision should be affirmed in all respects.

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<sup>49</sup> Stark Truss Co., Inc. v. Superior Construction Corp., 360 S.C. 503, 508-509, 602 S.E.2d 99, 102.

<sup>50</sup> Dixon v. Besco Engineering, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995).

<sup>51</sup> Dixon v. Besco Engineering, Inc., 320 S.C. 174, 177, 463 S.E.2d 636, 638.

<sup>52</sup> Dixon v. Besco Engineering, Inc., 320 S.C. 174, 178, 463 S.E.2d 636, 638.

<sup>53</sup> Dixon v. Besco Engineering, Inc., 320 S.C. 174, 178, 463 S.E.2d 636, 638.

<sup>54</sup> Dixon v. Besco Engineering, Inc., 320 S.C. 174, 179, 463 S.E.2d 636, 639.

**2. Mr. Owens Was Not Entitled To Any Relief From The Entry Of Default Pursuant To The Factors Established In Wham v. Shearson Lehman Bros., Inc.**

Mr. Owens failed to justify and/or put forth a reasonable explanation regarding his failure to answer or otherwise respond to the foreclosure action Complaint. Consequently, there is no need for the Court of Appeals to address Mr. Owens situation vis-à-vis the various factors established by this Court of Appeals in Wham v. Shearson Lehman Bros., Inc.<sup>55</sup> Nevertheless, even if this Court of Appeals deems it appropriate to consider Mr. Owens' case in light of the Wham factors, Mr. Owens is still not entitled to any relief and the Master-in-Equity's decision should be affirmed in all respects.

For example, in Richardson v. P.V., Inc.,<sup>56</sup> our Supreme Court stated that the defendant hotel failed to show good cause despite its reliance on its insurance company to defend the case.<sup>57</sup> Affirming yet again that negligence of an attorney or the insurance company "cannot constitute good cause to relieve Appellants from the entry of default,"<sup>58</sup> the Supreme Court then held

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<sup>55</sup> Wham v. Shearson Lehman Brothers, Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct.App. 1989). See Sundown Operating Co., Inc. v. Intedje Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009) (The Wham factors are considered only "[o]nce a party has put forth a satisfactory explanation for the default"). See also Limehouse v. Hulsey, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (2011 WL 2447100 \*7). In order to get to the Wham factors, Mr. Owens was required to pass the **threshold burden** of "put[ting] forth 'an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.'" Limehouse v. Hulsey, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (2011 WL 2447100 \*7) (quoting Sundown Operating Co., Inc. v. Intedje Industries, Inc., 383 S.C. 601, 681 S.E.2d 885).

<sup>56</sup> Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263 (2009).

<sup>57</sup> Richardson v. P.V., Inc., 383 S.C. 610, \_\_\_, 682 S.E.2d 263, 266-267.

<sup>58</sup> Richardson v. P.V., Inc., 383 S.C. 610, \_\_\_, 682 S.E.2d 263, 266-267.

[m]oreover, the Wham factors do not weigh in favor of lifting the entry of default. Appellants filed the motion to set aside over two months after the entry of default, and Appellants have not asserted a meritorious defense or argued that Respondent will not be prejudiced if the entry of default is lifted.<sup>59</sup>

Just like the hotel defendant in Richardson v. P.V., Inc., Mr. Owens is not entitled to have this Court of Appeals set aside the entry of default under the Wham factors. Under Wham, this Court of Appeals must consider three important factors in considering whether to lift the default: (1) the timing of Mr. Owens' motion for relief for default; (2) whether Mr. Owens has a meritorious defense; and (3) the degree of prejudice to Regions Bank if Mr. Owens is granted relief.<sup>60</sup>

a. **Application of the Wham Factors**

First, with respect to the timeliness of a request to set aside default, a motion to set aside an entry of default under Rule 55(c), SCRCivP, is not governed by any particular express time limit. Nevertheless, the time limit appears to be something less than 60 days.<sup>61</sup> In Pilgrim v. Miller,<sup>62</sup> the defendant's motion appears to have been filed approximately 60 days after service was accomplished.<sup>63</sup> In Stark Truss Co. v. Superior Construction Co.,<sup>64</sup>

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<sup>59</sup> Richardson v. P.V., Inc., 383 S.C. 610, \_\_\_, 682 S.E.2d 263, 267.

<sup>60</sup> Top Value Homes, Inc., v. Harden, 319 S.C. 302, 305-306, 460 S.E.2d 427, 429 (Ct App. 1995) (*citing Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E.2d 499).

<sup>61</sup> See generally Richardson v. P.V., Inc., 383 S.C. 610, \_\_\_, 682 S.E.2d 263, 266-267.

