RECEIVED
Jun 21 2021
SC Court of Appeals

REPLY BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Judge

Appellate Case No.: 2021-000269
C.A. No. 2020CP1100632

Bobby E. Leopard, Luther Harris, and Donna Harris,

Appellants,

v.

Perry W. Barbour,

Respondent.

REPLY BRIEF OF APPELLANT

Submitted by:

s/Donald L. Smtih
Donald L. Smith (Bar No.:6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

Anderson, South Carolina
June 18, 2021

TABLE OF CONTENTS

Table of Authorities ii

Arguments

I. RESPONDENT IS NOT ENTITLED TO RELIEF FROM ENTRY OF DEFAULT. 1

II. APPELLANTS ARE ENTITLED TO EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS. 4

III. THE DOCTRINE OF UNCLEAN HANDS IS APPLICABLE IN THIS CASE. 5

Conclusion

TABLE OF AUTHORITIES

Cases

Hooper v. Ebenezer Sr. Services, 386 S.C. 108 (S.C. 2009) 4, 5

Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261 (S.C. 2019),
citing Factory Mutual, 256 S.C. at 381, 182 S.E.2d at 729-30
Squires v. Nat'l Grange Mut. Ins. Co., 247 S.C. 58, 67,
145 S.E.2d 673, 677 (1965) 3

Shores v. Weaver , 315 S.C. 347, 354, 433 S.E.2d 913, 916 (Ct. App. 1993) 3

Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465,
381 S.E.2d 499, 501-02 (Ct.App. 1989) 1

Appellants make the instant submission in response to Respondent's Initial Brief. Appellants adopt and incorporate by reference the Statement of Case and Facts presented in their Initial Brief.

I.

RESPONDENT IS NOT ENTITLED TO RELIEF FROM ENTRY OF DEFAULT.

Appellants will address Respondent's Arguments Nos. 1 and 2 in this section because they are intricately connected.

Firstly, Appellants assert the two-step analysis relied upon by the courts in determining whether to grant relief from entry of default. (Appellant's Initial Brief, p. 6). The first step is to provide "good cause", and after establishing the same, the court determines whether the Wham factors are satisfied. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App. 1989). The three (3) factors mentioned in the Wham case are as follows: (a) timeliness; (b) meritorious defense; and, (3) degree of prejudice to Appellants *Wham, supra.*

Appellants argue Respondent has not offered a "good cause", outside of the "potential affirmative defenses" he could have asserted. It is an established rule that failure to plead an affirmative defense results in the waiver of that defense and its exclusion as an issue in the case. Appellants maintain Respondent is precluded from raising the defense of statute of limitations and pendency of appeal because they were not raised within the reglementary period for filing an Answer or responsive pleading.

Apart from its exclusion as meritorious defense due to it being waived, the defense of statute of limitations does not apply in the instant case. Appellants believe due to the circumstances surrounding the matter between the parties, the statute of limitations should be equitably tolled in favor of Appellants, as will be discussed in the succeeding section.

Appellants reiterate their objection to Mr. Moore's reference of the Spartanburg action, which he considered as not having been filed at all. Mr. Moore should not be permitted to change his theory of the case.

It should be noted Mr. Moore raised the potential affirmative defenses as basis for his "good cause" as well as the meritorious defense. To establish a meritorious defense, defendant must make an affirmative showing of a defense that is likely to be successful. In this case, this "potential affirmative defenses" will not be successful because they have been waived by Respondent's inaction.

Secondly, in their Initial Brief, Appellants challenged Mr. Moore's representation of herein Respondent. Mr. Moore has not provided proof of his standing to this case, as he has not disclosed if he was hired by Respondent. However, in his Initial Brief for Respondent, Mr. Moore disclosed he received the notice of entry of default after a February 1, 2021 letter from Appellant. What Mr. Moore failed to state is the letter and notice was sent to the Insurance Company. It is therefore not improbable to assume Mr. Moore was hired by the Insurance Company. Mr. Moore represents the Insurance Company and not Respondent.

