

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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

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RECEIVED  
JUL 20 2015  
SC Court of Appeals

Dickie Shults, .....Appellant,

v.

Angela G. Miller, .....Respondent.

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BRIEF OF APPELLANT

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## TABLE OF CONTENTS

Table of Authorities .....	ii
Statement of Issues on Appeal .....	1
Statement of the Case .....	2
Facts .....	3
Standard of Review .....	5
Arguments .....	6
<i>I. The Trial Court should not have Set Aside the Entry of Default</i> .....	6
<i>II. The Defendant should not have been Granted Summary Judgment         by the Trial Court</i> .....	11
Conclusion .....	17

## TABLE OF AUTHORITIES

### CASES

<i>Baugus v. Wessinger</i> , 303 S.C. 412, 401 S.E.2d 169 (1991) . . . . .	6
<i>Helena Chem. Co. v. Allianz Underwriters Ins. Co.</i> , 357 S.C. 631, 594 S.E.2d 455 (2004) . . . . .	6
<i>Hill v. Dotts</i> , 345 S.C. 304, 310, 547 S.E.2d 84, 897 (Ct.App.2001) . . . . .	9
<i>McCall v. State Farm Mut. Auto. Ins. Co.</i> , 359 S.C. 372, 597 S.E.2d 181 (Ct.App.2004) . . . . .	6
<i>Medical Univ. of South Carolina v. Arnaud</i> , 360 S.C. 615, 602 S.E.2d 747 (2004) . . . . .	5
<i>Mulherin-Howell v. Cobb</i> , 362 S.C. 588, 608 S.E.2d 587 (Ct. App.2005) . . . . .	5
<i>Norton v. Opening Break</i> , 319 S.C. 469, 462 S.E.2d 861 (1995) . . . . .	16
<i>Pittman v. Grand Strand Entm't, Inc.</i> , 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005) . . . . .	5
<i>Regions Bank v. Owens</i> , 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct.App.2013) . . . . .	7, 9, 10
<i>Roberts v. Peterson</i> , 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct.App.1987) . . . . .	7
<i>Steinke v. S.C. Dep't. of Labor, Licensing and Regulation</i> , 336 S.C. 373, 387. 520 S.E.2d 142, 149 (1999) . . . . .	11
<i>Sundown Operating Company, Inc. v. Intedge Industries, Inc.</i> , 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) . . . . .	passim
<i>Thomasko v. Poole</i> , 349, S.C. 7, 561 S.E.2d 597 (2002) . . . . .	15
<i>Wham v. Shearson Lehman Bros., Inc.</i> , 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App.1989) . . . . .	7, 10

<i>White Oak Manor, Inc. v. Lexington Ins. Co.</i> , 407 S.C. 1, 753 S.E.2d 537 (2014) . . . . .	8
<i>Williams v. Vanvokenburg</i> , 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App.1994) . . . . .	8
<i>Wilson v. Marshall</i> , 260 S.C. 271, 195 S.E.2d 610 (1973) . . . . .	15
<i>Willis v. Wu</i> , 362 S.C. 146, 607 S.E.2d 63 (2004) . . . . .	6

STATUTES

S.C. Code Ann. § 56-5-580 (Supp. 2014) . . . . .	16
S.C. Code Ann. § 56-5-1520 (Supp. 2014) . . . . .	17
S.C. Code Ann. § 56-5-1810 (Supp. 2014) . . . . .	16
S.C. Code Ann. § 56-5-2320 (Supp. 2014) . . . . .	17

OTHER AUTHORITIES

Rule 55, SCRPC . . . . .	6
Rule 56, SCRPC . . . . .	5, 6, 11
Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, § 28-2 . . . . .	15
Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, § 28-1 . . . . .	15

## STATEMENT OF ISSUES ON APPEAL

- I. Should the trial court have set aside the entry of default?
- II. Should the Defendant have been granted summary judgment by the trial court?