<sup>62</sup> Pilgrim v. Miller, 350 S.C. 637, 567 S.E.2d 527. As noted previously, all references to Pilgrim v. Miller are for illustrative purposes only as the decision was vacated.

<sup>63</sup> Pilgrim v. Miller, 350 S.C. 637, 639-640, 567 S.E.2d 527, 527-528.

the defendants' motion was filed approximately 90 days after service.<sup>65</sup> In Dixon v. Besco Engineering, Inc.,<sup>66</sup> the defendant filed his motion 106 days after service.<sup>67</sup> On the other hand, in Richardson v. P.V., Inc.<sup>68</sup> and Sundown Operating Co., Inc. v. Intedg Industries, Inc.,<sup>69</sup> the defendants filed their motions within 60 and 51 days, respectively.<sup>70</sup> Mr. Owens' 171-day delay after service until he filed his Motion to Set Aside Entry of Default (Affidavit of Service, p.1; Motion to Set Aside Default, pp.1-2) far exceeds any of these deadlines. Under the circumstances and consistent with his prior inaction, Mr. Owens waited far too long before taking any action.

Second, Mr. Owens failed to show a meritorious defense. Mr. Owens alleged he did not sign the Note or Mortgage (R.pp.50-51, paras. 6, 8-10; R.p.366, lines 10-22; R.p.372, line 19 – R.p.373, line 6; R.p.373, lines 21-22; R.p.375, lines 20-23; R.p.382, line 13 – R.p.383, line 23; R.p.389, lines 14-22; R.p.395, lines 14-16; R.p.396, lines 12-20). However, Mr. Paddy and Attorney Refosco, two *disinterested* witnesses, controverted Mr. Owens' recollection and demonstrated Mr. Owens, among other things, signed the loan documents and

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<sup>64</sup> Stark Truss Co. v. Superior Construction Co., 360 S.C. 503, 602 S.E.2d 99.

<sup>65</sup> Stark Truss Co. v. Superior Construction Co., 360 S.C. 503, 506-507, 602 S.E.2d 99, 101.

<sup>66</sup> Dixon v. Besco Engineering, Inc., 320 S.C. 174, 463 S.E.2d 636.

<sup>67</sup> Dixon v. Besco Engineering, Inc., 320 S.C. 174, 177-178, 463 S.E.2d 636, 638.

<sup>68</sup> Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263.

<sup>69</sup> Sundown Operating Co., Inc. v. Intedg Industries, Inc., 383 S.C. 601, 681 S.E.2d 885.

<sup>70</sup> Richardson v. P.V., Inc., 383 S.C. 610, \_\_\_, 682 S.E.2d 263, 266-267; Sundown Operating Co., Inc. v. Intedg Industries, Inc., 383 S.C. 601, 604-605, 681 S.E.2d 885, 887.

had the terms and conditions of the loans explained to him at closing. (R.pp.403-409; R.p.453, line 18 – R.p.454, line 21; R.p.455, line 25 – R.p.458, line 7; R.p.463, lines 7-21; R.p.473, lines 9-21; R.p.554, line 3 – R.p.559, line 2; R.p.559, line 15 – R.p.562, line 5; R.p.570, lines 4-21). Consequently, Mr. Owens did not have any defense to Regions Bank's claims, much less a meritorious defense.<sup>71</sup>

Third, and finally, Regions Bank will be prejudiced if this Court of Appeals grants Mr. Owens's request and sets aside the Entry of Default. As demonstrated by his proposed *Answer and Counterclaim* (R.pp.50-53), if Mr. Owens is permitted to answer, he will greatly expand the scope of this litigation, by including a claim that Regions Bank violated the South Carolina Unfair Trade Practices Act. (R.p.52). Also, due to Mr. Owen's failure to comply with the

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<sup>71</sup> Mr. Owens would have this Court of Appeals believe he agreed with Mr. Paddy to invest with Mr. Hostetler (R.p.369, lines 12-17; R.p.370, line 16 – R.p.371, line 22; R.p.372, lines 19-23; R.pp.430-431; R.p.507, line 14 – R.p.508, line 17), only to later learn through the Regions Bank's foreclosure action that he was not an investor, but a borrower. When Mr. Owens asked Mr. Paddy for an explanation of why he was named in the foreclosure action, Mr. Paddy apparently did not respond. (R.p.388, line 23 – R.p.389, line 7). Yet inexplicably, and despite Mr. Paddy's apparent failure to protect Mr. Owens in the past, as well as to get Mr. Owens caught up in a financial mess he allegedly knew nothing about, Mr. Owens decided to rely solely on Mr. Paddy to protect him in this lawsuit. Mr. Owens, unreasonably and imprudently, took no steps whatsoever to protect himself and continued to rely completely on the advice of Mr. Paddy - his fellow defendant. Mr. Owens appears to claim he was either willfully blind or totally ignorant as to the loan transaction and the handling of this litigation. Notwithstanding these arguments, this Court of Appeals should not reward Mr. Owens for his own negligence and/or intentional ignorance. See Goodson v. American Bankers Insurance Co. of Florida, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (citing Harry M. Lightsey, Jr. and James Flanagan, South Carolina Civil Procedure, 400; McCall v. A-T-O, Inc., 276 S.C. 143, 276 S.E.2d 529). (“[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney.”).

requirements of Rule 12(a), SCRCivP, the duration of the legal process in this case has greatly increased, as have Region Bank's attorneys' fees and litigation expenses.

