

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2016-CP-46-03212

Andy Lee Rayburn,

Respondent,

v.

David Dysart,

Appellant.

RECORD ON APPEAL

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INDEX

Order Granting Plaintiff's Motion for Default Judgment	2
Order Denying Defendant's Motion to Set Aside Entry of Default and Awarding Damages	3
Order Denying Defendant's Motion to for Reconsideration.....	8
Summons.....	10
Complaint.....	11
Transcript from February 28, 2017 Hearing	15
Transcript from May 18, 2017 Hearing	49
Affidavit of Service.....	70
Plaintiff's Motion for Default Judgment	71
Defendant's Motion for Reconsideration	74
Notice of Appeal	78
Proof of Transcript Order	81
Certificate of Appellant.....	90
Proof of Service	91

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Andy Lee Rayburn,

Plaintiff,

vs.

David Dynast,

Defendant.

IN THE COURT OF COMMON PLEAS

C.A. No.: 2016-CP-46-03212

ORDER

FILED-RECEIVED
 2016 DEC 28 PM 12:23
 CLERK OF COURT
 YORK COUNTY, SC

IT APPEARING from the affidavit of J. Richards McCrue, III, Esquire, attorney for the Plaintiff, that Defendant in this matter has been duly served with a Summons and Complaint and that more than thirty (30) days have elapsed since service, during which time no responsive pleading was filed by the defendant; and

IT FURTHER APPEARING, that pursuant to Rule 35 of the South Carolina Rules of Civil Procedure, a hearing to ascertain damages should be held to determine the relief due the plaintiff.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant is hereby in default and a judgment, in an amount to be determined at a hearing to be held at a time and date set by the Clerk of Court, shall be filed in favor of the Plaintiff.


 PRESIDING JUDGE
 SIXTEENTH JUDICIAL CIRCUIT

York, South Carolina

Dated: 12-22-16

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	
Andy Lee Rayburn,	)	Case No.: 2016-CP-46-03212
Plaintiff,	)	
vs.	)	ORDER
David Dynast,	)	
Defendant.	)	

This matter came before the Court on February 28, 2017, upon Plaintiff's request for a default damages hearing. J. Richards McCrae represented the Plaintiff, and Caroline M. Gieser represented the Defendant. By consent of the parties, a motion by Defendant presented at the hearing to set aside Defendant's default pursuant to Rule 55, SCRPC, was also heard.¹ Based on the record presented, Plaintiff's evidence of damages, and the arguments of counsel for the parties, I make the following findings and conclusions.

FACTUAL/PROCEDURAL BACKGROUND

Plaintiff commenced this action on October 31, 2016, by filing the Summons and Complaint. Defendant was personally served with the Summons and Complaint on November 5, 2016, but has failed to file an answer, or otherwise respond to the pleadings. Plaintiff filed an Affidavit of Default and Motion for Default Judgment on December 13, 2016. Subsequently, on December 22, 2016, the Hon. Daniel D. Hall issued an Order granting Plaintiff's Motion for Default Judgment, and provided that damages were to be determined at a subsequent hearing.

Prior to the hearing on damages, Defendant's oral motion to set aside the default pursuant to Rule 55, SCRPC, was heard.

DISCUSSION/ANALYSIS

1. Rule 55 Motion.

Defendant's basis for the motion to set aside the order of default was that the Court lacked personal jurisdiction over Defendant. Defendant maintains that because the pleadings

¹ Defendant did not file a Motion to Set Aside the Default Judgment in this matter prior to the hearing conducted on February 28. However, with the consent of all parties, Defendant's motion was heard prior to Plaintiff's damages hearing.

identified the Defendant as "David Dynast", when in reality his name is "David Dysart", he has not been made a party to the action. He asserts that, therefore, he, "David Dysart", has never been properly served with the Summons and Complaint.

It is undisputed that David Dysart was duly served with the Summons and Complaint naming "David Dynast", as the party-defendant. It is likewise undisputed that David Dysart is the party that was involved in the motor vehicle collision with Plaintiff that is the subject of this action. The driver's license number for "David Dynast" on the accident report is in fact David Dysart's driver's license number.

Relief from entry of default under Rule 55(c) must be predicated upon "good cause." Rule 55(c), 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." *Sundawn Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Once that has been done, the trial court must also consider the timing of the motion, the existence of any meritorious defense, and the prejudice to the Plaintiff if relief from default is granted. *Id.* In this case, I find and conclude that Defendant has failed to provide a satisfactory explanation for the default. Thus, analysis beyond that finding is not required.

As noted above, Defendant asserts that the Court lacks personal jurisdiction over David Dysart because his name was misspelled in the Summons and Complaint.

The purpose of Rule 5, SCRCP, is to provide a defendant with notice of the action so as to afford him the opportunity to respond to the lawsuit in the appropriate manner. "To establish that service has been properly effected, the plaintiff need only show compliance with the civil rule on service of process." *McCall v. IKON*, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Cl. App. 2005). "When these rules are followed, there is a presumption of proper service." *Id.*

The primary issue presented by Defendant's motion is whether the misnomer of Defendant in the caption of the case defeats the Court's personal jurisdiction over Defendant, and whether this error entitles him to relief from the December 22, 2016, Order, adjudging him to be default. Our Supreme Court first addressed this issue in 1885, and stated:

The weight of authority, . . . is that this makes no difference, and if the writ is served on the party intended to be served, and he fails to appear and plead in abatement, and suffers judgment to be obtained by default, he is concluded, and in all future litigation

may be connected with the suit or judgment by proper averments.
(*Waldrop v. Leonard*, 22 S.C. 118, 127 (1885).)

Following *Waldrop*, the Court more recently held:

... where a defendant sued by a wrong name omits to plead in abatement and suffers the plaintiff to proceed to judgment, though he has never appeared to the wrong name, this Court will not interfere to set aside the proceedings." (*Tri-County Ice and Fuel Company v. Palmetto Ice Company*, 303 S.C. 237, 241, 199 S.E.2d 779, 782 (1990).)

In this case, David Dysart was duly served with the Summons and Complaint in full compliance with Rule 5, SCRPC. The pleading adequately described a specific motor vehicle collision, and Mr. Dysart knew he was a party to that collision. Seeing that the pleadings incorrectly named him as "David Dynast",² Mr. Dysart had every opportunity thereafter either to file a responsive pleading objecting to the misnomer, or to bring a motion to dismiss the action pursuant to Rule 12(b)(2), SCRPC. Instead, he did nothing until after Plaintiff had already obtained an order from the Court holding him in default.

Our Supreme Court has stated:

We have never required exacting compliance with the rules to effect service of process. (Citations omitted.) Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings. (*Roche v. Young Bros. Inc.*, 318 S.C. 207, 209-10, 456 S.E.2d 897, 899 (1995).)

As the Court of Appeals has noted:

A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else. (*McCall v. IKON*, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005). Internal citations omitted.)

Accordingly, I find and conclude that Defendant has failed to demonstrate that the

² The apparent source of the confusion was the fact that the accident report pertaining to the collision, and prepared by the investigating/responding law enforcement officer, incorrectly rendered Mr. Dysart's last name as "Dynast." This error was perpetuated by the misnomer of Mr. Dysart in the Complaint.

DCW
#3

previous Order of Default should be set aside for good cause and, as such, Defendant's motion must be denied.

2. Plaintiff's damages.

With respect to damages, I find and conclude that Plaintiff has proved the following by a preponderance of the evidence.

