

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

**RECEIVED**  
AUG 23 2019  
SC Court of Appeals

Civil Action No.: 2017-CP-26-08135

Appellate Case No.: 2019-001076

Jesse Cook,.....Respondent,

vs.

Edward Jenerette,.....Appellant.

**INITIAL BRIEF OF APPELLANT**

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& SALEEBY, P.A.

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## STATEMENT OF ISSUES ON APPEAL

- I. This action was not timely commenced pursuant to Rule 3 South Carolina Rules of Civil Procedure and §15-3-20 South Carolina Code Annotated.
  
- II. This action is barred by the Statute of Limitations as set forth in §15-3-530(5) South Carolina Code Annotated.

## **STATEMENT OF THE CASE**

The origin of this matter is a motor vehicle accident which occurred December 16, 2014. On December 12, 2017 a Civil Action was filed on behalf of the Plaintiff/Respondent Jesse Cook (and separate pleadings for Benjamin Cook, a case later settled) alleging negligence against Edward Jenerette. No service was ever perfected upon Edward Jenerette, and on September 11, 2018 Chief Administrative Judge William Seals entered an Order dismissing the action pursuant to Rule 5(d) SCRPC (“Upon failure to serve the Summons and Complaint, the action may be dismissed by the Court on the Court’s own initiative or upon application of any party.”)

On November 28, 2018 counsel for the Plaintiff/Respondent Cook filed a “Notice of Motion and Motion to Restore Action” citing Rule 60(b)(1) SCRPC due to mistake, inadvertence or excusable neglect. A hearing was set in Horry County, South Carolina before the Honorable Larry Hyman for January 28, 2019. Upon the case being called, Judge Hyman declined to hear the matter in light of the dismissal having been issued by Judge Seals. An Order transferring the case for hearing to Judge Seals was entered January 29, 2019. Upon receipt, Judge Seals issued an Order transferring the case back to Judge Hyman for hearing, such Order being filed January 30, 2019. The case was then rescheduled for a hearing before Judge Hyman March 6, 2019. On May 6, 2019, Judge Hyman filed an Order granting Plaintiff’s Motion to Restore. That same day, May 6, 2019, a Motion for Reconsideration was submitted, and the reconsideration motion was scheduled for June 25, 2019. Judge Hyman filed an Order dated June 25, 2019 denying the Motion for Reconsideration.

This appeal followed.

## **STANDARD OF REVIEW**

The Court of Appeals is free to decide questions of law with no particular deference to the trial court. See Proctor v. Steedley, 398 S.C. 561, 573, 730 S.E. 2d 357, 363 (Ct. App. 2012) “This Court reviews questions of law de novo.”

## **ARGUMENT**

### **I.**

**This action was not timely commenced pursuant to Rule 3 South Carolina Rules of Civil Procedure and §15-3-20 South Carolina Code Annotated.**

It is undisputed in this case that the Defendant has never been served via Order of Publication or through any method otherwise allowed by law. **Rule 3 SCRPC** “**Commencement of Action**” states as follows:

(a) **Commencement of Civil Action.** A civil action is commenced when the Summons and Complaint are filed with the Clerk of Court if;

(1) The Summons and Complaint are served within the statute of limitations in any manner prescribed by law; or

(2) If not served within the statute of limitations, actual service must be accomplished not later than 120 days after filing.

**§15-3-20 South Carolina Code Annotated reads as follows:**

(a) Civil Actions may only be commenced within the periods prescribed in this Title after the cause of action has accrued, except, when in special cases, a different limitation is prescribed by statute.

(b) A civil action is commenced when the Summons and Complaint are filed with the Clerk of Court if actual service accomplished within 120 days after filing.

In interpreting the meaning of the SCRCF, the Appellate Court shall apply the same rules of construction used to interpret statutes. Green v. Lewis Truck Lines, Inc., 314, S.C. 303, 304, 443, S.E. 2d 906, 907 (1994). If the language is plain, unambiguous and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced. See Knotts v. South Carolina Department of Natural Resources, 348, S.C. 1, 10, 558 S.E. 2d 511, 516 (2002).

The lawsuit filed by Plaintiff/Respondent Jesse Cook, having never been served, was never “commenced” pursuant to the plain and unambiguous language of the Code, and was never “commenced” consistent with the clear and unambiguous language of the SCRCF.

It is of paramount importance that no service has ever been accomplished in this case. Failure to properly serve the action means no action has ever been commenced. This is pursuant to both the language of the statute and the language of the civil procedure rules, both of which have a stated meaning, are clear and unambiguous. Consequently, the “Motion to Restore Action” filed on behalf of Jesse Cook November 28, 2018 was improper as the action had never been commenced and thus could not be

restored. The mere filing of the Complaint, without service, fails to provide the Defendant with notice, but also fails to provide the Court personal jurisdiction. Luden v. Moragne, 327 S.C. 465, 486 S.E. 2d 525, rehearing denied (Ct. App. 1997), Brown v. Evatt, 322 S.C. 189, 470 S.E. 2d 848 (1996). Additionally, until such time that service is perfected, no action has been commenced, hence there is no proceeding pending. See Chabek v. Nationwide Mutual Fire Insurance Company, 303 S.C. 26, 397 S.E. 2d 786 (Ct. App. 1990) (where filing/service had not yet been performed when the Circuit Court referred the matter to a Master, there was no action then pending and thus the Circuit Court had nothing to refer to the Master).

Additionally, the Order of Chief Administrative Judge Seals dismissing this action pursuant to Rule 5(d) SCRCF for failure to serve pleadings constitutes a “Judgement” as defined by Rule 54(a) SCRCF (“**Definition; Form.** “Judgment” as used in these rules includes any decree or Order which dismisses the action as to any party or finally determines the rights of any party. A judgment need not contain a recital of pleadings, the Report of a Master or the record of prior proceedings.”) It therefore follows, consistent with Rule 59(b) SCRCF that the time to submit any Motion attempting to amend the judgment is required to be filed no later than ten (10) days after receipt of the written notice of judgment “or of the filing of an Order disposing of the action...”. The rules require that any motion seeking to amend the Order of Chief Administrative Judge Seals (dismissing this action) would be required to have been filed on or before September 21, 2018. In contrast, the Motion to Restore that is the subject of this appeal was filed sixty-seven (67) days beyond that period, on November 28, 2018. This is well beyond the timeframe provided for under Rule 59 SCRCF, and is untimely,

in addition to being improper since the case was filed but never served, and no “commencement” as set forth by the statute and rules. There can be no restoration of an action that was not properly commenced originally.

## **II.**

**This action is barred by the Statute of Limitations as set forth in §15-3-530(5) South Carolina Code Annotated.**

The motor vehicle accident giving rise to this cause of action occurred December 16, 2014. Pursuant to §15-3-530 of the South Carolina Code Annotated, a three-year statute of limitations as to alleged injury of a person controls this claim. The statute of limitations would thus expire December 16, 2017. S.C. Code Ann. §15-3-20(B) provides an additional 120 days after filing with the Clerk of Court if actual service is accomplished in that timeframe. This is consistent with the language of Rule 3(a)(2) of the SCRCF where it is noted that a case is commenced “if not served within the statute of limitations, actual service must be accomplished not later than 120 days after filing”. Thus, as noted by our Supreme Court in Mims Ex-REL Mims v. Babcock Center, Inc., 399 S.C. 341, 346 (2012) “the statute and rule, read together, provide that (1) an action is commenced upon filing the Summons and Complaint, if service is made within the statute of limitations, and (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of filing.” The net effect of this, as to the matter before the Court, is that with the 120 days added, service would have been required on or before April 11, 2018.

Service has never been accomplished at any point in time. There has been no personal service, no service by way of publication order, nor service through any other method provided by law. In brief, the Plaintiff filed the action but failed to serve it within even the most liberal timeframes permitted by the statute and court rules.

The Order of the trial court granting the Plaintiff's Motion to Restore this action states that the Court finds "excusable neglect" but does not specify the excusable neglect relied upon. In Rouvet v. Rouvet, 388, S.C. 301, 696 S.E. 2d 204 (Ct. App. 2010) the Court considered a Rule 60(b)(1) SCRCP request for relief, noting that generally "the neglect of the attorney is the neglect of the client, and...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" Citing Sterns Bank National Association v. Glenwood Falls, LLP, 373 S.C. 331, 342, 644 S.E. 2d 793, 798 (Ct. App. 2007) (quoting Simon v. Flowers, 231 S.C. 545, 551, 99 S.E. 2d 391, 394 (1957)). Failure of the client to abide by the applicable statute of limitations is not excusable for the requested relief, and this argument likewise fails as to alleged mistake, inadvertence, or excusable neglect for Plaintiff's counsel which has no evidentiary support in the record.

The Plaintiff/Respondent Cook has argued that the statute of limitations would not apply based upon a theory of estoppel or equitable tolling. Specifically, the Plaintiff/Respondent represents that there were "negotiations" taking place with Mr. Jenerette's liability insurance carrier after the statute of limitations had expired and consequently estoppel prevents the statute of limitations from application or, in the alternative, the statute of limitations should be equitably tolled. However, our Courts

have determined that absent the most unusual of circumstances, estoppel or equitable tolling would not circumvent a statute of limitations.

The essential elements of estoppel are (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the parties subsequently attempts to assert; (2) intention, or at least expectation, that such conduct should be acted upon by the other party; (3) knowledge, actual or constructive of the real facts. Further, as to the party claiming the estoppel, the essential elements are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position. Southern Development Land & Golf Company, Ltd. v. South Carolina Public Service Authority, 311, S.C. 29, 426 S.E. 748 (1993). Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other. Evins v. Richland County Historical Preservation Commission, 341 S.C. 15, 20, 532 S.E. 2d 876, 878 (2000).

In the present action, there is no proof that any negotiations were ongoing, and the record is devoid of any proof of conduct amounting to any false representations or concealment of material facts. Importantly, there is likewise nothing in the record to support any proposition that anyone on behalf of Mr. Jenerette lulled the Plaintiff/Respondent “into a sense of security, preventing him from filing suit before the running of the statute.” Republic Contracting Corp. v. South Carolina Department of Highways and Public Transportation, 332, S.C. 197, 211, 503 S.E. 2d 761, 768 (Ct. App. 1998), Lovell v. C.A. Timbes, Inc., 263, S.C. 384, 390, 210 S.E. 2d, 610, 612 (1974). To

the contrary, not only was the Plaintiff not prevented from filing suit, he actually did file suit, but he never served the Complaint.

The record is also devoid of any express representation that the claim would be settled without litigation or suggesting that any lawsuit was unnecessary (again noting that the lawsuit was filed but never served, evidencing the fact that the Plaintiff/Respondent was not estopped). Although negotiations were not ongoing, even if they had been, our courts have determined that settlement negotiations commenced but not finalized will not bar a Defendant's assertion of the statute of limitations. Moates v. Bobb, 322 S.C. 172, 174, 470 S.E. 2d 402, 403 (Ct. App. 1996), Gadsden v. Southern R.R., 262 S.C. 590, 206 S.E. 2d 882 (1974). "No conduct on the part of the Defendant warranting application of the doctrine of estoppel has been shown to the Court. A fair summary of the record reveals nothing more or less than the fact that negotiations for a settlement were undertaken but never finalized. We agree with the Lower Court when it held that "there was no promise orally and certainly not in writing to waive or not to plead the statute." In addition, there is no evidence that the Defendant made any misrepresentations or misled the Plaintiff or her counsel."

Under our law, equitable tolling only applies once the Defendant wrongfully deceived or misled the Plaintiff in order to conceal the existence of a cause of action. The record here is devoid of any deception or concealment by the Defendant. "To invoke equitable tolling, the Plaintiff must therefore show that the Defendant attempted to mislead him and that the Plaintiff reasonably relied on the misrepresentations by neglecting to file a timely charge." English v. Pabst Brewing Company, 828 F. 2d 1047, 1049 (4<sup>th</sup> Cir. 1987). As noted in 51 Am Jur 2d *Limitations of Action* §174 (2007),

equitable tolling is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or in other words, if the relevant facts present sufficient rare and exceptional circumstances that would warrant application of the doctrine. See Crocker v. SC DHEC, Opinion Number 5670 (Ct. App. filed July 24, 2019), “equitable tolling is a doctrine that should be used sparingly and only when the interest of justice compels its use.” Citing Hooper v. Ebenezer Senior Services and Rehab Center, 396 S.C. 108, 117, 687 S.E. 2d 29, 33 (2009). When addressing principles of equitable tolling, our United States Supreme Court, in Irwin v. Department of Veteran Affairs, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L.E. 2d 435 (1990), opined that it does not extend to “what is at best a garden variety claim of excusable neglect”.

### **CONCLUSION**

The Circuit Court erred as a matter of law in determining that this action could be restored, as no case was ever properly served, thus no case ever commenced. Once ended by way of the Chief Administrative Judge’s Order, any attempted “Motion to Restore” was defective and untimely.

The statute of limitations applicable to this case, even with the 120 days as provided by Rule 3 SCRCF (and S.C. Code Ann. §15-3-20) was not complied with, and this action is time barred. The record fails to reflect any proof of the Plaintiff being misled so as to prohibit him from bringing an action, and in fact the action actually was filed within the statute of limitations, but never served and thus not actually commenced. There is no proof of deception or concealment by or on behalf of Mr. Jenerette at any time.

Statutes of limitations have long been respected as fundamental to a well-ordered judicial system and are not simply technicalities. 54 C.J.S. *limitations of actions* §II, at 16-17 (1989). A statute of limitations protects potential Defendants from protracted fear of litigation, 51 Am. Jur. 2d *Limitation of action* §17, at 602-03 (1970). The cornerstone policy consideration in underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. They are, indeed, fundamental to our judicial system. Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 174, 609 S.E. 2d 548, 552 (Ct. App. 2005).