Consequently, even considering the Wham factors, Mr. Owens is not and should not be entitled to any relief for the entry of default. Mr. Owens unreasonably and imprudently relied on Mr. Paddy to "cover him" in this litigation even though their positions were diametrically opposite. Then Mr. Owens sat back and did nothing to monitor the course of this case until he was in default. Given the law and the facts of this case, Mr. Owens did not have any reasonable basis to rely on Mr. Paddy to file an Answer on his behalf. This Court of Appeals should affirm the Master-in-Equity's decision in all respects.

**C. Mr. Owen's Default Does Not Constitute An Excusable "Mere Technicality"**

Mr. Owens asserts that since his default was a "mere technicality" the Master-in-Equity should have granted him relief. (*Appellant's Brief*, pp.10-11). Mr. Owens misconstrues the facts and misinterprets the law. He was not entitled to any relief.

As Mr. Owens broadly notes, it is South Carolina's "public policy favors the disposition of cases on the merits rather than on mere technicalities." (*Appellant's Brief*, p.10).<sup>72</sup> Likewise, he correctly states that "Rule 55(c)[

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<sup>72</sup> See Micronics, Inc. v. South Carolina Department of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct.App. 2001) (*citing Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct.App.1986); Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 153, 399 S.E.2d 439, 440 (Ct.App.1990)).

SCRCivP,] should be liberally construed to promote justice and dispose of cases on their merits.” (*Appellant’s Brief*, pp.10-11).<sup>73</sup> Unfortunately for Mr. Owens his situation is not a simple one and, more importantly, his own inaction created the dilemma in which he now finds himself. The default was no technicality and the Master-in-Equity did not abuse his discretion in upholding the default.<sup>74</sup>

Mr. Owens “justified” his failure to file an answer or other response to the foreclosure Complaint solely on the proposition he “understood” Mr. Paddy was going to have his attorney put in a response to the foreclosure action for both he and Mr. Owens. (R.p.49, para. 6; R.p.388, line 23 – R.p.389, line 7). Mr. Paddy disputed Mr. Owens’ position, noting, while the foreclosure covered Mr. Hostetler, Mr. Owens and himself, his lawyer did not represent anyone but him. (R.p.470, lines 8-16; R.p.472, line 20 – R.p.473, line 8).

Unfortunately, based on this unilaterally assumed “reliance”, Mr. Owens ***did not*** retain legal counsel in order to protect his interests, ***did not*** file a *pro se* answer or other response to the Complaint in order to protect his interests, and ***did not*** check with either Mr. Paddy or Mr. Paddy’s attorney or, apparently, anyone to see if an answer had been filed on Mr. Owens’ behalf in order to

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<sup>73</sup> See Dixon v. Bescoe Engineering, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (citing Ricks v. Weinrauch, 293 S.C.372, 360 S.E.2d 535 (Ct.App. 1987)).

<sup>74</sup> McCall v. A-T-O, Inc., 276 S.C. 143, 145-146, 276 S.E.2d 529, 530 (citing Stewart v. Floyd, 274 S.C. 437, 265 S.E.2d 254 (1980); Accord, Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981)). As this Court of Appeals is aware, “[a]n abuse of discretion arises when the judge’s decision was controlled by some error of law or lacks evidentiary support.” Melton v. Olenik, 379 S.C. 45, 55, 664 S.E.2d 487, 492 (Ct.App. 2008) (citing Boland v. South Carolina Public Service Authority, 281 S.C. 293, 295, 315 S.E.2d 143, 145 (Ct.App.1984)).

protect his interests.<sup>75</sup> Mr. Owens did not allege or present any evidence showing he contacted either Mr. Paddy or Mr. Paddy's attorney to confirm the attorney would file a joint response to the foreclosure action for both Mr. Paddy and Mr. Owens. Additionally, Mr. Owens did not present any evidence showing why Mr. Paddy or his attorney failed to include Mr. Owens in the response to the Complaint.