Plaintiff injured his neck, back and right ankle as a result of the motor vehicle collision that occurred on April 14, 2016. He incurred a combined total of \$10,057.69 in medical and chiropractic costs due to the injuries suffered in this collision.

At the time of this incident, Plaintiff was employed with Comporium Communications where he earned \$19.17 an hour. He was unable to work for eight days following this incident, missing a total of sixty-four hours. Using these factors to calculate a total, Plaintiff suffered lost wages in the amount of \$1,226.88.

Plaintiff had moderate-to-severe pain in his affected body-parts for approximately one-and-a-half months following the collision, and his pain and discomfort did not fully resolve until sometime in August, 2016. This coincided with the conclusion of his medical and chiropractic treatment. Plaintiff was unable to play football with his young son or go fishing for several months after this accident, activities which he regularly pursued and enjoyed.

Plaintiff acknowledged that he had previously injured his neck, back and ankle in an earlier motor vehicle collision in 2014, and had sought chiropractic care following that incident. However, immediately prior to the subject accident, he was not experiencing pain of any kind in any of these areas of his body.

Defendant did not dispute Plaintiff's claims with regard to his lost wages. Nor was there any evidence that Plaintiff's medical and chiropractic treatment was either unreasonable, or unnecessary, aside from pointing out that Plaintiff had suffered similar injuries two years earlier.

Based on the evidence and testimony presented at the hearing, I find and conclude that Plaintiff is entitled to an award of actual damages in the amount of \$25,000.00.

ORDER

Therefore, based on the record presented, and the findings and conclusions herein, it is ordered as follows:

1. Defendant's motion to set aside default judgment pursuant to Rule 55, SCRPC, is denied.

DM
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2. Plaintiff is granted judgment against the Defendant, David Dysart, in the sum of \$25,000.00, actual damages, together with the costs of this action.

3. The caption of this case shall be amended to reflect the name of the Defendant as "David Dysart", and the appropriate records of the Court shall be amended to reflect the amendment.

4. The Clerk of Court is authorized and directed to enter the judgment in this case upon the judgment roll against the Defendant in name of "David Dysart."

AND IT IS SO ORDERED.

March 7, 2017


S. Jackson Kimball
Special Circuit Court Judge
York County



FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP4603212

Andy Lee Rayburn

David Dysart

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(c), SCRPC (Pl. Nonuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order, (formal order to follow) ☐ Statement of Judgment by the Court:

This matter came before me on May 18, 2017, upon Defendant's motion pursuant to Rule 59(e), SCRPC, asking the Court to alter or amend the Court's Order filed March 8, 2017. Representing the parties were: J. Richards McCrae for Plaintiff, and, Carrie H. O'Brien for Defendant.

The purpose of Rule 59(e), SCRPC, to alter or amend the judgment, is to request the trial judge to "... reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (Citations omitted). A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment, but was not. See *Johnson v. Sonoco Products Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009); and, *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009).

Upon reviewing the record presented, and considering the memoranda and arguments of counsel, I find no matter presented that was not addressed expressly or by clear implication in the prior order. I further find no basis for reconsideration or amendment of the ruling rendered in the prior order.

Therefore, it is ordered that Plaintiff's/Defendant's Motion pursuant to Rule 59(e), SCRPC, be denied.
AND IT IS SO ORDERED.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment In Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details. E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Special Circuit Court Judge

3063
Judge Code

5/23/2017
Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

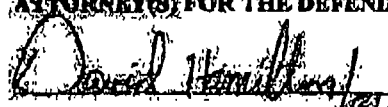
John Richards McCrae III PO Box 707 Rock Hill, SC
29731-6707

Carrie H. O'Brien 6701 Carmel Road Suite 475 Charlotte,
NC 28226

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

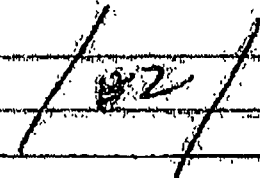

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

Andy Lee Rayburn,

Plaintiff,

vs.

David Dynast,

Defendant.

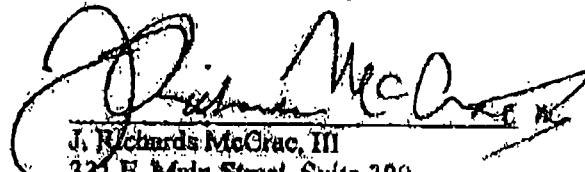
IN THE COURT OF COMMON PLEAS

C.A. No.: 2016CP4603212**SUMMONS**
(JURY TRIAL REQUESTED)

TO: THE DEFENDANT, ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint upon the subscriber, at his office at 331 E. Main Street, Suite 300, Rock Hill, South Carolina 29730, within thirty (30) days after the service thereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the complaint.

MORTON & GETTYS, LLC



J. Richards McGrac, III

331 E. Main Street, Suite 300

Post Office Box 707

Rock Hill, South Carolina 29731

(803) 366-3988 (o)

(803) 366-4076 (f)

Attorney for the Plaintiff

Rock Hill, South Carolina

October 27, 2016

FILED-RECEIVED
2016 OCT 31 PM 12:01
CLERK OF COURT
C.C. & A.S.
YORK COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Andy Lee Rayburn,

Plaintiff,

vs.

David Dynast,

Defendant.

IN THE COURT OF COMMON PLEAS

CASE ACTION NO.:

2016CP4603212

COMPLAINT
(JURY TRIAL REQUESTED)

FILED-RECEIVED
2016 OCT 31 PM 12:01
CLERK OF COURT
YORK COUNTY, SC

The Plaintiff would respectfully show unto the Court that:

PARTIES & VENUE

1. Plaintiff is a citizen and resident of the County of York, State of South Carolina.
2. Upon information and belief, Defendant is a citizen and resident of the County of York, State of South Carolina.
3. Venue is proper in this Court pursuant to §15-7-30(C) of the South Carolina Code of Laws.

FACTUAL ALLEGATIONS

4. On or about April 14, 2016, Plaintiff was traveling north on Chamberside Drive in Rock Hill, South Carolina when, at the intersection of Chamberside and Dave Lyle Boulevard, Defendant, coming from the opposite direction, attempted to turn left onto Dave Lyle Boulevard, and, in doing so, collided into the driver-side of Plaintiff's car.
5. At the time of this collision, Defendant was required under South Carolina law to yield to Plaintiff's vehicle.
6. As a result of the collision, Plaintiff suffered the following injuries and damages:
 - a) personal injury;

- b) pain, suffering and discomfort;
- c) mental anguish;
- d) disability for a period of time;
- e) money spent for medical care and treatment;
- f) inability to carry on normal activities;
- g) emotional trauma and distress
- h) loss of enjoyment of life; and
- i) loss of earnings.

