STATE OF SOUTH CAROLINA
In the Supreme Court

On Appeal from Charleston County
Court of Common Pleas

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

Case No. 06-CP-10-1577

Lawton Limehouse, Sr.

RESPONDENT,

v.

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

PETITIONERS

BRIEF OF PETITIONERS

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In this case the Court of Appeals affirmed the judgment of the trial court where the default had been entered before the circuit court had jurisdiction, the trial court applied the wrong standard under Rule 55(c) in refusing to set aside the entry of default, and then the trial court conducted a default damages trial in violation of Rule 55(b) and fundamental due process guarantees. The Court has granted the Petition for a Writ of Certiorari to review the decision of the Court of Appeals on the following questions:

1. The Court of Appeals erred in ignoring the mandatory requirements of the federal removal statutes, 28 U.S.C.A § 1446(d) and 1447(c), necessary to revest jurisdiction in the state court after remand.

2. The Court of Appeals erred in improperly creating a new and novel test for a Rule 55(c), SCRCP, request to set aside entry of default and in overlooking that the Defendants made the requisite showing of good cause under Rule 55(c).

3. The Court of Appeals erred in affirming the unduly restrictive limitations used by the trial court during the default hearing that did not comport with Rule 55(b), which effectively deprived Defendants of their fundamental right to a fair hearing and due process, in numerous particulars including:

   a. The trial court ignored Rule 55(b)(2);

   b. The damages procedure in the trial court did not even follow the current law of default in South Carolina.

   c. The Defendants were not allowed to fully defend against allegations introduced by the Plaintiff at trial, which were outside of the pleadings, and therefore not admitted by Defendants;

   d. The trial court improperly commented on the facts in answering the jury's question about the Defendants' website link;

   e. The Defendants were not allowed a full and fair hearing on punitive damages; and

   f. The trial court improperly charged the jury that it had a duty to make an award of punitive damages and submitted a verdict form that invaded the province of the jury.

STATEMENT OF THE CASE

This is a slander action against an attorney and his practice, Defendants/Petitioners Paul H. Hulsey and the Hulsey Litigation Group, LLC (collectively referred to as "Hulsey"), brought by Lawton Limehouse, Sr. ("Limehouse"), the disgruntled defendant in an underlying class action filed in federal court by Hulsey on behalf of former Limehouse employees.[1] The slander cause of action is predicated on alleged statements made by Hulsey in response to a phone call from a reporter during the course of the underlying RICO litigation, which allegedly included statements by Hulsey accusing Limehouse of "creating a perfect racketeering enterprise just like Tony Soprano."

Limehouse and his son owned and operated an employment staffing agency, L & L Services, LLC, in Charleston County. In 2004, Hulsey filed a class action lawsuit in federal court on behalf of former Limehouse employees, alleging violations of RICO, Racketeer Influenced and Corrupt Organizations Act, and other federal and state laws ("the RICO case"). Limehouse, his son, and L & L Services were named as defendants. As described by the Honorable W. Weston Houck, "the plaintiffs alleged that to obtain cheap labor, the defendants hired unauthorized aliens and then exploited them under the threat of deportation." [R.p. 182.]

While that case was still pending, Limehouse filed the complaint in this case on April 19, 2006, and served the Defendants on April 21, 2006 (as to Defendant Hulsey) and April 20, 2006 (as to the Defendant LLC). [R.p. 32.] Limehouse alleged that, on or

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

about April 23, 2004, Hulsey "held a press conference or otherwise made false statements about the Plaintiff to certain new agencies including but not limited to a reporter from the [Charleston] "Post & Courier staff," which statements included:

a) The Plaintiff had engaged in a classic racketeering scheme,

b) The Plaintiff's conduct set the community back 150 years,

c) The Plaintiff engaged in a blatant case of indentured servitude, and

d) The Plaintiff created a perfect racketeering enterprise just like Tony Soprano.

[R.p. 37.] As further alleged, these statements were published by the Charleston Post & Courier on April 24, 2004. [R.p. 39.] Limehouse sought actual and punitive damages, alleging that he had suffered general damages including embarrassment, humiliation, mental suffering, and special damages including the loss of his business and the legal costs of defending the underlying federal class action. [R.p. 41.]

Hulsey filed a notice of removal[2] to federal district court on May 5, 2006, which immediately divested the state court of jurisdiction over the case. [R.p. 47.] On motion of Limehouse, the federal district court remanded the matter to state court on the ground that federal question jurisdiction was not present.[3] The federal court order of remand was signed by U.S. District Court Judge Houck on July 19, 2006, and entered on the docket by the District Court Clerk on July 20, 2006. [R.p. 6, 29.] A copy of the remand order was filed in the Charleston County Clerk of Court's Office on July 21, 2006, and on July

[2] Hulsey removed the case based on the pending RICO action in federal court which would be res judicata/dispositive of the truth of the allegations and a complete defense to the defamation claims. [R.p. 791.]

[3] In the meantime, in the RICO case, Hulsey's plaintiff clients survived the Limehouse defendants' motions to dismiss and for summary judgment; and the case was poised for class action certification. [R.p. 182, 188, 649.] Although Judge Houck found that there were issues for trial, the case ultimately settled prior to trial. [R.p. 644.]

27, 2006, the Charleston County Clerk of Court mailed a notice as to the filing of the remand order to counsel of record. [R.p. 26.] The remand order was not certified. A certified order of remand was not sent until March 5, 2009.

Upon the remand of this action, Hulsey calculated the answer due date as – August 31, 2006 -- 30 days, plus 5 days for mailing, from the date of the order of remand. However, on August 21, 2006, Limehouse submitted affidavits of default, without serving the same on Defendants [R.p. 101-108], and on August 22, 2006, the clerk made the "entry of default." The Charleston County of Clerk of Court entered default on August 22, 2006, and on August 24, 2006, the Clerk mailed a Form 4 order to all parties noting the entry of default. [R.p. 26, 109-110.]

On receiving the notice of "entry of default," Hulsey immediately filed an answer on August 29, 2006[4] and also moved, under Rule 55, to set aside the "entry of default," which was heard before the Honorable Daniel F. Pieper. [R.p. 111, 121.] In his order, filed February 7, 2007, Judge Pieper denied the motion, entered default judgment and ordered a damages hearing. [R.p. 8.] Judge Pieper held that the answer was late and would not allow it to stand even though the parties and the court took different views on when the answer was actually due because it was -- as Judge Pieper himself noted -- a novel question of law. [R.p. 8.]

