THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
THE HONORABLE L. CASEY MANNING
Circuit Court Judge
Fifth Judicial Circuit

CASE NO: 2018-CP-400-5641

RONALD I. PAUL..Appellant,

V.

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION; PAUL D. DE HOLCZER, individually and as a partner of the law Firm of Moses, Koon & Brackett, PC; MICHAEL H. QUINN, individually and as senior lawyer of Quinn Law Firm, LLC; J. CHARLES ORMOND, JR., individually and as a partner of the Law Firm of Holler, Dennis, Corbett, Ormond, Plante & Garner; OSCAR K. RUCKER, in his individual capacity as, Director Rights of Way South Carolina Department of Transportation; MACIE M. GRESHAM, in her individual capacity as Eastern Region Right of Way Program Manager South Carolina Department of Transportation; NATALIE J. MOORE, in her individual capacity as assistant chief counsel South Carolina Department of Transportation.. Respondents.

FINAL REPLY BRIEF OF APPELLANT

Ronald I. Paul
Post Office Box 4353
Columbia, S.C. 29240
Appellant, *Pro Se* litigant
(803) 414-2305

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APPELLANT'S RESPONSE TO RESPONDENT'S STATEMENT OF THE CASE

Appellant objects to Respondents' Rucker in his individual capacity (hereinafter Rucker or Respondent) and Gresham in her individual capacity (hereinafter Gresham or Respondent) Statement of the Case to the extent it includes factual inaccuracies, contested factual matter and arguments.

ARGUMENTS

I The Circuit Court judge erred and abused his discretion in refusing to entry default against Rucker and Gresham pursuant to Stark Truss Co. v. Superior Const. Corp

Ministerial Act

Respondents, Rucker in his individual capacity (hereinafter Rucker or Respondent) and Gresham in her individual capacity (hereinafter Gresham or Respondent) in their brief, on pages 10-11 clearly conceded to entry of default against Rucker and Gresham in their individual capacities pursuant to authoritative precedent and binding authority in Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004) (citing Thynes v. Lloyd, 294 S.C. 152, 153–54, 363 S.E.2d 122, 123 (Ct. App. 1987), which held that "whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit" of the moving party). As a result, no further analysis is needed.

II The Circuit Court judge incorrectly held in his order dated June 7, 2019, that service of the Summons and Complaint on Rucker and Gresham was ineffective and, erred and abused his discretion in dismissing them from the Complaint for lack of personal jurisdiction.

Rule 4, SCRCP

As the Respondents, Rucker and Gresham have correctly and clearly conceded to entry of default. (See Respondents brief p 10-11) Burris Chemical, Inc. v. Daniel Const. Co., 251 S.C. 483, 487, 163 S.E.2d 618, 620 (1968). Rule 4, SCRCP serves at least two purposes. "It confers personal jurisdiction on

the court and assures the defendant of reasonable notice of the action." Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995) Exacting compliance with the rules is not required to effect service of process. *Id.* at 209-10, 456 S.E.2d at 899 "Rather, (the court must) inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *Id.* at 210, 456 S.E.2d at 899. (Emphasis added).

Gresham submitted no affidavit

It's important to recognize that Gresham filed a motion to set aside entry of default (R 77-83) but did not submit an affidavit of improper service of process in this case (R 77-83) as a result no further analysis is needed for Gresham.

Rucker affidavit

In Respondents brief on page 15, in response to Appellant evidence submitted.[1] Respondents explained, "the pleadings may have been routed on that occasion to Rucker and Gresham (but more likely to the insurer for SCDOT), that counsel was retained to defend, and that Rucker, Gresham, and their counsel chose not to challenge the sufficiency of the purported service of process". (See Respondents brief p 15). However, it appears in this case counsel chose to challenge the service of process on Rucker and Gresham

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[1] Evidence that shows in the "past on May 18, 2012 Rucker had retired at this point and time also and, the SCDOT Postal Specialist signed the receipts for the documents sent to Rucker at his former employer address in his individual capacity, in other words there is express or implied authority conferred on SCDOT Postal Specialists and there is apparent authority created by PS Form 1093". (R 261 line 11 – 264 line 7; p 92-100)

but filed a Notice of Appearance on behalf of SCDOT, Paul D. de Holczer and Natalie J. Moore. (R 245 lines 16-18). Negligence of an insurance company is imputed to a defaulting litigant and cannot constitute good cause to relieve Respondents from the entry of default. *See* Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987) (observing that the "courts of this state have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant") and Williams v. Vanvolkenburg, 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994) (imputing an attorney's negligence to a defaulting litigant).