This action was not timely commenced, nor ever commenced as defined by the Rules of Civil Procedure and the South Carolina Code, the attempt to restore the action is improper and untimely, and this action should be dismissed for these reasons as well as failure to comply with the applicable statute of limitations.

AIKEN, BRIDGES, ELLIOTT, TYLER

& SALEEBY P. A.

By: 

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Florence, South Carolina  
August 21, 2019

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2608135

Jesse Cook  
PLAINTIFF(S)

Edward Jenerette  
DEFENDANT(S)

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.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);  
☐ Other
- ☒ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;  
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
☒ Other **see below**
- ☐ **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:

Case Dismissed Pursuant to SCRCP Rule 5(d) for Failure to Serve Pleadings

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/11/2018 .

Edward Jenerette

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** 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-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

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|                         |   |                              |
|-------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
|                         | ) | FIFTEENTH JUDICIAL CIRCUIT   |
| COUNTY OF HORRY         | ) | CASE NUMBER 2017-CP-26-08135 |
| Jesse Cook,             | ) |                              |
|                         | ) |                              |
| Plaintiff,              | ) |                              |
|                         | ) |                              |
| Vs.                     | ) | NOTICE OF MOTION AND MOTION  |
|                         | ) | TO RESTORE ACTION            |
| Edward Jenerette,       | ) |                              |
|                         | ) |                              |
| Defendant.              | ) |                              |
|                         | ) |                              |

YOU WILL PLEASE take notice that the Plaintiff, Jesse Cook, by and through undersigned counsel, will move this Court ten (10) days after service hereof or as soon as the Motion may be heard, for an Order Restoring this Action. The case was dismissed pursuant to Rule 5(d). This Motion is made pursuant to South Carolina Rule of Civil Procedure 60(b)(1) authorizing relief from judgment because of mistake, inadvertence, or excusable neglect. The Plaintiff filed this action on December 12, 2017. A courtesy copy of the Summons and Complaint was sent to the insurance company on the same date. The Plaintiff's attorney continued negotiations for this case as well as another party injured in the same accident after the statute of limitations believing the case would be settled without continued litigation. The Plaintiff has a meritorious claim, there is no prejudice to the Defendant, and the failure to serve the Defendant is excusable based on the negotiations and communication with Defendant's insurance company.

WHEREFORE, Plaintiff moves for an Order Restoring the Case and any other relief the Court deems appropriate.

[SIGNATURE LINE ON NEXT PAGE]

*/s/ Scott Bellamy*

---

Scott Bellamy, Esq.  
1206 Third Avenue  
Conway, SC 29526  
(843) 248-3173  
Attorney for the Plaintiff

November 28, 2018

|                         |   |                               |
|-------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS  |
|                         | ) | FIFTEENTH JUDICIAL CIRCUIT    |
| COUNTY OF HORRY         | ) | CASE NUMBER 2017-CP-26-08135  |
| Jesse Cook,             | ) |                               |
|                         | ) |                               |
| Plaintiff,              | ) |                               |
|                         | ) |                               |
| Vs.                     | ) | MEMORANDUM IN SUPPORT OF      |
|                         | ) | PLAINTIFF'S MOTION TO RESTORE |
| Edward Jenerette,       | ) | ACTION                        |
|                         | ) |                               |
| Defendant.              | ) |                               |
|                         | ) |                               |

Plaintiff Jesse Cook ("Plaintiff") submits this Memorandum in Support of the Plaintiff's Motion to Restore Action. Plaintiff makes the Motion on the following grounds:

#### **FACTUAL AND PROCEDURAL BACKGROUND**

On December 16, 2014, the Plaintiff was injured in an automobile accident. The accident occurred near Conway, South Carolina. The Plaintiff was driving Northbound on U.S. Highway 501. The Defendant, Edward Jenerette ("Defendant") was stopped at the intersection of S.C. 22 and U.S. Highway 501. The Defendant failed to yield the right-of-way and attempted to enter U.S. Highway 501 and collided with the Plaintiff. Also injured in the accident was the Plaintiff's son, Benjamin Cook. Around January of 2015, the Plaintiff hired an attorney to represent him and his son for the injuries sustained in this accident. Plaintiff's counsel notified the Defendant's insurance company of his representation. Plaintiff's counsel and the insurance company entered into negotiations to settle both claims.

On December 12, 2017, Plaintiff filed the Summons and Complaint initiating this lawsuit and Benjamin Cook's lawsuit for injuries stemming from the same accident. That same day, Plaintiff's counsel sent a courtesy copy to the Defendant's insurance company by electronic mail. On December 13, 2017, the Summons and Complaint for both lawsuits were given to the Sheriff's

Department to serve the Defendant. On January 8, 2018, Phillip E. Thompson of the Sherriff's Department signed an Affidavit of Non-Service as they were unable to locate the Defendant.

On September 11, 2018, the Honorable William H. Seals, Jr. signed a Form 4 Order dismissing the case due to failure to serve the Summons and Complaint. Between December 12, 2017 and September 11, 2018, the Plaintiff's counsel and the insurance company were negotiating the claim. During this time, on July 11, 2018, they were able to settle the companion claim for the Plaintiff's son, Benjamin Cook. Plaintiff's counsel was in the processing of returning the release for Benjamin Cook's case and negotiating the Plaintiff's case when both cases were dismissed on September 11, 2018 by the Form 4 Order.

The Defendant's insurance company was aware of the claim as early as January of 2015. The Defendant's insurance company was also aware that a lawsuit was filed on December 12, 2017. Further, the Defendant's insurance company was aware that the Defendant had moved, and they were also unable to locate the Defendant.

#### ARGUMENT:

The Plaintiff is entitled to have the case restored to the docket based on excusable neglect and Equitable Tolling.

#### **A. PLAINTIFF IS ENTITLED TO RELIEF FROM THE FORM 4 ORDER DISMISSING THE CASE DUE TO EXCUSABLE NEGLIGENCE.**

A Court may relieve a party from a final order due to mistake, inadvertence, surprise, or excusable neglect. *S.C.R.C.P. 60(b)*. A Plaintiff is entitled to an enlargement of time if the Plaintiff can show excusable neglect and a meritorious claim. *Davis v. Lunceford*, 274 S.C. 576, 580, 266 S.E. 2d 73, 75 (1980). "The power conferred upon courts to relieve parties from judgment taken against them by reason of their mistake, inadvertence, surprise or excusable neglect should be exercised by them in the same liberal spirit in which the Code section was designed--in furtherance

of justice and in order that cases may be tried and disposed of upon their merits". *Ex Parte Union Mfg. & Powers Co.*, 81 S.C. 265, 62 S.E. 259, 128 Am. St. Rep., 908. Excusable neglect can exist when a party's counsel suffers illness or strain. See *Gaskins v. California Ins. Co.*, 195 S.C. 376, 11 S.E. 2d 436 (1940).; *Jenkins v. Jones*, 208 S.C. 421, 38 S.E.2d 255 (1946).

In *Davis*, the Plaintiff timely served a Summons but failed to serve the Complaint. *Id.* at 578. The Defendant's counsel made a demand for the Complaint, but the Plaintiff failed to serve it on the Defendant. *Id.* Defendant filed a Motion to Dismiss. *Id.* The Court remanded the case to the trial court in order for it to make a determination as to whether excusable neglect existed. *Id.* at 580.

In this case, the Plaintiff has a meritorious claim. The Plaintiff was injured in an automobile accident in which the Defendant was cited by the investigating officer to be at fault. The Defendant's insurance company settled the companion case for the Plaintiff's son's injuries for the same accident. In this case, the Plaintiff failed to serve the Summons and Complaint within the 120-day limit due to excusable neglect. Plaintiff's counsel was in communication and negotiations with the Defendant's insurance company with the belief the case could be settled, like it's companion case, without extended litigation.

As the Plaintiff has a meritorious claim and excusable neglect exists, the Plaintiff is entitled to relief from the Form 4 Order dismissing the case.

**B. PLAINTIFF IS ENTITLED TO RELIEF FROM THE FORM 4 ORDER DISMISSING THE CASE AS THE DEFENDANT IS ESTOPPED FROM CLAIMING THE STATUTE OF LIMITATION AS A DEFENSE.**

"In South Carolina, a defendant may be estopped from claiming the statute of limitations as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit." *Hedgepath v. AT&T*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001);

*Republic Contr. Corp. v. S.C. Dep't of Highways & Pub. Transp.*, 332 S.C. 197, 211, 503 S.E.2d 761, 768 (Ct. App. 1998). "Application of equitable estoppel does not require an intentional misrepresentation." *Hedgepath*, 348 S.C. at 360. "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *Id.* at 361. "Estoppel by silence" arises "where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." *Id.* Additionally, "[t]here is no requirement that the person whose silence misleads another have actual knowledge of the true facts if circumstances are such that knowledge is necessarily imputed to him." *S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993). "[N]egligence will take the place of the intent to deceive when there is a duty to disclose." *Id.*

In this case, the Defendant's insurance company was communicating with Plaintiff's counsel and negotiating both the Plaintiff's claim and his son's claim. The Plaintiff's son's claim was settled in July of 2018, after the 120- day deadline for service of the Summons and Complaint. The insurance company did not raise the service issue during negotiations and did not raise it until after the case had been administratively dismissed. The adjuster continued to negotiate the Plaintiff's claim until September 20, 2018, when they were notified that the case was dismissed. The silence of the insurance company in this case on the issue of service, after it knew that the Defendant has moved and they themselves were unable to locate him, misled the Plaintiff. As a result, the Plaintiff failed to timely serve the Defendant. This misrepresentation was made worse by the fact that the Defendant's insurance company continued to negotiate the claim with the Plaintiff until the case was dismissed.

### CONCLUSION

The Plaintiff is entitled to relief from the Form 4 Order Dismissing this case due to

excusable neglect. Further, the Defendant is estopped from claiming the statute of limitations as a defense in this case. As such, the Plaintiff moves that this case be restored to the docket and that the Plaintiff be granted an extension of time in which to properly served the Defendant.

*/s/ Scott Bellamy*

---

Scott Bellamy, Esq.  
1206 Third Avenue  
Conway, SC 29526  
(843) 248-3173  
Attorney for the Plaintiff

December 27, 2018

|                         |   |                                          |
|-------------------------|---|------------------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS             |
| COUNTY OF HORRY         | ) | C/A NO.: 2017-CP-26-08135                |
| Jesse Cook,             | ) |                                          |
|                         | ) |                                          |
| Plaintiff,              | ) | <b>APPEARANCE ON BEHALF OF THE</b>       |
|                         | ) | <b>DEFENDANT AND OPPOSITION OF</b>       |
| vs.                     | ) | <b>PLAINTIFF'S MOTION TO RESTORE</b>     |
|                         | ) | <b>ACTION UPON PASSING OF STATUTE OF</b> |
| Edward Jenerette,       | ) | <b>LIMITATIONS</b>                       |
|                         | ) |                                          |
| Defendant.              | ) |                                          |

The undersigned, as counsel for the Defendant Jenerette, makes an appearance in this action and consistent with Rule 12 hereby reserves and preserves any and all defenses in this action without waiving the same, including but not limited to Rule 12(b) SCRCPP, in that the three year statute of limitations set forth in §15-3-20 South Carolina Code Annotated provides that civil actions “may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute” and with §15-3-530 South Carolina Code Annotated providing that any action for “any injury to the person or rights of another, not arising on contract and not enumerated by law” must be commenced within three (3) years.

The case at hand is an automobile negligence case, to which §15-3-530 S.C. Code applies. This case arose from an automobile accident December 16, 2014 and the action was commenced December 12, 2017. The Plaintiff, through his counsel, failed to serve the action within 120 days after filing nor was it served 120 days following the expiration of the statute of limitations, as required to be done pursuant to §15-3-20(B) S.C. Code Annotated, and Rule 3(a)(2) South Carolina Rules of Civil Procedure.

Based upon the failure to serve the Defendant through any means provided by statute, this action was dismissed by The Honorable William Seals, Chief Administrative Judge, Fifteenth Judicial Circuit on September 11, 2018. This dismissal by the Court was upon the court's own initiative as provided by Rule 5(d) SCRCF.

On November 28, 2018 the present Motion by Plaintiff "to restore action" was filed seeking relief pursuant to Rule 60(b)(1) due to mistake, inadvertence or excusable neglect. This motion submitted by Plaintiff is improper, untimely and should be similarly dismissed as the statute of limitations has expired, the additional time for service (120 days) provided under Rule 3 and by statute has run without service being effected through any means, or any attempted means, and the Order ending this action pursuant to Rule 5(d) acts as "entry upon verdict or decision" of the Court consistent with Rule 58 SCRCF ("upon a decision by the Court granting other relief...the Court shall promptly prepare the form of the Judgment, to which may be attached to the Decision, Order or Opinion of the Court, and after review and approval by the Court, the Clerk shall promptly enter it"). Consequently, any attempt to amend this Judgment/Order of Dismissal must be submitted within ten (10) days after receipt of the written notice of the filing of the Order disposing of the action, consistent with Rule 59(b) "Time for motion"). Hence, in addition to the substance of the Motion failing pursuant to statute and the Rules of Civil Procedure, the Motion was not timely filed.

This Appearance in Opposition of Plaintiff's Motion may be supported by Affidavits or other Court's submissions.

Respectfully submitted.

AIKEN, BRIDGES, ELLIOTT, TYLER &  
SALEEBY, P. A.