The case then came before the Honorable Roger M. Young, who presided over a jury trial on damages on February 4-6, 2008. The jury returned a verdict of $2,390,000 in actual damages and $5,000,000 in punitive damages against the Defendants, and

[4] However, by Hulsey's calculation the answer was not yet due until August 31, 2006. Hulsey calculated the answer date as 30 days, plus 5 days for mailing, from the date of the order of remand.

judgment has been entered. [R.p. 17, 18.] Hulsey made post-trial motions, which Judge Young denied. [R.p. 19.] Hulsey timely appealed, and the judgment has been affirmed by the majority of the Court of Appeals' Panel, with Chief Judge Few dissenting. [App. 1, Opinion filed 3/10/11; App. 79, Substituted opinion refiled 6/2/11; App. 127, substituted opinion refiled 6/16/11.]

As a point of reference for the Court, Limehouse's son also filed a slander action against these same defendants. Lawton Limehouse, Jr., v. Paul H. Hulsey, et. al., Case No. 2006-CP-10-1578. The complaints are virtually identical and the procedural history of the Limehouse Jr. action is a mirror of this action through the point of Judge Pieper's order denying the motion to set aside the entry of default. While this action has been pending on appeal, a default damages trial was held in the Limehouse Jr. action in November 2009, and the jury awarded a verdict of $1,000,000 in actual damages and $2,600,000 in punitive damages against Hulsey. Hulsey appealed to the Court of Appeals and the Supreme Court issued an order certifying that appeal for review pursuant to Rule 204(b), SCACR. Accordingly, the Limehouse Jr. action also is currently pending before the Supreme Court .

SUMMARY OF ARGUMENT

Lack of Jurisdiction

When Hulsey filed the notice of removal to federal court, the state court was divested of jurisdiction to proceed until the matter was remanded. 28 U.S.C Section 1446(d). Jurisdiction revests in the state court to proceed remand once a certified copy of remand is mailed to the state court. 28 U.S.C. §1447(c) In this case, a certified copy of the order of remand was not transmitted to the state court until March 5, 2009, while

this case has been pending on appeal. Thus, the state court was without jurisdiction to proceed when the default was entered, and when the trial took place. Therefore, the judgment is void and should be vacated, as should be the entry of default and all other orders and proceedings in the state court since the case was removed on May 5, 2006. However, the Court of Appeals has ignored the mandatory requirements of the federal removal statutes and

Unjustified Entry of Default

Rule 55(c) provides that a trial court may set aside an entry of default for "good cause shown." The appellate courts have traditionally identified three factors to be considered in determining whether "good cause" has been shown: 1) the timing of the motion for relief from default; (2) whether moving party has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.* 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989) ("the *Wham* factors"), *as applied in Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009). The Court of Appeals has overlooked the fact that Hulsey made the requisite showing of good cause under Rule 55(c) and the *Wham* factors, and created a new and novel test for a Rule 55(c).

Instead, the Court of Appeals has improperly created a two-prong test, which requires the defendant to give a reasonable, satisfactory explanation for the default, before reaching the *Wham* factors. The reasonableness of the explanation for the default is a factor in the excusable neglect inquiry for a motion to set aside a default judgment under Rule 60(b); however, it has no place in the more lenient "good cause" standard to set aside entry of default under Rule 55(c). In the alternative, considering this new factor only for the sake of argument, the Court of Appeals erred in finding that the Defendants

have an unreasonable explanation for defaulting in view of the trial court's own acknowledgement that the question of when the answer was due is a novel question.

Denial of Due Process in Default Damages Trial

Entry of default against a defendant does not empower the court to award a plaintiff everything for which he asks without regard to truth or justice under the law. Rule 55(b)(2) provides a mechanism for courts to investigate into matters to ensure that the jury hears the truth during a default damages hearing. However, the trial court ignored Rule 55(b)(2) and conducted a default damages trial using Draconian methods which so unreasonably restricted the Defendants' participation to cross-examination and objection that the Defendants were effectively deprived of their fundamental right to a fair hearing and due process. The trial court allowed the Plaintiff to present evidence on matters outside the pleadings, but then refused to allow the Defendants to defend against those new allegations which were not deemed admitted by the default. The trial court even improperly interjected its opinion by commenting on the facts in answering the jury's question about the Defendants' website link which was a matter entirely outside the complaint.

Denial of Due Process in the Award of Punitive Damages

Over the last two decades, the highest courts in the nation and this state have repeatedly held that defendants are afforded due process protections against the unfair and excessive imposition of punitive damages. *See, e.g., Pacific Mutual Life Ins. v. Haslip*, 499 U.S. 1 (1991); *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 568 (1996) ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor."); see also *Gamble v.*

Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991), *S.C. Farm Bureau Mut. Ins. v. Love Chevrolet*, 324 S.C. 149, 478 S.E.2d 57 (1996); *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004). This Court even has adopted a de novo review standard for appellate scrutiny of punitive damages. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 182-183 (2009). The same due process protections should have been afforded to the Defendants, irrespective of the default, to allow them to defend fully and effectively against the imposition of such clearly excessive punitive damages.

In addition to denying the Defendants their due process rights to defend against the Plaintiff's claim for punitive damages, the trial court incorrectly charged the jury that it had a duty to make an award of punitive damages and submitted a verdict form that invaded the province of the jury. Contrary to the trial court's instruction, the jury always retains the discretion to decline to award punitive damages. *Smith v. Wade*, 461 U.S. 30, 52 (1983). The trial court's error in charging the jury that it was duty bound to award punitive damages was compounded by submitting a verdict form that did not give the jury an option to decline to award any punitive damages.

ARGUMENT

Lack of Jurisdiction

I. The Court of Appeals erred in ignoring the mandatory requirements of the federal removal statutes, 28 U.S.C.A § 1446(d) and 1447(c), necessary to revest jurisdiction in the state court after remand.

The federal removal statutes mandates that the state court is divested of jurisdiction to proceed with a case once a notice of removal is filed and that jurisdiction does not revest in the state court until the federal court mails a certified copy of the

remand order to the state court. 28 U.S.C. §§1446(d), 1447(c). More specifically, Section 1446(d) of the federal removal statute states that upon removal the state court "shall proceed no further unless and until the case is remanded:"

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

Section 1447(c) states in equally plain language that once a certified copy of remand is mailed to the state court, the state court "may thereupon proceed with such case."

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

In this case, the state court was divested of jurisdiction to proceed on May 5, 2006, when the notice of removal was filed, and jurisdiction was not revested in the state court until March 5, 2009, when a certified copy of the order of remand was transmitted to the state court. For this reason, the state court was without jurisdiction when the default was entered, and when the trial took place, and therefore, the judgment is void and should be vacated, as should be the entry of default and all other orders and proceedings in the state court since the case was removed on May 5, 2006.