## STATEMENT OF THE CASE

On July 22, 2009, Dickie Shults (hereinafter "Shults") was injured in an automobile collision. (R. p. 16)(Summons & Complaint, p. 2). The Plaintiff filed a Summons and Complaint against Angela G. Miller (hereinafter "Miller") on September 13, 2011. (R. p. 15)(Summons & Complaint). The Defendant failed to file an Answer to the Complaint and the Spartanburg County Clerk of Court entered an Entry of Default on October 20, 2011. (R. p. 23)(Entry of Default). On October 26, 2011, the Defendant served a Motion to Set Aside the Entry of Default and an Answer. (R. p. 24, 26)(Motion to Set Aside the Entry of Default; Answer). A hearing was held before Judge J. Derham Cole on the Defendant's Motion to Set Aside the Entry of Default on January 3, 2012 in Spartanburg, South Carolina. (R. p. 62)(Hearing Transcript 01/03/12). On July 11, 2012, Judge J. Derham Cole filed an order setting aside the entry of default. (R. p. 3)(Order Setting Aside Entry of Default). The Plaintiff served a Motion to Reconsider, Alter or Amend the Order Setting Aside Entry of Default on July 18, 2012. (R. p. 46)(Motion to Reconsider 07/18/12). On October 31, 2012, the Defendant served a Motion for Summary Judgment. (R. p. 48)(Defendant's Motion for Summary Judgment). A hearing was held before Judge J. Derham Cole on the Plaintiff's Motion to Reconsider the Order Setting Aside the Entry of Default and on Defendant's Motion for Summary Judgment on February 7, 2013 in Spartanburg, South Carolina. (R. p. 74)(Hearing Transcript 02/07/13). On March 18, 2013, Judge J. Derham Cole filed an order denying Plaintiff's Motion to Reconsider and granting the Defendant's Motion for Summary Judgment. (R. p. 6)(Order 03/18/13). The Plaintiff served, on March 22, 2013, Plaintiff's Motion to Reconsider, Alter or Amend the Order Granting Defendant's Motion for Summary Judgment. (R. p. 58)(Motion to Reconsider 03/22/13). Judge J.

Derham Cole heard the Plaintiff's Motion to Reconsider, Alter or Amend the Order Granting Defendant's Motion for Summary Judgment on October 31, 2013 in Spartanburg, South Carolina. (R. p. 95)(Hearing Transcript 10/31/13). On January 27, 2015, Judge J. Derham Cole filed an order denying the Plaintiff's motion to reconsider. (R. p. 10)(Form 4 Order 01/27/15). On February 20, 2015, the Plaintiff served a Notice of Appeal on the Defendant. (R. pp. 60-61)(Notice of Appeal; Proof of Service 02/20/15).

### **FACTS**

This case arises out of an automobile collision between Defendant Angela Miller and Plaintiff Dickie Shults. On July 22, 2009, the Defendant was traveling west on South Carolina 292 in Spartanburg County. (R. p. 124)(Miller Depo. p. 13). The road has two lanes - one in each direction. (R. pp. 135-136)(Miller Depo. pp. 24-25). The Plaintiff was travelling east on South Carolina 292. (R. p. 124)(Miller Depo. p. 13). Defendant Miller crossed over the center line of the road and struck the Plaintiff's vehicle. (R. pp. 141-142, 254)(Miller Depo. pp. 30-31; Shults Depo. p. 47). The Defendant's vehicle had enough momentum to completely cross 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). The Plaintiff was injured in the collision. (R. pp. 17, 257-262)(Complaint p. 3; Shults Depo. pp. 50-55).

The Defendant was served with the Summons and Complaint on September 15, 2011. (R. pp. 173, 18-22)(Miller Depo. p. 62; Motion for Entry of Default and Exhibits). The Defendant 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. (R. pp. 173-175)(Miller Depo. pp. 62-64). She thinks that her husband delivered the paperwork to the Watson Insurance Agency within 1 week of being served, but she is not sure of the date. (R. pp. 174, 186)(Miller Depo. pp. 63, 75). 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). 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). 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). The Nationwide agent did tell the Defendant that the Watson Insurance Agency did not timely file the lawsuit with Nationwide. (R. p. 187)(Miller Depo. p. 76). 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). The Defendant failed to timely file an Answer to the Complaint and the Spartanburg County Clerk of Court entered an Entry of Default on October 20, 2011. (R. p. 23)(Entry of Default).

### **STANDARD OF REVIEW**

The decision whether to set aside an entry of default lies solely within the discretion of the trial court. *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Id.* An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *Id.* at 383 S.C. 607, 681 S.E.2d 888.

"In reviewing the grant of summary judgment, [an appellate court] applies the same standard that governs the trial court under Rule 56, SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). 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), SCRPC. 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).