By: s/MATTHEW N. TYLER

MATTHEW N. TYLER, SC Bar #: 12869  
181 EAST EVANS STREET (29501)  
P. O. DRAWER 1931 (29503)  
FLORENCE, SC  
Telephone: 843-669-8787  
Facsimile: 843-664-0097  
mnt@aikenbridges.com

Florence, South Carolina

ATTORNEY FOR THE DEFENDANT

January 10, 2019

|                         |   |                                  |
|-------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS     |
| COUNTY OF HORRY         | ) | C/A NO.: 2017-CP-26-08135        |
| Jesse Cook,             | ) |                                  |
|                         | ) |                                  |
| Plaintiff,              | ) | <b>AFFIDAVIT OF ALEX ZEIGLER</b> |
|                         | ) |                                  |
| vs.                     | ) |                                  |
|                         | ) |                                  |
| Edward Jenerette,       | ) |                                  |
|                         | ) |                                  |
| Defendant.              | ) |                                  |

PERSONALLY appeared before me, Alex Zeigler, who, being duly sworn, states as follows:

1. My name is Alex Zeigler and I am claims representative with Travelers Insurance Company.
2. Travelers Insurance Company is the insurance company which issued a policy of liability insurance involving a vehicle driven by Edward Jenerette in December of 2014. In January of 2015 a letter of representation was received by Travelers from Attorney Scott Bellamy. On January 15, 2015 (the next day) medical records were requested from Attorney Bellamy. On April 7, 2015 I again requested medical information as to the Plaintiff Jesse Cook.
3. Between June 2015 and December 2017, I requested medical bills and information on at least 18 occasions. On December 6, 2017 Attorney Bellamy's office provided me with some of the bills and advised that they were aware of the statute of limitations and requested an extension of the statute of limitations from me, but I explained that I was unable to provide any extension of a statute of limitations.
4. I received a copy of the Summons and Complaint on December 22, 2017.

5. There were no negotiations between receipt of the Summons and Complaint and June 6, 2018 at which point I explained that I still did not have all of the medical records and bills, I made an offer to resolve the case based upon the limited information I had, and this offer was not accepted. I was told that the Defendant would be served by way of an Order of Publication.

6. On July 11, 2018 I was again told that medical information and bills would be forthcoming. On August 14, 2018 I was told no service had been made yet. On September 20, 2018 I informed Attorney Bellamy that I had learned of an Order from the Court September 11, 2018 dismissing the action, and consequently the matter was concluded.

7. There were never any continued negotiations, and in fact to the contrary. I had no information with which to negotiate and made one offer in June of 2018 which was not accepted, being instead informed that service would be made by an Order of Publication.

FURTHER AFFIANT SAYETH NOT.

*Alex Zeigler*  
Alex Zeigler

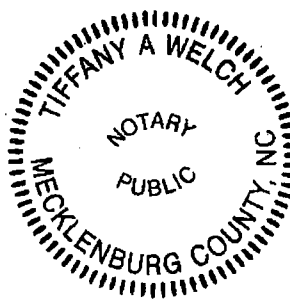
*Alexander B. Zeigler*

SWORN to and subscribed before me

this 18<sup>th</sup> day of January, 2019.

*Tiffany A. Welch*  
Notary Public for North Carolina

My commission expires: 11/12/19



STATE OF SOUTH CAROLINA )  
COUNTY OF HORRY )  
Jesse Cook, )  
Plaintiff, )  
vs. )  
Edward Jenerette, )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NUMBER 2017-CP-26-08135

**AFFIDAVIT IN SUPPORT OF MOTION  
TO RESTORE ACTION**

PERSONALLY APPEARED BEFORE ME, G. Scott Bellamy, who being first duly sworn,  
deposes and states as follows:

1. That I am the attorney for the Plaintiff in the above-captioned action;
2. That this affidavit is filed in support of Plaintiff's Motion to Restore;
3. I was retained to represent Mr. Jesse Cook and Mr. Benjamin Cook concerning injuries they sustained in an automobile accident that occurred on December 16, 2014.
4. I filed a Summons and Complaint for each client on December 12, 2017. On that same day, I sent a copy of the lawsuits to the insurance carrier for the Defendant. (Exh 1)
5. On December 13, 2017, I delivered a copy of the Summons and Complaints to the Horry County Sheriff to serve on the Defendant.
6. The Sheriff did a non-service affidavit on January 8, 2018. (Exh 2)
7. I was never able to locate the Defendant to serve him with the Summons and Complaints nor did the insurance carrier not know his whereabouts. (Exh. 1)

G

8. I continued to negotiate with the adjuster for the insurance carrier on both claims well beyond the 120 days after I filed the lawsuit.
9. I settled Benjamin Cook's case on July 11, 2018. (Exh 3)
10. On September 11, 2018, Judge William Seals entered a Form 4 Order and administratively dismissed the case for lack of service pursuant to Rule 5(d). (Exh 4)
11. I returned the Settlement Agreement for Benjamin Cook on September 20, 2018 and my office informed the insurance adjuster that we could now work to resolve Jesse Cook's case. (Exh. 5)
12. The insurance adjuster informed that he reviewed the Public Index and discovered that the Court had entered a Form 4 Dismissal.
13. Thereafter, I filed the Motion to Restore based on Rule 60(b)(1) and Estoppel.
14. Deponent respectfully requests that this Court grant Plaintiff's Motion to Restore to allow Plaintiff time to proceed on the merits of the case.

Respectfully submitted,

*/s/ Scott Bellamy*

---

Scott Bellamy, Esq.  
1206 Third Avenue  
Conway, SC 29526  
(843) 248-3173  
Attorney for the Plaintiff

SWORN TO before me on this  
29th day of January, 2019

---

Notary Public for South Carolina  
My Commission Expires: \_\_\_\_\_

azeigler Search Mail Station Web Tangie Mills Account Info Go Sign Out Home

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Inbox (545) kensaq.c... Zeigler Used Cars - Informati... Sponsored

Drafts (117) 32V0086: Jesse/ Benjamin Co Friday, December 22, 2017 1:22 PM

Sent ok

Spam (691) [Empty] From: "Zeigler, Alexander Brux" <AZEIGLER@travelers.com>

Trash (60) [Empty] To: "Tangie Mills" <tangie\_mills@yahoo.com>

My Folders [Edit] Tangie,

I'm not sure that Mr. Jenerette lives at that address any longer. That said, I've just been informed that I had a wrong number for him and have not been able to verify that yet. If you guys successful in serving the suit to him, please let me know when that is completed.

I'm sending letters to multiple possible addresses and hope to hear from him directly. That said, I would like to avoid the issue of a default and the possible disclaiming of coverage that typically results.

Thanks,

Alexander B. Zeigler | Claim Professional | Auto Travelers  
Charlotte Claim Center  
W: 704.544.3080 C: 704.591.5856 F: 877.389.4687  
Mailing Address: Travelers - P.O. Box 430 | Buffalo, NY 14240

If further assistance is required, please contact my manager, Ryan Pirozzi at [rpirozzi@travelers.com](mailto:rpirozzi@travelers.com).

-----Original Message-----  
From: Tangie Mills [mailto:[tangie\\_mills@yahoo.com](mailto:tangie_mills@yahoo.com)]  
Sent: Tuesday, December 12, 2017, 1:22 PM  
To: Zeigler, Alexander Brux <AZEIGLER@travelers.com>  
Subject: Fw: Summons and Complaint for Jesse/ Benjamin Cook

Hi Alex, please find enclosed a Summons and Complaint regarding Jess and Benjamin Cook.

Thank you,  
Tangie

Tangie I. Cooke  
Legal Assistant/Office Manager for G.Scott Bellamy  
G. Scott Bellamy P.C., Attorney At Law  
1206 Third Avenue Suite A  
Conway, SC 29526  
843-248-3173  
fax: 843-248-5142

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are best  
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Combine home & auto  
to save up to 35%.

RE: 32V0086: Benjamin Cook  
Tuesday, July 24, 2018 10:28 AM

From: "Zeigler, Alexander Brux" <AZEIGLER@travelers.com>

To: "Tangie Mills" <tangie\_mills@yahoo.com>  
"sbellamy@sccoast.net" <sbellamy@sccoast.net>

Raw Message Print this View

July 11, 2018

G. Scott Bellamy, PC  
G. Scott Bellamy  
Email: [sbellamy@sccoast.net](mailto:sbellamy@sccoast.net)

G. Scott Bellamy, PC  
Tangie Mills  
Email: [tangie\\_mills@yahoo.com](mailto:tangie_mills@yahoo.com)

RE. Insured: Kenneth Hyatt  
Company: The Travelers Indemnity Company  
Claim: E2V0086  
Date of Loss: December 16, 2014  
Claimant: Benjamin Cook  
Suit Number: 2017-CP-26-08133  
Suit Caption: Benjamin Cook vs. Edward Jencrette

Dear Mr. Bellamy,

This will confirm our settlement of your client's Bodily Injury claim in the amount of One Hundred Five Thousand Dollars (\$105,000.00). Enclosed please find our Release to be executed and returned. Our settlement check will follow under separate cover.

This will also confirm that you will hold these funds in trust until the enclosed release has been executed and returned to me. You will be responsible for any medical provider, health carrier or other liens to include Medicare/Medicaid arising from your client's treatment. You will immediately file a Dismissal with prejudice with regards to the lawsuit referenced above.

Please contact us at with any questions or concerns regarding this letter.

Respectfully yours,

Alexander B. Zeigler | Claim Professional | Auto  
Travelers  
Charlotte Claim Center  
W: 704.544.3080 C: 704.591.5856 F: 877.389.4687  
Mailing Address: Travelers - P.O. Box 430 | Buffalo, NY 14240

If further assistance is required, please contact my manager, Ryan Pirozzi at [rpirozzi@travelers.com](mailto:rpirozzi@travelers.com).

-----Original Message-----  
From: Zeigler, Alexander Brux

azeigler Search Mail Search Web Tangie Mills Account Info Go Sign Out Home

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My Folders [Edit] Tangle...

**RE: Release for Benjamin Cook**

ok

From: "Zeigler Alexander Brux" <AZEIGLER@travelers.com>

To: "Tangie Mills" <tangie\_mills@yahoo.com>

Raw Message Printable View

You don't need to get the dismissal. I was reviewing this claim earlier today and located a Form 4 Dismissal on the Public Index which has already been filed by the court due to lack of service. I'll close Benjamin's claim down now that we have the release to go with that.

Thanks,

Alexander B. Zeigler | Claim Professional | Auto  
Travelers  
Charlotte Claim Center  
W: 704.644.3080 C: 704.591.5856 F: 877.389.4687  
Mailing Address: Travelers - P.O. Box 430 | Buffalo, NY 14240

If further assistance is required, please contact my manager, Ryan Pirozzi at [rpirozzi@travelers.com](mailto:rpirozzi@travelers.com).

-----Original Message-----  
From: Tangie Mills ([mailto:tangie\\_mills@yahoo.com](mailto:tangie_mills@yahoo.com))  
Sent: Thursday, September 20, 2018 11:05 AM  
To: Zeigler, Alexander Brux <AZEIGLER@travelers.com>  
Subject: Fw: Release for Benjamin Cook

Alex, please find enclosed a release Mr. Cook has signed. Also, as soon as I have a dismissal will forward that as well.

Thanks,  
Tangie

Tangie I. Cooke

Legal Assistant/Office Manager for G.Scott Bellamy

G. Scott Bellamy P.C., Attorney At Law

1206 Third Avenue Suite A

Conway, SC 29526

843-248-3173

fax: 843-248-5142

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— On Thu, 9/20/18, Scott Bellamy's Office <[bellamycooper@gmail.com](mailto:bellamycooper@gmail.com)> wrote:  
> From: Scott Bellamy's Office <[bellamycooper@gmail.com](mailto:bellamycooper@gmail.com)>

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2608133

Benjamin Cook  
PLAINTIFF(S)

Edward Jenerette  
DEFENDANT(S)

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.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ 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 see below
- ☐ **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:

Case Dismissed Pursuant to SCRPC Rule 5(d) for Failure to Serve Pleadings

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/11/2018 .

Edward Jenerette

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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**E2V0086: Jesse Cook vs. Edward Jenerette**

From: "Zeigler, Alexander Brux" <AZEIGLER@travelers.com>

To: "Tangie Mills" <tangie\_mills@yahoo.com>

Row Message Printable View

2 Files 313KB Download All

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Tangie,

Unfortunately, we don't believe we can offer settlement on Jesse's case at this point. From what we understand, Jesse's case is now barred by the statute of limitations. Since the statute of limitations is no longer tolled by an active lawsuit, it seems that he has no legal avenue for recovery. If Mr. Jenerette is not legally liable for the damages that Jesse suffered, then Travelers is not obligated to pay for them. We have attached a letter which is going out today in the mail for further explanation.

If you disagree with our position, or have evidence that contradicts our position, please contact me to discuss it further. Otherwise, we must consider this matter concluded.

Sincerely,

Alexander B. Zeigler | Claim Professional | Auto  
Travelers  
Charlotte Claim Center  
W: 704.544.3080 C: 704.591.5856 F: 877.389.4687  
Mailing Address: Travelers - P.O. Box 430 | Buffalo, NY 14240

If further assistance is required, please contact my manager, Ryan Pirozzi at [rpizzozi@travelers.com](mailto:rpizzozi@travelers.com).

—Original Message—  
From: Tangie Mills ([mailto:tangie\\_mills@yahoo.com](mailto:tangie_mills@yahoo.com))  
Sent: Thursday, September 20, 2018, 12:00 PM  
To: Zeigler, Alexander Brux <AZEIGLER@travelers.com>  
Subject: RE: Release for Benjamin Cook

Ok. Now to get Jesse resolved.