FIRST CAUSE OF ACTION
(Negligence, Gross Negligence and Recklessness)

- 7. Plaintiff repeats and realleges paragraphs 1 through 6 as if set forth verbatim herein.
- 8. Defendant had a duty to use reasonable care and due care while operating a motor vehicle on the public roadways. Furthermore, Defendant had a duty to comply with all applicable traffic laws.
- 9. The injuries and damages incurred by Plaintiff were directly and proximately caused by Defendant's careless, negligent, grossly negligent, willful, wanton, reckless, and unlawful acts in one or more of the following particulars:
 - a) in failing to apply the brakes of the vehicle and/or maintain them in proper working condition;
 - b) in failing to steer or take other evasive action so as to avoid the collision;
 - c) in failing to keep a proper lookout;
 - d) in failing to yield as required by law;
 - e) in operating the vehicle too fast for existing conditions;
 - f) in failing to observe the condition of traffic;

- g) in failing to keep the vehicle under proper control;
- h) in driving at an excessive rate of speed;
- i) in failing to reduce speed under the circumstances then and there prevailing;
- j) in attempting to make an improper left turn;
- k) in violating state laws enacted to protect the safety and health of the motoring public so as to constitute negligence per se;
- l) in failing to exercise that due care as required by law that reasonably prudent persons or entities would have used under the same and similar circumstances; and
- m) in such other particulars as may be learned from discovery or at the trial of this matter.

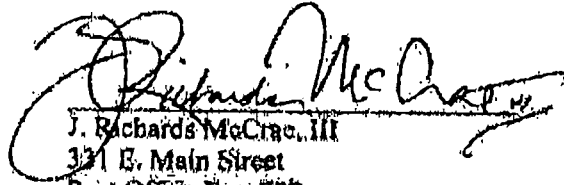
10. Defendant's careless, negligent, grossly negligent, willful, wanton, reckless and unlawful acts were the direct and proximate cause of the collision and resulting injuries and damages to Plaintiff.

11. Plaintiff is informed and believes that he is entitled to judgment against Defendant for actual and punitive damages in an appropriate amount.

WHEREFORE, the Plaintiff prays for judgment against the Defendant for actual and punitive damages in an appropriate amount to be determined at trial, the costs of this action, and for such other and further relief as the Court may deem just and proper.

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

MORTON & GETTYS, LLC



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321 E. Main Street
Post Office Box 707
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Attorney for the Plaintiff

Rock Hill, South Carolina

October 27, 2016

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT COMMON PLEAS

ANDY LEE RAYBURN,

PLAINTIFF,

-VS-

DAVID DYNAST,

DEFENDANT.

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2016-CP-46-03212

TRANSCRIPT OF RECORD

FEBRUARY 28, 2017
YORK, SOUTH CAROLINA

BEFORE:

THE HONORABLE S. JACKSON KIMBALL, III

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

JOHN R. McCRAE, III, ESQ.

ATTORNEY FOR DEFENDANT:

CAROLINE M. GIESER, ESQ.

SUSAN W. HUDGINS
CIRCUIT COURT REPORTER

INDEXWITNESSPAGE NO.

ANDY RAYBURN

DIRECT BY MR. McCRAE ----- 16

CROSS BY MS. GIESER ----- 26

REDIRECT BY MR. McCRAE ----- 29

CERTIFICATE OF REPORTER ----- 34

3

EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVIDENCE</u>
P-1	MEDICAL BILL -----	4	18
P-2	MEDICAL BILL -----	4	18
P-3	SET OF CHIROPRACTIC BILLS ----	4	19
P-4	MEDICAL BILLS -----	4	31
P-5	SUMMARY OF MEDICAL BILLS -----	4	21
P-6	EARNING STATEMENT - PAY STUBS ----	4	23
P-7	EARNING STATEMENT - PAY STUBS ----	4	23

4

1 (Whereupon Plaintiff's exhibits 1 - 7 were marked for
2 identification)

3 (Whereupon the hearing convened at 10:01 am)

4 **THE COURT:** This is case number 2016-CP-46-3212, Andy
5 Lee Rayburn against David -- is it Dyrast?

6 **MR. DYSART:** It's Dysart.

7 **THE COURT:** Dynast? Pardon?

8 **MR. DYSART:** It's Dysart.

9 **THE COURT:** You need to come sit up here, please, sir.

10 **MR. DYSART:** Okay. I'm sorry.

11 **UNIDENTIFIED SPEAKER:** They sent us to the wrong place.

12 **MR. DYSART:** They sent us to ---

13 **THE COURT:** Well, I think it's a little bit confused
14 today.

15 **MR. DYSART:** I'm sorry, Your Honor.

16 **THE COURT:** That's all right.

17 **MR. McCRAE:** Your Honor, the pleadings say Dynast. I
18 think Ms. Gieser ---

19 **MS. GIESER:** Gieser.

20 **MR. McCRAE:** --- Gieser, who is here today, I believe,
21 representing the Defendant or a Defendant, might have a
22 matter to take up with the Court before we get into the
23 damages hearing.

24 **THE COURT:** Well, but let's get his name correct --
25 what is your last name?

5

1 MR. DYSART: It's Dysart.

2 THE COURT: Spell it, please.

3 MR. DYSART: D-y-s-a-r-t.

4 THE COURT: D-y-s-a-r-t. Okay. Yes, ma'am.

5 MS. GIESER: Yes, Your Honor. The matter we want to
6 bring up with the Court ---

7 THE COURT: Your name, please.

8 MS. GIESER: My name is Caroline Gieser. That last
9 name is G-i-e-s-e-r.

10 THE COURT: G-i-e-s-e-r.

11 MS. GIESER: Yes, sir.

12 THE COURT: Caroline with i-n-e or y?

13 MS. GIESER: i-n-e.

14 THE COURT: i-n-e. Okay, Ms. Gieser.

15 MS. GIESER: And I only wanted to bring to the
16 attention of the Court ---

17 THE COURT: Now tell me who you -- tell me who -- who
18 do you represent?

19 MS. GIESER: We represent Mr. Dysart, but no Mr. Dysart
20 has been named in this. David Dynast has been named in
21 this. And to our knowledge there is no David Dynast.

22 We do not represent a David Dynast nor is there any
23 insurance coverage for a David Dynast. And for that -- we
24 reached out to Plaintiff's counsel and informed them of that
25 when we got this file back on February the 9th and then

6

1 reminded them of that on Friday, February the ---

2 THE COURT: When you -- who is we got the file on
3 February the 9th?

4 MS. GIESER: My office.

5 THE COURT: Okay.

6 MS. GIESER: And ---

7 THE COURT: Do you represent an insurer?

8 MS. GIESER: We represent Mr. Dysart, who ---

9 THE COURT: But was you hired by an insurer ---

10 MS. GIESER: Yes.

11 THE COURT: --- to represent ---

12 MS. GIESER: Yes.

13 THE COURT: --- Mr. Dysart?

14 MS. GIESER: Yes, Your Honor. Um-hum (affirmative).

15 THE COURT: Okay. Go ahead.

16 MS. GIESER: And so the Court has no personal
17 jurisdiction over David Dysart as he has never been sued in
18 this matter. Any judgment would be in the name of David
19 Dynast. The Progressive Insurance Company doesn't insure
20 Mr. Dynast. We don't even know a Mr. Dynast. So a judgment
21 would just be a piece of paper in this case.

22 THE COURT: Tell me how you came to show up.

23 MS. GIESER: So he -- Mr. Dysart was personally served
24 with these papers that said David Dynast. He then
25 ultimately reached out to his insurance company who reached

7

1 out to us. And so then we contacted the Plaintiff's
2 attorney's office to explain the error in this case that
3 there had ---

4 THE COURT: When did that occur?

5 MS. GIESER: When did we reach to the Plaintiff's
6 attorney?

7 THE COURT: Yes, ma'am.

8 MS. GIESER: That was February the 9th, the first time
9 we reached out.

10 THE COURT: Looking for -- hold on a second. So he
11 acknowledges that he was served with papers naming a Mr.
12 David Dynast as a Defendant ---

13 MS. GIESER: Correct.

14 THE COURT: --- on the 5th of November?

15 MS. GIESER: Correct.

16 THE COURT: And when did -- when did the insurer get
17 the paperwork?

18 MS. GIESER: The insurer got the paperwork in, I
19 believe, January it was. And then our -- we got information
20 February 9th.

