THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2015-000359
Case No. 2011-CP-42-3951

Dickie Shults, ...Appellant,

v.

Angela G. Miller, ...Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

PART I

I. The Trial Court should not have Set Aside the Entry of Default.

The Defendant's Brief correctly points out that a trial court's decision to set aside an entry of default will not be disturbed on appeal absent an abuse of discretion. *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). An abuse of discretion occurs when the judge issuing the order was (1) controlled by some error of law or (2) when the order, factually, is without evidentiary support. *Id.* at 383 S.C. 607, 681 S.E.2d 888. In this case, the lower court's decision was both (1) controlled by an error of law and (2) is factually without evidentiary support. Therefore, there was an abuse of discretion by the trial court when it set aside the entry of default.

A. The trial court's order was controlled by an error of law.

The trial court's order was controlled by an error of law. Specifically, the trial court failed to require the Defendant "to put forth a satisfactory explanation for the default" before addressing the *Wham* factors. *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). This case is controlled by *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). In *Sundown*, the Supreme Court reiterated that a Defendant cannot establish good cause to be relieved of default by arguing that it relied upon an insurance agent to respond to the Complaint. The Supreme Court specifically said that:

> This argument is without merit, as the law is clear that an attorney or insurance company's misconduct is imputed to

> the client. *See Williams v. Vanvokenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App.1994) (observing that an attorney's negligence in failing to answer is imputable to the defendant); *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct.App.1987) (recognizing that negligence of an attorney or insurance company is imputable to a defaulting litigant)."

Sundown, 383 S.C. at 609, 681 S.E.2d at 889.

The Defendant testified that she relied on the Watson Insurance Agency to hire her an attorney to file an answer and that is why she went into default. (R. p. 194)(Miller Depo. p. 83). This is the only reason ever given by the Defendant as to why she went into default. Since the Defendant's proffered excuse has already been declared to be without merit by the Supreme Court, it was an error of law for the trial court to set aside the entry of default.

Instead of analyzing whether the Defendant's proffered excuse was legally sufficient, the trial court skipped over that legal issue and just analyzed the *Wham* factors. This too was an error of law. "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607-08, 681 S.E.2d 885, 888 (2009)(emphasis added). It is important to recognize that in *Sundown*, the Supreme Court did not reach the *Wham* factors in its analysis of the facts. The Court of Appeals has also held that it does not reach the three *Wham* factors if there is not a satisfactory explanation for the default. *Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct.App.2013) ("Because we find the master did not err in finding Owens failed to show good cause for failing to answer the complaint, we need not consider the

Wham factors."). Therefore, it was an error of law for the trial court to reach the *Wham* factors in its analysis of whether to set aside the entry of default.

In addition, in analyzing whether the Defendant's proffered excuse is legally sufficient, it is important to keep in mind that the Defendant in this case is also at fault for the entry of default in this case. A Defendant cannot establish good cause if she shares responsibility for the entry of default. *Sundown*, 383 S.C. at 609, 681 S.E.2d at 889. The Defendant's liability insurance carrier, Nationwide (formally Allied Insurance Co.), called the Defendant about three days after her husband dropped the paperwork off at the Watson Insurance Agency to discuss the lawsuit. (R. pp. 175-176, 183 ("It was probably about three days, I guess."), 185)(Miller Depo. pp. 64-65, 72, 74). However, in that first telephone conversation with the Nationwide agent three days after her husband dropped off the lawsuit, the Nationwide agent told the Defendant that she had already gone into default. (R. p. 185)(Miller Depo. p. 74). This demonstrates that the Defendant did not drop the paperwork off with her insurance agent until right before (or right after) the entry of default.

Also, in the thirty days after being served with the lawsuit, the Defendant did not call anyone at either Nationwide or Allied Insurance Company. (R. p. 188)(Miller Depo. p. 77). In the thirty days after being served with the lawsuit, other than the Watson Insurance Agency, the Defendant did not send the lawsuit to any lawyer, insurance agency, or insurance company. (R. p. 188)(Miller Depo. p. 77). *See Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 84, 897 (Ct.App.2001) (holding "a party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a laymen to any lesser standard than is applied to an attorney."). The Defendant shares responsibility for the entry of default,

and therefore, there is not good cause to set aside the entry of default. Again, because there is no good cause pursuant to the holding in *Sundown*, it was an error of law for the trial court to consider the *Wham* factors. The trial court erred in this case when it made its decision solely on the three *Wham* factors. Instead, the analysis should have stopped with the determination that the Defendant has failed to establish an explanation that constitutes good cause or that the Defendant shares responsibility for the entry of default.