Mr. Owens' unreasonable actions in "relying"<sup>76</sup> on Mr. Paddy to protect his interests and, in turn, Mr. Owens' one inexplicable complete inaction in flowing up on his misplaced "reliance" resulted in him being placed in default. This was a technicality, but the direct result of Mr. Owens choosing to do nothing to help himself even though Mr. Owens was "relying" on the very person to protect him who has gotten him embroiled in this financial morass in the first place.

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<sup>75</sup> See Goodson v. American Bankers Insurance Co. of Florida, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (citing Harry M. Lightsey, Jr. and James Flanagan, South Carolina Civil Procedure, 400; McCall v. A-T-O, Inc., 276 S.C. 143, 276 S.E.2d 529 (1981)).

<sup>76</sup> Mr. Owens agreed with Mr. Paddy to invest with Mr. Hostetler (R.p.369, lines 12-17; R.p.370, line 16 – R.p.371, line 22; R.p.372, lines 19-23; R.pp.430-431; R.p.507, line 14 – R.p.508, line 17), only to later learn through the Regions Bank's foreclosure action he was not an investor, but a borrower. (**Red Flag No. 1**). Furthermore, when Mr. Owens asked Mr. Paddy for an explanation of why he was named in the foreclosure action, Mr. Paddy apparently did not respond. (R.p.388, line 23 – R.p.389, line 7). (**Red Flag No. 2**). Yet inexplicably, and despite Mr. Paddy's apparent failure to protect Mr. Owens in the past, as well as to get Mr. Owens caught up in a financial mess he allegedly knew nothing about (**Red Flag No. 3**), Mr. Owens chose to rely solely on Mr. Paddy to protect him in this lawsuit. Mr. Owens then took no steps whatsoever to protect himself and continued to rely completely on the advice of Mr. Paddy - his fellow defendant. Equally importantly, as Mr. Paddy's attorney noted, "Mr. Owens is alleging a defense [to the foreclosure action] completely different than Mr. Paddy's defense, so I don't understand exactly how one attorney would be able to represent [the] both of them anyway . . ." (R.p.128, lines 5-9). Mr. Owens "defense" to Regions Bank's claims necessarily involved his allegations that Mr. Paddy conned and/or tricked him into the loan transaction. Consequently, Mr. Paddy's and Mr. Owens' positions and defenses were diametrically opposed. Mr. Paddy's attorney could not have represented both Mr. Paddy and Mr. Owens as there was an inherent and unavoidable conflict in the representation.

This Court of Appeals should dismiss Mr. Owens' argument that his default was a "mere technicality" outright as it is meritless and without either a legal or factual basis.

**D. The Master-In-Equity's Reference To *Pilgrim v. Miller* Does Not Constitute An "Error Of Law" Justifying A Reversal**

Mr. Owens asserts that since the Master-in-Equity cited this Court of Appeals vacated decision in *Pilgrim v. Miller*<sup>71</sup> that his order refusing to set aside the entry of default was controlled by an "error of law" and, therefore, must be reversed. (*Appellant's Brief*, pp.11-12). Mr. Owens' argument is meritless as many other cases prior to and after *Pilgrim v. Miller* stand for the same proposition – all detrimental to Mr. Owens' arguments.

The Master-in-Equity cited *Pilgrim v. Miller* for the general proposition enunciated by this Court of Appeals that "[t]he courts of this [S]tate have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant." (R.p.27). In stating this position this Court of Appeals was quoting from *Roberts v. Peterson*.<sup>78</sup> It is axiomatic, regardless of the viability of *Pilgrim v. Miller*, that this same proposition has been upheld numerous times and is still "black-letter" law in this State.<sup>79</sup> The Master-in-

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<sup>71</sup> *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 527.

<sup>78</sup> *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281 which, in turn, was citing to 12 South Carolina Digest, *Judgment*, Key No. 143 (West 1975).

<sup>79</sup> See generally *Mitchell Supple Co., Inc. v. Gaffney*, 279 S.C. 160, 163-164, 375 S.E.2d 321, 323; *Richardson v. P.V., Inc.*, 383 S.C. 610, \_\_\_, 682 S.E.2d 263, 267; *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 609, 681 S.E.2d 885, 889; *Williams*

Equity's reference to Pilgrim v. Miller does not constitute an error of law as the cited proposition is well-established by numerous other decisions which are still viable.

Mr. Owens' arguments to the contrary are meritless and must be dismissed in all respects.

## V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Respondent, Regions Bank, respectfully requests this Court of Appeals to affirm the decision of the Circuit Court in all respects.

Respectfully submitted:

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4 January 2012

NPCHAR1:791951.1-TBF-(SPG) 024340-00059

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*v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409; *Limehouse v. Hulsey*, \_\_\_ S.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (2011 WL 2447100 \*8).