THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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

Dickie Shults, ...Appellant,

v.

Angela G. Miller, ...Respondent.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Appellant respectfully moves the Court for a rehearing of its unpublished Per Curiam Opinion filed June 29, 2016 which affirmed the trial court's order granting Angela Miller's motion to set aside an entry of default and her motion for summary judgment.

I. The Opinion Overlooks or Misapprehends Points Made by the Plaintiff Regarding the Trial Court's Setting Aside of the Entry of Default.

Rehearing of the Opinion is needed because the unpublished Opinion misinterprets *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). The Opinion cites *Sundance* in support of the affirmance of the trial court, yet it fails to perform any analysis of the facts and procedural history of

this case under the *Sundance* framework. As such, the Opinion conflicts with *Sundance* and longstanding precedent addressing the issue of setting aside an entry of default. Specifically, the Defendant and the trial court failed to provide a satisfactory explanation for the default, the purported explanation is without evidentiary support and is not legally sufficient under the case law, and the trial court did not determine if vacation of the default would serve the interests of justice.

First, the Defendant and the trial court failed to provide a satisfactory explanation for the default. In this case, the "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 Per Curiam Opinion did not address in its order whether the Defendant had a satisfactory explanation for the default that constituted good cause. In fact, the Defendant does not have a satisfactory explanation for the default. The Court should rehear this case to determine if the Defendant has a satisfactory explanation for the default.

Second, the unpublished Opinion overlooks and misapprehends that the Defendant's purported explanation for the default is without evidentiary support. The Defendant alleges that the trial court's statement in the first order and second order that the "Defendant explained there was some confusion with Seay's insurance accepting liability for the accident and a change of her own insurance companies" is an explanation for the default. (R. pp. 4, 8). However, the undisputed testimony, by the Defendant herself, is that she was not confused about her responsibilities. Instead, she had a complete lack of communication with the insurance agent she had at the time of the accident and with the agent she had on the day she was served with the Complaint. She said she gave the Summons and Complaint to her husband with the understanding that the husband would take it to the Watson Insurance Agency, Inc., her automobile liability insurance company at the time of the accident. (R. pp. 173-175)(Miller Depo. pp. 62-64). She was not present at the agency when her husband dropped off the lawsuit. (R. p. 174)(Miller Depo. p. 63). She does not know the name of the person that her husband gave the lawsuit to at the agency and he did not get a receipt. (R. p. 189)(Miller Depo. p. 78). The Defendant never called the Watson Insurance Agency in

the 35 days following service of the Complaint to confirm that it had the Summons and Complaint or that it was going to respond to the Complaint. (R. pp. 184, 186)(Miller Depo. pp. 73, 75).

The Defendant never testified that she was confused about Seay's insurance company paying for the claim (she had no contact with Seay's insurance company about this lawsuit). She never mentions any confusion caused by her changing insurance agencies. She changed from the Watson Insurance Agency to the Cornerstone (Haygood) Insurance Agency after the accident, but both agencies placed her with Nationwide. (R. pp. 177-178, 180-182)(Miller Depo. pp. 66-67, 69-71). She had absolutely no contact with the Cornerstone (Haygood) Insurance Agency after being served, and never gave it the Complaint, because Cornerstone was not her agent at the time of the accident. (R. pp. 180-182)(Miller Depo. pp. 69-71). There was no confusion – just a lack of communication. She testified that she had no conversations, for any reason, with the Watson Insurance Agency after being served with the lawsuit. (R. p. 186)(Miller Depo. p. 75). In the thirty days after being served with the lawsuit, the Defendant did not call anyone at either Nationwide or Allied Insurance Company. (R. p. 188)(Miller Depo. p. 77). In the thirty days after being served with the lawsuit, other than the Watson Insurance Agency, the Defendant did not send the lawsuit to any lawyer, insurance agency, or insurance company. (R. p. 188)(Miller Depo. p. 77). The Defendant testified that she relied on the Watson Insurance Agency to hire her an attorney to file an answer and that is why she went into default. (R. p. 194)(Miller Depo. p. 83).

Third, the unpublished Opinion overlooks and misapprehends that the Defendant's purported explanation has been rejected by the Court's precedent. The trial court's order was controlled by an error of law. Specifically, this case is controlled by *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). In *Sundown*, the Supreme Court reiterated that a Defendant cannot establish good cause to be relieved of default by arguing that it relied upon an insurance agent to respond to the Complaint. The Supreme Court specifically said that:

> This argument is without merit, as the law is clear that an attorney or insurance company's misconduct is imputed to the client. *See Williams v. Vanvokenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App.1994) (observing that an attorney's negligence in failing to answer is imputable to the defendant); *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct.App.1987) (recognizing that negligence of an attorney or insurance company is imputable to a defaulting litigant)."