Tangie I. Cooke  
Legal Assistant/Office Manager for G.Scott Bellamy  
G. Scott Bellamy P.C., Attorney At Law  
1206 Third Avenue Suite A  
Conway, SC 29526  
843-248-3173  
fax: 843-248-5142

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**Trash (50)**
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**My Folders**
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**RE: Release for Benjamin Cook**

**From:** Zeigler, Alexander Bruce <AZEIGLER@travelers.com>  
**To:** "Tangio MIs" <tangio\_mis@yahoo.com>  
**Subject:** Fw: Release for Benjamin Cook

You don't need to get the dismissal. I was reviewing this claim earlier today and located a Form 4 Dismissal on the Public Index which has already been filed by the court due to lack of service. If close Benjamin's claim down now that we have the release to go with that.

Thanks,  
 Alexander B. Zeigler | Claim Professional | Auto  
 Travelers  
 Charlotte Claim Center  
 W: 704.544.3000 C: 704.591.6856 F: 877.389.4687  
 Mailing Address: Travelers - P.O. Box 430 | Buffalo, NY 14240

If further assistance is required, please contact my manager, Ryan Pirozzi at [rpierozzi@travelers.com](mailto:rpierozzi@travelers.com).

-----Original Message-----  
**From:** Tangio MIs <tangio\_mis@yahoo.com>  
**Sent:** Thursday, September 20, 2018 11:35 AM  
**To:** Zeigler, Alexander Bruce <AZEIGLER@travelers.com>  
**Subject:** Fw: Release for Benjamin Cook

Alex, please find enclosed a release Mr. Cook has signed. Also, as soon as I have a dismissal will forward that as well.

Thanks,  
 Tangio

Tangio I. Cooke  
 Legal Assistant/Office Manager for G.Scott Bellamy  
 G. Scott Bellamy P.C., Attorney At Law  
 1209 Third Avenue Suite A  
 Conway, SC 29526  
 843-248-3173  
 fax: 843-248-5142

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-- On Thu, 9/20/18, Scott Bellamy's Office <[bellamyroscopier@gmail.com](mailto:bellamyroscopier@gmail.com)> wrote:  
 > From: Scott Bellamy's Office <[scottbellamy@scottbellamy.com](mailto:scottbellamy@scottbellamy.com)>

azeigler Search Mail Search Mail Tangle Mills Account Info Sign Out Home

Inbox Compose Mailbox Calendar

Compose Delete Reply Reply All Forward Actions Apply Back to Sender

Inbox (545) kansasq... Zeigler Of Schaumburg - Inf... Sponsored

Drafts (117)

Sent

Spam (691) [Empty]

Trash (60) [Empty]

My Folders [Edit] 1 Files 0MB

RE: 32V0086: Benjamin Cook

From: "Zeigler, Alexander Bruce" <AZEIGLER@travelers.com>

To: "Tangle Mills" <tangle\_mills@yahoo.com>

"sbelamy@seccast.net" <sbelamy@seccast.net>

Attachments: Benjamin Cook

Switch to the newest Yahoo Mail

Club Crackers are best with family

Combine home & auto to save up to 35%.

July 11, 2018

G. Scott Bellamy, PC  
G. Scott Bellamy  
Email: [gscottbellamy@seccast.net](mailto:gscottbellamy@seccast.net)

G. Scott Bellamy, PC  
Tangle Mills  
Email: [gscottbellamy@seccast.net](mailto:gscottbellamy@seccast.net)

RE: Insured: Kenneth Hyatt  
Company: The Travelers Indemnity Company  
Claim: E2V0086  
Date of Loss: December 16, 2014  
Claimant: Benjamin Cook  
Suit Number: 2017-CV-26-08133  
Suit Caption: Benjamin Cook vs. Edward Jenerette

Dear Mr. Bellamy,

This will confirm our settlement of your client's Bodily Injury claim in the amount of One Hundred Five Thousand Dollars (\$105,000.00). Enclosed please find our Release to be executed and returned. Our settlement check will follow under separate cover.

This will also confirm that you will hold these funds in trust until the enclosed release has been executed and returned to me. You will be responsible for any medical provider, health carrier or other liens to include Medicare/Medicaid arising from your client's treatment. You will immediately file a Dismissal with prejudice with regards to the lawsuit referenced above.

Please contact us at with any questions or concerns regarding this letter.

Respectfully yours,

Alexander B. Zeigler | Claim Professional | Auto  
Travelers  
Charlotte Claim Center  
W: 704.544.3080 C: 704.591.5856 F: 877.389.4637  
Mailing Address: Travelers - P.O. Box 430 | Buffalo, NY 14260

If further assistance is required, please contact my manager, Ryan Pirozzi at [rpirozzi@travelers.com](mailto:rpirozzi@travelers.com).

-----Original Message-----  
From: Zeigler, Alexander Bruce

[oazgler](#)
[Account Info](#)
[Sign Out](#)
[Home](#)

[Switch to the newest Yahoo Mail](#)

[Inbox](#)
[Compose](#)
[Contacts](#)
[Calendar](#)

[Delete](#)
[Reply](#)
[Reply All](#)
[Forward](#)
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[Apply](#)
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[Inbox \(545\)](#)
[Drafts \(117\)](#)
[Sent](#)
[Spam \(591\)](#)
[Trash \(50\)](#)
[My Folders](#)

[Kansasq.c...](#)
[Zeigler Used Cars - Informa...](#)
[Sponsored](#)

[\[Empty\]](#)
[\[Empty\]](#)

**32V0086: Jesse/ Benjamin Co**  
**ok**  
**From: "Zeigler, Alexander Bruc" <AZEIGLER@travelers.com>**  
**To: "Tangio Mills" <tangio\_mills@yahoo.com>**  
**Re: Meeting - 12/12/17**

[\[Edit\]](#)

**Tangio,**

I'm not sure that Mr. Jencorette lives at that address any longer. That said, I've just been informed that I had a wrong number for him and have not been able to verify that yet. If you guys successful in serving the suit to him, please let me know when that is completed.

I'm sending letters to multiple possible addresses and hope to hear from him directly. That said, I would like to avoid the issue of a default and the possible disclaiming of coverage that typically results.

Thanks,

Alexander B. Zeigler | Claim Professional | Auto  
Travelers  
Chadole Claim Center  
W: 704.544.3083 C: 704.591.5856 F: 877.389.4007  
Mailing Address: Travelers - P.O. Box 430 | Buffalo, NY 14240

If further assistance is required, please contact my manager, Ryan Prozzi at [rprozzi@travelers.com](mailto:rprozzi@travelers.com).

-----Original Message-----  
**From:** Tangio Mills ([mills@travelers.com](mailto:mills@travelers.com))  
**Sent:** Tuesday, December 12, 2017 1:22 PM  
**To:** Zeigler, Alexander Bruc <[AZEIGLER@travelers.com](mailto:AZEIGLER@travelers.com)>  
**Subject:** FvrSummons and Complaint for Jesse Benjamin Cook

Hi Alex, please find enclosed a Summons and Complaint regarding Jess and Benjamin Cook.

Thank you,  
Tangio

Tangio I. Cooke  
Legal Assistant/Office Manager for G.Scott Befamy  
G. Scott Befamy P.C., Attorney At Law  
1200 Third Avenue Suite A  
Conway, SC 29526  
843-248-3173  
fax: 843-248-5142

IRS CIRCULAR 230 DISCLOSURE: Pursuant to requirements imposed by the IRS, any tax advice contained in this communication (including any attachments) is not intended to be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code for promoting, marketing or recommending to another any tax-related matter.

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STATE OF SOUTH CAROLINA, )  
COUNTY OF HORRY )

CASE NUMBER:# 2017CP2608135

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD  
who being duly sworn states that he/she is a Deputy Sheriff for Horry  
County, South Carolina and that the SUMMONS AND COMPLAINT  
on behalf of JESSE COOK was delivered to the  
VS  
EDWARD JENERETTE

Sheriff of Horry County on the 13th day of DECEMBER 2017, for service on  
the Defendant at 3997 B CIRCLE ROAD  
LONGS, S.C.

South Carolina; and that Deponent made a diligent search, but was unable  
to locate EDWARD JENERETTE

Sworn to before me this 8th  
day of JANUARY , 2018.

Deanna M. Y. Z. [Signature]  
NOTARY PUBLIC FOR SOUTH CAROLINA

[Signature]  
Phillip E. Thompson  
Sheriff of Horry County

[Signature]  
DAVID FLOYD  
Deputy Sheriff

MY COMMISSION EXPIRES: 05/25/2027

unable to located, doesn't live here

ELECTRONICALLY FILED - 2019 Jan 29 12:01 PM - HORRY - COMMON PLEAS - CASE#2017CP2608135

STATE OF SOUTH CAROLINA, )  
 )  
COUNTY OF HORRY )

CASE NUMBER:# 2017CP2608135

NON-SERVICE

AFFIDAVIT

Personally appeared before me DAVID FLOYD  
who being duly sworn states that he/she is a Deputy Sheriff for Horry  
County, South Carolina and that the SUMMONS AND COMPLAINT  
on behalf of JESSE COOK was delivered to the  
VS  
EDWARD JENERETTE  
Sheriff of Horry County on the 13th day of DECEMBER 2017, for service on  
the Defendant at 3997 B CIRCLE ROAD  
LONGS, S.C.

South Carolina; and that Deponent made a diligent search, but was unable  
to locate EDWARD JENERETTE

Sworn to before me this 8th  
day of JANUARY , 2018.

Deanne H. Bishop  
NOTARY PUBLIC FOR SOUTH CAROLINA

Phillip E. Thompson  
Sheriff of Horry County

David Floyd  
DAVID FLOYD  
Deputy Sheriff

MY COMMISSION EXPIRES: \_05/25/2027\_

unable to located, doesn't live here

A

34276

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2608135

Jesse Cook  
PLAINTIFF(S)

Edward Jenerette  
DEFENDANT(S)

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.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ 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:

Plaintiff's Motion to Restore case is transferred to be heard by Judge Seals.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/29/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** 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-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

---



Horry Common Pleas

**Case Caption:** Jesse Cook VS Edward Jenerette

**Case Number:** 2017CP2608135

**Type:** Order/Electronic Form 4

So Ordered

s/ Larry B. Hyman 2152

34276

**Bridgette Godbold**

---

**From:** efiledonotreply@sccourts.org  
**Sent:** Tuesday, January 29, 2019 4:17 PM  
**To:** Matt Tyler  
**Cc:** Bridgette Godbold  
**Subject:** Courtesy NEF RE: 2017CP2608135

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*

**NOTICE OF ELECTRONIC FILING [NEF]**

---

A filing has been submitted to the court RE: 2017CP2608135

**Official File Stamp:** 01-29-2019 04:17:07 PM  
**Court:** CIRCUIT COURT  
Common Pleas  
Horry  
**Case Caption:** Jesse Cook VS Edward Jenerette  
**Document(s) Submitted:** Order/Electronic Form 4-Motion/Restore case Transferred Order/Electronic Form 4  
**Filed by or on behalf of:** Larry B. Hyman

This notice was automatically generated by the Court's auto-notification system.

---

**The following people were served electronically:**

Matthew N. Tyler for Edward Jenerette  
Gregory Scott Bellamy for Jesse Cook

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

34276

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2608135

Jesse Cook  
PLAINTIFF(S)

Edward Jenerette  
DEFENDANT(S)

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.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);  
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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:

Plaintiff's Motion to Restore Case is transferred to Judge Hyman. This overrides the previous Form 4 transferring the Motion to Judge Seals filed January 29, 2019.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 01/30/2019.

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** 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-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

---



Horry Common Pleas

**Case Caption:** Jesse Cook VS Edward Jenerette

**Case Number:** 2017CP2608135

**Type:** Order/Electronic Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

|                         |   |                                   |
|-------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS      |
|                         | ) | FIFTEENTH JUDICIAL CIRCUIT        |
| COUNTY OF HORRY         | ) | CASE NUMBER 2017-CP-26-08135      |
| Jesse Cook,             | ) |                                   |
|                         | ) |                                   |
| Plaintiff,              | ) |                                   |
|                         | ) |                                   |
| Vs.                     | ) | <b>ORDER GRANTING PLAINTIFF'S</b> |
|                         | ) | <b>MOTION TO RESTORE CASE</b>     |
| Edward Jenerette,       | ) |                                   |
|                         | ) |                                   |
| Defendant.              | ) |                                   |
|                         | ) |                                   |

THIS MATTER COMES BEFORE THE COURT by way of a Motion to Restore Action filed by the Plaintiff. A hearing was held in this matter on March 6, 2019. The Court grants the Motion for the foregoing reasons:

**FACTUAL AND PROCEDURAL BACKGROUND**

On December 16, 2014, the Plaintiff, Jesse Cook, was injured in an automobile accident near Conway, South Carolina. The Plaintiff was driving North on Highway 501 when the Defendant, Edward Jenerette, failed to yield the right-of-way and collided with Plaintiff's vehicle. The Plaintiff's son, Benjamin Cook, was also injured in the accident.

Around January of 2015, the Plaintiff hired an attorney to represent him and his son for the injuries sustained in this accident. Plaintiff's counsel notified the Defendant's insurance company of his representation. The insurance company admitted liability and the Plaintiff's counsel and the insurance company began negotiations to settle both claims but did not resolve the claims before the impending expiration of the statute of limitations.

On December 12, 2017, Plaintiff's counsel filed a Summons and Complaint for Jesse Cook and a second lawsuit for Benjamin Cook for injuries stemming from the accident. The next day, the Summons and Complaints for both lawsuits were given to the Sheriff's Department to serve

the Defendant. On January 8, 2018, Phillip E. Thompson of the Sherriff's Department signed an Affidavit of Non-Service as they were unable to locate the Defendant. (Exh. A) Plaintiff's counsel was never able to locate the Defendant. (Exh G)

Plaintiff's counsel emailed copies of both lawsuits to the Defendant's insurance company on December 12, 2017. The insurance adjuster confirmed receipt of the lawsuits and stated that the carrier did not know their insured's whereabouts for service. The adjuster requested that Plaintiff's counsel notify him when the lawsuit was served and advised that he was trying to locate the insured as well. The adjuster further stated, "I would like to avoid the issue of default and the possible disclaiming of coverage that typically results." (Exh. B)

The insurance company then continued to negotiate with the Plaintiff's attorney for nine months after the statute of limitations had expired. The insurance company settled Benjamin's lawsuit on July 11, 2018--- approximately seven months after the statute of limitations had expired. (Exh. C) Benjamin's lawsuit was in the same posture as Jesse's lawsuit as the Defendant was not served on either case.