Finally, the *Sundown* "standard requires a party seeking relief from an entry of default under Rule 55(c) to ... give reasons why vacation of the default would serve the interests of justice." *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. This is a necessary step in any request for relief from default. The trial court's order setting aside the default does not give any reason why setting aside the default would serve the interests of justice. The order setting aside the default, and the order reconsidering the issue, is silent on this required finding. The Defendant argues that this issue is "disingenuous at best." (Def. Br. at 7). However, *Sundown* requires the trial court to consider the interests of justice. Therefore, the trial court committed an error of law and abused its discretion in setting aside the entry of default without considering if the vacation of the default would serve the interests of justice.

B. The trial court's decision to set aside the entry of default is also without evidentiary support.

The trial court's decision to set aside the entry of default is also without evidentiary support. The trial court's decision states that the "Defendant explained there was some confusion with Seay's insurance accepting liability for the accident and a change of her own insurance companies." (R. p. 4)(Order 7/11/12, p. 2). A

similar one sentence line appears in the Order denying the motion to reconsider. (R. p. 8)(Order 3/15/13, p. 3). The Defendant argues that this one sentence demonstrates that the Court considered evidence about an excuse. For the reasons stated above, this excuse is not legally sufficient because she is relying on an insurance agent to file an answer to the Complaint. However, the undisputed testimony, by the Defendant herself, is that she was not confused about her responsibilities. Instead, she had a complete lack of communication with the insurance agent she had at the time of the accident and with the agent she had on the day she was served with the Complaint. She said she gave the Summons and Complaint to her husband with the understanding that the husband would take it to the Watson Insurance Agency, Inc., her automobile liability insurance company at the time of the accident. (R. pp. 173-175)(Miller Depo. pp. 62-64). She was not present at the agency when her husband dropped off the lawsuit. (R. p. 174)(Miller Depo. p. 63). She does not know the name of the person that her husband gave the lawsuit to at the agency and he did not get a receipt. (R. p. 189)(Miller Depo. p. 78). The Defendant never called the Watson Insurance Agency in the 35 days following service of the Complaint to confirm that it had the Summons and Complaint or that it was going to respond to the Complaint. (R. pp. 184, 186)(Miller Depo. pp. 73, 75).

The Defendant never testified that she was confused about Seay's insurance company paying for the claim (she had no contact with Seay's insurance company about this lawsuit). She never mentions any confusion caused by her changing insurance agencies. She changed from the Watson Insurance Agency to the Cornerstone (Haygood) Insurance Agency after the accident, but both agencies placed her with Nationwide. (R. pp. 177-178, 180-182)(Miller Depo. pp. 66-67, 69-71). She

had absolutely no contact with the Cornerstone (Haygood) Insurance Agency after being served, and never gave it the Complaint, because Cornerstone was not her agent at the time of the accident. (R. pp. 180-182)(Miller Depo. pp. 69-71). There was no confusion – just a lack of communication. She testified that she had no conversations, for any reason, with the Watson Insurance Agency after being served with the lawsuit. (R. p. 186)(Miller Depo. p. 75). In the thirty days after being served with the lawsuit, the Defendant did not call anyone at either Nationwide or Allied Insurance Company. (R. p. 188)(Miller Depo. p. 77). In the thirty days after being served with the lawsuit, other than the Watson Insurance Agency, the Defendant did not send the lawsuit to any lawyer, insurance agency, or insurance company. (R. p. 188)(Miller Depo. p. 77). The Defendant testified that she relied on the Watson Insurance Agency to hire her an attorney to file an answer and that is why she went into default. (R. p. 194)(Miller Depo. p. 83).

In this case, the trial court committed several errors of law in its decision and therefore it abused its discretion. The Defendant did not proffer a legally sufficient explanation for the entry of default. The trial court erred when it accepted an explanation that has already been rejected as without merit by the Supreme Court. The trial court erred because it reached the *Wham* factors in its analysis. The trial court erred when it failed to consider the fault of the Defendant in the entry of the default. The trial court erred when it failed to consider if setting aside the entry of default would serve the interests of justice. The trial court's evidentiary findings are without support. For these reasons, the order setting aside the entry of default should be reverse and the case should be remanded to the trial court for a damages hearing.

