IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2017-000674

Lahitsha Hampton, Respondent,

v.

George Edward Willoughby, Richard Mann, & William Sherman, Defendants,

OF WHOM:
William Sherman is the Appellant.

INITIAL BRIEF OF APPELLANT

Matthew C. LaFave
CROWE LAFAVE, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5727
ATTORNEY FOR APPELLANT

TABLE OF AUTHORITIES

CASES

RULES OF CIVIL PROCEDURE

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying Appellant's Motion to Prevent Entry of Default or, in the Alternative, for Relief From Entry of Default Pursuant to SCRCP Rule 55?

2. Did the trial court err in denying Appellant's Motion to Stay Enforcement of a Judgment?

STATEMENT OF THE CASE

On December 11, 2015 Respondent, Lahitsha Hampton, filed suit against each of the above Defendants alleging negligence stemming from a motor vehicle accident against Defendants Mann and Willoughby with a separate claim for Negligent Entrustment against Appellant. Respondent, on March 24, 2016, moved for an Entry of Default as to Appellant contending he was personally served at 36 Lisa Drive in Greenville, South Carolina on December 14, 2015 though no Answer was filed within the requisite thirty (30) days. Appellant, on June 1, 2016, filed a Motion to Prevent Entry of Default or, in the Alternative, for Relief from Entry of Default Pursuant to SCRCP 55, which was heard by The Honorable Letitia H. Verdin on July 28, 2016 in Greenville, South Carolina. After hearing oral arguments and taking the matter under advisement, Judge Verdin issued an Order Denying Appellant's Motion. Of significance, as of the date of the Hearing Defendant Mann was also in default and Defendant Willoughby had only just filed an Answer on July 13, 2016. Moreover, on October 7, 2016 an Order was filed setting aside default as to Defendant Mann.

Following the entry of the foregoing Order by Judge Verdin Appellant filed subsequent motions including the other that forms the basis for this appeal, which was the Motion to Stay Enforcement of a Judgment. In response to the entry of a Default Judgment on October 17, 2016, Appellant filed a Motion to Stay Enforcement of a Judgment pursuant to Rules 54(b), 62(b), and 62(h), SCRCP. Judge Verdin heard Appellant's Motion on November 1, 2016 and later issued, on November 9, 2016, a Form 4 Order denying Appellant's Motion without a

detailed ruling. Finally, on November 17, 2016, Appellant filed a Motion for Reconsideration of the Court's ruling denied on February 17, 2017. The instant appeal follows.

FACTS

On or about March 30, 2015 Plaintiff was driving a 2007 Ford northbound on East Stone Avenue near the intersection of Spartanburg Street. Defendant, Richard Mann, was traveling southbound on East Stone Avenue in a 2006 Mini Cooper near the aforementioned intersection of Spartanburg Street. Defendant, George Edward Willoughby was also traveling southbound on East Stone Avenue in a 1973 Chevy, which was owned by Appellant. Mr. Willoughby was slowing to make a left turn onto Spartanburg Street when his vehicle was struck from behind causing his vehicle to enter the northbound lane of East Stone Avenue resulting in a collision with Respondent's vehicle. Appellant was not present at the scene and is only involved in this instant suit by virtue of his ownership of the 1973 Chevy.

Respondent contends that she sustained numerous injuries including a concussion requiring medical treatment.

Respondent alleges Appellant was negligent under the numerous theories including, family purpose doctrine, negligent entrustment, bailor/bailee, lessor/lessee, employer/employee, master/servant, principal/agent; including any ostensible or apparent agency relationships, contractual relationships, corporate relationships, family and/or other relationships including business relationships.

ARGUMENT

1. Appellant's original motion requesting entry of default be set-aside should have been granted on the ground that Appellant established the "good cause" contemplated by the South Carolina Rules of Civil Procedure and met the rigors of the *Wham* factors warranting relief.

Appellant can and did show the motion to set-aside was timely, Respondent would suffer no prejudice should the court grant the requested relief, and Appellant can show he has a meritorious defense to the claim against him.