In the email enclosing the \$105,000 release, the insurance adjuster requested that the Plaintiff's attorney file a dismissal of the lawsuit. (Exh. C) The Plaintiff's attorney negotiated the check and returned the release on September 20, 2018. It was on that day that the insurance company advised Plaintiff's counsel that the dismissal did not need to be filed because the adjuster had reviewed the court website and learned that the Form 4 Dismissal had been entered on both lawsuits. (Exh. D)

On September 11, 2018, the Honorable William H. Seals, Jr. signed a Form 4 Order dismissing both cases due to failure to serve the Summons and Complaint. (Exh..E) The insurance carrier then changed its position and refused to negotiate on the Plaintiff's case. (Exh. F)

**ANALYSIS:**

The Plaintiff is entitled to have the case restored to the docket based on excusable neglect and equitable estoppel.

**A. PLAINTIFF IS ENTITLED TO RELIEF FROM THE FORM 4 ORDER DISMISSING THE CASE DUE TO EXCUSABLE NEGLIGENCE.**

A Court may relieve a party from a final order due to mistake, inadvertence, surprise, or excusable neglect if the motion is made within one year of the order<sup>1</sup>. *S.C.R.C.P. 60(b)*. A Plaintiff is entitled to an enlargement of time if the Plaintiff can show excusable neglect and a meritorious claim. *Davis v. Lunceford*, 274 S.C. 576, 580, 266 S.E. 2d 73, 75 (1980). "The power conferred upon courts to relieve parties from judgment taken against them by reason of their mistake, inadvertence, surprise or excusable neglect should be exercised by them in the same liberal spirit in which the Code section was designed--in furtherance of justice and in order that cases may be tried and disposed of upon their merits". *Ex Parte Union Mfg. & Powers Co.*, 81 S.C. 265, 62 S.E. 259, 128 Am. St. Rep., 908. Excusable neglect can exist when a party's counsel suffers illness or strain. See *Gaskins v. California Ins. Co.*, 195 S.C. 376, 11 S.E. 2d 436 (1940).; *Jenkins v. Jones*, 208 S.C. 421, 38 S.E.2d 255 (1946).

In *Davis*, the Plaintiff timely served a Summons but failed to serve the Complaint. *Id.* at 578. The Defendant's counsel made a demand for the Complaint, but the Plaintiff failed to serve it on the Defendant. *Id.* Defendant filed a Motion to Dismiss. *Id.* The Court remanded the case to the trial court for it to decide as to whether excusable neglect existed. *Id.* at 580.

In this case, the Plaintiff can show excusable neglect and that he has a meritorious claim.

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<sup>1</sup> An order of dismissal for failure to proceed with the suit is in the nature of a discontinuance of the action and is not an adjudication of the merits. Ordinarily, it does not put an end to the cause of action, but merely terminates the suit itself. An order of dismissal *with prejudice* under the present facts was not justified. *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) Therefore, the Plaintiff has properly and timely brought this Motion as a Motion to Restore pursuant to Rule 60 by filing it within one year.

The Plaintiff and his son were injured in an automobile accident in which the Defendant was cited by the investigating officer to be at fault. The insurance company admitted liability. Plaintiff's counsel filed two lawsuits at the same time before the expiration of the statute of limitations but did not serve the Defendant within 120 days. The Defendant's insurance company received copies of the complaints, knew the Defendant had not been served and continued to negotiate the claims for many months beyond the statute of limitations.

Plaintiff's counsel communicated and negotiated with the Defendant's insurance company for nine months *after* the statute of limitations expired. Plaintiff's counsel relied on the representations and actions of the insurer and believed that serving the Defendant was unnecessary. These actions induced the Plaintiff not to serve the defendant and caused him to believe that both lawsuits would be settled. The best evidence to support the reasonableness of Plaintiff's reliance on the insurance companies' representations and actions is that the insurance company actually settled Benjamin's lawsuit seven months *after* the Statute of Limitations had expired. It is not unreasonable to believe that the carrier would treat the Plaintiff's case the same way as it did the sons and settle the Plaintiff's lawsuit. This reliance is reasonable and gives support for excusable neglect.

The court has the authority under Rule 60, S.C.R.C.P, to grant relief from a final Order. The Plaintiff has satisfied that burden by establishing that he has a meritorious claim and excusable neglect exists. The reasons set forth are wholly sufficient to justify restoring the case. Accordingly, the Plaintiff is entitled to relief from the Form 4 Order dismissing the case.

**B. PLAINTIFF IS ENTITLED TO RELIEF FROM THE FORM 4 ORDER DISMISSING THE CASE AS THE DEFENDANT IS ESTOPPED FROM CLAIMING THE STATUTE OF LIMITATIONS AS A DEFENSE.**

"In South Carolina, a defendant may be estopped from claiming the statute of limitations

as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit.” *Hedgepath v. AT&T*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001); “The conduct may involve inducing Plaintiff either to believe that an amicable adjuster of the claim will be made without suit or to otherwise forbear exercising the right to sue.” *Republic Contr. Corp. v. S.C. Dep’t of Highways & Pub. Transp.*, 332 S.C. 197, 211, 503 S.E.2d 761, 768 (Ct. App. 1998).

“Application of equitable estoppel does not require an intentional misrepresentation.” *Hedgepath*, 348 S.C. at 360. “Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel.” *Id.* at 361. “Estoppel by silence” arises “where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts.” *Id.* Additionally, “[t]here is no requirement that the person whose silence misleads another have actual knowledge of the true facts if circumstances are such that knowledge is necessarily imputed to him.” *S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993). “[N]egligence will take the place of the intent to deceive when there is a duty to disclose.” *Id.*

This case is distinguishable from Moates and Gadsden<sup>2</sup>. In this case, the Defendant’s insurance company communicated with Plaintiff’s counsel and negotiated both the Plaintiff’s claim and his son’s claim well beyond the statute of limitations. The carrier’s actions not only implied that it would not require the Plaintiff to serve its insured, it affirmed this belief when it settled the Plaintiff’s son’s case well beyond the statute of limitations.

The Plaintiff’s son’s claim was settled in July of 2018, long after the 120- day deadline for service of the Summons and Complaint. The insurance company did not raise the service issue

---

<sup>2</sup> In *Moates vs. Bobb*, 322 S.C. 172 (1996) which cited *Gadsden vs Southern RR*, 262 S.C. 590, 206 S.E.2d 882 (1974), the plaintiffs did not even *begin* settlement negotiations let alone finalize them and did not discuss the applicable statute of limitations; thus, the court found that the defendant was not estopped from asserting the statute of limitations defense.

during negotiations and did not raise it until after the lawsuits had been administratively dismissed. The adjuster continued to negotiate the Plaintiff's claim after it settled the son's claim until September 20, 2018, when they learned that the case was dismissed.

The silence of the insurance company in this case on the issue of service, after it knew that the Defendant had moved and they themselves were unable to locate him, misled the Plaintiff. The insurance companies continued negotiations and settlement of one lawsuit represented to the Plaintiff that service was unnecessary and they would resolve both claims.

Because the insurance company continued to negotiate both claims and settled one lawsuit, it led the Plaintiff to believe that service was unnecessary, and settlement was impending. The Defendant is now estopped from claiming the statute of limitations as a defense.

#### **CONCLUSION**

The Motion is GRANTED and the Plaintiff is entitled to relief from the Form 4 Order Dismissing this case due to excusable neglect and equitable estoppel. As such, this case shall be restored to the docket and the Plaintiff shall be granted leave to serve the Defendant through publication.

March 6, 2019

  
\_\_\_\_\_  
Honorable Larry Hyman  
Fifteenth Judicial Circuit

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY

C/A NO.: 2017-CP-26-08135

Jesse Cook,

Plaintiff,

**MOTION FOR RECONSIDERATION**

vs.

Edward Jenerette,

Defendant.

**TO: G. SCOTT BELLAMY, ESQUIRE AND NATASHA HANNA, ESQUIRE,  
ATTORNEYS FOR THE PLAINTIFF:**

The undersigned hereby moves this Court pursuant to Rules 59 and 60 SCRPC for the Court's reconsideration of its Order Granting Plaintiff's to Restore Case filed May 6, 2019.

This Motion is submitted seeking the Court reconsider the facts, the law and the nature of the Order entered, which is respectfully believed to be mistaken, and for which an amendment is necessary for a proper interpretation of the law, and specifically, the statute of limitations as has been ruled upon by both the Court of Appeals and the Supreme Court of South Carolina.

You are invited to attend and take such part as is fit and proper.

AIKEN, BRIDGES, ELLIOTT, TYLER &  
SALEEBY, P. A.

By: s/MATTHEW N. TYLER

MATTHEW N. TYLER, SC Bar #: 12869  
181 EAST EVANS STREET (29501)  
P. O. DRAWER 1931 (29503)  
FLORENCE, SC  
Telephone: 843-669-8787  
Facsimile: 843-664-0097  
mnt@aikenbridges.com

Florence, South Carolina  
May 6, 2019

ATTORNEY FOR THE DEFENDANT

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2608135

Jesse Cook  
PLAINTIFF(S)

Edward Jenerette  
DEFENDANT(S)

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.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ 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:

Defendant's Motion to Reconsider is Denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/25/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

**Court Reporter:**

**E-Filing Note:** 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-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

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Horry Common Pleas

**Case Caption:** Jesse Cook VS Edward Jenerette

**Case Number:** 2017CP2608135

**Type:** Order/Electronic Form 4

So Ordered

s/ Larry B. Hyman 2152

34276

**Bridgette Godbold**

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**Sent:** Tuesday, June 25, 2019 1:23 PM  
**To:** Matt Tyler  
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**Official File Stamp:** 06-25-2019 01:23:14 PM  
**Court:** CIRCUIT COURT  
Common Pleas  
Horry  
**Case Caption:** Jesse Cook VS Edward Jenerette  
**Document(s) Submitted:** Order/Electronic Form 4-Motion to Reconsider is Denied Order/Electronic Form 4  
**Filed by or on behalf of:** Larry B. Hyman

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**The following people were served electronically:**

Matthew N. Tyler for Edward Jenerette  
Gregory Scott Bellamy for Jesse Cook

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STATE OF SOUTH CAROLINA                      **TRANSCRIPT OF RECORD**

COUNTY OF HORRY                      CASE NO: 2017-CP-26-08135

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**B E F O R E:**    The Honorable Larry B. Hyman  
                    June 25, 2019

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JESSE COOK,

Plaintiff,

vs.

EDWARD JENERETTE,

Defendant.  
-----

APPEARANCES:

G. Scott Bellamy, Esq.  
Attorney for the Plaintiff.

Matthew Tyler, Esq.  
Attorney for the Defendant.

Natalie Dahl, RPR

Court Reporter:

P-R-O-C-E-E-D-I-N-G-S

THE COURT: What do we have here? We have Mr. Tyler's motion to reconsider my order in Cook versus Jenerette, which was issued March the 6th.

Okay. Let's talk about it, Mr. Tyler.

MR. TYLER: I'll go through this. I know you had hundreds of cases since then, so I'll refresh.

THE COURT: I remember this one. I labored. I went back and forth several times deciding what is appropriate in this matter.

MR. TYLER: Yes, sir. And, Judge, for purposes of the record, the order that you filed was actually signed March 6<sup>th</sup>, but not entered into the record, for whatever reason, until May 6<sup>th</sup>, and I filed a motion for reconsider the same day.

THE COURT: You know, that may have very well been that it came in in March. As I said, I went back and forth on these orders several times, but there is no question that you have appropriately filed your motion.

MR. TYLER: Thank you, Your Honor.

Really, Judge, what the motion to reconsider focuses on is the fact -- and I say this respectfully, there is nothing -- the motion was granted on the premise that either estoppel or excusable neglect

1 would apply to allow a case to be brought back and  
2 served after years have passed and the statute of  
3 limitations has run. The basis for the motion today  
4 to reconsider, respectively, that there is nothing in  
5 the record to brace an estoppel argument upon.

6 Judge, estoppel by silence requires someone with  
7 a duty to speak doesn't, and that is not the situation  
8 here. I don't think there is any doubt but that  
9 everyone would concede that an insurance adjuster does  
10 not have a duty to inform an attorney that he has to  
11 comply with the statute of limitations. But even  
12 beyond that, there was nothing in the record, at all,  
13 to show that anyone was ever promised anything or  
14 involved in any kind of behavior. There was no  
15 concealment of facts, no false representations made.

16 In fact, Your Honor, what the record does reflect  
17 is that there weren't any ongoing negotiations. There  
18 were repeated requests for medical records from the  
19 time, basically, that the statute ran up until the  
20 point in time where Judge Seals issued the order  
21 dismissing the case because of lack of service. There  
22 was an affidavit filed by Mr. Ziegler that was  
23 submitted January of 2019; that is in the record. As  
24 to what constitutes the grounds for estoppel, it's  
25 just simply not there. There is no false information.

1 There is no trickery.

2 THE COURT: But, you know, wouldn't you agree  
3 that -- you know, in this case -- I mean, both parties  
4 went forward with the understanding that neither of us  
5 can find him, the defendant, and, you know, we have  
6 the carrier actually -- and I think -- I don't think  
7 there is any dispute -- actually corresponding with  
8 Mr. Beverly -- I mean Bellamy and saying, you know, we  
9 don't want you to hold us in default on this thing.  
10 We don't want to get into a default situation, and  
11 they go forward for months and, in fact, actually  
12 settled one of the cases, and nobody -- no one was  
13 aware of the fact that Judge Seals administratively  
14 dismissed it until they went to file the settlement  
15 documents on one of the cases, and then it pops up.