21 THE COURT: Okay. Has there been any motion to -- for
22 relief from default under Rule 55?

23 MS. GIESER: Their office has not filed a motion at
24 this time.

25 THE COURT: Why not?

8

1 MS. GIESER: Because he hadn't been, I mean, this was
2 on the calendar. And so the Plaintiffs -- to come here and
3 defend this motion.

4 THE COURT: What concern -- what -- I understand your
5 plight.

6 MS. GIESER: Um-hum (affirmative).

7 THE COURT: What concerns me is that nobody has --
8 nobody has laid the foundation for the relief you seek.
9 And, thus, there is no -- the Plaintiff doesn't know what
10 he's defending. There are no -- there's no motion filed.
11 There's no affidavit filed in support of the motion.

12 And I, I mean, I understand your predicament, but I
13 think what -- and what you're arguing is a legitimate --
14 raises a legitimate question, but I think it has to be the
15 basis of a proper motion to be heard.

16 MS. GIESER: Okay.

17 THE COURT: Now, that being said, Mr. McCrae, what's
18 the Plaintiff's position? I understand that this -- this
19 may introduce a source of payment into the equation.

20 MR. McCRAE: May it please the Court, Your Honor?

21 THE COURT: Yes.

22 MR. McCRAE: The source of the confusion is that both
23 the FR-10 and the collision report --

24 THE COURT: What?

25 MR. McCRAE: I'm sorry.

9

1 **THE COURT:** Well, I'm not really asking about --
2 there's no question the pleading named somebody that is not
3 the Defendant.

4 **MR. McCRAE:** That's correct.

5 **THE COURT:** That may or may not relieve him from
6 default. There's no motion. It appears to me -- it seems
7 like Ms. Gieser is retained by an insurer who would be a
8 source of payment, whereas if you get a default judgment
9 against Mr. Dysart, the insurance company may decline to
10 pay.

11 **MR. McCRAE:** Your Honor, based upon my research on this
12 matter, I feel the case law, one, would say that any
13 judgment in this matter against Mr. Dysart, even if the
14 pleadings do identify Mr. Dynast, would still be proper and
15 enforceable and that under separate case law Progressive
16 Insurance Company would still have an obligation to pay the
17 claim.

18 **THE COURT:** Okay. Now, you were going to show me
19 something.

20 **MR. McCRAE:** It might not be anything the Court is
21 particularly interested in seeing. But the source of the
22 confusion is that both the FR-10 and the collision report
23 identify the other driver in this accident as a David
24 Dynast. And so that's why when we filed the lawsuit it was
25 filed ---

10

1 THE COURT: Did you have a driver's license number?

2 MR. McCRAE: It has a driver's license number, but
3 typically in this stage of litigation I would not have
4 requested the collision -- the driving history or anything
5 of that nature. It identifies an address of which Mr.
6 Dynast reports to have lived when we served the pleadings
7 ---

8 THE COURT: I'm sorry. That's where -- that is the
9 place where ---

10 MR. McCRAE: Well, ---

11 THE COURT: --- Mr. Dysart was served?

12 MR. McCRAE: Mr. -- Well, it's our understanding that's
13 where Mr. Dysart does reside.

14 THE COURT: Received the papers?

15 MR. McCRAE: And where he was personally served with
16 the original summons and complaint on November 5th of this
17 year. That affidavit of service was filed with the court.
18 And, Your Honor, ---

19 THE COURT: Let me say it this way. I would normally
20 -- I would normally -- obviously, I would normally have a
21 Rule 55 motion in front of me.

22 MR. McCRAE: Correct, Your Honor.

23 THE COURT: But I would normally -- because of the
24 circumstances I think that the -- Mr. Dysart is entitled to
25 some kind of a record on a motion. And I would normally

11

1 continue this to hear any motion properly made so that you
2 can properly respond to it.

3 MR. McCRAE: I agree, Your Honor, but I also, like the
4 Court's pointed out, recognize that that motion's not before
5 the Court.

6 THE COURT: It is.

7 MR. McCRAE: We scheduled this matter for a damages
8 hearing, and that's what we're here for. We think that the
9 argument being made by Defense counsel is merely intended to
10 gum up the work to prevent this damages hearing from going
11 forward. There's no motion before the Court that would
12 otherwise prevent this matter from going forward.

13 THE COURT: Ms. Gieser, do you -- I'm willing to hear
14 it without making a formal motion if the Defendant consents
15 to me doing it that way.

16 MS. GIESER: I'm sorry, I don't think I understand ---

17 THE COURT: Well, I've already said there's no motion.

18 MS. GIESER: Right. I understand that.

19 THE COURT: And so I believe that the Defendant is
20 entitled to be heard under the circumstances, which would
21 normally require a motion so that -- so that the Plaintiff
22 is not surprised by whatever the Defendant claims. However,
23 I'm willing to hear all of that now if the Defendant
24 consents to me hearing the motion now formally without the
25 paperwork having been filed and served.

12

1 MS. GIESER: Yes. We'll consent to that.

2 THE COURT: All right. Your argument stands, right,
3 Mr. McCrae?

4 MR. MCCRAE: Yes, sir, Your Honor. We don't think that
5 -- we think a motion's required and it's not properly before
6 the Court at this time.

7 THE COURT: All right. Now, Ms. Gieser, it appears
8 that Mr. Dysart had actual notice of the filing of
9 complaint.

10 MS. GIESER: Yes, Your Honor.

11 THE COURT: He knows whether or not he was in a wreck.

12 MS. GIESER: Yes, Your Honor. We don't contest that,
13 but our argument is that the Plaintiff still is required to
14 properly serve and properly name the Defendant in this
15 lawsuit. And they also had notice that he was improperly
16 named because we -- our office informed Plaintiff's attorney
17 of that on the 17th.

18 THE COURT: Of what?

19 MS. GIESER: Of February.

20 THE COURT: Well, I'm looking at an order for default
21 signed by Judge Hall dated December 22nd.

22 MS. GIESER: Yes, Your Honor, I ---

23 THE COURT: So the Defendant was held in default long
24 before the Plaintiff had any notice of what was going on.

25 MS. GIESER: Yes, Your Honor. And then prior -- but,

13

1 however, once our office got this file from the insurance
2 company, we put Plaintiff on notice before the hearing that
3 there was this issue with improperly named party and that he
4 -- Mr. Dysart was improperly named in the suit.

5 THE COURT: What is Mr. Dysart's driver's license
6 number?

7 MR. DYSART: 102682555.

8 THE COURT: What's on the report?

9 MR. McCRAE: 102682555.

10 (Pause)

11 MR. McCRAE: Your Honor?

12 THE COURT: Yes, sir.

13 MR. McCRAE: If it may please the Court. At some point
14 I'm prepared to address the issue at hand.

15 THE COURT: Well, anything else, Ms. Gieser, from the
16 Defendant?

17 MS. GIESER: No, Your Honor. Just our position ---

18 THE COURT: Isn't any question but what -- that the
19 papers were served on Mr. Dysart -- copies were left with
20 Mr. Dysart at his proper address.