Mr. Moore argues that the timeliness of a motion should be based upon when it received the notice of entry of default. This would have been a valid argument if it were not for the fact the Appellant was the one who sent the notice to the Insurance Company. It is not Appellant's primary responsibility to notify the insurance company—*that's the insured's responsibility*.

Therefore, as far as Appellant is concerned, he has served Respondent with the processes. It was Respondent's responsibility to notify the insurance company of the lawsuit against him. Respondent defaulted, and an order of default has been entered against him.

Appellants aver this case is akin to a situation where an insured fails to notify his insurer of a lawsuit. South Carolina courts have ruled the insurer may not automatically be permitted to avoid coverage to an innocent third party merely because the insured did not inform its insurer of a lawsuit. Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261 (S.C. 2019), decided July 24, 2019, citing *Factory Mutual, 256 S.C. at 381, 182 S.E.2d at 729-30, Squires v. Nat'l Grange Mut. Ins. Co., 247 S.C. 58, 67, 145 S.E.2d 673, 677 (1965).* Thus, this notice-prejudice rule whereby the insurer had the burden to show it was substantially prejudiced by the failure of its insured to comply with the notice provision. Id. Mr. Moore has not shown the Insurance Company was substantially prejudiced by Respondent's failure to notify it of the instant suit.

Furthermore, in the case of *Shores v. Weaver*, SC Court of Appeals found that, even if the insurance company proves substantial prejudice after a default judgment where they were not notified of the lawsuit, it must pay the required statutory minimum coverage. Shores v. Weaver , 315 S.C. 347, 354, 433 S.E.2d 913, 916 (Ct. App. 1993).

In *Shores v. Weaver*, the SC Court of Appeals found that, even if the insurance company proves substantial prejudice after a default judgment where they were not notified of the lawsuit, they must pay the required statutory minimum coverage:

> "[I]n accordance with the public purpose of protecting innocent third parties through mandatory insurance, [the insured's] violation of a provision of the policy providing this mandatory minimal coverage did not defeat or void that coverage." Id. at 355, 433 S.E.2d at 917. The court's rationale was grounded on the fact that the legislature mandated minimum limits coverage to protect innocent third parties. Id. at 356, 433 S.E.2d at 917. In essence, a contrary holding would have permitted an insurer to deny the very coverage that the General Assembly mandated that all motorists obtain, effectively nullifying the legislature's efforts to safeguard the public. Id. at 355, 433 S.E.2d at 917.

Thus, it may be argued that the Insurance Company is liable for the statutory minimum coverage even without Appellants notifying Insurance Company.

In terms of prejudice to Appellants, the mere fact Respondent cannot be located despite all efforts to uncover his address is prejudicial to them and their case.

In sum, Respondent has not presented any good cause for failing to engage in this case. With regards to timeliness of the filing of the motion, it should have been fixed from the time the Respondent had been served with the notice, not at the time Insurance Company received the same, otherwise it would nullify the public purpose of protecting innocent third persons. *Shores supra.* More importantly, Appellants have been prejudiced and will continue to be prejudiced with the grant of relief from default because of the loss of witnesses, particularly Respondent.

II.

APPELLANTS ARE ENTITLED TO EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS.

