THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Unpublished Opinion No. 2016-UP-336 (S.C. Ct. App. filed June 29, 2016)
Appellate Case No. 2015-000359
Case No. 2011-CP-42-3951

Dickie Shults, ...Petitioner,

v.

Angela G. Miller, ...Respondent.

PETITION FOR A WRIT OF CERTIORARI

Samuel D. Harms, Esq.
Harms Law Firm, P.A.
P.O. Box 51449
Piedmont, SC 29673
(864) 277-0102
Attorney for Petitioner

Other Counsel of Record:

Robert Eric Davis, Esq.
The Ward Law Firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304
(864) 591-2369
Attorney for Respondent

TABLE OF CONTENTS

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioner Dickie Shults (hereinafter "Shults") hereby petitions the Court for a writ of certiorari to review the opinion of the Court of Appeals in *Dickie Shults v. Angela G. Miller*, Op. No. 2016-UP-336 (S.C. Ct. App. filed June 29, 2016)(App. 355). The Court of Appeals affirmed the trial court's orders granting Angela G. Miller's (hereinafter "Miller") motion to set aside an entry of default and her motion for summary judgment. Petitioner now seeks a writ of certiorari so that this Court may review the Court of Appeals' opinion as to those motions.

CERTIFICATION OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled upon by the Court of Appeals on August 18, 2016. (App. 370).

QUESTIONS PRESENTED FOR REVIEW

I. Did the trial court and the Court of Appeals err by granting Miller's motion to set aside the entry of default?

   A. Did the trial court and the Court of Appeals err by granting Miller's motion to set aside the entry of default when Miller testified that she relied on her insurance agent to answer the complaint and the Supreme Court has previously held that reliance on an insurance agent to answer a complaint is not good cause to set aside an entry of default?

   B. Did the trial court and the Court of Appeals err by granting Miller's motion to set aside the entry of default where there is no evidentiary support that Miller went into default because she was confused about an insurance company accepting liability for the accident and a change of her own insurance company when Miller testified that she went into default because she relied on an insurance agent to answer the complaint?

   C. Did the trial court and the Court of Appeals err by granting Miller's motion to set aside the entry of default where the Courts and Miller did not give reasons why vacation of the default would serve the interests of justice as required by the Supreme Court's decision in *Sundown v. Intedge Industries*?

II. Did the trial court and the Court of Appeals err by granting Miller's motion for summary judgment where there are genuine issues of material fact that Miller was negligent when the evidence is viewed in the light most favorable to Shults?

STATEMENT OF THE CASE

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. (App. 125)(R. p. 124)(Miller Depo. p. 13). The road has two lanes - one in each direction. (App. 136-137)(R. pp. 135-136)(Miller Depo. pp. 24-25). The Plaintiff was travelling east on South Carolina 292. (App. 125)(R. p. 124)(Miller Depo. p. 13). Defendant Miller crossed over the center line of the road and struck the Plaintiff's vehicle. (App. 142-143, 255)(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. (App. 155-156)(R. pp. 154-155)(Miller Depo. pp. 43-44). The Plaintiff was injured in the collision. (App. 18, 258-263)(R. pp. 17, 257-262)(Complaint p. 3; Shults Depo. pp. 50-55).

The Plaintiff filed a Summons and Complaint against Angela G. Miller on September 13, 2011. (App. 16)(R. p. 15)(Summons & Complaint). The Defendant was served with the Summons and Complaint on September 15, 2011. (App. 174, 19-23)(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. (App. 174-176)(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. (App. 175, 187)(R. pp. 174, 186)(Miller Depo. pp. 63, 75). She was not present at the agency when her husband dropped off the lawsuit. (App. 175)(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. (App. 190)(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. (App. 185, 187)(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. (App. 187)(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. (App. 176-177, 184, 186)(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. (App. 186)(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. (App. 188)(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 (her subsequent insurance agency). (App. 189)(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. (App. 189)(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. (App. 195)(R. p. 194)(Miller Depo. p. 83). The insurance agent and the Defendant failed hire an attorney or to timely file an Answer to the Complaint and the Spartanburg County Clerk of Court entered an Entry of Default on October 20, 2011. (App. 24)(R. p. 23)(Entry of Default).

The Defendant went into default before any attorney was assigned to her case by the insurance carrier. (App. 186)(R. p. 185)(Miller Depo. p. 74);(App. 186)(R. p. 185)(Miller Depo. p. 74). On October 26, 2011, the Defendant served a Motion to Set Aside the Entry of Default and an Answer. (App. 25, 27)(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. (App. 63)(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. (App. 4)(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. (App. 47)(R. p. 46)(Motion to Reconsider 07/18/12). On October 31, 2012, the Defendant served a Motion for Summary Judgment. (App. 49)(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. (App. 75)(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. (App. 7)(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. (App. 59)(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. (App. 96)(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. (App. 11)(R. p. 10)(Form 4 Order 01/27/15). On February 20, 2015, the Plaintiff served a Notice of Appeal on the Defendant. (App. 61-62)(R. pp. 60-61)(Notice of Appeal; Proof of Service 02/20/15).

