

**BRIEF OF APPELLANT**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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Case No. 2012-CP-40-04857

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Allen University,

Respondent,

v.

Lawrence Terry,

Appellant.

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FINAL BRIEF OF APPELLANT

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FEB 26 2013

**SC Court of Appeals**

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**SC Court of Appeals**

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## STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO GIVE NOTICE OR HOLD A HEARING BEFORE MAKING A FINAL RULING?
2. WAS THE APPELLANT'S DUE PROCESS RIGHTS VIOLATED?
3. DID THE TRIAL COURT ERR IN DISMISSING THE CASE WITH PREJUDICE ALTHOUGH THE RESPONDENT FAILED TO FILE ANY RESPONSE TO THE AMENDED COMPLAINT AND REQUESTS FOR ADMISSIONS?
4. DID THE TRIAL COURT ERR IN FAILING TO ENTER A DEFAULT JUDGMENT AFTER THE PLAINTIFF PROPERLY FILED AN AFFIDAVIT OF DEFAULT?
5. DID THE TRIAL COURT ERR IN FAILING TO GIVE A CLEAR EXPLANATION ON ITS DISMISSAL?

## STATEMENT OF THE CASE

On July 16, 2012, Lawrence Terry brought this action alleging LIBEL, NEGLIGENCE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, CONSTRUCTIVE FRAUD, AND SILENT FRAUD against Allen University. Allen was served the Original Complaint, Summons, and Initial Requests For Admissions on July 30, 2012 and one day later on July 31, 2012 Allen University responded by filing a Motion To Dismiss.

On August 10, 2012 the Appellant properly filed and served an Amended Complaint to only allege Negligence and Intentional Infliction Of Emotional Distress. On August 27, 2012 Appellant filed a Motion For Summary Judgment.

An Affidavit Of Default was filed on September 11, 2012 after the Respondent failed to file any response to the Amended Complaint. On September 14, 2012 the Appellant properly filed a Motion For Default Judgment.

Without any prior notice or a hearing, The Honorable Judge L. Casey Manning abruptly

filed a Form Order Dismissing the case With Prejudice on September 17, 2012. A Motion For Reconsideration was filed on September 18, 2012 by the Appellant and additional documents in support of said motion were also later filed. Appellant made it clear in said motion that no notice was provided or a hearing. Reconsideration was denied February 11, 2013. Both Form Orders only stated that the case was dismissed but did not provide any explanation or reasoning.

## ARGUMENTS

- I. BECAUSE RESPONDENT FAILED TO RESPOND TO THE AMENDED COMPLAINT AND REQUESTS FOR ADMISSIONS THE CASE SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE AND INSTEAD THE DEFAULT JUDGMENT ENTERED AND DEFAULT MOTION GRANTED.

The Summons and Original Complaint were properly served to the Respondent on August 30, 2012. The Affidavit of Service filed in the docket proves service to the Defendant. The Summons clearly stated the following, *“Failure to file an Answer denying the allegations will result in a judgment against you, and action may be taken by the plaintiff or his/her attorney to satisfy the judgment .... PLEASE TAKE NOTICE that Plaintiff Lawrence Terry also requires of Defendant Allen University answers under oath to the attached Requests for Admissions within thirty (30) days from the date of service hereof pursuant to South Carolina Rules of Civil Procedure 36.”*(Summons p.1)(R. p.4 lines, 12-16) As can be seen on the docket, no Answer, Motion, or Reply to the Requests For Admissions were filed at any time.(Exhibit D)(R. p.12)

Therefore the Respondent has given up their right to speak, plead, or defend themselves in the instant case and all Admissions are deemed Admitted. (Plaintiff's Brief In Support Of Motion For Summary Judgment p. 2-3)(R. p.10, lines 21-23; p. 11, lines 1-20)

There is not a valid reason why the Entry Of Default was not entered or why the Motion For Default Judgment not Granted. Under Rule 55(c), the entry of default may be set aside for "good cause shown," which is a less stringent standard than the excusable neglect standard of Rule 60(b). *Sundown Operating Co. v. Intedgen Indus. Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). The good cause standard of Rule 55(c) requires, as a threshold burden, a party to put forth "an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Id.* "Once a party has put forth a satisfactory explanation . . . the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 607-08, 681 S.E.2d at 888. However, a trial court need not make specific findings of fact for each factor if sufficient evidence supports a trial court's determination that no reasonable explanation exists for vacation of default. *Id.* (Plaintiff's Memorandum Of Law In Support Of Motion For Default Judgment p.1)(R. p.4, lines 22-26; p.5, lines 1-6)