The Court of Appeals has chosen to ignore the mandatory language of the federal removal statutes and holds that the mailing of a certified copy is procedural, not jurisdictional, and thereby converts the statute to a notice statute. In so holding, the

Court's opinion overlooks state and federal rules of statutory construction, which bind the court to the plain language of the statute. *State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004).

This Court has held that: If "a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Miller v. Aiken*, 364 S.C. 303, 613 S.E.2d 364, 366 (2005) (emphasis added). In addition, the United States Supreme Court held that, according to the language of the statutes on removal and the policy of Congress, the removal statutes call for "strict construction of such legislation." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108, (1941). In light of these precedents, the Court of Appeals erred in failing to adhere to the requirement of strict construction. *See also Barbour v. Int'l. Union,* 640 F.3d 599, 605 (4th Cir.2011) (en banc), *abrogated on other grounds by* 28 U.S.C. § 1446(b)(2)(B) (citing *Shamrock* and holding removal statutes must be strictly construed).

As Chief Judge Few points out in his dissent, the plain language of Section 1447(c) establishes when jurisdiction revests in the state court:

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

Hulsey v. Limehouse, Judge Few's Dissent (emphasis added) [App. 153.] To circumvent the plain language of Section 1447(c), the Court erroneously relies upon the Fourth Circuit's decision in *In re Lowe*, 102 F.3d 731 (4th Cir. 1996), a case in which the court

was presented with the question of when the federal district court is divested of jurisdiction to reconsider its remand under Section 1446(d). Although the court in *Lowe* did not address the question of when the state court is revested with jurisdiction to proceed under Section 1447(c),[5] the Court of Appeals reasons that the determination of when jurisdiction revests in the state court must be determined by the same interpretation as when the federal court loses jurisdiction.

However, the Fourth Circuit's ruling as to when federal jurisdiction divests under Section 1446(d), does not answer the question as to when jurisdiction revests in the state court under Section 1447(c). In fact, while the Fourth Circuit has never ruled on the specific question of when jurisdiction revests in the state court, the Court has noted, in dicta, that a state court regains jurisdiction when the district court mails a certified copy of the remand order to the state court:

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

Bryan v. BellSouth Telecommunications, 492 F.3d 231, 241 (4th Cir. 2007). As to the pertinent issue presented here – when/whether jurisdiction is returned to the state court – other state courts have held that jurisdiction does not transfer until the statutorily mandated mailing of the certified copy of the order of remand: *State ex rel. Nixon v.*

[5] The Court of Appeals notes that the Missouri Court of Appeals and the Texas Supreme Court have stated that the Fourth Circuit held in *Lowe* that jurisdiction returns to the state court when the district court enters the remand. *Nixon v. Moore*, 108 S.W.3d 813, 817-18 (Mo. Ct. App. 2003); *Quaestor Invs., Inc. v. State of Chiapas*, 997 S.W.2d 226, 228 (Tex. 1999). However, with due respect to those courts, the Fourth Circuit did not make any such holding in *Lowe*. The holding is that the district court is divested of jurisdiction when the remand order is entered, and that is not the question presented in this case.

Moore, 108 S.W.3d 813 (Mo.App. W.D. 2003) (vacating as void judgment which was entered before the federal court mailed a certified copy of remand order to state court); *Turner v. Healthcare Services Group, Inc.*, 156 S.W.3d 431 (Mo.App. E.D. 2005) ("State court jurisdiction is only restored once a remand order is certified and mailed to the state court."); *Quaestor Investments, Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999) (holding that "jurisdiction revests in the state court when the federal district court executes the remand order and mails a certified copy to the state court"); *Laborers Local No. 942 v. Lampkin*, 956 P.2d 422, 438 (Alaska 1998) ("the state court apparently did not have jurisdiction of the case prior to receiving the certified copy of the order remanding the case from federal district court".)

The Court of Appeals further errs in holding that the requirement of Section 1447(c) is procedural as opposed to jurisdictional and turns Section 1447(c) into a statute requiring mere notice. As described above, the plain language of the statute requires mailing of a certified order of remand to return jurisdiction to the state court. Again, as the Chief Judge Few points out in his dissent, if Congress intended that a notice of remand was sufficient, it could have drafted the statute accordingly. Instead, Section 1447(c) defines the jurisdictional limitations on the power of a state to proceed based on the mailing of a certified order. Under the Court of Appeals' interpretation, the federal statutory mandate of Section 1447(c) can be ignored, so long as there is no prejudice. In effect, the Court rewrites the statute and deletes the certification requirement.

As to the significance of the certification requirement, the Defendants proffered to the Trial Court the notice from the Clerk of the District Court for the District of South Carolina that was circulated via electronic mail in February 2008. [R.p. 296] The notice

addresses the issue of affixing the seal of the court – as may be required by the federal rules [or federal statute] – in this "new" world of electronic filing. That procedure dispenses with the court's literal process of manually embossing the seal of the court on documents and substituting a new process (effective February 19, 2008) of utilizing an electronic seal. The notice provides that the electronic seal will also be used when certifying copies of documents filed in the court's record. Accepting that the federal Clerk of Court has the discretion and authority to utilize an electronic seal, this notice highlights the fact that there is a physical process – whether manually embossing or electronic seal – that the federal Clerk must utilize to duly "certify" the authenticity of copies of the documents that have been filed with the clerk and can be found in the court's record.

Section 1447(c), with its clear and plain language requiring mailing of a ***certified*** order, is a congressional mandate that defines when the state court is revested with jurisdiction to proceed. The Court of Appeals has no legal basis to rewrite the federal statute by holding that the Section 1447(c) requirement is a mere notice requirement that must be preserved by objection when an uncertified order is mailed, and may be ignored where there is no prejudice.

Jurisdiction is not subject to waiver, and no showing of prejudice need be shown from the failure to comply with a jurisdictional requirement. *See State v. Langford,* 223 S.C. 20, 73 S.E.2d 854, 860 (1953);[6] see also *Carroll v. U.S.*, 354 U.S. 394, 406 (1957). Thus, as subject matter jurisdiction, the failure to mail a certified copy can be raised at

[6] Overruled on separate grounds, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

any time. *Edwards v. State*, 372 S.C. 493, 642 S.E.2d 738, 739 (2007); Rule 12(h), SCRCP.