Rule 55(c), SCRCP requires a party moving to have an entry of default vacated to present "good cause" for such an action to be undertaken. In *Sundown Operating Co., Inc. v. Intedge Industries, Inc.,* the Court noted, "'good cause' requires the party to provide an explanation for the default and give reasons why vacation would serve the interests of justice." 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Once a showing of good cause has been made, the party seeking relief must also withstand the rigor of the test established in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989). According to *Wham*, the Court must consider "(1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; (3) the degree of prejudice to the plaintiff if relief is granted." *Id.*, 298 S.C. at 465.

Here, the nature of the accident and the Appellant's lack of involvement therein is at the very core of the argument that good cause exists for vacating the entry of default. It is undisputed that on or about March 30, 2015 Appellant's automobile was being driven by Defendant Willoughby on Stone Avenue when Defendant Mann struck it from behind while he was waiting to complete a left turn. Appellant was **not in the vehicle** and had **no knowledge** that the individual behind the wheel was driving the vehicle in the location it was at the time of the accident. The only nexus between Appellant and the accident or resulting lawsuit was the fact that a vehicle he owned was involved. This lack of involvement in the accident created significant confusion for Appellant believing it was a mistake that he could be involved in a lawsuit. The Complaint is so ill pleaded, lacking supporting facts, that Appellant could not and does not understand the basic facts to explain the cause of action against him. Furthermore,

Appellant had never previously been sued rendering him so unfamiliar with the process and the complicated motor vehicle laws in play that he did not forward the Summons and Complaint to his insurance company for a timely defense. Based on Appellant's complete absence from the scene and his lack of understanding of the claims against him, Appellant has established the "good cause" necessary for further inquiry into the appropriateness of vacating the entry of default.

As established in *Sundown*, Appellant next must show why the vacating of an entry of default would serve the interests of justice. Respondent has brought this suit against Appellant under the exclusive theory of negligent entrustment. Specifically, Respondent contends that Appellant is liable for Defendant Willoughby's negligence through the family purpose doctrine, negligent entrustment, bailor/bailee, lessor/lessee, employee/employer, master/servant, principal/agent and with a list of other relationships as a catchall. Appellant submits to this Court that vacating the entry of default would not only serve the interests of justice but to not set-aside would be to effectuate a grave injustice. In support, Appellant contends that this Court should look no further Complaint. The Complaint lists numerous obscure theories of recovery under the claim for negligent entrustment but is wholly devoid of any substantive factual allegations to support a viable cause of action under the law. For example, Plaintiff includes a theory of the Family Purpose Doctrine yet asserts no allegation(s) as to the nature of the familial relationship between Appellant and Defendant Willoughby. Additionally, Plaintiff references employee/employer, master/servant, and principal/agent yet the Complaint includes no facts or allegations to support such claims.

Finally, it is well settled in South Carolina that Rule 55(c) "should be liberally construed to promote justice and dispose of cases on the merits." *Melton v. Olenik*, 379 S.C. 45, 54, 664

S.E.2d 487, 492 (Ct. App. 2008). The principal espoused by this Court in *Melton* applies very clearly to matters such as the instant case. Appellant, as indicated herein, contends that the promotion of justice demands the entry of default be set aside in accordance with Rule 55(c) given the current posture of this suit and the glaring deficiencies. First and foremost, justice would best be served by affording Appellant the opportunity to defend the negligent entrustment claim against him as the Complaint lacks any allegations necessary to maintain such a claim such that it could not even withstand a challenge under Rule 12(b)(6), for failing to assert facts sufficient to constitute a cause of action. The Summons and Complaint served upon Appellant simply references causes of action by name but fails to provide factual allegations constituting a cause of action. Setting aside default unequivocally serves the interests of judgment in this matter as it permits Appellant to defend an otherwise meritless claim. The element for a meritorious defense is sagely included in this analysis for a reason and there could be no better set of circumstances warranting relief. A failure to vacate this default judgment disregards the promotion of justice especially where another Defendant's default has been set aside under far less persuasive circumstances.