In South Carolina, negligence on the part of an attorney is imputable to the client and will not be the basis of finding good cause to set aside entry of default. See *Vanvolkenburg*, 312 S.C. at 375, 440 S.E.2d at 410 (indicating, prior to *Sundown*, that the imputed negligence of an attorney to a defaulting litigant is not good cause). Similarly, our supreme court has recognized subsequent to *Sundown* that the good cause standard of Rule 55(c), encompasses a degree of reasonableness. See *Richardson v. P.V., Inc.*, 383 S.C. 610, 618-19, 682 S.E.2d 263, 267 (2009)

(finding, after Sundown, that negligence on the part of an insurance company or attorney will be imputed to a defaulting litigant and negligence does not constitute good cause to relieve an appellant from entry of default); see also Black's Law Dictionary 1133 (9th ed. 2009) (defining negligence as the failure to act reasonably under a specific set of circumstances). It stands, therefore, that because unreasonable conduct does not amount to good cause, an unreasonable explanation for defaulting is not a satisfactory explanation that serves a sufficient interest of justice. (Plaintiff's Memorandum Of Law In Support Of Motion For Default Judgment p.1-2) (R. p.5, lines 7-19) Even if the Court decided to relieve the Respondent from default, based on the Respondent's failure to also respond to the Appellant's Requests For Admissions they have admitted to Negligence and Fraud so they would not have a meritorious defense.

II. BECAUSE NO NOTICE WAS GIVEN OR ANY HEARING HELD THE CASE SHOULD NOT HAVE BEEN DISMISSED BECAUSE THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED AND DENIED.

The requirements of procedural due process, usually deemed to apply in a contested case or hearing which affects an individual's property or liberty interest, generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review. *In re Vora*, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003); *S.C Dept. of Soc Servs v Wilson*, 352 S.C. 445, 452-53, 574 S.E.2d 730, 733-34 (2002); *Cameron Barkley Co v S.C Procurement Review Panel*, 317 S.C. 437,

440, 454 S.E.2d 892, 894 (1995); *Brown*, 301 S.C. at 328-29, 391 S.E.2d at 867. "Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). Procedural due process requirements are not technical; no particular form of procedure is necessary. *In re Vora*, 354 S.C. at 595, 582 S.E.2d at 416. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Wilson*, 352 S.C. at 452, 574 S.E.2d at 733 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972)). The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur. *S.C. Dept. of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). To prevail on a claim of denial of due process, there must be a showing of substantial prejudice. *Palmetto Alliance, Inc v S C Pub. Serv. Comm'n*, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984). In the instant case there was and is not a pending Motion To Dismiss on the docket for the Appellant to prepare for or to have received notice of. Therefore Appellant has no idea why the instant case was Dismissed or why Appellant's due process rights were so blatantly denied. (Plaintiff's Memorandum Of Law In Support Of Motion For Reconsideration On Order To Dismiss p.2)(R. p.6, lines 3-25)

Although the order may be appropriate, it is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are affected. *Insurance Co. of North America v Hyatt*, 290 S.C. 159, 348 S.E. (2d) 532 (1986). If the judgment or order is taken without notice, the absent party may rightly ignore it and assume that no court will enforce it against his person. *Insurance Co. of North America v*

*Hyatt, supra* [citing *Koester v Citizens' Publishing Co.*, 154 S.C. 154, 151 S.E. 452 (1930)].

In the instant case there was and is no pending Motion To Dismiss on the docket for the Appellant to have prepared for or to have received Notice of. The Respondent failed to respond to all initial requests for discovery and failed to file any responsive pleading or motion in opposition to the Appellant's Amended Complaint. All requests for admissions were deemed admitted and the Respondent was in Default. Appellant properly filed an Affidavit of Default and also filed a Motion for Default Judgment, prior to the Order of Dismissal being filed. If Default was not properly filed then a Failure To Prosecute Order could have been entered and case Dismissed.

Now under the unique facts and circumstances of this case, I suggest the Court follow the rule set forth in *Sijon v Green*, 289 S.C. 126, 345 S.E. (2d) 246 (1986). In *Sijon*, the Court held that where a party litigant denies receiving notice of a hearing with finality, and the judgment roll or record does not reflect evidence of such notice, that party is entitled to a judicial determination as to whether or not they received proper notice. If it is determined that the party received such notice, then judgment would stand. If not, the objecting party would be entitled to a new trial.

(Plaintiff's Reply To Defendant's Memorandum In Opposition Of Plaintiff's Motion For Reconsideration p. 1-2)(R. p.7, lines 9-24; p.8, lines 1-3)

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest. The decision maker's

conclusion must rest solely on the legal rules and evidence adduced at the hearing. Some form of hearing is required before an individual is finally deprived of a property or liberty interest. It is often difficult to define "due process.", but it is not difficult for attorneys and judges to agree that if due process means anything, it means that a litigant must be given an opportunity to meet an issue before an adverse determination is made.