The federal statute is clear, and strict compliance is mandatory. In view of the undisputable fact that the federal district court did not mail a certified copy of the remand order to the Charleston County Clerk of Court until March of 2009, jurisdiction had not been revested in the state court until that time, and the court was without jurisdiction to hold Hulsey in default or otherwise proceed with this litigation. Therefore, the judgment is void and should be vacated, as should be the entry of default and all other orders and proceedings in the state court since the case was removed on May 5, 2006. The Supreme Court should reverse and remand for further proceedings.

II. The Court of Appeals erred in creating a new and novel test for a Rule 55(c) request to set aside entry of default, and in overlooking that the Defendants made the requisite showing of good cause.

The issue of the appropriate inquiry on a Rule 55(c) motion to set aside entry of default has been the subject of much confusion. The Court of Appeals creates a two-prong test, with the first prong essentially integrating the Rule 60(b) excusable neglect inquiry for a motion to set aside a default judgment into the much more lenient Rule 55(c) inquiry:

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

Hulsey v. Limehouse, 397 S.C. 49, 71, 723 S.E.2d 211,223 (Ct. App. 2011). The Court of Appeals is in error when it finds no good cause solely because of "no satisfactory explanation": this is a Rule 60(b) factor. In other words, the Court of Appeals considered

why Hulsey got into default (a Rule 60 inquiry) instead of why the default should be set aside to allow Hulsey to answer and defend on the merits (a Rule 55(c) inquiry).

In *Wham v. Shearson Lehman Bros., Inc.* 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989), the Court of Appeals identified three factors to be considered under a Rule 55 (c) motion: 1) the timing of the motion for relief from default; (2) whether moving party has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. There was no factor for the explanation or excuse of the defaulting party.

In *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009), this Court found that a moving party should "provide an explanation for the default and give reasons why the vacation of the default entry would serve the entry of justice." The Court also noted that the standards for relief of a default judgment under Rule 60(b) were more rigorous and required "a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fault misrepresentation or other misconduct. Id. at 608, 888. The opinion also stated that while "it is often observed...that the criteria for obtaining relief from judgment under Rule 60(b)-mistake, inadvertence, excusable neglect, suprpise, newly discovered evidence, fraud, misrepresentation--are relevant in determining whether good cause has been shown under Rule 55(c)...we caution that this language invites trial courts to apply a heightened standard to Rule 55(c) motions." *Id.* at 608, 889. This Court also clearly said: "No trial court should ever find good cause lacking based solely on the absence of a Rule 60(b) factor." *Id.* A later decision by this Court, *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009), never mentions the newly created test identified above, but instead applied only the *Wham* factors in a Rule 55(c) inquiry.

The Court of Appeals' conclusion that there is no good cause solely because of "no satisfactory explanation" makes a Rule 60(b) factor the controlling factor into a Rule 55(c) inquiry, despite the warnings of this Court in *Sundown*. Thus, the Court of Appeals has created a new test that departs from the standard of "[f]or good cause shown" under Rule 55(c) and focuses on why there is a default rather than why a default should be vacated:

> The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Id. Once a party has put forth a satisfactory explanation . . . the trial court must also consider [the Wham factors].

Hulsey v. Limehouse, 397 S.C. at 70, 723 S.E.2d at 222. In other words, the Court made the good cause standard a strict two-step process with the first step being an undefined step for the defaulting party to "put forth a satisfactory explanation," or, in other words, to explain why the default occurred. Relying on *Sundown,* the Court of Appeals claims that if the explanation is not "satisfactory," no relief under 55(c) can be given. However, *Sundown* simply holds:

> Although the presence of other factors, in the totality of the circumstances, may amount to a showing of "good cause," a defendant may not be relieved from the entry of default *solely* because it relied to its detriment on a negligent insurance agent.[7]

Id. 383 S.C. at 609, 681 S.E.2d at 889. There is no such reliance at issue in this case.

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

In *Sundown,* the Supreme Court cites to *Ricks v. Weinrauch,* 293 S.C. 372, 360 S.E.2d. 535 (Ct. App. 1987), in which good cause was shown in the totality of circumstances involving misplaced reliance on an insurance agent. In *Ricks,* the Court did not solely consider an insurance agent's negligence, but .recognized the overriding principle that the rules are liberally construed to see that justice is promoted and to strive for disposition of cases on their merits.

Not once does the Court of Appeals decision mention that the totality of circumstances may amount to "good cause" or that Rule 55(c) strives to have cases heard on their merits. Instead, the Court of Appeals improperly inserted an overriding Rule 60(b) reasonableness standard. In *11 Fed. Practice and Procedure § 2858* on Rule 60(b),[8] there are a legion of cases where reasonableness is the issue, more commonly called the "mistake" or "inadvertence" issue.[9] Such is not a Rule 55(c) issue.

This Court, in *Richardson,* in looking at "good cause to set aside the entry of default," states:

In deciding whether good cause exists, the trial court should consider the

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

[9]Even if reasonableness is the standard of "good cause" under Rule 55(c), the Court of Appeal overlooks or misapprehends that Hulsey's interpretation of the deadline for filing of the answer after remand was not unreasonable where the question was novel, Hulsey's interpretation was supported by law from other jurisdictions, and the timing was subject to at least two other different interpretations by the trial court and Plaintiff's own counsel. The confusion about when the answer was due is apparent from Court of Appeals' opinion, as neither the majority nor the dissent opines when the answer should have been filed in state court. In fact, in the trial court's order, Judge Pieper acknowledged that it was a novel question of law. [R.p. 10]

> following factors: (1) the timing of the defendant's motion for relief, (2) whether the defendant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros.* 298 SC. 4621, 465, 381 S.E.2d 499, 502 (Ct. App. 1989).[10]

Richardson, 383 S.C. at 610, 682 S.E.2d at 266. Significantly, the *Wham* factors, even where there was reliance on a negligent insurance agent, were considered:

> Moreover, 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.

Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d at 267.

A careful reading of *Sundown* and *Richardson* clearly shows that "in the interest of justice" requires a Rule 55(c) inquiry which centers on the *Wham* considerations.[11] There is no pre-*Wham* inquiry. The Rule 55(c) test clearly is the *Wham* factors.

Since the *Richardson* case, there have been several cases discussing default, However, most of those cases have either addressed a motion to set aside default judgment under Rule 60 or have been based on the fact that service was improper and have not discussed the "good cause" standard.[12] The only post-*Richardson* case (beside

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[10] It should be noted that the 60(b) factor of "the reasons for the failure to act promptly" has been eliminated.

[11] It is apodictic that a just determination of every action is an overriding consideration. *See*, SCRCP Rule 1.