On June 29, 2016, the Court of Appeals filed Opinion No. 2016-UP-336 which addressed Petitioner's arguments. The Court issued an unpublished Per Curiam Opinion affirming the trial court's orders. (App. 355). The Petitioner filed a petition for rehearing on July 11, 2016. (App. 358). That petition was denied on August 18, 2016. (App. 370). Petitioner now files this petition for a writ of certiorari.

SUMMARY OF GROUNDS FOR CERTIORARI

Rule 242 of the South Carolina Appellate Court Rules sets forth some of the reasons the Court will consider that special and important reasons exist to issue a writ of certiorari. One of those reasons exists in this case and weights in favor of this Court issuing a writ of certiorari to review and reverse the Court of Appeals' opinion. Specifically, the Court of Appeals' opinion is in conflict with a prior decision of the Supreme Court. *See* Rule 242(b)(3), SCACR.

Miller testified that she relied on her insurance agent to answer the complaint and that is why she went into default. (App. 195)(R. p. 194)(Miller Depo. p. 83). The

trial court and the Court of Appeals granted Miller's motion to set aside the entry of default. However, the Supreme Court has previously held that reliance on an insurance agent to answer a complaint is not good cause to set aside an entry of default. *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009).

Review is also appropriate because the Supreme Court has specifically stated that 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. 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 and the Court of Appeals' opinion setting aside the default does not give any reason why setting aside the default would serve the interests of justice. The order and opinion are silent on this issue. The Court of Appeals' decision conflicts with the Supreme Court's holding that this finding is required by the trial court.

In addition, the Court of Appeals and trial court ignored binding precedent of this Court. The trial court dismissed the case at the summary judgment stage when it failed to view the evidence in the light most favorable to the non-moving party and when there were genuine issues of material fact whether the Defendant was negligent. The trial court's order ignores the evidence that favors the Plaintiff and fails to address the Plaintiff's contentions. The Court of Appeals affirmance of the trial court conflicts with a long history of prior decisions of the Supreme Court. Therefore, special and important reasons exist to support the issuance of a writ of certiorari in this case. This

Court should reverse the decision of the Court of Appeals and remand the matter for further proceedings consistent with this Court's opinion.

ARGUMENTS

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, SCRCP: 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).

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).

I. The trial court and the Court of Appeals erred by granting Miller's motion to set aside the entry of default.

There are three reasons why the trial court and the Court of Appeals erred by granting Miller's motion to set aside the entry of default.

A. The trial court and the Court of Appeals erred by granting Miller's motion to set aside the entry of default when Miller testified that she relied on her insurance agent to answer the complaint and the Supreme Court has previously held that reliance on an insurance agent to answer a complaint is not good cause to set aside an entry of default.

The trial court's order and the Court of Appeals' opinion conflicts with the Supreme Court's decision in *Sundown Operating Company, Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). Rule 55(c) states that: "[f]or good cause shown the court may set aside an entry of default." Rule 55, SCRCP. "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.

B. The trial court and the Court of Appeals erred by granting Miller's motion to set aside the entry of default where there is no evidentiary support that Miller went into default because she was confused about an insurance company accepting liability for the accident and a change of her own insurance company when Miller testified that she went into default because she relied on an insurance agent to answer the complaint.

The trial court erred when its decision to set aside the entry of default was without evidentiary support and it was err for the Court of Appeals to affirm that decision. At the trial court level, an abuse of discretion occurs when the judge issuing the order was (1) controlled by some error of law or (2) when the order, factually, is without evidentiary support. *Sundown* at 383 S.C. 607, 681 S.E.2d 888.

The trial court's decision states that the "Defendant explained there was some confusion with Seay's insurance accepting liability for the accident and a change of her own insurance companies." (App. 5)(R. p. 4)(Order 7/11/12, p. 2). A similar one sentence line appears in the Order denying the motion to reconsider. (App. 9)(R. p. 8)(Order 3/15/13, p. 3). For the reasons stated above, this excuse is not legally sufficient because she is relying on an insurance agent to file an answer to the Complaint. However, the undisputed testimony, by the Defendant herself, is that she was not confused about an insurance company accepting liability for the accident or a change in her insurance companies. There was no confusion at all and she brought the Complaint to the correct insurance agent. Instead, she had a complete lack of communication with the insurance agency she had at the time of the accident and with

the agency 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. (App. 174-176)(R. pp. 173-175)(Miller Depo. pp. 62-64). She was not present at the agency when her husband dropped off the lawsuit. (App. 175)(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. (App. 190)(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. (App. 185, 187)(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. (App. 178-179, 181-183)(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 she said Cornerstone was not her agent at the time of the accident. (App. 181-183)(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. (App. 187)(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. (App. 189)(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. (App. 189)(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. (App. 195)(R. p. 194)(Miller Depo. p. 83). The trial court's evidentiary findings about the Defendant being confused are without evidentiary support.

C. The trial court and the Court of Appeals erred by granting Miller's motion to set aside the entry of default where the Courts and Miller did not give reasons why vacation of the default would serve the interests of justice as required by the Supreme Court's decision in *Sundown v. Intedge Industries*.