16 I mean, I think both parties went forward in good  
17 faith. The insurance company was saying let's get  
18 this case out of the way, let's get these things  
19 settled. Both parties wanted to do that. The issue  
20 was never -- but for Judge Seals issuing that order,  
21 this case would have been settled, just like the other  
22 one, and the parties would have gone on their way.

23 MR. TYLER: Respectively, judge, I am not sure  
24 that that is the case, because even if Judge Seals had  
25 not issued that order, then what likely would have

1 happened is that at some point service would have been  
2 done. As we sit here today, in June of 2019, it has  
3 never been served through any means. But if and when  
4 it was ever served, then an answer would have been  
5 filed alleging that the statute of limitations had not  
6 been complied with, so the same result would have been  
7 that we would come before the Court and argue the  
8 statute of limitations defense.

9 On top of that, Judge, one thing I --

10 THE COURT: Doesn't your carrier have the  
11 authority to settle this case without considering your  
12 client?

13 MR. TYLER: I'm sure they do, yes, sir.

14 THE COURT: In fact, they did, at least to the  
15 companion case.

16 MR. TYLER: Right. And, again, Judge, I was not  
17 involved in any of that.

18 THE COURT: I understand.

19 MR. TYLER: But there was a wreck with two people  
20 involved, and they were related. One case was settled  
21 because the carrier had gotten the information to,  
22 basically, adjust it. The other one --

23 THE COURT: And aren't they telling Mr. Bellamy  
24 when they do that -- I mean, same lawyer, same wreck,  
25 same related people, and they are saying, you know,

1 getting this information, we'll settle this case.

2 MR. TYLER: That is the crux of this. That had  
3 been a request -- according to the affidavit -- from  
4 before the statute until after the statute, and so you  
5 have repeated requests for information.

6 THE COURT: But they didn't have to settle the  
7 first case, did they?

8 MR. TYLER: They got the information on that to  
9 settle it.

10 THE COURT: I mean at 120 days they could have  
11 said, 120 days has passed, we're out of here.

12 MR. TYLER: I think we need to draw a dichotomy  
13 between anything that happened in that case versus  
14 what happened in this case. Because in this  
15 particular situation, what had taken place was that  
16 after repeated requests for information and  
17 correspondence from Mr. Bellamy's office advising that  
18 they were in the process of serving the defendant, it  
19 was the adjuster who went on-line to check with Horry  
20 County register to see if there was any record of any  
21 service, and that is when we learned of the order  
22 filed by Judge Seals.

23 THE COURT: I was under the impression that he  
24 discovered that when he went to file the settlement  
25 documents?

1 MR. TYLER: No, sir, there was no settlement  
2 documents to be filed. Because there wasn't a minor  
3 involved or anything. There was no dismissal. There  
4 would be nothing to file. He was actually checking to  
5 see whether there had ever been service because he was  
6 told that service was forthcoming.

7 THE COURT: Why then did he settle the first one?

8 MR. TYLER: Well, that had been -- again, I don't  
9 know the details of that, but I know --

10 THE COURT: Aren't they germane actually to this  
11 case? I mean, why -- if he was going back to check to  
12 make sure that there was service before he goes and  
13 settles the case on the present case, why wouldn't he  
14 have done that with the companion case, which was --  
15 who was the plaintiff in that case?

16 MR. BELLAMY: That was....

17 THE COURT: Benjamin Cook.

18 MR. BELLAMY: Yes.

19 MR. TYLER: I think I can address that, Your  
20 Honor. Even before -- at some point in time -- and  
21 let's just hypothetically discuss mid-January --  
22 excuse me, December of 2017 would be the statute of  
23 limitations, when it would have ended. Mr. Bellamy's  
24 office, as I understand it, and he can correct me if  
25 I'm wrong, he had been providing the adjuster with

1 information with regard to Benjamin. I gather that  
2 the information in his records didn't have a problem  
3 getting to wherever it was. So there were discussions  
4 and negotiations ongoing. So even after the statute  
5 ran, presumably is when they settled that case. There  
6 was never any reason for any kind of problem.

7 With the other case, which is the case we're here  
8 before you on today, there had never been any of the  
9 medical records or bills provided. The adjuster had  
10 been requesting those, and then the statute runs, he  
11 is still requesting those, but told at that point in  
12 time that, A, a suit had been filed, so he knew that a  
13 suit had been filed, and, B, that service was  
14 forthcoming.

15 So the other case, really, is on its own. That  
16 has nothing to do with this case, because at this  
17 point in time, he's aware of the fact that a suit had  
18 been filed and service is in the process. And so at  
19 this juncture, as he is awaiting service, he checks  
20 the records, available public records, and discovers  
21 that it was dismissed.

22 So I understand your point about the two, but it  
23 is no different than a bus wreck where one attorney  
24 might be representing four or six or eight people on a  
25 bus. They are all on their own, basically. The

1 situations are independent of one another.

2 THE COURT: Mr. Bellamy.

3 MR. BELLAMY: If I might, just on that point,  
4 Judge. The issue between the two was that Mr. Cook  
5 was still being treated and there was a potential for  
6 further surgery, and we had relayed that. Benjamin  
7 Cook was treated and released, so his was done. There  
8 was nothing else out there that would be forthcoming.  
9 We settled Mr. Benjamin Cook's case in July, well  
10 after the December it was filed and got the lawsuit to  
11 the adjuster and let him know it was in the hands of  
12 the sheriff.

13 We, six or seven months later, settled Benjamin  
14 Cook. We went to settle the other one, and I believe  
15 that is when he discovered it. They were going to do  
16 a dismissal for Benjamin Cook and realized it had been  
17 administratively dismissed, because they wanted that  
18 lawsuit dismissed because we had settled it.

19 THE COURT: Well, what I recall -- it says the  
20 first case was settled for \$105,000. In the e-mail  
21 enclosing the \$105,000 release, the adjuster requested  
22 that the plaintiff's attorney file a dismissal of the  
23 lawsuit, Exhibit C. The plaintiff's attorney  
24 negotiated the check and returned a release on  
25 September 20, 2018. It was on that day that the

1 insurance adjuster's company advised plaintiff's  
2 counsel that the dismissal did not need to be filed  
3 because the adjuster had reviewed the court website  
4 and learned that the Form 4 dismissal had been entered  
5 on both lawsuits.

6 I mean, that was what I remembered. You know, no  
7 one knew about it until it already settled and the  
8 case was proceeding. You know, maybe it is the right  
9 ruling; maybe it is the wrong ruling. As I said, I  
10 labored over this for quite some time. I just looked  
11 at the equities of it.

12 I'll respectively deny your motion, okay. I'm  
13 sure it is going up, you know.

14 MR. TYLER: Yes, sir.

15 THE COURT: I wouldn't hold that against you,  
16 Mr. Tyler.

17 MR. TYLER: Yes, sir. One other thing, Judge,  
18 that I feel like I need to put on the record, and I  
19 respect Your Honor's statements.

20 The second grounds of the order that you signed  
21 granted relief based upon excusable neglect of Mr.  
22 Bellamy.

23 THE COURT: Right. Uh-huh.

24 MR. TYLER: There was law that was cited in that  
25 order.

1 THE COURT: The Moates (phonetic) case?

2 MR. TYLER: Davis versus Lundsford.

3 THE COURT: Okay. All right.

4 MR. TYLER: First off, Judge, our supreme court  
5 -- excusable neglect is not a mechanism through which  
6 a statute of limitations can be circumvented. The key  
7 thing is that our courts, as you know, take a firm  
8 approach to the statute of limitations. There are two  
9 decisions, the Ion decision and the Personal Care  
10 versus Theos Uricchio Howe decision, 2019 opinions. I  
11 have the sites, and I actually cited them at the  
12 initial hearing. But the key language in there is  
13 that actions must be commenced within the limitations  
14 period. "Must be" is key language here.

15 The order that you signed citing the 1980 Davis  
16 versus Lundsford decision, the problem I have with  
17 that is that that was the first time that that case  
18 was on appeal. It went up two other times, and that  
19 is actually more germane to this matter, because in  
20 the second time that the case went up on appeal, which  
21 would be 309 S.E.2d 791, 1983, the Court stated that  
22 neglect of an attorney cannot be used as a basis to  
23 permit service after the statute of limitations.

24 Then the third time it went up on the court of  
25 appeals -- excuse me, the supreme court, which is at

1 335 S.E.2d 798, the supreme court held that the  
2 statute of limitations had not been met and,  
3 therefore, they ordered that ruling be in favor of the  
4 appellant, and the case was over because the statute  
5 of limitations wasn't satisfied.

6 The last thing I want to put on the record, Your  
7 Honor, respectively, is the fact that I think there is  
8 a problem in an order that allows a case to be  
9 restored, such as what is entered by the Court, when a  
10 case was never commenced. There is no doubt but that  
11 the case was filed December of 2017. There is no  
12 doubt but that it has never been filed, and under  
13 Rule 3, you cannot commence a case until filing --  
14 until service takes place either within the statute or  
15 120 days after. Here, it had never taken place.

16 So, in essence, what the order of this Court has  
17 allowed to be done is roughly four-and-a-half years  
18 after the statute of limitations has ended -- excuse  
19 me, after the cause of action arose, and a  
20 year-and-a-half after statute of limitations ended,  
21 you are allowing a case to be filed and now served on  
22 someone, and I believe that that is in direct  
23 contravention of the reason and the basis of having  
24 the statute of limitations. I would cite to the Court  
25 the case of Moates v. Babb, which is found at

1 322 S.C 172, 470 S.E.2d 402, which basically recites  
2 the fact they are not mere technicalities, that the  
3 statute of limitations serve very important purposes,  
4 and it goes through what those purposes are.

5 So, Judge, I think the Moates case is directly on  
6 point here. I respectfully believe that there is no  
7 proof of estoppel. Excusable neglect is not grounds  
8 to allow this case to proceed under the supreme court  
9 rulings, and you can't restore a case that was never  
10 commenced. For that reason, Judge, we're asking,  
11 respectfully, that the earlier order be vacated, and  
12 what we believe to be the proper ruling put in place.

13 THE COURT: Thank you, Mr. Tyler. I would,  
14 again, deny your motions for reconsideration. Okay.  
15 Thank you, gentlemen.

16 (Whereupon, the proceedings concluded.)  
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## 1 CERTIFICATE OF REPORTER

2  
3 State of South Carolina)

4 County of Horry )

5  
6 I, Natalie Dahl, Official Court Reporter for the  
7 State of South Carolina, do hereby certify that the  
8 foregoing is a true, accurate Transcript of Record of  
9 the requested portions of the trial and the evidence  
10 introduced in the hearing of the above-captioned case,  
11 relative to appeal, in the Court of Common Pleas for  
12 Horry County, South Carolina, on the  
13 25th day of June, 2019.

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

16  
17 July 10, 2019  
18

19 \_\_\_\_\_  
20 Natalie Dahl, RPR

21 Court Reporter  
22  
23  
24  
25

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

Jesse Cook,

Versus

Edward Jenerette,

B E F O R E:

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

Matthew N. Tyler, Esquire  
Attorney for Defendant

1 (There were no exhibits marked during the hearing.)

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1 (On the record, March 6, 2019.)

2 MS. HANNA: I am actually here arguing this motion for  
3 Mr. Bellamy. He represents Jesse Cook and Benjamin Cook in  
4 this action.

5 THE COURT: All right. Let me see. This, this case is  
6 Cook versus Jenerette. Is that right?

7 MS. HANNA: Yes, sir.

8 MR. TYLER: Yes, sir.

9 THE COURT: Okay. And you're going to argue for Mr.  
10 Bellamy to restore a case?

11 MS. HANNA: Yes, sir.

12 THE COURT: Okay. And Mr. Tyler, you represent Mr.  
13 Jenerette?

14 MR. TYLER: Yes, sir. I made an appearance on behalf of  
15 Mr. Jenerette. We, we challenge the ability of this matter  
16 really actually to even go forward, Your Honor, but I can go  
17 into that in more detail.

18 THE COURT: Okay. Well, let -- it, it looks like it's  
19 Ms. Hanna's case or her motion. So let me hear from her.  
20 Okay.

21 MS. HANNA: Thank you, Your Honor. Good morning. As I  
22 stated momentarily or moments ago, I do -- I'm here today to  
23 speak for Mr. Bellamy in the motion to restore. By way of  
24 background, Your Honor, this is a car wreck case.

25 THE COURT: Okay.

1 MS. HANNA: A car wreck that occurred on December 16<sup>th</sup>,  
2 2014, where Jesse Cook and Benjamin Cook were both injured in  
3 this accident. Sometime thereafter they hired Mr. Bellamy to  
4 handle the personal injury case. Mr. Bellamy handled the  
5 case. Mr. Cook, both Jesse and Benjamin, it's a father, son,  
6 treated for these injuries. They have significant injuries,  
7 significant medical bills.

8 Fast forward to December 2017, neither party had --  
9 neither of the Plaintiffs were ready to submit a demand at  
10 that point. So Mr. Bellamy filed a lawsuit within the statute  
11 of limitations.

12 THE COURT: Okay.

13 MS. HANNA: He filed it on December 12<sup>th</sup>, 2017, filed in  
14 the courthouse and sent a courtesy copy to the insurance  
15 company, and that's very important.