[12] See, *White Oak Manor, Inc. v. Lexington Ins. Co.*, 394 S.C. 375, 715 S.E.2d 383 (Ct. App. 2011) (entry of default should be set aside based on improper service but no discussion of "good cause" under Rule 55); *McClurg v. Deaton*, 395 S.C. 85, 716 S.E.2d 887 (2011)(affirming denial relief from judgment of Rule 60 motion); *Mull v. Ridgeland Realty*, 387 S.C. 479, 693 S.E.2d 27 (Ct. App. 2010)(denial of motion for relief from judgment under Rule 60(b) based on improper service was affirmed); *Rodriguez v. Gutierrez*, 391 S.C. 323, 705 S.E.2d 323 (2011) (court declined to reverse the denial of a motion for relief from judgment under Rule 60(b)); *Graham Law Firm, P.A. v. Makawi*,

this one) to discuss "good cause" is *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 719 S.E.2d 703 (Ct. App. 2011). In that case, the Court of Appeals affirmed the denial of a Rule 55(c) motion to set aside an entry of default in which the defendant claimed "she did not recall" receiving a copy of the complaint. The Court again inserted the "satisfactory explanation" requirement (which is Rule 60 factor) and then listed the *Wham* factors as the standard for a Rule 55(c) motion. Despite the Court's claim that a "satisfactory explanation" is required before the *Wham* factors are considered, the Court in *Wilder* did **not** discuss the explanation provided, but merely considered the *Wham* factors. The only "explanation" that Blue Ribbon provided in that case, was that it had not been served as the president of the company stated that "she did not recall" being served. The order of the trial court (upheld by the appellate court) held that Blue Ribbon had been served, finding that in that type of situation, the process server's affidavit was more persuasive.

The Court then considered the *Wham* factors and held:

> Under the Wham factors, we likewise find no abuse of discretion in Judge Barber's finding that Blue Ribbon did not show good cause sufficient to relive it from the entry of default. As to the first factor, the timing of the motion for relief, more than a year elapsed between the time Blue Ribbon was served with the summons and complaint and when it moved for relief. Regarding a meritorious defense, the second factor, Judge Barber accepted Blue Ribbon's acknowledgement that it had no meritorious defense to liability. Finally, as to the degree of prejudice to Wilder, Barber recognized Wilder's argument that she would be prejudiced if the matter was further delayed while Blue Ribbon conducted discovery on an issue such as liability, which was not in dispute.

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396 S.C. 290, 721 S.E.2d 430 (2012) (considering improper service and motion under Rule 60); *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (affirming denial of Rule 60 motion for relief from judgment based on mistake, inadvertence or excusable neglect).

Wilder, 396 S.C. at 145-146, 719 S.E.2d at 707. It is clear that the proper test in a Rule 55 motion is the *Wham* factors. [13]

The record in this case demonstrates that Hulsey handily met the *Wham* factors. Hulsey promptly answered and moved for relief from the entry of default. [R.p. 121]. The record also shows that there exists a meritorious defense to the defamation, including the absolute truth of the statements made by Hulsey, a good faith litigation privilege and lack of proximate cause in that Limehouse's illegal operation of his business and prior associated bad publicity and bad reputation were the reason his business failed [R.p. 111; Answer.] Finally and foremost, there was no prejudice to Limehouse from the short delay in answering – which Plaintiff's counsel acknowledged at the hearing.[14] [R.p. 781.] Thus, Appellant has demonstrated "good cause" under Rule 55(c) , and the entry of judgment should be vacated.

III. The Court of Appeals erred in affirming the unduly restrictive limitations used by the trial court during the default hearing that did not comport with Rule 55(b), which effectively deprived Defendants of their fundamental right to a fair hearing, in various ways.

A. The trial court ignored Rule 55(b)(2).

In *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880, 882 (1978), this

[13] However, even if a "satisfactory explanation" is required, the *Wilder* Court obviously found a satisfactory explanation because it then proceeded to analyze the *Wham* factors. If "I don't recall being served" is a satisfactory explanation (as was present in *Wilder*), then the miscalculation of a deadline in this case-- especially where the question of the deadline is a novel questions of law (R.p. 8) -- certainly should be considered satisfactory.

[14] At oral argument before the Court of Appeals, Limehouse amazingly took the position that it was impossible to file a timely answer in state court after the remand. Limehouse asserted that the state court could determine that there was a default in the federal court, even though the state court was without jurisdiction over the case at the time it was pending in federal court. In fact, there was no finding of default by the federal court, and Limehouse chose not to raise the issue of default with the federal court.

Court decided to adopt a default damages procedure that limits a defendant's participation to cross-examination and objection to plaintiff's evidence. The Court of Appeals found there was no controlling authority for diverging from that ruling. However, the Court of Appeals overlooked that the *Howard* decision predates passage of Rule 55, when the South Carolina Rules of Civil Procedure first became effective on July 1, 1985. And, while there are post-1985 cases that have cited *Howard,*[15] no appellate court has examined the post-Rule procedure set forth in Rule 55 and its departure from the pre-Rule procedure used in the *Howard* case.

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

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

Thus, Rule 55 specifically acknowledges that in a default damages hearing the court can consider the truth of the allegations and any other evidence, in addition to damages.

The lower court's refusal to allow any inquiry to "establish the truth of an averment" was an error, especially in light of Rule 55(b)(2)'s stated purpose. This Court has stated that: "It is generally recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits." *Lewis v. C. O. R. E., Inc.*, 275 S.C. 556, 274 S.E.2d 287,

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[15] *Ammons v. Hood*, 288 S.C. 278, 341 S.E.2d 816 (Ct. App. 1986)**Error! Bookmark not defined.**; *Doe v. S.B.M.*, 327 S.C. 352, 488 S.E.2d 878 (Ct. App. 1997); and *Roche v. Young Brothers, Inc. of Florence*, 332 S.C. 75, 504 S.E.2d 311 (1998).

289 (1981). Moreover, may courts across the United States allow a defaulting party to fully participate in a damages hearing.

In *Dungan v. Superior Court In & For Pinal County*, 512 P.2d 52, 54 (Ariz. App. 1973), the Court noted that the Rule 55(b) provision allows the court to "conduct such hearings" as would be in furtherance of "establishing the truth of the averments" and stated:

> Since we are committed to an adversary system of justice, we do not construe this rule to mean that a "hearing" ipso facto means a one-sided presentation by the party seeking the default judgment. It is well-settled in this jurisdiction that, as to setting aside default judgments, all doubts should be resolved in favor of a trial on the merits. We conceive that the same principle should apply to a hearing under Rule 55 as to the amount of damages.