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. The Court of Appeals' opinion conflicts with a prior decision of the Supreme Court because it does not require the trial court to consider if vacation of the default would serve the interests of justice.

II. **The trial court and the Court of Appeals erred by granting Miller's motion for summary judgment where there are genuine issues of material fact that Miller was negligent when the evidence is viewed in the light most favorable to Shults.**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences [that] can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). In addition, "[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). "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 below." *Id.* "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803. "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). Finally, "[B]ecause summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly

deprived of a trial on disputed factual issues." *Lord v. D & J Enterprises, Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014).

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 this Court 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. (App. 125)(R. p. 124)(Miller Depo. p. 13). The road has two lanes - one in each direction. (App. 136-137)(R. pp. 135-136)(Miller Depo. pp. 24-25). The

Plaintiff was travelling east on South Carolina 292. (App. 125)(R. p. 124)(Miller Depo. p. 13). Defendant Miller crossed over the center line of the road and struck the Plaintiff's vehicle. (App. 142-143, 255)(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. (App. 155-156)(R. pp. 154-155)(Miller Depo. pp. 43-44). The Plaintiff was injured in the collision. (App. 18, 258-263)(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). (App. 142-143, 111)(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. (App. 129)(R. p. 128)(Miller Depo. p. 17). The Defendant's husband saw the collision. (App. 132)(R. p. 131)(Miller Depo. p. 20). The Defendant's husband yelled "look out" prior to the collision. (App. 133)(R. p. 132)(Miller Depo. p. 21).

The weather was clear and the Defendant's vision was not obstructed by anything. (App. 137-138)(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. (App. 138-141)(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.

(App. 144-145)(R. pp. 143-144)(Miller Depo. pp. 32-33). The Defendant's vehicle was hit in the front right corner by Mr. Seay. (App. 145, 165)(R. pp. 144, 164)(Miller Depo. pp. 33, 53). The Defendant was not rear-ended or hit from behind by Mr. Seay. (App. 145-146)(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.

(App. 146)(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. (App. 146, 150, 160-161)(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. (App. 148, 165)(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. (App. 149)(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. (App. 150)(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. (App. 150-151)(R. pp. 149-150)(Miller Depo. pp. 38-39). The Defendant had no conversations with Mr. Seay after the collision. (App. 163)(R. p. 162)(Miller Depo. p. 51).

In addition, the Defendant did not see the Plaintiff's vehicle until after the impact. (App. 151)(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. (App. 161)(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. (App. 152, 161, 172)(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 Mr. Seay's or 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. 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 could have stopped before entering the lane of 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.

The trial court's order does not discuss any of the facts favorable to the Plaintiff. The trial court incorrectly states that the Plaintiff did not offer any testimony establishing negligence. In fact, the Plaintiff's main factual argument is that the Defendant's own testimony establishes her negligence. In addition, the trial court did not discuss that the Defendant owed a duty to keep a proper lookout or that the Defendant was negligent per se. These arguments and issue are completely ignored by the trial court. The Court of Appeals' opinion also fails to discuss the facts favorable to the Plaintiff and fails to consider the arguments of the Plaintiff regarding the Defendant's common law and statutory duties and the breach of those duties. Finally, the trail court's decision views the evidence in the light most favorable to the Defendant instead of viewing the evidence in the light most favorable to the non-moving party. For these reasons, the trial court erred when it granted the Defendant's motion for summary judgement and the Court of Appeals should not have affirmed the trial court's decision.

CONCLUSION

Based on the arguments set forth above, this Court should issue a writ of certiorari to review and reverse the Court of Appeals' opinion affirming 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.

September 16, 2016

Samuel D. Harms, Esq.
S.C. Bar No: 13537
Harms Law Firm, P.A.
P.O. Box 51449
Piedmont, SC 29673
(864) 277-0102
Attorney for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 16 2016
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Unpublished Opinion No. 2016-UP-336 (S.C. Ct. App. filed June 29, 2016)
Appellate Case No. 2015-000359
Case No. 2011-CP-42-3951

Dickie Shults, ...Petitioner,

v.

Angela G. Miller, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for a Writ of Certiorari and the Appendix on Angela G. Miller by depositing a copy of them in the United States Mail, postage prepaid, on September 16, 2016, addressed to her attorney of record:

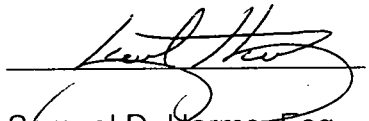
Robert E. Davis, Esq.
The Ward Law Firm, P.A.
P.O. Box 5663
Spartanburg, SC 29304

I further certify that I served the Petition for a Writ of Certiorari and the Appendix by hand delivering a copy of them on September 16, 2016 to the office of:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
(Without Appendix)

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

September 16, 2016



Samuel D. Harms, Esq.
S.C. Bar No: 13537
Harms Law Firm, P.A.
P.O. Box 51449
Piedmont, SC 29673
(864) 277-0102
Attorney for Petitioner