16 After that time, Mr. Bellamy sent the summons and  
17 complaint to the sheriff the next day. The statute of  
18 limitations arguably ran on December 16<sup>th</sup>, 2017. The sheriff  
19 did a non-service affidavit the next month in January, and  
20 then this is what's really important, what happens between  
21 January 8<sup>th</sup> --

22 THE COURT: But don't, don't you only have under the  
23 rules 120 days to perfect service if the statute runs after  
24 filing? I mean, isn't, isn't that in the rule?

25 MS. HANNA: Yes.

1 THE COURT: Okay. All right.

2 MS. HANNA: Yes, sir, Your Honor. You do. There are two  
3 exceptions that fall beyond that which would be Rule 60(b).  
4 You can -- you have the authority to set that aside if you  
5 find excusable neglect and that's where I'm going with this.  
6 So fast forward, Your Honor, and the second one, Rule 60(b),  
7 and more importantly estoppel, Defendant is estopped from  
8 asserting any kind of statute of limitations.

9 THE COURT: Well, let me, let me just back up there.

10 MS. HANNA: Yes, sir.

11 THE COURT: There's been a relatively recent case on the  
12 statute, and, and when it runs and if it runs and under what  
13 conditions, and I, I cannot remember the case, but it's been  
14 visited recently. Does 60(b) permit this court -- was there  
15 an order entered dismissing the action already?

16 MS. HANNA: And that's what's most important here as  
17 well, Your Honor. There's -- this is not a default issue.  
18 This is an administrative dismissal. Judge Seals was looking  
19 through the roster or somebody in the clerk of court's office  
20 was looking through the roster, and Judge Seals entered an  
21 administrative dismissal in September 2018. There was no  
22 notice sent to Mr. Bellamy. I think there usually is an order  
23 that's actually done before it's actually dismissed. That was  
24 not done in this particular case. I've seen it done in other  
25 cases that I was not involved in, but I've seen it in other

1 cases. So Judge Seals actually did an administrative,  
2 administrative dismissal. So this is distinguished from an  
3 order of default, and I think that's important that the  
4 Plaintiff is not in default, did not miss the statute of  
5 limitations. More importantly, the Defendant never placed or  
6 filed a motion to be in default. Instead what happened, Your  
7 Honor, is the insurance company kept negotiating. They kept  
8 right on negotiating and didn't even settle the companion case  
9 until seven months after the statute of limitations.

10 THE COURT: And what, what was the companion case?

11 MS. HANNA: Benjamin Cook, which is his son.

12 THE COURT: Oh, the other one, okay. Were they filed at  
13 the same time and together?

14 MS. HANNA: Yes. They were filed at the same time.

15 THE COURT: Mr., Mr. Tyler why would they do that?

16 MR. TYLER: Pardon me, sir. Why, why would they settle  
17 one, not the other?

18 THE COURT: Yeah. Uh-huh.

19 MR. TYLER: Because --

20 THE COURT: I mean, it's just odd to me that --

21 MR. TYLER: Well, Judge, and I'll be glad to elaborate,  
22 but I've submitted an affidavit of the adjuster, but on one of  
23 them, the one that we're before today, Mr. Jesse Cook, they  
24 could never get any medical bills or treatment records.

25 THE COURT: Okay.

1 MR. TYLER: Despite requests, requests, requests. I  
2 think it says in the affidavit --

3 THE COURT: Okay.

4 MR. TYLER: -- there were 18, 18 some odd requests for  
5 this.

6 THE COURT: Okay.

7 MR. TYLER: But it had not, not been received, and so  
8 without that information they could not negotiate.

9 THE COURT: Why would they settle either one of them?

10 MS. HANNA: I don't have that.

11 MR. TYLER: Well, the other one he had gotten the  
12 information on.

13 THE COURT: No, no, no, no. It was procedurally in the  
14 same position; was it not, no service.

15 MR. TYLER: That's right.

16 THE COURT: Okay. And the statute had run?

17 MR. TYLER: Yes, sir.

18 THE COURT: So why, why would they --

19 MR. TYLER: Right. Judge, and I can, I can explain that.  
20 This is, of course, before -- prior to my involvement.

21 THE COURT: Uh-huh.

22 MR. TYLER: But the adjuster at the point in time that he  
23 settled that one he is unaware of the fact that -- he, he had  
24 not been made aware of the fact the statute had run and then  
25 later he learned that Judge Seals had signed this order

1 dismissing the case, and that's what led to Mr. Bellamy being  
2 informed.

3 THE COURT: You're, you're saying he messed up in  
4 settling the case?

5 MR. TYLER: Well, he probably should not have. The  
6 statute had run. That's right. He, he settled one. He  
7 probably should not have, but he did, and he honored that, and  
8 he sent the check and got the release and whatnot.

9 THE COURT: Okay. All right. Go on, Ms. Hanna.

10 MS. HANNA: Your Honor, over the course of those seven  
11 months or actually eight months Mr. Zeigler, who was the  
12 adjuster, continued to email back and forth with Mr. Bellamy's  
13 assistant. The case was not settled until July 11, 2018, and  
14 then the release was returned. They settled that one for  
15 \$105,000.

16 THE COURT: That was the, the --

17 MS. HANNA: The companion case.

18 THE COURT: -- companion case.

19 MS. HANNA: Yeah. Jesse's son, Benjamin.

20 THE COURT: Okay.

21 MS. HANNA: We settled that one for \$105,000. So under  
22 the case, case law of equitable -- under the case law of  
23 equitable estoppel, Your Honor, you know, it clearly says in  
24 the cases of Republic versus SCDOT a Defendant is estopped to  
25 assert the statute of limitations defense against a

1 Plaintiff's claim if the Defendant's conduct has induced the  
2 delay that otherwise would give operation to the statute, and  
3 what I've submitted previously, Your Honor, were emails back  
4 and forth between the adjuster and Mr. Bellamy's assistant  
5 where he acknowledges, the adjuster acknowledges that he can't  
6 even find his own client, and he says, "That said, I would  
7 like to avoid the issue of a default and the possible  
8 disclaiming of coverage that typically results," and then he  
9 continued to negotiate with Mr. Bellamy's office. He had a  
10 copy of the summons and complaint, and additionally, you know,  
11 we have an email confirming that they didn't even settle it  
12 until eight months after the statute of limitations. So Mr.  
13 Bellamy is believing that, well, they settled this one and  
14 then even Tangie sends an email to, to Mr. Zeigler saying,  
15 "Okay. Let's, let's start working on Jesse's now." So I  
16 would say to you, Your Honor, two reasons. They are estopped  
17 to argue this as a defense because their own actions induced  
18 the Plaintiff to not continue to spend money, to spend time --

19 THE COURT: Let's revisit, you said there was an email or  
20 letter where they say, "Don't hold us in default" --

21 MS. HANNA: Yes, sir, and I would --

22 THE COURT: -- or something like that?

23 MS. HANNA: Yes, sir. I think I submitted it at the last  
24 hearing, the packet of emails.

25 THE COURT: What, what about that, Mr. Tyler?

1 MR. TYLER: Judge --

2 THE COURT: I mean, isn't that an acknowledgement of  
3 proper service by your carrier, and I don't know what  
4 difference that makes but --

5 MR. TYLER: Judge, and I can go into it more when, when I  
6 am given the opportunity to go fully into our position.

7 THE COURT: Okay.

8 MR. TYLER: But I will tell you that in reference to that  
9 email, as I understand that email, the copy I had was not  
10 dated, but based upon the content of the email, the way I  
11 understand it is that the statute was about to run. It had  
12 not run yet. The suit was filed on or about December 12<sup>th</sup>, and  
13 the statute was going to run December 16<sup>th</sup>. They notified --  
14 they sent a copy of the complaint to the adjuster. The  
15 adjuster at that point says, "I'm not sure that address we  
16 have -- that you have is an accurate address, and before we go  
17 through the whatever might happen if you try and serve him and  
18 you get a, you know, you do serve him and we're unaware of it,  
19 etcetera, then maybe we can discuss trying to work this case  
20 out," but at that point the statute hadn't even run.

21 THE COURT: Okay. All right. Go ahead, Ms. Hanna.

22 MS. HANNA: Eight months after the statute runs this is  
23 what Mr. Zeigler says to Mr. Bellamy's office then, "This will  
24 confirm settlement of your client's bodily injury claim for  
25 \$105,000. Here's the release, sign and get it returned to

1 me," and then he says this, "You will immediately file a  
2 dismissal with prejudice with regards to the lawsuit  
3 referenced above." So again, it's seven months, eight months  
4 beyond any argument for statute of limitations, and they're  
5 still telling Mr. Bellamy's office, "Hey, we're going to  
6 settle with you and then you can file your dismissal."

7 MR. TYLER: Your Honor, I just want to clarify that's the  
8 other case she's talking about.

9 THE COURT: I understand.

10 MS. HANNA: It is, but they're parallel, Your Honor. I  
11 think it just makes our case that much stronger because  
12 they're acting in the companion case the same way that we're  
13 believing they're acting in this particular case. So, you  
14 know, it's email after email, and then in September, "Alex,  
15 please find enclosed a release Mr. Cook has signed. Also, as  
16 soon as I have a dismissal I will forward that as well."  
17 That's when the adjuster says, "You don't need to get the  
18 dismissal. I was reading this claim earlier today and located  
19 a form 4 dismissal on the public index, which has been filed  
20 with the court due to lack of service." So they're not even  
21 staying on top of it, and instead they're acting in accordance  
22 with, "Don't worry about finding this guy, don't spend money  
23 on a private investigator, we're here with you, we got the  
24 lawsuit before the statute of limitations expired," and the  
25 big thing that comes out of this, Your Honor, is there's no

1 prejudice to the Defendant, none. So for those reasons, Your  
2 Honor, you have the power to set it aside. Again, it's not a  
3 default issue. It's under Rule 60 for excusable neglect and  
4 then also for estoppel. So I would just ask Your Honor based  
5 on not just one reason, but two reasons to set this aside and  
6 allow the case to proceed, allow Mr. Bellamy to file a -- to  
7 do a motion by publication if the Defendant insists on that,  
8 and then proceed forward with the merits of the case. Thank  
9 you, Your Honor.

10 THE COURT: All right. Mr. Tyler.

11 MR. TYLER: Thank you, Your Honor. If I might I'm going  
12 to hand up a couple of things --

13 THE COURT: Okay.

14 MR. TYLER: -- I think would be helpful.

15 THE COURT: Where in the world is Mr. Jenerette?

16 MR. TYLER: Judge, I do not know.

17 THE COURT: Nobody knows where Mr. Jenerette is?

18 MR. TYLER: So, Judge, there are a number of reasons  
19 that relief in this matter should be denied. Respectfully I  
20 say that, and it's according to the rules, the statutes and  
21 the case law, but first I think what I need to do is back up  
22 and cover some of the timelines with you. As Ms. Hanna  
23 pointed out, the case was filed December 12<sup>th</sup>, and the statute  
24 ran December 16<sup>th</sup>, and as Your Honor pointed out under rule --  
25 statute 15-3-20 you've got 120 days after filing to get it

1 served, and that's in accordance with Rule 3 that I handed up  
2 to the court as well. So looking at the calendar it has to be  
3 served by April 11<sup>th</sup>, 2018. On September 11<sup>th</sup>, 2018, Judge --  
4 and that's a full six months later now -- Judge Seals signs  
5 his order saying this thing has not been served. Importantly,  
6 there has never been any service at all as we sit here today,  
7 and you asked where Mr. Jenerette is and I do not know where  
8 Mr. Jenerette is. He has never been made a party to this  
9 action, and that's my point, Your Honor, this motion to  
10 restore is invalid because there is nothing to restore.  
11 Unlike, for example, a Rule 40(j) where filing is made,  
12 service is made, an answer's entered and then the parties  
13 consent to a dismissal and then you restore it, in this case  
14 it was filed but it was never served, and under Rule 3 a case  
15 --

16 THE COURT: Well, wasn't, wasn't there a prior filing I  
17 thought, that, that this, this was never 40(j)'d. I was under  
18 the misunderstanding.

19 MR. TYLER: No, sir. It was not.

20 THE COURT: Okay.

21 MR. TYLER: No, sir. It was never 40(j)'d. So you've  
22 got a case that was filed in December and it was never served.  
23 Under Rule 3 the case must be served in order for a -- excuse  
24 me, the pleadings must be served in order for a case to be  
25 commenced. So if a case is never commenced then it stands to

1 reason that a case cannot be restored. Otherwise, we take the  
2 position that the Court respectfully lacks subject matter  
3 jurisdiction because you're restoring an action that has never  
4 been commenced to begin with. That is the first position.

5 The second position, Your Honor, has to do with the  
6 motion itself being untimely. Judge, under Rule 54 the order  
7 Judge Seals entered September 11<sup>th</sup> constitutes an entry of  
8 judgment. Under Rules 52 and 59, they clearly mandate that if  
9 you're going to make a motion to amend a judgment or to ask  
10 the Court to reconsider some of the Court's findings you've  
11 got ten days to do it. Okay. Judge Seals entered his order  
12 September 11<sup>th</sup>. That means you've got up and, up and through  
13 September 22<sup>nd</sup> to file that motion. This motion, the one we're  
14 here on today, was filed on November 28<sup>th</sup> of 2018.

15 THE COURT: But they move under 60(b).

16 MR. TYLER: Yes, sir. Well, and I, and I will get to  
17 that in just a moment.

18 THE COURT: Okay.

19 MR. TYLER: I don't think 60(b) has any application at  
20 all to this.

21 THE COURT: Okay.

22 MR. TYLER: The motion they filed was 77 days late.

23 THE COURT: And you were talking about a motion to  
24 reconsider or a motion to amend; right?

25 MR. TYLER: Correct. That's right.

1 THE COURT: Okay.

2 MR. TYLER: And I think I probably -- I think that was  
3 the, the proper way at the time of doing that, but in this  
4 case this motion that was filed was filed basically 67 days  
5 too late, and that is our position and it's untimely.

