

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

C.A. No.: 2013-CP-04-1700
Appellate Case No. 2018-000289

Mario Escalante,

v.

Appellant,

David L. Rodgers and Janice W. Rodgers,
d/b/a Whitehall Express Mart,

Respondents.

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MAR 05 2018
SC Court of Appeals

**ADDENDUM TO APPELLANT'S
PETITION FOR REHEARING**

Appellant, by and through his counsel of record, respectfully submits this Addendum to his Petition for Rehearing, and offers the following:

**RES JUDICATA DOES NOT APPLY IN THE STATE ACTION
AS IT WAS NOT PROPERLY RAISED.**

Appellant submits that *res judicata* is one of the affirmative defenses that a defendant in a case may avail of. Rule 8(c) SCRPC. ¹ Affirmative defenses must be asserted or pled in an

¹ Rule 8(c) states "in pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper designation. A party may file a reply to any of the foregoing affirmative defenses.

Answer on any responsive pleading. Rule 12(b) SCRC². A review of the Answer shows that the following affirmative defenses were alleged by Respondents: failure to state facts constituting a cause of action, failure to mitigate damages, assumption of risk, failure to join party, good faith, truth, comparative and contributory negligence, proximate cause, and unconstitutionality of imposition of punitive damages. *Res judicata* was not among those pled in Defendants' Answer, dated August 19, 2013.

Not having claimed the defense in their Answer, Respondents are not entitled to raise *res judicata* as a defense for the first time in their Motion for Summary Judgment. South Carolina Supreme Court held that "(E)ven if these affirmative defenses were not procedurally barred, we disapprove of the practice of orally raising unpled issues for the first time at a summary judgment motion." Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993). Failure to plead an affirmative defense is a waiver of right to assert, pursuant to Rule 12. Town of Kingstree v. Chapman, 405 S.C. 282, 313 747 S.E.2d 494, 510 (2013).

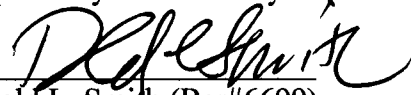
CONCLUSION

For the above and foregoing reasons, Appellant respectfully requests this Honorable Court reconsider its Order affirming the lower court's ruling in dismissing the State action and grant his Petition for Rehearing.

{SIGNATURE TO FOLLOW}

² Rule 12(b) of the SCRC² states that, "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim.

Respectfully submitted by:



Donald L. Smith (Bar#6699)

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Attorney for Plaintiff

Anderson, South Carolina

Date: March 3, 2020.

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**FORM 16
CERTIFICATE OF COUNSEL**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

C.A. No.: 2013-CP-04-1700
Appellate Case No. 2018-000289

Mario Escalante,

v.

David L. Rodgers and Janice W. Rodgers,
d/b/a Whitehall Express Mart,

Appellant,


Respondents.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Addendum to Appellant's Petition for Rehearing complies with Rule 240 in relation to Rule 267, SCACR.

Respectfully submitted by:


Donald L. Smith (SC Bar#6699)
Attorney for Plaintiff
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Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com.

Anderson, South Carolina
Date: March 3, 2020

**FORM 7
PROOF OF SERVICE
PETITION FOR REHEARING**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

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C.A. No.: 2013-CP-04-1700
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Mario Escalante,

Appellant,

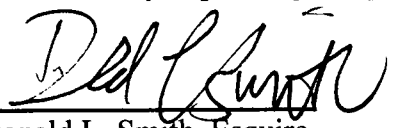
v.

David L. Rodgers and Janice W. Rodgers,
d/b/a Whitehall Express Mart,

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the Addendum to Appellant's Petition for Rehearing and Proof of Service for same upon The Honorable Jenny Abbott Kitchings, Clerk of Court South Carolina Court of Appeals, at PO Box 11629, Columbia SC 29211, and Respondents, by and through their counsels of record, Phillip Reeves, Esquire and Nicholas A. Farr, Esquire, at Gallivan White and Boyd, P.A., Post Office Box 10589, Greenville, SC 29603, by depositing a copy of it in the United States Mail, postage prepaid, on March 3, 2020.


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attorneydonaldsmith@gmail.com
Attorney for Appellant

March 3, 2020.

FORM 8
LETTER TO THE APPEALS COURT CLERK
FILING OF PETITION FOR REHEARING

March 3, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

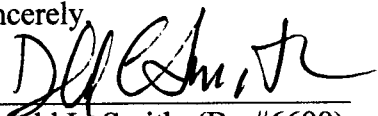
**RE: Mario Escalante v. David L. Rodgers and Janice W. Rodgers,
d/b/a Whitehall Express Mart
Appellate Case No. 2018-000289
C.A. No.: 2013-CP-04-1700**

Dear Honorable Kitchings:

Please find enclosed the following materials for filing:

- (1) Addendum to Appellant's Petition for Rehearing; and,
- (2) Proof of Service for same.

Sincerely


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Attorney for Appellant

cc: Phillip Reeves, Esquire
Nicholas A. Farr, Esquire

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SC Court of Appeals

Attorney Office of Donald Smith
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Anderson, SC 29621

Hon. Jenny Abbott Kitchings
Clerk of Court,
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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