## ARGUMENTS

### PART I

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

Rule 55(c) states that: “[f]or good cause shown the court may set aside an entry of default.” Rule 55, SCRPC. “This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.”

*Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). “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) (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App.1989). The first step in the analysis is to determine if the party put forth a satisfactory explanation for the default that constitutes good cause. The Court 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.”). In *Sundown*, the Supreme Court did not reach the *Wham* factors in its analysis of the facts.

In this case, the trial court did not address in its order whether the Defendant had a satisfactory explanation for the default. This was an error of law and an abuse of discretion. In fact, the Defendant does not have a satisfactory explanation for the default. 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 said:

Initially, we reject Petitioner’s argument that if should be

granted relief from the entry of default because it should not be held responsible for the negligence of its insurance agent in failing to answer the complaint. 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 Supreme Court, in *Sundown*, went on to hold that: "a defendant may not be relieved from the entry of default solely because it relied to its detriment on a negligent insurance agent." *Sundown*, 383 S.C. at 609, 681 S.E.2d at 889. See also *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 753 S.E.2d 537 (2014) (a defendant misplacing a complaint is not good cause to set aside an entry of default). In this case, the Defendant's sole argument that she has good cause to set aside the entry of default is the negligence of her insurance agency. Since the Supreme Court has held that the negligence of an insurance agency is not good cause, and that the Defendant's argument is without merit, it was an error of law and an abuse of discretion for the trial court to grant the Defendant relief from the default.

There is a second reason why the entry of default should not be set aside in this case. The Defendant shares responsibility for the entry of default with the insurance agency. 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. In *Sundown*, the Defendant waited two weeks to notify the insurance agency of the lawsuit, and the court found that this fact caused the defendant to share in the responsibility for the

default. The case of *Regions Bank* is controlling on this point. *Regions Bank v. Owens*, 402 S.C. 642, 741 S.E.2d 51 (Ct.App.2013). In *Regions Bank*, a 79-year-old defendant with a limited education went into default. *Id.* He argued the he relied on a person to whom he gave a power of attorney to file an answer to a complaint. However, the Court noted that the defendant “presented no evidence he took any steps to protect himself by contacting either Paddy [his power of attorney] or Paddy’s attorney to confirm an answer would be filed on his behalf.” *Regions Bank v. Owens*, 402 S.C. 642, 648-49, 741 S.E.2d 51, 54-55 (Ct.App.2013).

In this case, it appears that the Defendant’s husband may not have delivered the lawsuit to the insurance agency until three days before the default. The Defendant testified that she got a call from Nationwide three days after her husband delivered the lawsuit to the Watson Insurance Agency, and she testified that the Nationwide agent told her that she was already in default during that telephone conversation. These two statements, taken together, indicate that the lawsuit was not delivered to the agency until the very last moment before the default. In addition, the Defendant failed to call the insurance agency to see if and when it received the Summons and Complaint. The Defendant did not inquire with the insurance agency if it was going to respond to the Complaint. The Defendant did not make a single phone call to the agency. *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.

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. *Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct.App.2013) (*Wham* factors are not considered if there is no good cause). In *Sundown*, the three *Wham* factors were not considered or analyzed by the Court because there was no initial explanation that could be considered good cause. 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. In this case, the Defendant did not give any reason to the trial court why vacation of the default would serve the interests of justice. 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. 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. 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.**

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), SCRPC. In this case, when viewing the evidence in the light most favorable to the Plaintiff, there are genuine issues of material fact that preclude the granting of summary judgment. The trial court committed an error of law and an abuse of discretion when it granted summary judgment to the Defendant. 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.

In order to prevail in a negligence cause of action, the plaintiff must establish: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. *Steinke v. S.C. Dep't. of Labor, Licensing and Regulation*, 336 S.C. 373, 387. 520 S.E.2d 142, 149 (1999). In this case, the Plaintiff's negligence claim should not have been dismissed by the trial court because the Defendant owed a duty of care

to the Plaintiff, the Defendant breached that duty, and the breach was the actual and proximate cause of the Plaintiff's injury.