The Court in *Hooper v. Ebenezer* discussed the application of the doctrine of equitable tolling "in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits". Hooper v. Ebenezer Sr. Services, 386 S.C. 108 (S.C. 2009). While the doctrine "typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control", tolling has been applied in a variety of contexts such as:

> Federal precedent equitably tolls the limitations period in three circumstances: (1) where the plaintiff has actively pursued his or her judicial remedies by filing a timely but defective pleading; (2) where extraordinary circumstances outside the plaintiffs control make it impossible for the plaintiff to timely assert his or her claim; or (3) where the plaintiff, by exercising reasonable diligence, could not have discovered essential information bearing on his or her claim." (footnotes omitted)); *Kaplan v. Morgan Stanley Co.*, 2009 Vt. 78, ___, 987 A.2d 258, ___ (2009) (2009

> WL 2401952) ("Equitable tolling applies either where the defendant is shown to have actively misled or prevented the plaintiff in some extraordinary way from discovering the facts essential to the filing of a timely lawsuit, or where the plaintiff has timely raised the same claim in the wrong forum.") (citing *Beecher v. Stratton Corp.*, 170 Vt. 137, 743 A.2d 1093, 1098 (1999)); *cf. Machules v. Dep't of Admin.*, 523 So.2d 1132, 1134 (Fla. 1988)

Ibid. at 116.

In the instant case, Appellant has actively pursued his judicial remedies, but was prevented from commencing their action properly due to Respondent's deliberate act of providing outdated address. Contrary to Respondent's contentions, Appellant had to rely on Respondent's misrepresentation and/or misinformation. Appellants also presented proof of Respondent's propensity to provide wrong information and/or contact details, preventing most of his victims from getting compensated for their injuries.

Appellants submit Respondent should be equitably estopped from raising the defense of statute of limitations. Equitable estoppel is a defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, which resulted in the other person being injured in some way.

For his willful disregard of the laws of this State, and reckless and wanton misrepresentation with objective of escaping his liability, Respondent should not be allowed to benefit from the defenses and/or advantages available under the very law he violates.

III.

THE DOCTRINE OF UNCLEAN HANDS IS APPLICABLE IN THIS CASE.

Appellants posit Respondent has continuously violated the laws and evaded responsibility as evidenced by the number of traffic infractions in which he was found guilty in absentia. His

evasion strategy is tantamount to an inequitable conduct that prevented Appellants (as well as some of his victims) from properly commencing the case against him.

CONCLUSION

Based on the foregoing, in addition to the arguments made in their Initial Brief, Appellants respectfully request this Honorable Court to grant their appeal, and put Respondents in default or, in the alternative, remand the case to the Circuit Court to allow the parties to litigate the case.

s/Donald L. Smith
Donald L. Smith (Bar No. 6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

Anderson, South Carolina
Date: June 19, 2021.

RECEIVED
Jun 21 2021
SC Court of Appeals

FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Judge

Appellate Case No.: 2021-000269
Case No. 2020-CP-1100632

Bobby E. Leopard, Donna Harris and Luther Harris,
Appellants,

v.

Perry W. Barbour, Respondent.

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I served a copy of the Reply Brief of Appellant, and Proof of Service, upon The Honorable Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals, and Mr. David L. Moore, Esquire, by email through the following addresses:

Ms. Jenny Abbott-Kitchings ctappfilings@sccourts.org
Mr. David L. Moore, Esquire DMoore@turnerpadget.com

I certify that I have served the Respondent Perry Wendell Barbour at his last known address: 130 Valentine Court, Martinsville, VA 24112.

s/Donald L. Smith
Donald L. Smith, (Bar No.: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

Anderson, South Carolina
June 19, 2021.

FORM 8
LETTER TO THE COURT OF APPEALS CLERK OF COURT
FILING REPLY BRIEF OF APPELLANT

RECEIVED
Jun 21 2021
SC Court of Appeals

June 19, 2021

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

RE: Bobby E. Leopard, Donna and Luther Harris vs. Perry W. Barbour
Appellate Case No.: 2021-000269
Case No. 2020-CP-1100632

Dear Ms. Kitchings:

Please find enclosed the following documents for filing:

1. Reply Brief of Appellant; and,
2. Proof of Service of the same.

Sincerely,

s/Donald L. Smith

Donald L. Smith (Bar No.: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

cc:
Mr. David L. Moore, Esquire
Mr. Perry Barbour