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

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

Fourth, the Per Curiam Opinion fails to address the Plaintiff's argument that the trial court failed to consider if the vacation of the default entry would serve the interests of justice. The *Sundown* decision is clear that the "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). The trial court did not consider or discuss whether the vacation of the default entry would serve the interests of justice, and the Defendant did not provide any such argument. As such, it was an error of law and an abuse of discretion to set aside the entry of default.

II. The Opinion Overlooks or Misapprehends Points Made by the Plaintiff Regarding the Trial Court's Granting of Summary Judgment to the Defendant.

Rehearing of the Opinion is needed because the unpublished Opinion overlooks or misapprehends the Plaintiff's arguments concerning the trial court's granting of summary judgment to the Defendant. The Per Curiam Opinion fails to discuss the factual evidence that precludes the granting of summary judgment. The Opinion acknowledges that 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). However, the Opinion fails to view the evidence in the light most favorable to the Plaintiff.

In addition, the Opinion fails to discuss that even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Baugus v. Wessinger*, 303 S.C. 412, 401 S.E.2d 169 (1991). The party seeking summary judgment has the burden of clearly establishing

the absence of a genuine issue of material fact. *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct.App.2004). Summary judgment is a drastic remedy and should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004).

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

The Plaintiff's argument is based on the testimony of the Defendant, and all reasonable inferences from the Defendant's own testimony. The Defendant testified that she was hit from the front-right side by Mr. Phillip Seay as he was entering S.C. 292 from a road that dead-ended into S.C. 292 at a right angle (a "T" intersection). (R. pp. 141-142, 110)(Miller Depo. pp. 30-31; Collision Report). The Defendant admitted that she never saw Mr. Seay until after the impact even though he was coming from in front of her and she was looking forward. (R. pp. 143-144)(Miller Depo. pp. 32-33). However, her husband did see Mr. Seay prior to the collision and yelled "look out." (R. p. 132)(Miller Depo. pp. 21). Since she testified that she was only traveling 20 mph in a 35 mph zone, and she already had her foot on the brake before the impact, there are

genuine issues as to whether she was keeping a proper lookout, and whether she could have stopped before the impact with Mr. Seay or stopped before she crossed the center line and hit the Plaintiff. (R. pp. 147, 149, 164)(Miller Depo. pp. 36, 38, 53). Instead of stopping at such a slow speed, her vehicle completely crossed the Plaintiff's lane of travel and come to a rest in the ditch on the Plaintiff's side of the road. (R. pp. 154-155)(Miller Depo. pp. 43-44).

Next, there is evidence that the Defendant was negligent per se. The violation of a state statute may constitute negligence per se. *Norton v. Opening Break*, 319 S.C. 469, 462 S.E.2d 861 (1995). This issue is fully briefed in the Brief of the Appellant. The unpublished Opinion does not address the Plaintiff's argument that the Defendant was negligent per se.

CONCLUSION

The Appellant's Petition for Rehearing should be granted because the Per Curiam Opinion overlooks or misapprehends the case law and the factual arguments concerning the trial court's order setting aside the entry of default and the trial court's order granting summary judgment to the Defendant.

July 11, 2016

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PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on Angela G. Miller by depositing a copy of it in the United States Mail, postage prepaid, on July 11, 2016, addressed to her attorney of record:

Robert E. Davis, Esq.
The Ward Law Firm, P.A.
P.O. Box 5663
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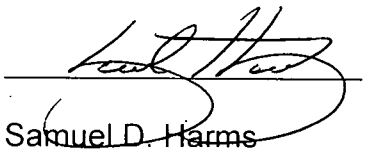
July 11, 2016



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July 11, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Dickie Shults vs. Angela G. Miller
Appellate Case No. 2015-000359

Dear Ms. Kitchings:

Enclosed for filing is the Appellant's Petition for Rehearing in the above case. Also enclosed are the following:

1. Six copies of the Appellant's Petition for Rehearing.
2. A check for $25.00 for the filing fee.
3. Proof of Service of the Appellant's Petition for Rehearing on the Respondent.
4. An additional copy of the above referenced documents. Please stamp the copies and return them to me in the enclosed self-addressed stamped envelope.

Sincerely,

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