On July 22, 2009, the Defendant was traveling west on South Carolina 292 in Spartanburg County. (R. p. 124)(Miller Depo. p. 13). The road has two lanes - one in each direction. (R. pp. 135-136)(Miller Depo. pp. 24-25). The Plaintiff was travelling east on South Carolina 292. (R. p. 124)(Miller Depo. p. 13). Defendant Miller crossed over the center line of the road and struck the Plaintiff's vehicle. (R. pp. 141-142, 254)(Miller Depo. pp. 30-31; Shults Depo. p. 47). The Defendant's vehicle had enough momentum to completely cross 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). The Plaintiff was injured in the collision. (R. pp. 17, 257-262)(Complaint p. 3; Shults Depo. pp. 50-55).

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's husband, Frank Miller, was in the car at the time of the collision. (R. p. 128)(Miller Depo. p. 17). The Defendant's husband saw the collision. (R. p. 131)(Miller Depo. p. 20). The Defendant's husband yelled "look out" prior to the collision. (R. p. 132)(Miller Depo. p. 21).

The weather was clear and the Defendant's vision was not obstructed by anything. (R. pp. 136-137)(Miller Depo. pp. 25-26). She was not wearing prescription eyeglasses at the time of the collision, but in the year 2010 she had to get prescription eyeglasses to help her distance vision. (R. pp. 137-140)(Miller Depo. pp. 26-29). Even though the weather was clear, and Mr. Seay was approaching from in front of the

Defendant, the Defendant did not see Mr. Phillip Seay until after the collision. The

Defendant testified as follows:

Q. The very first time that you remember his vehicle being present how far away was his vehicle?

A. When I was struck. I mean, it wasn't no – I didn't have no kind of distance at all.

Q. Okay. So do I understand it correctly that before your vehicle and Mr. Seay's vehicle made contact you did not see his vehicle at all?

A. No.

Q. "No" you disagree with me or "no" you didn't see his vehicle at all?

A. No, I didn't see him until I was struck by him.

Q. Tell me why you did not see Mr. Seay's vehicle prior to contact being made by the vehicles?

A. I guess cause he yielded to stop and hit me. I mean, I don't know.

Q. Where you looking at some place other than the road in front of you?

A. No, looking straight ahead.

(R. pp. 143-144)(Miller Depo. pp. 32-33). The Defendant's vehicle was hit in the front right corner by Mr. Seay. (R. pp. 144, 164)(Miller Depo. pp. 33, 53). The Defendant was not rear-ended or hit from behind by Mr. Seay. (R. pp. 144-145)(Miller Depo. pp. 33-34).

When pressed again on the issue of why she did not observe Mr. Seay, the Defendant testified as follows:

Q. What I need to know was there anything obstructing your view of Mr. Seay's vehicle?

A. No.

Q. So then tell me in your own words why did you not see Mr. Seay's vehicle until after the collision occurred?

A. Everything happened so fast. I mean, I didn't have a chance. I didn't see him at all. I don't know why but I didn't see him.

(R. p. 145)(Miller Depo. p. 34).

The Defendant did not know how fast Mr. Seay was traveling before the impact,

because she never saw him. (R. pp. 145, 149, 159-160)(Miller Depo. pp. 34, 38, 48-49). The Defendant testified that the speed limit was 35 mph for her, but she was only traveling 20 mph when she was struck by Mr. Seay. (R. pp. 147, 164)(Miller Depo. pp. 36, 53). She claimed she was traveling only 20 mph at the time of the initial collision, but when she was asked why she did not stop before getting struck by Mr. Seay's vehicle, she said she didn't have time to react to stop. (R. p. 148)(Miller Depo. p. 37). She said that she had her foot on the brake prior to the collision because she was being "cautious" with her driving. (R. p. 149)(Miller Depo. p. 38). She could not explain why she did not stop before crossing over the center lane into the Plaintiff's lane of travel. (R. pp. 149-150)(Miller Depo. pp. 38-39). The Defendant had no conversations with Mr. Seay after the collision. (R. p. 162)(Miller Depo. p. 51).

In addition, the Defendant did not see the Plaintiff's vehicle until after the impact. (R. p. 150)(Miller Depo. p. 39). She does not know how fast the Plaintiff was traveling because she never saw the Plaintiff until after the impact. (R. p. 160)(Miller Depo. p. 49). The Defendant testified that the Plaintiff did not cause the accident, that the Plaintiff was not negligent in his driving, that the Plaintiff did nothing wrong, and there was nothing the Plaintiff could have done to avoid the collision. (R. pp. 151, 160, 171)(Miller Depo. pp. 40, 49, 60). Mr. Philip Seay died a few months after the collision (from unrelated causes) and the parties were not able to depose him prior to his death.