21 MS. GIESER: Yes, Your Honor. We don't -- we don't
22 deny that.

23 THE COURT: Okay. Mr. McCrae.

24 MR. McCRAE: May it please the Court, Your Honor?
25 Under McCall v. Icon to establish that service has been

14

1 properly effected the Plaintiff only has to show the
2 compliance with the Civil Rules on service of process. When
3 the rules are followed there's an assumption of proper
4 service. There's no question, they don't deny that he was
5 served with the summons and complaint.

6 The purpose of the rule is to put the intended
7 defendant on notice of the action. The summons and
8 complaint clearly addresses -- it describes an accident that
9 Mr. Dysart that he knows he was involved with.

10 Regarding the fact that he was misnamed in the
11 pleadings, our courts going back to 1885 has said that where
12 a defendant -- where there's a misnomer in a defendant's
13 name, but the summons is served on the party intended and
14 that party fails to appear or object to the misnomer, which
15 we believe would require him to file a Rule 12(b)(2) motion,
16 and suffers a judgment to be obtained by default, he is
17 concluded.

18 Further, the Tri-County Fuel & Ice Company versus
19 Palmetto Ice Company case is where a defendant is sued by a
20 wrong name, admits to plead in abatement and suffers the
21 plaintiff to proceed by a judgment, the court will not set
22 aside the proceeding.

23 And then finally, Your Honor, I think what the
24 Defendant is requiring under Rule 5 is hyper-technical
25 compliance, which our courts have rejected and says is, in

15

1 fact, not required. In fact, what the courts have said is
2 that a suit at law is not a children's game, but a serious
3 effort on the part of adult human beings to administer
4 justice and the purpose of process is to bring parties into
5 court. If it names them in such terms that every
6 intelligent person understands who is meant, it has
7 fulfilled its purpose.

8 And we would argue that this is a mere misnomer and
9 that the case law in South Carolina is clear that that does
10 not defeat the case or provide for grounds for relief or
11 default judgment. And that -- and if that motion is before
12 the Court, it should be denied and we should be able to
13 proceed forward with our damages hearing.

14 **THE COURT:** All right. I find that and that I agree
15 that the mere -- a mere misnomer of a party, then the party
16 can otherwise determine -- has notice that they are the
17 party does not afford a reason for relief from default,
18 particularly when the party was, in this instance, where the
19 party was served in November, an order of default was issued
20 in December, December 22nd, and no response on the
21 Defendant's behalf was made until mid February. Thus, I
22 deny the motion as we structured it pursuant to Rule 55 for
23 lack of good cause to set aside the default.

24 The Defendant has had notice of the pleading, the
25 claim. And he knew what it was about. He knew he was the

ANDY RAYBURN - DIRECT EXAMINATION BY MR. McCRAE

16

1 one that had a wreck. I think he had some duty not to just
2 sit back. So I deny the motion to set aside the default.

3 We will now proceed with the default damages portion of
4 -- so judgment will be entered by default as to the
5 liability. We need to now hear the damages portion. So,
6 Mr. McCrae, if you're ready to go ahead.

7 MR. McCRAE: Yes, sir, Your Honor. We would call Lee
8 Rayburn.

9 THE COURT: Mr. Rayburn, if you will come around right
10 over there, please. Raise your right hand, please, sir.

11 MR. RAYBURN: Yes, sir.

12 Andy Rayburn, being duly
13 sworn testified as follows;

14 THE COURT: All right. Have a seat. Mr. McCrae.

15 Direct Examination by Mr. McCrae:

16 Q. Mr. Rayburn, were you involved in a car accident
17 October 14th of last year?

18 A. Yes, sir.

19 Q. Were you injured in that wreck?

20 A. Yes, I was.

21 Q. What parts of your body were injured as a result of
22 that wreck?

23 A. My back, my neck, and my ankle.

24 Q. All right. Were any of those body parts hurting you
25 before this wreck?

ANDY RAYBURN - DIRECT EXAMINATION BY MR. McCRAE

17

1 A. No, sir.

2 Q. All right. In the immediate aftermath of the wreck
3 were all those body parts hurting you at that one time?

4 A. No.

5 Q. What was hurting you immediately after the wreck?

6 A. My side right here in my back.

7 Q. All right. And then when did the other injuries come
8 about?

9 A. Came about the next day.

10 Q. All right. Right after the wreck did you seek any
11 medical attention?

12 A. Yes, sir.

13 Q. Where did you go?

14 A. Went to Piedmont.

15 Q. All right. And what did they do for you at Piedmont?

16 A. They checked me out on my side and my burns. And they
17 gave me a little bit of pain medication.

18 THE COURT: Did you say burns?

19 A. Yeah. I had some burns on my arm from the airbag and
20 also on me like -- it was like right down in here in this
21 part of my arm.

22 THE COURT: All right, sir.

23 MR. McCRAE: Approach the witness, Your Honor?

24 THE COURT: Yes, sir. You don't have to ask.

25 MR. McCRAE: Thank you.

ANDY RAYBURN - DIRECT EXAMINATION BY MR. McCRAE

18

1 Q. Hand you what's marked Plaintiff's exhibits 1 and 2.

2 Can you identify those two documents for the Court?

3 A. Yes, sir. Piedmont medical bills.

4 Q. Those are the two bills you had from Piedmont Medical
5 Center?

6 A. Yes, sir.

7 Q. All right. And what amounts were they for?

8 A. This one's for six hundred and thirty-one dollars

9 (\$631.00). And this one right here is for -- where's it at?

10 I don't see it on here. I'm trying to find it. Okay. Six
11 twenty-seven, sixty-nine (627.69).

12 Q. All right.

13 MR. McCRAE: Your Honor, we'd like to offer these as
14 Plaintiff's exhibits 1 and 2.

15 THE COURT: Any objection?

16 MS. GIESER: No, Your Honor.

17 THE COURT: All right. They're admitted without
18 objection.

19 (Whereupon Plaintiff's exhibits 1 and 2 were admitted
20 into evidence)

21 Q. After you were seen at Piedmont did you seek any
22 additional medical treatment?

23 A. Yes.

24 Q. All right. And who did you go to after that, after
25 your first emergency room visit?

ANDY RAYBURN - DIRECT EXAMINATION BY MR. McCRAE

19

1 A. Dr. Maxwell.

2 Q. All right. And what all did Dr. Maxwell do for you?

3 A. He did a series of like, you know, patches with the
4 pain, Iso -- Isotherapy ---

5 Q. All right. What parts of your body did he treat?

6 A. Back, neck, and ankle.

7 Q. All right. Was his treatment beneficial to you?

8 A. Yes, it was.

9 Q. Did it aid in your recovery in your opinion?

10 A. Yes, it did.

11 Q. All right. I'll hand you what's marked Plaintiff's
12 exhibit 3. Can you identify that document?

13 A. This is Dr. Maxwell's bill.

14 Q. All right. Can you tell us what the total -- his total
15 charges were?

16 A. Five thousand, seven hundred and sixty-four dollars
17 (\$5,764.00).

18 Q. All right.

19 MR. McCRAE: Your Honor, we'd like to offer that as
20 Plaintiff's exhibit 3.

21 THE COURT: Any objection?

22 MS. GIESER: No objection, Your Honor.

23 THE COURT: All right.

24 (Whereupon Plaintiff's exhibit 3 was admitted into
25 evidence)