Id. at 53-54 (internal citations omitted). The *Dungan* court concluded that in a hearing under Rule 55, a defendant should be permitted "to cross-examine and even present counterproof." *Id.* Similarly, another court has warned that in a damages hearing, a court "should be alert that no fraud is perpetrated on the court and that the chance for error in setting damages is kept to a minimum." *Boit v. Brookstone Co., Inc.*, 641 A.2d 864 (Maine 1994).

Other courts have also recognized that a party in default should be allowed complete participation in the damages hearing. *See, e.g., Napolitano v. Branks*, 128 A.D.2d 686, 513 N.Y.S.2d 185, 186 (1987)(defendant is entitled to "full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages"); *Bashforth v. Zampini*, 576 A.2d 1197, 1200 (R.I. 1990) (Relying on Rule 55, the court found that defaulting defendants must be permitted to engage in the discovery process and present counter- evidence at a damages hearing); *Gallegos v. Franklin*, 89 N.M. 118,

123, 547 P.2d 1160, 1165 (Ct. App. 1976)(the defaulting defendant has the right to cross-examine plaintiff's witnesses and to introduce affirmative testimony on his own behalf in mitigation of damages); *Payne v. Dewitt*, 995 P.2d 1088, 1095 (Okla. 1999) (defaulting party has a right to be heard on the extent of damages, including the right to cross examination and introducing evidence on his behalf); *Pittman v. Colbert*, 120 Ga. 341, 47 S.E. 948 (1904) (defaulting defendant can contest before the jury the amount of the damages, and to this end may not only rigidly cross-examine the witnesses for the plaintiff, but also introduce evidence in his own behalf); *McGarvin-Moberly Const. Co.*, 897 P.2d 1310 (Wyo. 1995)(upholding lower court's ruling allowing defaulting party to participate fully on issues of proximate cause and damages, including question of comparative fault).[16]

In the present case, the trial court ignored its duty under Rule 55(b)(2) and failed to inquire into the truthfulness of several "facts" that went before the jury, e.g., that there was never a press conference as alleged by the Complaint and the actual statements in the allegedly defamatory article were never shown to the jury. Hulsey was even prevented from presenting prior articles that showed:

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

[16] One court has found that a defendant in default could introduce evidence and "defeat the action by showing that **no** damages were caused by the plaintiff to the matter alleged." *Hallett Const. Co. v. Iowa State Highway Comm'n,* 154 N.W.2d 71, 74 (Iowa 1967) (emphasis added).

- Limehouse was failing to pay federal taxes.

[R.p. 371-375; 720-740]. Likewise, Limehouse was allowed to testify that Hulsey had run the false statements on his Firm website for three years, though the complaint contained no allegations about the website (and thus none were deemed admitted) [R.p. 377]. Hulsey was precluded from proving the true content of the website and, more importantly, was not allowed to demonstrate that Limehouse was never mentioned on the website. [R.p. 403:17- 404:14]. Even as to the "facts" that were alleged in the complaint, the presence of such allegations in the complaint does not give Limehouse liberty to purposefully proclaim known falsehoods or relieve the Court of the obligation to investigate the truth under Rule 55(b)(2). A default does not sanction untruths.

B. The damages proceeding in the trial court did not even follow the current law of default in South Carolina.

Even if a defaulting defendant cannot introduce evidence and is restricted to cross-examination under *Howard v. Holiday Inns*, *supra*, because South Carolina takes such a sweeping view of cross-examination, a defaulting defendant must be allowed under due process to confront witnesses with latitude and with documents for impeachment, even if those documents are not allowed to be introduced into evidence. See, e.g., *North Greenville Coll. v. Sherman Constr. Co., Inc.*, 243 S.E.2d 441, 442 (S.C. 1978) ("Considerable latitude is generally allowed in the cross-examination of an adverse witness for possible bias."); *State v. Brewington*, 226 S.E.2d 249, 250 (S.C. 1976) ("On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality of the witness."). As one noted treatise states: "(Cross-examination) is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 *Wigmore Evidence* (3d Ed. 1940), § 1367 at pages 28-9.

The method of restricted cross-examination allowed by the trial court and affirmed by the Court of Appeals actually renders cross-examination ineffective. First, Hulsey was prohibited from using any documents to impeach during cross-examination. [R.p. 378:6-379:15; 398:2-9] Second, although Limehouse put honesty and his reputation in the community at issue, the trial court prohibited Hulsey from cross-examining Limehouse about subjects relating to his honesty or reputation, including that he provided substandard housing that was raided by the government [R.p. 398:23-399:4]; that previous newspaper articles already had destroyed his reputation [R.p. 371-375; 720-740]; and that a probate court had found that Limehouse had mishandled/misappropriated money from his father's estate [R.p. 460-466; 741]. In essence, while Limehouse was allowed to paint himself as an upright and honest businessman whose reputation had been damaged, Hulsey was prevented from demonstrating on cross-examination that Limehouse had a terrible reputation from the outset and had acted dishonestly in other matters.

Because the trial court restricted cross-examination so greatly as to render it ineffective, Hulsey was not even allowed the cross-examination to which defaulting defendants are entitled under *Howard*. No impeachment was allowed, even when dealing with matters that were overtly false and/or outside the allegations of the complaint.

C. The Defendants were not allowed to fully defend against the allegations introduced by the Plaintiff at trial, which were outside the complaint, and therefore not admitted by any Defendants' default.

When a defendant is in default, the plaintiff's right to recover is not unlimited and is circumscribed by the complaint he drafted. *Wiggins v. Todd*, 296 S.C. 432, 373 S.E.2d 704, 705 - 706 (Ct. App. 1988). "The allegations of a complaint cannot be enlarged by

evidence introduced to support a judgment by default." *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 510 S.W.2d 555, 562 (Ark. 1974). As one court explained:

> Ordinarily considerable latitude in pleading is given, and if the testimony calls for relief in addition to that called for by the facts stated in the complaint, then the complaint is treated as amended to conform to the proof. The same latitude is not permissible, however, in the instance of a judgment taken by default.

Kerr v. Kerr, 234 Ark. 607, 610, 353 S.W.2d 350, 352 (1962). The noted treatise *Corpus Juris Secundum* states:

> A judgment for plaintiff by default must strictly conform to, and be supported by, the allegations of the petition or complaint. A closer correspondence between pleading and judgment is necessary than after a contested trial, since a party is deprived of his or her day in court....A defendant's default does not enlarge or broaden the plaintiff's claim and rights under the allegations of the petition. Nor nor may the allegations of the petition be enlarged by any evidence offered or introduced on confirmation of the default judgment.