A.

In this case, 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. A person who has the right-of-way is not excused from the common law duty to keep a reasonable lookout to avoid hazards. *Thomasko v. Poole*, 349, S.C. 7, 561 S.E.2d 597 (2002). The common law duty to keep a proper lookout is not merely one of looking but one of observation. Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, § 28-2. “A person operating a motor vehicle on a public highway owes an urgent duty to keep the vehicle under proper control so as to be able to slow down, stop or turn such vehicle in order to avoid colliding with other vehicles.” *Id.* Also, a person has a common law duty to use reasonable care in the operation of her vehicle so that the vehicle is controlled in a manner to avoid a collision. Ralph King Anderson, Jr., South Carolina Requests to Charge – Civil, 2002, § 28-1; *Wilson v. Marshall*, 260 S.C. 271, 195 S.E.2d 610 (1973). In this case, the Defendant’s husband yelled “look out” prior to the collision. The Defendant was hit from the front-right side by Mr. 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). Yet, the Defendant testified several times that she never saw Mr. Seay until after the moment of impact. This fact is hard to explain if the Defendant was keeping a proper lookout. This raises a genuine issue as to whether she was keeping a proper lookout. She testified that her vision was not obstructed by anything and it was a clear day. She testified that she was only driving 20 mph in a 35 mph zone. At such a slow speed, it seems unreasonable that she never saw Mr. Seay’s vehicle approaching from in front of her, and at such a slow speed, a reasonable person could have stopped to avoid the collision if the person was keeping a proper lookout. Also, on this subject of her vision, the Defendant was not wearing prescription eyeglasses at the time of the collision, but she had to get prescription eyeglasses about 1 year after the collision to

help her see distant objects. This raises an issue as to whether she should have been wearing prescription eyeglasses at the time of the collision.

Also, since she was only driving 20 mph, according to her testimony, there is an issue as to whether she could have stopped her vehicle before it collided with the Plaintiff's vehicle. At such a slow speed, she could have stopped almost immediately after the initial impact. She testified that her foot was on her brake prior to the first impact because she is a cautious driver and she drives with her foot on the brake. However, she ended up traveling all the way across the Plaintiff's lane of travel and into the grass ditch on the Plaintiff's side of the road. This indicates that the Defendant negligently pushed the accelerator pedal after the initial impact and accelerated into the Plaintiff. There is a genuine issue as to whether a reasonable person could have stopped a vehicle before hitting the Plaintiff when the Defendant's vehicle's speed was only 20 mph and the Defendant already had her foot on the brake; or in the alternative, a reasonable person would not have pressed down on the accelerator pedal and accelerated into oncoming traffic.

B.

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). First, the Defendant admits that she crossed over the center yellow line and into the Plaintiff's lane of travel. The Defendant's conduct violates S.C. Code Ann. § 56-5-1810 (Supp. 2014)(drive on the right side of road, exceptions). So, the Defendant violated a statutory obligation imposed on her and that raises an issue of her negligence per se. Second, the Plaintiff had the right of way in his lane of travel when the Defendant struck him, so the Defendant violated S.C. Code

Ann. § 56-5-580 (Supp. 2014)(right of way) and S.C. Code Ann. § 56-5-2320 (Supp. 2014)(vehicle turning left) when she entered into his lane of travel. Third, she violated S.C. Code Ann. § 56-5-1520 (Supp. 2014)(general rules as to maximum speeds)("speed must be so controlled to avoid colliding with a ... vehicle") because she was driving too fast to avoid a collision with both Seay and the Plaintiff. In her deposition, she could not explain why she could not stop before hitting Mr. Seay since she was going so slow prior to the first impact and why she could not stop before hitting the Plaintiff.

C.

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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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Appellate Case No. 2015-000359  
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Dickie Shults, .....Appellant,

v.

Angela G. Miller, .....Respondent.

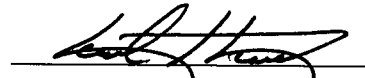
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CERTIFICATE OF COUNSEL

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

July 16, 2015



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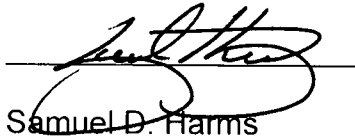
Angela G. Miller, .....Respondent.

PROOF OF SERVICE

I certify that I have served the Final 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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