PART II

II. The Defendant should not have been Granted Summary Judgment by the Trial Court.

As an initial matter, since the Defendant was in default, and liability was therefore admitted by the Defendant, summary judgment should not have been granted by the Court. Since it was an error for the trial court to set aside the entry of default, it was an error for the trial court to then grant summary judgment to the Defendant. So, the issue of the granting of summary judgment is only reached on appeal if the Court of Appeals affirms the trial court's decision to set aside the entry of default.

A.

The Defendant argues that there is sufficient evidence to support the trial court grant of summary judgment to the Defendant. The Defendant's entire argument neglects the fact that this claim was dismissed at the summary judgment stage. In determining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004). If triable issues exist, those issues must go to the jury. *Mulherin-Howell v. Cobb*, 362 S.C. 588, 608 S.E.2d 587 (Ct. App.2005).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and

inferences arising in and from the evidence in a light most favorable to the non-moving party. *Willis v. Wu*, 362 S.C. 146, 607 S.E.2d 63 (2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct.App.2004). Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004).

In this case, the Plaintiff has produced sufficient evidence to establish that there are genuine issue of material fact that preclude summary judgment. In addition, the Defendant has failed to meet her burden of clearly establishing the absence of a genuine issue of material fact. There is evidence that the Defendant was negligent under both a common law standard and negligent per se because she violated a motor vehicle statute. As to the common law standard, there is a genuine issue of material fact as to whether the Defendant was keeping a proper lookout at the time of the collision, or if she was using reasonable care in the operation of her vehicle. The Defendant argues that the Plaintiff's argument that the Defendant failed to keep a proper lookout is speculative. (Def. Br. p. 8).

The Plaintiff's argument is not based on speculation, but on the testimony of the Defendant, and all reasonable inferences from the Defendant's own testimony. The Defendant testified that she was hit from the front-right side by Mr. Phillip Seay as he was entering S.C. 292 from a road that dead-ended into S.C. 292 at a right angle (a

"T" intersection). (R. pp. 141-142, 110)(Miller Depo. pp. 30-31; Collision Report). The Defendant admitted that she never saw Mr. Seay until after the impact even though he was coming from in front of her and she was looking forward. (R. pp. 143-144)(Miller Depo. pp. 32-33). However, her husband did see Mr. Seay prior to the collision and yelled "look out." (R. p. 132)(Miller Depo. pp. 21). Since she testified that she was only traveling 20 mph in a 35 mph zone, and she already had her foot on the brake before the impact, there are genuine issues as to whether she was keeping a proper lookout, and whether she could have stopped before the impact with Mr. Seay or stopped before she crossed the center line and hit the Plaintiff. (R. pp. 147, 149, 164)(Miller Depo. pp. 36, 38, 53). Instead of stopping at such a slow speed, her vehicle completely crossed the Plaintiff's lane of travel and come to a rest in the ditch on the Plaintiff's side of the road. (R. pp. 154-155)(Miller Depo. pp. 43-44).

Next, there is evidence that the Defendant was negligent per se. The violation of a state statute may constitute negligence per se. *Norton v. Opening Break*, 319 S.C. 469, 462 S.E.2d 861 (1995). This issue is fully briefed in the Brief of the Appellant. The Defendant argues that the Defendant did not violate a criminal statute. For the reasons articulated in the Brief of the Appellant, the Defendant is incorrect on this issue.

B.

For these reasons, the trial court should not have granted the Defendant's motion for summary judgement.

CONCLUSION

The Plaintiff respectfully requests the Court of Appeals to reverse the trial court's order setting aside the entry of default. In addition, the Plaintiff requests the Court to reverse the trial court's order granting summary judgment to the Defendant.

July 16, 2015

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CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant on Angela G. Miller by depositing a copy of it in the United States Mail, postage prepaid, on July 17, 2015, addressed to her attorney of record:

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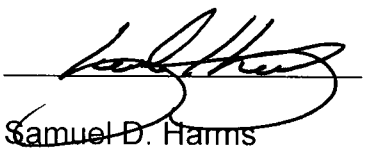

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