Once the *Sundown* elements have been satisfied the Court must next assess the factors established in *Wham*. First, Appellant must show the motion for relief from default was timely. *Wham v. Lehman Bros.*, 298 S.C. at 465. Here, the Affidavit of Service produced by Respondent indicates service was made personally on Appellant, despite his lack of recollection, on December 14, 2015. However, despite the assertion that service was perfected on the foregoing date no effort was undertaken to obtain an entry of default on behalf of Respondent until March 22, 2016, with such entry being filed on March 24, 2016. Appellant's insurance carrier was not made aware of this litigation until May 17, 2016 at which time counsel was immediately retained

and the process for having the entry of default vacated commenced. The Motion to Prevent Entry of Default or, in the Alternative, for Relief From Entry of Default Pursuant to SCRCP Rule 55 was subsequently filed on May 31, 2016. At no point prior to the submission of the foregoing motion had counsel or Appellant's insurance carrier been notified of the suit against him or the default status such that the instant motion was timely filed.

The second element of the *Wham* factors is whether there exists a meritorious defense. *Id.* As previously mentioned, Defendant submits that a litany of theories have been asserted in an attempt to ensnare him in an action to which he otherwise has no connection. Taking the allegations simply at face value Appellant submits that the Complaint cannot withstand a Rule 12(b)(6) motion for failure to state a cause of action for which relief can be granted. The only theory upon which Respondent could realistically build a claim against Appellant, based upon the allegations and a liberal interpretation thereof, would be negligent entrustment. However, Respondent simply blindly asserts, presumably because Defendant Willoughby was the driver, that Appellant "provided" the vehicle to Defendant Willoughby without any factual basis for this assertion. Appellant unequivocally denies any assertion that he "provided" the vehicle to Defendant Willoughby or in any other way directly authorized or permitted him to drive said vehicle on March 30, 2015.

Moreover, no factual allegations are made necessary to satisfy any of the elements to sustain a claim for negligent entrustment. As recently as 2007 in *Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc.*, the Supreme Court declined to adopt Sections 308 and 390 of Restatement (Second) of Torts thereby standing pat on the existing requirements for a negligent entrustment cause of action to proceed. 374 S.C. 171, 648 S.E.2d 585 (2007). Specifically, "the elements of negligent entrustment are (1) knowledge of or knowledge imputable to the owner

that the driver was either addicted to intoxicants or had the habit of drinking; (2) the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver." *Id.*, 374 S.C. at 176. Respondent has no evidence, as none exists, that she would be able to satisfy any one, let alone, all of the required elements to sustain a negligent entrustment claim. Therefore, a meritorious defense is certainly present in this case as Defendant Willoughby was not asserted to be nor was he arrested and/or convicted of operating this vehicle while intoxicated.

Finally, Appellant must show that Respondent will suffer no prejudice if the entry of default is vacated. *Wham*, 298 S.C. at 465. Appellant submits that when the instant motion was filed Defendant Willoughby had not yet been served with the Complaint such that the litigation had not even begun in earnest. Moreover, at no point during the pendency of the motion had any party engaged in discovery such that the case was, at a minimum, more than a year from a possible trial date. Specifically, Appellant points to the fact that Respondent had, only on May 26, 2016 begun the process for serving Defendant Willoughby by publication with Defendant Willoughby, on July 13, 2016, having filed his Answer. Moreover, Defendant Mann remained in default as of the date of the hearing on Appellant's motion, though the entry of default against him was subsequently vacated nearly one (1) month later. Therefore, the case, despite the timing of the suit being filed, remains in its relative infancy with the litigation only beginning in earnest as of the date of Defendant Willoughby's Answer. Moreover, there has been no formal discovery been completed and there exists no readily apparent risk that the delay has led to the loss of evidence or inability to locate witnesses. Vacating the entry of default against Appellant would not compromise, alter or otherwise affect the timely adjudication of this matter. Therefore, in light of the status of the underlying litigation at the time of Appellant's motion there would have

been no delay in the adjudication of Respondent's claims. Given the absence of any interruption in litigation of this matter there can be no prejudice to Respondent in the vacating of the entry of default.