6 So then we move to the substance of the motion. As you  
7 were going to a moment ago, Judge, Rule 60(b), I don't think  
8 it can hardly be argued that missing a statute of limitations  
9 or missing a service period as required by the statute  
10 constitutes a mistake that can be looked at and viewed as  
11 excusable under Rule 60(b). Our courts have discussed this on  
12 numerous occasions. That is the, the law. The law is that an  
13 attorney has an obligation to know the law and to know what  
14 the rules are and to have service effective within the proper  
15 time. You mentioned a moment ago, Your Honor, that this has  
16 been visited recently by our courts. It has, case of Personal  
17 Care versus Theos; Uricchio and Howe, Opinion 5628, filed  
18 December -- excuse me, February 20<sup>th</sup> of 2019, and just last  
19 week Walback versus Ion Company, Opinion 5588 filed February  
20 27<sup>th</sup> of 2019. Both of them discuss the discovery rule, the  
21 fact that a person of common knowledge and common experience  
22 is put on notice that they might have a claim against another  
23 person, and consequently, they've got three years to act to  
24 preserve that statute, and of course, you're given an extra  
25 120 days to get it -- if you're trying to serve them beyond

1 the statute of limitations.

2 THE COURT: My, my understanding is, is the courts in  
3 their most recent opinions have taken a very hard line when  
4 you look at the statute of limitations and, and they're --  
5 have basically said they're absolute.

6 MR. TYLER: That's exactly right. That's what these,  
7 these -- in these most recent opinions have stated that very  
8 thing, that it is the door shuts, when that time runs the door  
9 shuts. It's actually quite simple that they've, they've  
10 stated that, and they basically state that it's up to the  
11 court as a matter of law to make that determination.

12 As to the argument that statute shouldn't apply and that  
13 it should be equitably tolled because the, the Plaintiff was  
14 estopped --

15 THE COURT: Okay. And that's where I want to go. I  
16 mean, I know what the rules and the statutes say. I  
17 understand the service. I understand you got 120 days from  
18 filing, even if it's 119 days before your statute runs. You  
19 don't have it from the time the statute runs. You have it  
20 from the time of filing.

21 MR. TYLER: Exactly. Yes, sir.

22 THE COURT: Okay. I understand that. I understand what  
23 the rule is. What I want to know can there be equitable  
24 tolling or can, can there be equitable relief under a 60(b)  
25 motion.

1 MR. TYLER: Yes, sir.

2 THE COURT: From an -- and you know, this is what I'm  
3 kind of thinking about 60(b), Judge Seals issued an order  
4 administratively dismissing the action. Okay. If that order  
5 -- they're granted relief from that order, aren't we still in  
6 the same situation?

7 MR. TYLER: Yes, sir.

8 THE COURT: I mean, isn't it still the same?

9 MR. TYLER: Well, in essence, Judge, I think at that  
10 point in time --

11 THE COURT: Does it fix it? I mean, what --

12 MR. TYLER: No. It doesn't fix it, but I think at that  
13 point in time it actually prolongs the inevitable, which is to  
14 say that should, should -- let me back up.

15 THE COURT: If he administratively --

16 MR. TYLER: Yes, sir.

17 THE COURT: -- dismissed it, if that order is set aside,  
18 you're going to move.

19 MR. TYLER: That's right. What -- I think at that point  
20 what, what happens is that the Defense, excuse me, the  
21 Plaintiff still has to in some way, shape or form serve the  
22 Defendant, and at that point in time the Defendant then  
23 responds with a whole litany of motions to dismiss based upon  
24 the statute of limitations not being complied with. I mean,  
25 we're, you know, we're, we're delaying the inevitable, but if

1     you will --

2           THE COURT:   I mean, it doesn't prevent you from raising  
3     the defense.

4           MR. TYLER:   Right. But I don't even think you get there  
5     because equitable tolling or equitable estoppel does not  
6     apply, and I'll, I'll be glad to address that with the Court.

7           THE COURT:   Okay. Let me hear it.

8           MR. TYLER:   Okay. So --

9           THE COURT:   That's what I want to talk about.

10          MR. TYLER:   Yes, sir. Understood. So in South Carolina  
11     if you're going to claim equitable estoppel you got to show  
12     basically three elements. You got to show that the Defendant  
13     involved -- was involved in some type of a deception or  
14     concealment of true facts, that the Plaintiff relied upon that  
15     when the Defendant actually had true knowledge of it. Okay.  
16     There's none of that here. There's absolutely none of that  
17     going on in this particular case, and I don't think anybody's  
18     claiming that or, or claiming that there was.

19          THE COURT:   And thirdly, you gave me two. You said there  
20     were three.

21          MR. TYLER:   Yes, sir. Well, the, the first one is  
22     concealment of facts or making false representations, the  
23     Defendant doing that. Second is the Plaintiff relying on  
24     that.

25          THE COURT:   Okay.

1 MR. TYLER: And the third is the Defendant knowing the  
2 truth.

3 THE COURT: Okay.

4 MR. TYLER: Here these parties were basically on equal  
5 footing. Okay. First off the Defendant --

6 THE COURT: You're saying based upon that the Plaintiff,  
7 I mean, the Defendant would have had to essentially trick --

8 MR. TYLER: That's right.

9 THE COURT: -- the Defendant into not --

10 MR. TYLER: That's exactly right, and, and here under,  
11 under --

12 THE COURT: Trick the Plaintiff into not filing.

13 MR. TYLER: And the Defendant had nothing to do with  
14 this, but let's just take that a step further and say it was  
15 the Defendant's insurance carrier, if that's what the  
16 allegation is. They were on equal footing. As mentioned  
17 earlier, the, the insurance carrier rep did not even know that  
18 the statute was running or else he probably would not have  
19 settled that other case, but here's what's important, Judge,  
20 and I'm, I'm quoting a Supreme Court decision, Evins versus  
21 Richland County Historic Preservation Commission, which is 532  
22 S.E.2d 876, quote, [as read], "Estoppel cannot exist if the  
23 knowledge of both parties is equal and nothing is done by one  
24 to mislead the other." So there is no estoppel there. Okay.  
25 Citing 51 Am Jur 2d Section 174, [as read], "To state that

1 equitable tolling is only available if the claimant" -- it  
2 states that, [as read], "The equitable tolling is only  
3 available if the claimant's prevented in some extraordinary  
4 way from commencing their case despite their own diligence."  
5 Here this is an auto accident case. There is no extraordinary  
6 way that the Plaintiff was prevented from commencing their  
7 case. They could have, could have done whatever they needed  
8 to do to serve it. Okay? So now I want to move on if I can.  
9 -- I think that addresses the equitable tolling, but there's  
10 still the equitable estoppel discussion.

11 THE COURT: Okay.

12 MR. TYLER: Judge, a virtually identical set of facts was  
13 before the court in Moates v. Bobb, and that's a case I handed  
14 up to the Court. That's found at 470 S.E.2d 402. It's a 1996  
15 opinion. That actually is a little bit more of an, of an  
16 egregious type case because that was an auto accident case,  
17 also, and unfortunately, the Plaintiff was rendered a  
18 paraplegic. There were discussions that were ongoing between  
19 the Plaintiff's attorney and the insurance carrier. These  
20 discussions led up to the statute of limitations. The  
21 insurance carrier even sent a check for 24,000 and some change  
22 to help modify the Plaintiff's home while these discussions  
23 were ongoing. Just like in here, that carrier was requesting  
24 medical bills so that they could try and adjust the claim.  
25 Just like in here in this case there was never any service

1 perfected upon the Defendant. The statute ran. In that case  
2 the Plaintiff's attorney took the position that the carrier  
3 was equitably estopped from arguing that the statute of  
4 limitations applied. The Court of Appeals said, "No. That's  
5 not right. You've got a duty to represent your client, which  
6 means you've got to preserve that statute of limitations, even  
7 if discussions are ongoing." In fact, what they said was  
8 that, "It doesn't matter if the discussions are ongoing or  
9 not, if -- even if they had started, as long as they had not  
10 been finalized, you still had to preserve the statute of  
11 limitations." They cited a 1974 decision from the South  
12 Carolina Supreme Court, Gadsden versus Southern Railroad,  
13 which is a case where actually Judge Harwell was the trial  
14 judge, David Harwell, and Judge Harwell in that particular  
15 case made the same finding, basically affirmed by the Supreme  
16 Court, which is to say that if you're having discussions, as  
17 long as they're not -- as long -- if the case ain't settled  
18 you still have to abide by the statute of limitations.

19 THE COURT: And you know, that, that in, in some respects  
20 addresses a, a question I had, you know, is the company  
21 estopped if they say, "We're going to settle this case."  
22 You're saying under the Bobb case that even if they did, if it  
23 had not been finalized --

24 MR. TYLER: I, I think in that, in that situation you  
25 would have to have -- if you had some confirmation from

1 someone saying they were paying "X" number of dollars.

2 THE COURT: No. No. Just generally saying, "We're going  
3 to settle the case."

4 MR. TYLER: No. If that's that the case no, sir. You're  
5 right. If -- under the Bobb case and that Gadsden decision,  
6 if the settlement discussions are not finalized then you must  
7 preserve the statute of limitations.

8 THE COURT: Okay. I want both of you then to submit  
9 proposed orders to me, and please address equitable estoppel  
10 and the other issues.

11 MR. TYLER: Yes, sir.

12 THE COURT: Let's, let's look at -- give me some time to  
13 look at this. Please attach any cases you cite to this stuff  
14 and send it to me hard copy, please.

15 MR. TYLER: Yes, sir.

16 THE COURT: Okay. Thank you.

17 MR. TYLER: Thank you, Judge.

18 MS. HANNA: Your Honor --

19 THE COURT: Let me give this back to you. Yes, ma'am.

20 MS. HANNA: Your Honor, there is one issue that I did not  
21 raise in the beginning that I would just like to be put on the  
22 record.

23 THE COURT: Okay.

24 MS. HANNA: Also under the argument of excusable neglect,  
25 as Your Honor is aware, Mr. Bellamy, you know, and this is not

1 for public knowledge, but a lot of people know, was diagnosed  
2 with a significant illness this past year and that was --  
3 could be part of the reason for, for some of the delays and  
4 the issues. That is a third argument, but I wanted it cited  
5 on the record so that I could include it in our written  
6 argument.

7 THE COURT: In your excusable neglect.

8 MS. HANNA: Yes, sir.

9 THE COURT: I, I understand that, and I'm aware of that.

10 MS. HANNA: Yes, sir.

11 THE COURT: Okay.

12 MS. HANNA: And that is not -- we do still rely on our  
13 first two stronger arguments for equitable estoppel and  
14 excusable neglect.

15 THE COURT: All right. Thank you.

16 MS. HANNA: Thank you.

17 MR. TYLER: Thank you, Your Honor.

18 THE COURT: Thank you both, okay.

19 MR. TYLER: Yes, sir.

20 THE COURT: Get that to me in let's say in the next  
21 couple of weeks. All right?

22 MR. TYLER: Yes, sir.

23 THE COURT: A couple of weeks do it?

24 MR. TYLER: Will do.

25 THE COURT: All right.

1. MS.. HANNA: Yes, sir. Thank you, Your Honor.

2 MR. TYLER: Thank you, Judge.

3 THE COURT: All right.

4 (Adjourned.)

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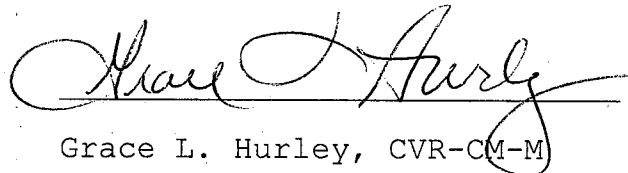
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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the hearing held in the case of Jesse Cook versus Edward Jenerette, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on March 6, 2019.

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



Grace L. Hurley, CVR-CM-M

Official Reporter

July 8, 2019.

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No.: 2017-CP-26-08135

**RECEIVED**  
AUG 23 2019  
SC Court of Appeals

Jesse Cook,.....Respondent,

vs.

Edward Jenerette,.....Appellant.

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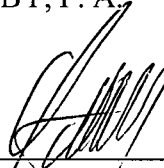
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THE HONORABLE JENNY ABBOTT KITCHINGS  
SOUTH CAROLINA COURT OF APPEALS CLERK  
P.O. BOX 11629  
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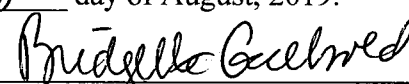
By: 

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ATTORNEY FOR THE APPELLANT

SWORN to before me this

21<sup>st</sup> day of August, 2019.

  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: 6/28/21

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Matthew N. Tyler •  
James M. Saleeby, Jr.  
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Alvin A. Coleman (1930-1995)

August 21, 2019

•Certified Mediator/Arbitrator  
+Also Admitted District of Columbia

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals Clerk  
P.O. Box 11629  
Columbia, SC 29211

RE: Jesse Cook v. Edward Jenerette  
Appellate Case #: 2019-001076  
AB File No.: 34276

Dear Ms. Kitchings:

Please find enclosed with this letter the original and one (1) copy of the Initial Brief of Appellant in the above-referenced matter. I would appreciate it very much if you would file the original with your Court and return a clocked copy to me in the enclosed self-addressed, stamped envelope provided for your convenience.

Should you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely yours,

MATTHEW N. TYLER

MNT/bdg  
Enclosure

Cc:

G. Scott Bellamy, Esquire  
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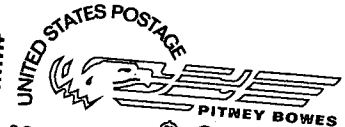
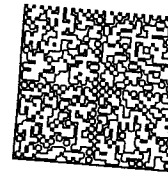
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