ANDY RAYBURN - DIRECT EXAMINATION BY MR. McCRAE

20

1 Q. In addition to Dr. Maxwell did you see any other
2 doctors for the injuries you had from this wreck?

3 A. There was Dr. Ash also.

4 Q. Okay. And what all parts of your body did Dr. Ash
5 treat?

6 A. Dr. Ash looked at my back. And then he gave me a
7 little bit of pain medication.

8 Q. Okay. I'm handing you what's been marked as
9 Plaintiff's exhibit 4. Can you identify this document for
10 us?

11 A. It's Dr. Ash's -- well, this is Maxwell's Isotherapy.

12 Q. All right. Can you identify the provider?

13 A. Oh, Palmetto Physical Medicine.

14 Q. Okay. Is that Dr. Ash?

15 A. Yeah, that's Dr. Ash.

16 Q. What were the total charges for Palmetto Physical
17 Medicine and Dr. Ash?

18 A. Three thousand and thirty-five (3,035).

19 Q. All right. Do you know what your total medical
20 expenses come to?

21 A. I think it's ...

22 THE COURT: I'm sorry, what was your response?

23 A. It's -- I think it's ten thousand -- around that area.

24 Q. Ten thousand ---

25 A. Ten thousand, five seven five (10,575), something like

ANDY RAYBURN - DIRECT EXAMINATION BY MR. McCRAE

21

1 that.

2 Q. Would the summary of your medical and chiropractic
3 charges aid in your recollection of that amount?

4 A. Yeah. Yeah, it would.

5 Q. I'm handing you what's marked Plaintiff's exhibit 5.
6 Can you identify this document for us?

7 A. Ten thousand, fifty-seven ---

8 Q. What's the document ---

9 A. Oh, ---

10 Q. --- first ---

11 A. Oh, sorry. This is the cost summary involved with
12 everything.

13 Q. And what is that amount?

14 A. Ten thousand, fifty-seven and sixty-nine cents
15 (10,057.69).

16 Q. All right.

17 MR. McCRAE: We'd like to offer this as Plaintiff's
18 exhibit 5.

19 THE COURT: Any objection?

20 MS. GIESER: No objection.

21 THE COURT: All right. Without objection.

22 (Whereupon Plaintiff's exhibit 5 was admitted into
23 evidence)

24 Q. Mr. Rayburn, did you miss any work as a result of this
25 incident?

ANDY RAYBURN - DIRECT EXAMINATION BY MR. McCRAE

22

- 1 A. Yes, I did.
- 2 Q. How much time did you miss from work?
- 3 A. I missed eight days from work.
- 4 Q. Where are you employed?
- 5 A. It's Comportant [sic].
- 6 Q. All right. What is your position there?
- 7 A. I'm an installer.
- 8 Q. Can you tell us what you were earning at the time of
- 9 this wreck in April of 2016?
- 10 A. Nineteen -- I think it's nineteen fifteen. I think
- 11 that's what it was.
- 12 Q. All right.
- 13 **THE COURT:** I'm sorry. Is that an hour?
- 14 A. Yeah. Yes, sir.
- 15 **THE COURT:** Nineteen fifteen an hour?
- 16 A. I think it's nineteen fifteen.
- 17 **THE COURT:** All right.
- 18 Q. I'm going to hand you what's marked Plaintiff's exhibit
- 19 6 and 7. Can you identify those documents for me?
- 20 A. Yes. This is my billing -- this is billing statements.
- 21 This is my billing statements.
- 22 Q. Your -- I'm sorry, did you say ---
- 23 A. Yeah.
- 24 Q. --- your billing statements?
- 25 A. Yeah, for -- well, no, this is my actual payroll.

ANDY RAYBURN - DIRECT EXAMINATION BY MR. McCRAE

23

1 Q. Okay. Those reflect your earnings?

2 A. Yep.

3 Q. What are the dates on those two documents?

4 A. Dates on this one is 04/10/2016 through 04/23/2016.

5 And the other one is 04/24/2016 and 05/07/2016.

6 Q. Okay. And so those are the dates immediately before
7 and after this wreck?

8 A. Yeah.

9 Q. Okay. Do those documents identify what your hourly
10 rate of pay was at the time of this wreck?

11 A. Yes, it does. And it's nineteen -- nineteen seventeen.

12 Q. Nineteen seventeen an hour?

13 A. An hour, yeah.

14 Q. All right. And you said that you missed eight days of
15 work. How many hours do you work in a daily shift?

16 A. Forty.

17 Q. I'm sorry. A daily shift?

18 A. Oh, daily shift? Eight.

19 Q. Eight.

20 MR. McCRAE: We'd like to offer these as Plaintiff's
21 exhibit 6 and 7.

22 MS. GIESER: No objection.

23 THE COURT: All right. Without objection.

24 (Whereupon Plaintiff's exhibits 6 and 7 were admitted
25 into evidence)

ANDY RAYBURN - DIRECT EXAMINATION BY MR. McCRAE

24

1 Q. Mr. Rayburn, how long did you experience pain after
2 this car wreck?

3 A. All the way into August until -- until I finished my
4 treatment ---

5 Q. Okay.

6 A. --- with Dr. Maxwell.

7 Q. All right. And at its worst can you describe what the
8 pain was like for you?

9 A. It's more like a agging [sic] feeling, like it'd come
10 and go on my back. And my neck, more of like a pulse type
11 back and forth.

12 Q. If you had to rate your pain on a 1 to 10 scale for
13 your neck what would you give it, at its very worst?

14 A. At its very worst, about a 7.

15 Q. All right. What about for your back and for your
16 ankle?

17 A. My back -- my back was about a -- about a 7 also.

18 Q. And your ankle?

19 A. Ankle was around a 5.

20 Q. Okay. And for the period of time that that pain was a
21 7 for your neck and back and a five for your ankle, how long
22 did that period last before you began to see some
23 improvement on your injuries?

24 A. It lasted up to about August area.

25 Q. No, I'm sorry.

ANDY RAYBURN - DIRECT EXAMINATION BY MR. McCRAE

25

- 1 A. Oh.
- 2 Q. Did your injuries gradually improve over time?
- 3 A. Yes.
- 4 Q. Okay.
- 5 A. Yes, they did.
- 6 Q. And I guess what I'm asking you is when your pain was
7 at its very worst, how long was it at its worst?
- 8 A. At its worst? About a month and a half almost.
- 9 Q. Okay.
- 10 A. Yeah.
- 11 Q. So a month and a half you had fairly bad pain and then
12 ---
- 13 A. Yeah.
- 14 Q. --- it gradually improved?
- 15 A. Um-hum (affirmative).
- 16 Q. All right. During the period of time that you were
17 still treating and recovering from these injuries were there
18 activities that you were accustomed to doing that you
19 weren't able to do aside from not being able to work for
20 eight days?
- 21 A. I wasn't able to play with my son, football outside,
22 get him ready for football this year. Also, I like to fish.
23 And I wasn't able to fish at all.
- 24 Q. How long was it before you could resume either of those
25 two activities?