Vol. 49 C.J.S. Judgments § 288. The relief allowable by default is limited not only by the prayer for damages but also by the substantive allegations of the complaint. The court cannot allow a plaintiff to prove different claims or different damages at a default hearing than those pled in the complaint. *Argentinis v. Fortuna*, 39 A.3d 1207, 1217 (Conn. App. 2012). The *Argentinis* court held that an "admission cannot traverse beyond the bounds of the underlying pleading and admit allegations not made by the pleader; the pleading is, unless leave is granted to modify, the ceiling." *Argentinis*, 39 A.3d at 1217.

Limehouse was allowed to present evidence of other allegations beyond those admitted in the complaint, but the trial court prohibited Hulsey to fully contesting the new allegations.

To the extent that Hulsey's failure to answer constituted an admission, the admission of fact should have been limited to the alleged false statements made at the alleged press conference,[17] and damages should have been limited to that incident. However, the Trial Court improperly allowed testimony outside of the complaint that Hulsey was not allowed to contest regarding issues such as the value of the Limehouse's business, Hulsey's net worth, the harm suffered by others, the facts of the RICO case, Hulsey's pro bono work, and the Firm website. For instance, Limehouse was allowed to testify that Hulsey had run the false statements on his Firm website for the last three years including up to the morning of trial and that the website violated some unspecified court order, which were not true, [R.p. 367:4-8], and to compound this error, the Plaintiff's attorney was allowed to argue in closing that the website justified punitive damages. [R.p. 682]. Even though no such allegations were made in the complaint and thus were not deemed admitted, Hulsey was precluded from proving the content of the website and allowing the jury to learn the truth about those allegations and the article – perhaps most critically, that Limehouse was never mentioned on the website.[18] [R.p. 745, 756]

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[17] Limehouse's attorney even admitted that "all this case is about is damage to Mr. Limehouse's reputation as a result of those four statements that I put in the complaint." [R.p. 377: lines 22-23.] Plaintiff's counsel further specifically proclaimed that this case in solely about the articles in the Post & Courier. [R.p. 376: lines 3-4.]

[18] The Court of Appeals erred in stating that this issue was not preserved for review based upon a failure to object to testimony. The Court of Appeals limits its inquiry to the issue regarding whether the trial court erred in allowing Limehouse to testify about new allegations outside of the complaint and states that there was no contemporaneous objection. However, one of the main issues on appeal involves the testimony of Limehouse on the website, which was an issue beyond the scope of complaint. A contemporaneous objection was not required because Hulsey expected – and due process required – that he would be able to fully explore this issue on cross-examination by introducing evidence of the website in question. Hulsey was not allowed prove the content of the website to allow the jury to learn the truth about those allegations. Even if

It was error for the court to continue to adhere to the rigid strictures of *Howard* when Hulsey attempted to contest issues beyond the scope of the default admissions as the court is not permitted to allowed the "the allegations of the petition [to] be enlarged by any evidence offered or introduced on confirmation of the default judgment." 49 *C.J.S. Judgments* § 288.

D. The trial court improperly commented on the facts in answering the jury's question about the Defendants' website link.

The trial court commented on the facts and obstructed Hulsey's opportunity to cross-examine and impeach Limehouse regarding the website. At the trial, Limehouse testified that Hulsey had "run [the false statements] on their website for the last three years, and that is against—he agreed to a Court Order saying he couldn't do it anymore, and it's been on his website for three years and it was on there again this morning." ROA 367:4-8. Limehouse's attorney asked "Is he still running on his website that you're engaged in racketeering?" and Limehouse responded in the affirmative. Limehouse also testified that there was a link to the Post & Courier story. None of these statements by Limehouse were in the Complaint. In addition, there was no court order directing Hulsey to take any action with regard to his website. However, the trial court refused to allow Hulsey to show that Limehouse's testimony was not correct as to the contents of the website.

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the court takes the restrictive view that the decision in *Howard* allows defaulting defendants only cross-examination and objection, this certainly only applies to those allegations admitted in the complaint. Each time Hulsey attempted to introduce evidence of the website on cross-examination to defend against these new allegations, the trial court precluded him from doing so. Simply stated, although Limehouse opened the door regarding allegations beyond the complaint, the trial court treated those allegations as if they had been admitted in the complaint and continued to hold Hulsey to the default procedures.

Furthermore, during deliberations, the jury specifically asked about the website and whether the link to the article was still there. Even though the website had not been the subject of any of the allegations in the complaint (and thus, could not have been admitted by Hulsey), and despite the fact that Hulsey had been denied the right to present evidence or show the jury the actual website, [R.p. 711], the trial court told the jury that the article was still linked as of Monday of trial. [R.p. 714.] The Court of Appeals upheld this ruling.

"A trial judge should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally." *Sierra v. Skelton*, 307 S.C. 217, 414 S.E.2d 169, 174 (Ct. App. 1992). Here, the trial court actually established a fact, which is worse than giving an opinion on the facts.

Further, the Court of Appeals held that, although Limehouse was allowed to testify that the link on the website was a violation of a court order, Hulsey could have cross-examined Limehouse on this matter. However, Hulsey was in fact precluded from introducing the very court order/proceedings from the federal class action which indisputably evidences that there was no prohibition from mentioning the case on the firm website. [R.p. 815.] Because of this overly-restrictive procedure, the trial court improperly established a fact for the jury, which was not a matter that had been deemed admitted by virtue of the complaint and was not true.

E. The Defendants were not allowed a full and fair hearing on punitive damages.

The Court of Appeal overlooked or misapprehended the due process requirements afforded to parties in default. The Court of Appeals states that Hulsey provided no authority to support the proposition that South Carolina should employ a different default

damages procedure for punitive damages than for actual damages. However, Hulsey has provided extensive authority to describe the protection afforded to any defendant in the context of punitive damages. *See, e.g., Pacific Mutual Life Ins. v. Haslip*, 499 U.S. 1 (1991); *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 568 (1996) ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor."); *see also, Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), *S.C. Farm Bureau Mut. Ins. Love Chevrolet*, 324 S.C. 149, 478 S.E.2d 57 (1996); *Atkinson v. Orkin Exterminating Co.,* 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004). See, e.g., *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 638 S.E.2d 667, 670 (2006). Indeed, the Supreme Court of South Carolina has recently increased appellate scrutiny of punitive damages adopting a de novo standard, as opposed to abuse of discretion. *Mitchell v. Fortis Ins. Co.,* 385 S.C. 570, 583, 686 S.E.2d 176, 182-183 (2009). Because courts scrutinize punitive damages so severely, a corollary of this protection is that a defendant must be able to defend against the imposition of punitive damages, even in the default context.[19] This is especially true where punitive damages were awarded based upon conduct that Hulsey could have proved never occurred, had he been given the opportunity to defend himself.