III. THE RESPONDENT DID NOT FILE ANYTHING IN THIS CASE ON AUGUST 27, 2012 OR ANY DATE AFTER THE AMENDED COMPLAINT WAS FILED.

There was not a Motion To Dismiss on the docket so I do not understand how or why the Respondent stated in their Memorandum In Opposition To Appellant's Motion For Reconsideration, "*For the reasons explained in Defendant's Motion to Dismiss, filed on August 27, 2012, and incorporated herein, Defendant opposes Plaintiff's Motion For Reconsideration*" I have included a copy of the docket which clearly shows the only document filed on August 27, 2012 was the Appellant's Motion For Summary Judgment. (Plaintiff's Brief In Support Of Motion For Summary Judgment, Exhibit D)(R. p.8, lines 23-26; p.12)

The Respondent is well represented by experienced legal counsel from one of the largest law firms in the United States of America. They had no issue responding the next day when the Original Complaint was served. Where an attorney is merely neglectful, the general rule applies and relief from judgment is unavailable. Concerning a claim of attorney neglect, the general rule is that "the neglect of the attorney is attributable to the client." *Graham v. Town of Loris*, 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978). In discussing this general rule, the *Graham* court quoted approvingly from *Simon v Flowers*, 231 S.C. 545, 551, 99 S.E.2d 391, 394 (1957):

Although a wide discretion is vested in courts to set aside or vacate judgments because of the neglect, misconduct or inadvertence of counsel employed in the case, the general rule undoubtedly is that the neglect of the attorney is the neglect of the client, and that no mistake, inadvertence or neglect attributable to the attorney can be successfully used as a ground for relief, unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client.

In *Simon*, 231 S.C. 545, 99 S.E.2d 391, defense counsel failed to answer a complaint because he was involved in a multi-day trial. As a result of defense counsel's failure to answer the complaint, the court entered a default judgment against defendant. On appeal, our supreme court was sympathetic to defense counsel's plight but nevertheless adhered to the general rule and imputed the neglect of counsel to his client. The court explained:

[T]he default was the result of forgetfulness on [the attorney's] part which in turn was due to pressure of his business in the trial of cases.... In the crowded routine of a busy lawyer's life a mistake such as the record here discloses is understandable; but it entails the penalty of default under strict enforcement of the rule of procedure, and the trial court's refusal to forgive it affords no basis for reversal.

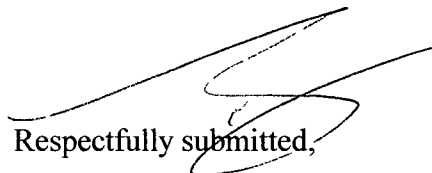
*Id* at 550-51, 99 S.E.2d at 394. (Plaintiff's Brief In Reply to Defendant's Memorandum In Opposition To Plaintiff's Motion For Reconsideration p. 2)(R. p.9, lines 11-29; p.10, lines 1-5)

## CONCLUSION

I understand that I am not a lawyer but I should still be treated fairly. This appeal is clear. No notice was given, no hearing was held so that I could defend myself, and the order(s) did not give any reasoning behind the dismissal. The Respondent admitted to negligence and was in default by failing to respond to the Amended Complaint. The docket proves all of this. Motion

To Reconsider included newly discovered evidence, Amended Complaint included new causes of action from previous cases, and ALL previous cases were Dismissed WITHOUT PREJUDICE.

For the reasons stated, this Court should reverse the Order of the Circuit Court and allow the Entry Of Default to be entered.



Respectfully submitted,

February 21, 2013

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THE STATE OF SOUTH CAROLINA  
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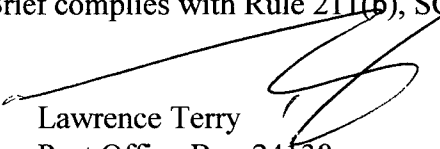
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**CERTIFICATE OF COUNSEL**

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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**PROOF OF SERVICE OF FINAL BRIEF**

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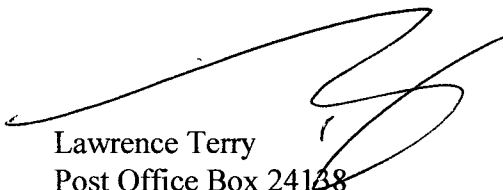
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**PROOF OF SERVICE**

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I certify that I have served copies of the Final Brief on Allen University by personally delivering the copies of it to his attorney of record, Debbie Whittle Durban, at her office at Post Office Box 11070 Columbia, South Carolina 29211, on February 21, 2013.

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