ANDY RAYBURN - CROSS EXAMINATION BY MS. GIESER

26

1 A. It was around August, around August whenever I got to
2 get back.

3 Q. Okay.

4 MR. McCRAE: Your Honor, those are all the questions I
5 have for Mr. Rayburn.

6 THE COURT: Okay. Give me just a moment.

7 (Pause)

8 THE COURT: Okay. Ms. Gieser, any cross examination of
9 the witness?

10 MS. GIESER: Your Honor, would you permit a brief five
11 minute recess?

12 THE COURT: Yes, ma'am. We'll be in recess for five
13 minutes based on the clock on the wall.

14 (Whereupon court was in recess at 10:26 am)

15 (Whereupon court reconvened at 10:32 am)

16 THE COURT: Okay. Ms. Gieser.

17 MS. GIESER: Thank you, Your Honor.

18 THE COURT: Back on the record.

19 Cross Examination by Ms. Gieser:

20 Q. Before this accident had you ever treated with a
21 chiropractor before?

22 A. Yes, I had.

23 Q. And why did you treat with a chiropractor prior to the
24 accident?

25 A. I was in a -- I was in a car accident two years before

ANDY RAYBURN - CROSS EXAMINATION BY MS. GIESER

27

- 1 that. Somebody rear-ended me.
- 2 Q. What injuries did you sustain in that car accident?
- 3 A. I ended up hurting -- I hurt my ankle and also my back
- 4 and my neck also.
- 5 Q. And did you injure your ankle in this accident?
- 6 A. Yes, I did.
- 7 Q. Did you injure your back in this accident?
- 8 A. Yes, I did.
- 9 Q. Did you injure your neck in this accident?
- 10 A. Yes, I did.
- 11 Q. How -- how many -- roughly how many chiropractor visits
- 12 did you have from the prior accident?
- 13 A. From the last one?
- 14 Q. Um-hum (affirmative).
- 15 A. I think it was almost -- it was two and a half months,
- 16 I think, something like that from the last one.
- 17 Q. And how many -- roughly how many chiropractor visits
- 18 did you have from this accident?
- 19 A. From this one? I don't exactly know. I think it was
- 20 like three months. It was through August. So from May and
- 21 August, yeah.
- 22 Q. What did the chiropractor do to help you?
- 23 A. He did the -- he pretty much popped my neck and stuff.
- 24 And then we did the, what is it, the electronic, I guess, I
- 25 don't know what they call that. It's just where they put

ANDY RAYBURN - CROSS EXAMINATION BY MS. GIESER

28

1 the electric -- electrodes on you and let it go off.

2 And then they did the little spin looking table on you.

3 I guess that stretches you out. And then he also did the

4 patches with the -- I guess the medicine they put on both

5 sides with the batteries or something like that.

6 Q. Other than the accident that brings us here today, the

7 prior accident where you said you were rear-ended, have you

8 ever been involved in any other car accidents?

9 A. Any other car accidents? Yes, I have.

10 Q. How many?

11 A. One. One before that.

12 Q. And were there any injuries from that car accident?

13 A. No. I was actually -- I was really young. I was like

14 sixteen.

15 Q. Okay.

16 A. Yeah.

17 Q. Have you ever sought chiropractic care for anything

18 other than the accident that brings us here today and the

19 car accident where you were rear-ended?

20 A. No.

21 Q. Are you still seeking chiropractic treatment today?

22 A. I do -- every once in a while I do go to the

23 chiropractor.

24 Q. For what?

25 A. Just -- just to get my back popped and stuff 'cause I

ANDY RAYBURN - REDIRECT EXAMINATION BY MR. McCRAE

29

1 do a lot of -- I coach football. So it just keeps me in --
2 whenever I'm going to the gym to try to keep in shape,
3 that's when I go -- go there for -- also.

4 Q. And are you -- do you contend that you're still injured
5 today from this accident?

6 A. No.

7 Q. Are you still suffering any pain in your ankle?

8 A. No.

9 Q. Are you still suffering any pain in your back?

10 A. No.

11 Q. Are you still suffering any pain in your neck?

12 A. No, ma'am.

13 MS. GIESER: No further questions.

14 THE COURT: Any redirect?

15 MR. McCRAE: Just very briefly, Your Honor.

16 Redirect Examination by Mr. McCrae:

17 Q. In the minutes before this accident on October 14th,
18 2016 were you having any pain in your neck, back, or right
19 ankle?

20 A. No, I wasn't.

21 MR. McCRAE: That's all I have, Your Honor.

22 THE COURT: Thank you, sir. You may step down.

23 A. Thank you, sir.

24 THE COURT: Or step aside as the case may be. All
25 right. Anything further from the Plaintiff?

30

1 **MR. McCRAE:** Just to summarize, Your Honor. You have
2 the medical bill summary. There's ten thousand, fifty-seven
3 dollars and sixty-nine cents (\$10,057.69) in medical
4 expenses. The wage lost, if you take the testimony and do
5 the math, by my calculations that comes to one thousand, two
6 hundred, twenty-six dollars and ninety cents (\$1,226.90)
7 for the eight days that he missed at nineteen seventeen an
8 hour.

9 **THE COURT:** Give me that again, please.

10 **MR. McCRAE:** One thousand, two hundred and twenty-six
11 dollars and ninety cents (\$1,226.90).

12 **THE COURT:** That's sixty-four times nineteen seventeen?

13 **MR. McCRAE:** Yes, sir.

14 **THE COURT:** Okay.

15 **MR. McCRAE:** You heard Mr. Rayburn's testimony
16 regarding the, I guess, more intense pain that he had for
17 about a month and a half and that he -- the injury resolved
18 sometime in August around the time he concluded the
19 treatment with Dr. Maxwell and that it did affect him beyond
20 that and that he wasn't able to do what he would normally
21 have done with his young son. Wasn't able to fish. We
22 believe that in light of the testimony that a reasonable
23 judgment in this matter would be in the neighborhood of
24 twenty-five thousand dollars (\$25,000.00).

25 **THE COURT:** All right. Anything else?

31

1 MR. McCRAE: No, sir, Your Honor.

2 THE COURT: All right. Now, we had an exhibit that I'm
3 not sure was properly dealt with. Number 4, which was the
4 bill -- the statement from Palmetto -- was it Pain Center or
5 something like that?

6 MR. McCRAE: Palmetto Physical Medicine, Your Honor.

7 THE COURT: Physical Medicine. Do you intend to offer
8 that?

9 MR. McCRAE: Yes, sir, Your Honor.

10 THE COURT: Any objection?

11 MS. GIESER: No objection.

12 THE COURT: All right.

13 (Whereupon Plaintiff's exhibit 4 was admitted into
14 evidence)

15 MR. McCRAE: I apologize, Your Honor.

16 THE COURT: All right. Ms. Gieser, in response?

17 MS. GIESER: Your Honor, we think in light of the fact
18 that he has prior injuries to the neck, ankle, and back, the
19 same injuries he suffered in this accident, and he sought
20 chiropractic care for those just as he did in this accident
21 that there's not sufficient evidence to enter a default
22 particularly on the chiropractic charges.

23 Furthermore, on the Plaintiff's counsel requesting
24 twenty-five thousand dollars (\$25,000.00), and that's
25 including the chiropractic for ten thousand (10,000.00), we

32

1 would also contend that, you know, roughly fifteen thousand
2 (15,000.00) -- well, I guess, his lost wages also. I'm
3 sorry. So specifically the chiropractic care we would
4 contend was not necessarily accident related.

5 And while we would contend that him going to the
6 emergency room was appropriate in this instance, we don't
7 deny that, that the chiropractic care was not necessary and
8 that it should not be compensated.

9 **THE COURT:** Okay. All right. Here's what I want to
10 do. Mr. McCrae, I want you to submit to me an order in Word
11 format with findings of fact consistent with what you stated
12 as well as separately stated conclusions of law. Do not
13 fill in an amount. I'll do that when I look through these
14 bills and that kind of thing. And I'll undoubtedly tweak
15 the order myself anyway.