South Carolina Rules of Civil Procedure, Rule 55 (e)

In Judge L. Casey Manning Order filed June 7, 2019, Judge Manning recognized that the Respondents Rucker and Gresham are being sued for their alleged conduct when they served as employees of SCDOT. (R 6 fn 4)". He then cited Rule 55 (e), SCRCP....... (R 6 fn 4)

Judge Manning reliance on South Carolina Rules of Civil Procedure, Rule 55 (e) is misplaced. The language reads:

Judgment Against the State and Certain Other Parties. No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof, against minors, incompetents, or parties to a suit for divorce or annulment of marriage or against a party upon whom service of summons was made by publication, and who did not subsequently make appearance in the action, or in any in rem action, unless the claimant establishes his claim to relief by evidence satisfactory to the Court.[2]

[2] Nothing in the text of South Carolina Rules of Civil Procedure, Rule 55 (e), suggests that state officials sued in their individual capacities prohibits entry of default judgment against them. Stated another way, ruled 55 (e) does not prohibits the entry of default judgment against the Respondents Rucker and Gresham who are state officials sued in their individual capacities.

Respondents, Rucker and Gresham are state officials sued in their individual capacity in Hafer v. Melo, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), the United State Supreme Court held state officials sued in their individual capacities are "persons" for purposes of § 1983.[3] This is a 42 USC 1983 case filed in state court, at this time or point federal law applies. According to the four corners of the Complaint, on page 3 paragraph 6 this action is brought pursuant to 42 U.S.C. Sections 1983 for Rucker and Gresham violating Plaintiff's rights while acting under color of state law in their individual capacities. (R 26)

Respondents argue unreasonably that Appellant fails to challenge this alternative basis for setting aside the entry of default against Rucker and Gresham. Appellant did appeal the Judge's primary finding that service was ineffective and addressed this finding.

Therefore, Judge Manning erred and abused his discretion in setting aside the entry of default against Rucker and Gresham pursuant to South Carolina Rules of Civil Procedure, Rule 55 (e).

[3] Unlike official-capacity defendants - who are not "persons" because they assume the identity of the government that employs them, Will v. Michigan Dept. of State Police, at 71 - officers sued in their personal capacity come to the court as individuals, and thus fit comfortably within the statutory term "person," cf. 491 U.S., at 71 , n. 10.

Judge Jocelyn Newman Order

In Respondents brief on pages 9, 16 and 17 Respondents urge the Court to take judicial notice of the Order Granting Motions to Dismiss issued by Judge Jocelyn Newman on November 13, 2019. Claiming those same defenses are available to the Respondents Rucker and Gresham [4] and are likewise a bar to any recovery by the Appellant against them.[5] Claiming those defenses demonstrate that there is a meritorious defense available to Rucker and Gresham[6] so as to bar the entry of a default judgment against

[4] Respondents' reliance on I'On v. Town of Mt. Pleasant is misplaced. In I'On v. Town of Mt. Pleasant the South Carolina Supreme Court stated "In clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.

[5] It is well settled that "A defaulting defendant cannot contest the Complaint". See Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability.") "A defendant in default admits liability but not the damages . . . ." Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012) (citing Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981)). "[T]he defaulting defendant has conceded liability.
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[6] In Morgan's Inc. v. Surinam Lumber Corp., supra, this Court pointed out that there is a difference between a defendant 242 being declared in default and subsequently having judgment entered against him for damages. By defaulting, a defendant forfeits his "right to answer or otherwise plead to the complaint." 251 S.C. at 66, 160 S.E. (2d) at 193. In essence, the defaulting defendant has concede liability. However, a defaulting defendant does not concede the amount of liability

them.[7] Further claiming a remand for the taking of depositions at this point would be legally futile.[8]

However, in this case, the Respondents requested in their motion to set aside the entry of default and maintained at the hearing that service of process was defective and ineffective, in other words service of process and ruled 55 (e) issues only, not good cause or meritorious defense. (R 77-83; 254 lines 20 - 21)

Therefore, on remand under these circumstances' res judicata, collateral estoppels, issue preclusion, claim preclusion, law of the case, unfairness, injustice results and public policy, but not limited to, would bar these defenses.

III The Circuit Court judge erred and abuse his discretion in denying Appellant's 59(e) Motion.

Appellant filed a Rule 59(e) Motion, since the issue is not whether Appellant can prove John Furgess, who is a SCDOT Postal Specialist was "authorized," but whether Rucker and Gresham had met their burden of proof that John Furgess was "unauthorized" under Rule 4 (d)(8), SCRCP,. (R 84-103)

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[7] The effect of default is that Defaulting Defendants cannot contest the merits of the case until they are successful in lifting the default. For example, our Supreme Court has said, "If our courts were to allow a defaulting defendant to fully participate in a post-default hearing, we believe there would be no consequence of default." Limehouse v. Hulsey, 404 S.C. 93, 116, 744 S.E.2d 566, 578–79 (2013). "It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability."
Roche v. Young Bros., Inc., of Florence, 332, S.C. 75, 81, 504 S.E.2d 311, 314 (1998). "By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint. In essence, the defaulting defendant has conceded liability. "A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court." McCall, 363 S.C. at 651, 611 S.E.2d at 317 (citing Griffin v. Capital Cash, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992)).