2. Secondarily, Appellant contends, in the alternative, that enforcement of the judgment entered against him should be stayed, pursuant to Rules 54(b) and 62(b), SCRCP.

The trial court refused to relieve Appellant from default rendering the allegations against him admitted for purposes of liability. However, this judgment remains inconsistent where Appellant's liability is **contingent** upon a finding of negligence on the part of the driver of his automobile, George Edward Willoughby. Defendant Willoughby steadfastly denies liability and the allegations against him remain contested in litigation. Therefore, enforcement of a default judgment at this time is not only premature but may result in an outcome entirely inconsistent with the future adjudication of this suit.

Rule 54(b) of the South Carolina Rules of Civil Procedure provides guidance for this scenario where "more than one claim for relief is presented in an action" permitting" entry of a judgment against "one or more but fewer than all of the claims or parties." However, in matters where only partial claims are adjudicated "the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 62(b) expressly contemplates the precise scenario at bar providing "[w]hen a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay the enforcement of that judgment until the entering of a subsequent judgment or judgments."

Appellant submits that a final judgment has been entered against him under the conditions stated in Rule 54(b) entered in this case as to Appellant and that under Rule 62(b) said judgment

should be stayed until the entering of a judgment or judgments in the tort proceedings against the remaining parties. To hold any differently could render an absurd and inconsistent result if a jury concludes Defendant Willoughby did not contribute to this accident.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and grant Appellant's Motion for Relief From Entry of Default Pursuant to Rule 55, SCRCP thereby permitting Appellant to file his conditional Answer. Alternatively, this Court, pursuant to Rules 54(b) and 62(b), SCRCP should reverse the judgment of the circuit court and stay the enforcement of the default judgment entered against Appellant so as to avoid a potential inconsistent result should Defendant Willoughby be absolved of liability in the underlying lawsuit.

Respectfully submitted,

August 9, 2017

Matthew C. LaFave
CROWE LAFAVE, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5727
ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and the Designation of Matter to be Included in the Record on Appeal on Lahitsha Hampton by depositing a copy of it in the United States Mail, postage prepaid, on August 9, 2017, addressed to her attorneys, Brian T. Smith and Christina Bradford, Brian T. Smith Law Offices, 714 Pettigru Street, Greenville, South Carolina 29601.

August 9, 2017

Denise M. Brockwell

Denise M. Brockwell, Paralegal
CROWE LAFAVE, LLC
P.O. Box 1149
Columbia, S.C. 29202
(803) 888-3936

Danny C. Crowe, Esq.
danny@crowelafave.com
Direct: 803.724.5728; Fax: 803.724.5730

Matthew C. LaFave, Esq.
matt@crowelafave.com
Direct: 803.724.5727; Fax: 803.724.5726

Mary D. LaFave, Esq.
mary@crowelafave.com
Direct: 803.726.6756; Fax: 803.726.3621

CROWE LAFAVE LLC
ATTORNEYS AT LAW

P.O. Box 1149
Columbia, SC 29202
Phone: 803.724.5729
Fax: 803.724.5731
contact@crowelafave.com

August 9, 2017

Via Hand Delivery
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Lahitsha Hampton v. George Edward Willoughby, Richard Mann, and William Sherman
Civil Action No. 2015-CP-23-07297
Claim No. 15-01909779

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the Initial Brief of Appellant, Designation of Matter to be Included in the Record on Appeal, and the Proof of Service in the above-captioned matter. Once filing is complete, please return the clocked copy to the individual presenting them for filing.

By copy of this correspondence to the attorneys for the Respondent, I am hereby serving a copy of the Initial Brief of Appellant and the Designation of Matter to be Included in the Record on Appeal upon Ms. Bradford and Mr. Smith.

Thanking you in advance, I am

Sincerely yours,

Denise M. Brockwell

Denise M. Brockwell

/dmb
Enclosures

cc: Christina Bradford, Esquire
Brian T. Smith, Esquire
Michael T. Coulter, Esquire
Client/Carrier