16 **MR. McCRAE:** Yes, sir, Your Honor.

17 **THE COURT:** Send a copy to Ms. Gieser. And I assume
18 you have her email address.

19 **MR. McCRAE:** Yes, sir. I'll either get it from her
20 directly or ---

21 **THE COURT:** And when I get that I'll look at it and
22 figure out what the damages are.

23 **MR. McCRAE:** Your Honor, one more matter. I would ask
24 for leave from the Court to, in that draft order, address
25 the issue regarding the misnomer of the Defendant's name ---

33

1 **THE COURT:** Yeah, yeah, yeah, yeah. Please. I didn't.
2 say that, but you need to do that too, please.

3 **MR. McCRAE:** Yes, sir. Thank you.

4 **THE COURT:** Ms. Gieser, anything else?

5 **MS. GIESER:** No. I would just request the Plaintiff's
6 counsel to go ahead and copy Ms. O'Brien. She is the lead
7 attorney on the case. So be sure that you copy her on the
8 order as well. That's it.

9 **MR. McCRAE:** No problem.

10 **THE COURT:** All right. Thank you. That'll conclude
11 the hearing.

12 **MR. McCRAE:** Thank you, Your Honor.

13 (Hearing Ended at 10:40 am)

14 (End of Requested Transcript of Record)

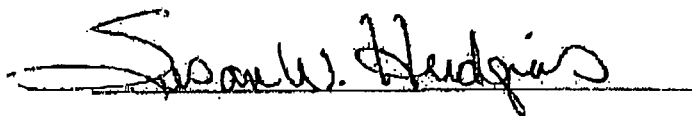
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Certificate of Reporter

I, the undersigned, Susan W. Hudgins, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for York County, South Carolina, on the 28th day of February 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

August 3, 2017

A handwritten signature in cursive script, reading "Susan W. Hudgins", is written over a horizontal line.

Circuit Court Reporter

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF YORK) IN THE COMMON PLEAS COURT
3
4 Andy Lee Rayburn,)
5 Plaintiff,) TRANSCRIPT OF RECORD
6 -vs-) 2016-CP-46-3212
7 David Dysart,)
8 Defendant.) May 18, 2017
9 York, South Carolina
10
11

12 B E F O R E :

13 HONORABLE S. JACKSON KIMBALL, III, JUDGE
14

15 A P P E A R A N C E S :

16 JOHN RICHARDS McCRAE, III, ESQUIRE
17 Attorney for the Plaintiff

18 CARRIE H. O'BRIEN, ESQUIRE
19 Attorney for the Defendant
20
21

22 Linda D. Moffitt
23 Circuit Court Reporter
24
25

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INDEX

Motion -- page 3.

No sworn testimony; no exhibits entered into evidence.

1 THE COURT: All right. First, Andy Lee Rayburn
2 against David Dysart or Dynast, depending on which one you
3 want.

4 The defendant, Ms. Carrie O'Brien, present; and
5 representing the plaintiff, Mr. Richard McCrae.

6 Defendant's motion to reconsider.

7 Ms. O'Brien.

8 MS. O'BRIEN: Good afternoon, Your Honor.

9 This is the defendant's motion for reconsideration,
10 and there are a few things that I specifically would like
11 to point out.

12 First I would like to, if I may hand up, Your Honor,
13 the Tunstall v. Lerner Shops case. May I approach?

14 THE COURT: Yes, ma'am.

15 MS. O'BRIEN: Thank you.

16 Your Honor, this is a 1931 Supreme Court case that
17 deals with a misnomer situation.

18 All of the cases that I am going to present to you in
19 the next few minutes specifically deal with misnomers, and
20 specifically this case stands for the proposition on page
21 two that a misnomer of a corporation in pleadings and
22 otherwise in judicial proceedings has the same affect as
23 the misnomer of an individual.

24 So I want to make sure that the Court understands that
25 whenever there's a corporation that has been misnamed it

1 has the same effect as if an individual has been misnamed.
2 And of course in this case we're speaking specifically
3 about an individual.

4 This case also goes on to discuss the fact that Lerner
5 Shops, Inc. was not the correct entity. And as a result of
6 it not being the correct entity the Court allowed an
7 amendment to substitute in the correct party. And, Your
8 Honor, that was done and there was no prejudice as to the
9 parties.

10 I'd also like to hand up if I may Sweeney vs.
11 Greenwood. May I approach, Your Honor?

12 THE COURT: Yes, ma'am.

13 MS. O'BRIEN: Thank you.

14 THE COURT: Tell me though. What -- what are the
15 facts of the Lerner case?

16 MS. O'BRIEN: Sure. The facts of the Lerner case is
17 that there had been a party that had been misnamed. It was
18 not the correct entity named.

19 The case was situated and had proceeded on, and the
20 Court allowed an amendment by the plaintiff to substitute
21 the correct party.

22 THE COURT: A judgment. This says amend a judgment.

23 MS. O'BRIEN: That is correct.

24 THE COURT: Okay.

25 MS. O'BRIEN: Okay. So in all of these cases, Your

1 has the same effect as if an individual has been misnamed.
2 And of course in this case we're speaking specifically
3 about an individual.

4 This case also goes on to discuss the fact that Lerner
5 Shops, Inc. was not the correct entity. And as a result of
6 it not being the correct entity the Court allowed an
7 amendment to substitute in the correct party. And, Your
8 Honor, that was done and there was no prejudice as to the
9 parties.

10 I'd also like to hand up if I may Sweeney vs.
11 Greenwood. May I approach, Your Honor?

12 THE COURT: Yes, ma'am.

13 MS. O'BRIEN: Thank you.

14 THE COURT: Tell me though. What -- what are the
15 facts of the Lerner case?

16 MS. O'BRIEN: Sure. The facts of the Lerner case is
17 that there had been a party that had been misnamed. It was
18 not the correct entity named.

19 The case was situated and had proceeded on, and the
20 Court allowed an amendment by the plaintiff to substitute
21 the correct party.

22 THE COURT: A judgment. This says amend a judgment.

23 MS. O'BRIEN: That is correct.

24 THE COURT: Okay.

25 MS. O'BRIEN: Okay. So in all of these cases, Your

1 Honor, there has been an amendment to the pleadings to
2 allow the correct entity to be named.

3 In the Sweeney Vs. Greenwood case, again, it was
4 Greenwood Index-Journal, Inc. that had been sued. And a
5 lot of the issues that were raised were lack of
6 jurisdiction over the person saying it wasn't the correct
7 entity, insufficiency of process, insufficiency of service
8 of process.

9 And in that case the Court held that, you know,
10 whenever the defendant came before the Court and stated
11 that there was a misnomer that they then were within the
12 jurisdiction of the Court.

13 But, again, in the Sweeney case the Court allowed
14 there to be an amendment of the complaint, an amendment to
15 name the appropriate party. And whenever that was done,
16 then it was substituted in for the correct party.

17 Again, if I may approach, Your Honor, and hand up the
18 Hughes case.

19 THE COURT: By whom was the motion?

20 MS. O'BRIEN: By the plaintiff. And whether it was
21 made by the plaintiff or made by the Court, it can be done
22 either way. We have seen any time you're in trial and
23 until the close of the evidence of the plaintiff's case
24 you're allowed to amend.

25 In South Carolina amendments are freely given. There