

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Appellate Case No. 2016-001911  
Unpublished Opinion No. 2016-UP-336 (S.C. Ct. App. filed June 29, 2016)

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Dickie Shults, .....Petitioner,

v.

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

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REPLY TO RETURN FOR PETITION OF CERTIORARI

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OCT 11 2016

**S.C. SUPREME COURT**

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~~REPLY BRIEF OF PETITIONER~~

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## ARGUMENTS

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 Respondent's Return completely ignores Shults' first argument. In this case, the trial court abused its discretion because it committed an error of law. 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). Specifically, the Supreme Court has held 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. *Sundown*, 383 S.C. at 609, 681 S.E.2d at 889. 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). Since the Supreme Court has held that the negligence of an insurance agency is not good cause, it was an error of law and an abuse of discretion for the trial court to grant the Defendant relief from the default.

Next, the Respondent's Return does not address the Petitioner's second argument that the trial court abused its discretion when the entry of default was set aside in a situation where the Respondent shares responsibility for the entry of default with an 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.

Since the Respondent does not present any arguments to the contrary, this issue has been fully briefed.

- 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 Respondent's Return side-steps the argument of the Petitioner. The trial court abused its discretion because there is no evidentiary support for the trial court's decision. 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. 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). (App. 178-179, 181-183, 189)(R. pp. 177-178, 180-182, 188)(Miller Depo. pp. 66-67, 69-71, 77). She never mentions any confusion caused by her changing insurance agencies. *Id.* She had absolutely no contact with the subsequent insurance agency (Cornerstone / Haygood) 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). The real issue is that Miller relied on her insurance agency to respond to the complaint. She was not confused about her situation, instead, she knew exactly what she was supposed to do, but her insurance agency failed to do its job.

- 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*.**

The Respondent's Return ignores the fact that the trial court's order setting aside the default does not state that setting aside the default would serve the interests of justice. 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 required finding by the Court. Contrary to the Respondent's arguments, the *Wham* factors do not establish that the interests of justice have been served by setting aside the default. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E.2d 499 (Ct.App. 1989). Again, there must be an independent finding by the Court that the interests of justice have been served by setting aside the default. As such, 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.

- 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.**

In the Respondent's Return, the Respondent presents all of the facts in the light most favorable to the Respondent. However, this case was dismissed at the summary judgment stage. The issue before this Court is that the trial court's order views the evidence in the light most favorable to the Defendant and it completely ignores the

Plaintiff's arguments that the Defendant was not keeping a proper lookout and that she was negligent per se.

A.

The Defendant stated that she was hit from the front-right side of her vehicle and the weather was clear. (App. 137-138)(R. pp. 136-137)(Miller Depo. pp. 25-26). The Defendant's husband saw Mr. Seay approaching. (App. 132)(R. p. 131)(Miller Depo. p. 20). The Defendant's husband had time to yell "look out" prior to the collision. (App. 133)(R. p. 132)(Miller Depo. p. 21). The Defendant never saw Mr. Seay. (App. 144-145)(R. pp. 143-144)(Miller Depo. pp. 32-33). The Defendant was traveling only 20 mph in a 35 mph zone. (App. 148, 165)(R. pp. 147, 164)(Miller Depo. pp. 36, 53). 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).

The Plaintiff's argument on this point is very simple. There is some evidence that the collision between the Defendant and Mr. Seay could have been avoided if the Defendant had been keeping a proper lookout (like her husband). In addition, there is some evidence that the collision between the Defendant and the Plaintiff could have been avoided if the Defendant had properly applied her brakes before traveling into the Plaintiff's lane of travel. At only 20 miles per hour (which is very slow), and with her foot already applying the brakes while she was traveling down the road, the Defendant should have been able to stop before being struck by Mr. Seay since her husband saw Mr. Seay coming and yelled "look out;" or in the alternative, the Defendant could have braked and stopped before hitting the Plaintiff in his lane of travel. Instead, the Defendant went completely across the Plaintiff's lane of travel and ended up in the ditch on the Plaintiff's side of the road. The Defendant argues that she was not the

proximate cause of the collision with the Plaintiff. That is not the case. If the Defendant had been keeping a proper lookout, and if she had applied her brakes, she would not have struck Mr. Seay's vehicle. Or in the alternative, she would have reduced her speed to the point that she would not have crossed into the Plaintiff's lane of travel. There is some evidence that the Defendant's conduct was, in part, the cause of her collision with the Plaintiff.

Second, the Respondent's Return argues that "Trooper Mace investigated the accident and spoke with all involved and found no evidence or testimony that Miller did anything to cause the accident." R. Return at 9. However, Trooper Mace was not a witness to the accident, and his opinions about fault would not be admissible at trial. The Respondent's argument on this issue ignores the standard that the evidence should be viewed in the light most favorable to the Plaintiff.


B.

The Respondent's Return argues that Miller did not violate any statutes because she was pushed by Mr. Seay into the Plaintiff and therefore she was not "in actual physical control of her vehicle." R. Return at 11. The Plaintiff's argument is that summary judgment was inappropriate in this case because there is some evidence that the Defendant could have avoided the accident if she had not been driving too fast for the conditions, i.e. she could have stopped before hitting Mr. Seay. Since her foot was already on the brake, and she was only traveling 20 mph, she should have been able to stop before crossing over the center lane in violation of the statute that requires her to remain on her side of the road. Again, these factual issues should be decided by a jury. As such, it was an error of law for the trial court to dismiss the case at the summary judgment stage.

## 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.

October 1, 2016



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PROOF OF SERVICE

I certify that I have served the Reply Brief of Petitioner on Angela G. Miller by depositing a copy of it in the United States Mail, postage prepaid, on October 1, 2016, addressed to her attorney of record:

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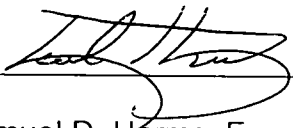
Angela G. Miller, .....Respondent.

PROOF OF SERVICE

I certify that I have served the Reply to Return for Petition of Certiorari (Title/Cover Change) on Angela G. Miller by depositing a copy of it in the United States Mail, postage prepaid, on October 4, 2016, addressed to her attorney of record:

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October 4, 2016

  
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