F. The trial court improperly charged the jury that it had a duty to make an award of punitive damages and submitted a verdict form that invaded the province of the jury.

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

The Defendants argued that the trial court also erred by charging the jury that it had a duty to make an award of punitive damages and by submitting a verdict form that invaded the province of the jury which always has the discretion to not make such an award. However, the Court of Appeals found no error, reasoning that the trial court did not instruct the jury it *had* to award punitive damages, but simply instructed the jury that *if* it found the plaintiff entitled to punitive damages it was their duty to determine the amount to which the Limehouse was entitled. In so holding, the majority overlooked or misapprehended the full context of the trial court's instruction to the jury along with the verdict form. The jury instruction stated: "Under proper allegations, a plaintiff proves by clear and convincing evidence a willful, wanton, reckless, and malicious violation of his rights. It is not only the right, **but the duty** of the jury to award punitive damages." R.p. 705 (emphasis added).

The trial court's instruction that the jury had a duty to award punitive damages, connotes an obligation on their part, which negated any implied option that they could decline to make an award of punitive damages.[20] The majority's reliance on the phrase "if" overlooks and misapprehends the nature of the trial as a default hearing where liability was never an issue for the jury and the verdict form did not give the jury an option not to award punitive damages; rather, the verdict form contains a blank for the jury to fill in an amount for punitive damages. [R.p. 17.]

Further, the concept of a *duty* to award clearly equates to "had to" which, in either wording, does not comport with controlling constitutional precedent that a jury has the

[20] Because this case was a default, it can be distinguished from *Magnolia North Property Owners Ass'n, Inc. v. Heritage Communities*, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App., 2012), *cert pending*, which upheld a similar instruction.

discretion to decline to award punitive damages. In this regard the majority has overlooked or misapprehended the law as stated in such cases as the U.S. Supreme Court's holding in *Smith v. Wade*, 461 U.S. 30, 52 (1983), that a finding of recklessness or malice or conscious disregard does not mandate an award of punitive damages:

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

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

CONCLUSION

The trial court entered default when it did not yet have jurisdiction to proceed under Section 1447(c) and refused to set aside the entry of default despite a showing of good cause under Rule 55(c). Then, at the default damages trial, the trial court so restricted the Defendants ability to cross-examine the witnesses or present evidence that the jury were prevented from hearing the truth as provided for in Rule 55(b) and also allowed the Plaintiff to submit evidence of allegations beyond his complaint, all of which thereby deprived the Defendants of any real, effective ability to defend themselves. The consequence of all which resulted in a judgment for $7.3 million in actual and punitive damages. In affirming the judgment, the Court of Appeals has ignored the mandatory requirements of Section 1447(c), created a new test for a showing "good cause" under Rule 55(c), ignored the provisions of Rule 55(b)(2) for conducting the default hearing

and allowed a judgment to stand where the Defendants were effectively deprived of their fundamental right to a fair hearing and due process.

For these reasons, Defendants respectfully request that the Court reverse the judgment and remand the case to allow the Defendants to answer and defend the claims against them on the merits in a trial that comports with the due process requirements of the State and Federal Constitutions.

Respectfully submitted,

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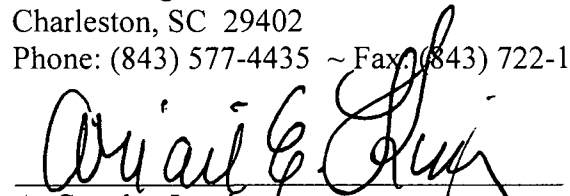

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October 10, 2012

STATE OF SOUTH CAROLINA

In the Supreme Court

On Appeal from Charleston County
Court of Common Pleas

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

Case No. 06-CP-10-1577

Lawton Limehouse, Sr.

RESPONDENT,

v.

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

PETITIONERS

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief complies with Rule 242, SCACR, and with the August 13, 2007 Order of the South Carolina Supreme Court which requires redaction of certain personal identifying information.

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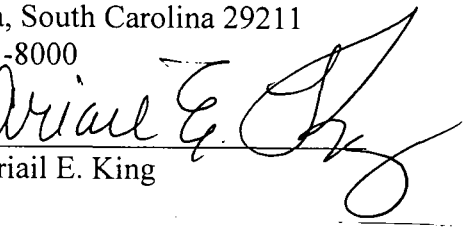
By: 
Ariail E. King

ATTORNEYS FOR PETITIONERS

Columbia, SC
October 10, 2012

STATE OF SOUTH CAROLINA
In the Supreme Court

On Appeal from Charleston County
Court of Common Pleas

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

Case No. 06-CP-10-1577

Lawton Limehouse, Sr.

RESPONDENT,

v.

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

PETITIONERS.

PROOF OF SERVICE

I, Connie W. Grugan, secretary for the law firm of Lewis, Babcock & Griffin, L.L.P., hereby certify that I have served the Brief of Petitioners upon opposing counsel, by mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to said opposing counsel at the following address:

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

Connie W. Grugan

This 10th day of October, 2012.

A. CAMDEN LEWIS
KEITH M. BABCOCK
JAMES M. GRIFFIN
ARIAIL E. KING
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October 10, 2012

VIA HAND-DELIVERY
The Honorable Daniel E. Shearouse
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Lawton Limehouse, Sr. vs. Paul H. Hulsey and The Hulsey Group, LLC
Case No. 06-CP-10-1577, Our File No. 09-105

Dear Mr. Shearouse:

Enclosed for filing please find the following documents in the above-referenced case:

1. One original unbound Appellants' Brief, 15 bound copies of the brief for the Court, and 1 bound copy to stamped and returned with our courier;

2. Thirteen additional copies of the Appendix/Record on Appeal.

By copy of this letter, a copy of the Brief is being served upon opposing counsel pursuant to Rule 242. Opposing counsel has already been served with a copy of the Appendix/Record on Appeal.

Sincerely,

LEWIS, BABCOCK & GRIFFIN, L.L.P

Ariail E. King

AEK:cg
Enclosure
cc: Frank M. Cisa, Esq., w/ enc.
Robert H. Hood, Esq., w/enc.