[8] Would uncover a fraud is been perpetrated upon the Court through Respondent's affidavits, containing false factual assertions.

In part, the motion relates directly to the critical issues the true facts regarding service, and Respondent's attempt to perpetrate a fraud on the court.

A The Circuit Court judge erred and abused his discretion in refusing Appellant's request for an opportunity to depose Rucker, Gresham, Furgess and Morey and other material fact witnesses before the judge's final ruling.

In Respondents brief on page 16, Respondents arguments addressing Appellant motion for a continuation to conduct discovery and cross – examination of witnesses are conclusory statement, in other words do not contain reasons for them, with citations to authorities and parts of the record on which the Respondents relies, therefore are deem abandoned. See First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal).

In addition, Judge Manning did not rule on Appellant motion for a continuation to conduct discovery and cross – examination of witnesses was a clear showing of an abuse of discretion. Judge Manning abuse his discretion in refusing to grant a continuance.

In Respondents brief on page 16, Respondents mistaken argued, that the motion hearing was not held *until more than ten weeks later* on April 16, 2019. This came as a shock to Appellant, because it cannot be disputed that

the default motions were brought before Judge Jack Early at a hearing held on February 11, 2019.[9] (R 237 lines 22 - 23) However, Judge Early only had time to hear some of the motions scheduled because of another commitment, but he did fully hear arguments on the Motions to Dismiss and stated that he would rule within days and have the other motions (specifically default and discovery motions) re-scheduled for later that same week. On April 16, 2019, the discovery and default motions that Judge Early still had under advisement were scheduled and heard by Judge Casey Manning.

Under these circumstances the request for discovery rights, and the timing thereof, were reasonable and justifiable, cry out for a chance to cross- examine Rucker, Gresham Furgess and Morey, that evidence shows is likely attempting to perpetrate a fraud on the Court, and who has avoided cross-examination to date by submitting affidavits and choosing to avoid attending court hearings. It was an abuse of discretion under these circumstances to deny Appellant an opportunity to cross-examine a party who was likely submitting false affidavit testimony to the Court, and to depose key witnesses. How can the Court evaluate the circumstances of authorization, if Respondents, in an attempt to perpetrate a fraud on the Court, dodges cross-examination and is allowed to avoid the search for the truth represented by discovery rights.

In most instances, there is a significant difference between extrinsic

[9] From January 31, 2019 to February 11, 2019 *is twelve days.*

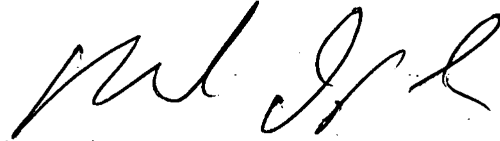
fraud and intrinsic fraud See, Ray v Ray, 374 S C 79, 647 S E 2d 237 (2007) That is because extrinsic fraud, taking place in secret outside of litigation, cannot be illuminated by discovery and cross-examination, and intrinsic fraud, perpetrated in litigation, may hopefully be revealed during litigation through vigorous cross-examination and discovery. However, the logical rationale for that distinction evaporates where, as here, a fraud is perpetrated upon the Court through Respondent's affidavits, containing false factual assertions, not subject to discovery or cross-examination of any kind. It is fundamental to our system of justice that all parties should be afforded basic rights to discovery and cross- examination. That is especially true where the party from whom discovery and cross-examination is sought is unworthy of belief, and where compelling evidence exists that such party is attempting to perpetrate a fraud upon the Court. Appellant respectfully submits that denial of an opportunity to engage in discovery under these circumstances is a miscarriage of justice which demands immediate correction by this Court.

CONCLUSION

Based on the foregoing, this Court should reverse the trial Court's Order and remand this matter for further proceedings or Appellant requests the Court to reverse the trial court's findings of ineffective service in the

Order dated and filed June 7, 2019 and rule that service of the Summons and Complaint on Defendants Oscar K. Rucker in his individual capacity and Macie M. Gresham in her individual capacity was valid and effective. In the alternative, Plaintiff requests the Court to permit deposition on John Furgess, Sherrie S. Morey, Oscar K. Rucker, Macie M. Gresham and other material discovery before finally determining whether service on Rucker and Gresham was ineffective, and to hold the June 7, 2019 Order in suspense pending such discovery.

Respectfully submitted,



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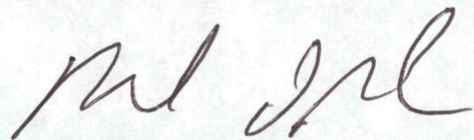
CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Reply Brief complies with Rule 211 (b), SCACR.



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