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SC Court of Appeals

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.

RECORD ON APPEAL

Submitted by:

s/Donald L. Smith

Donald L. Smith (Bar No.:6699)

122 N. Main Street

Anderson SC 29621

Telephone: (864) 642-9284

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Attorney for Appellants

Other Counsel:

Mr. David L. Moore, Jr., Esquire

Turner, Padget, Graham & Laney, P.A.

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Attorney for Respondents

Anderson, South Carolina
July 21, 2021.

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FORM 4
ORDER DENYING APPELLANTS'
MOTION FOR RECONSIDERATION
March 9, 2021

Bobby Leopard et al
PLAINTIFF(S)

Perry Wendell Barbour
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:

This matter comes before the Court through Plaintiff's motion to reconsider the Court's order granting Defendant's motion to vacate and Defendant's motion to dismiss. After careful review of the Court's ruling, this motion, and consideration of arguments from Counsel the Court remains satisfied with its order. Therefore, the Plaintiff's motion is respectfully 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 03/08/2021 .

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.



Cherokee Common Pleas

Case Caption: Bobby Leopard , plaintiff, et al VS Perry Wendell Barbour

Case Number: 2020CP1100632

Type: Order/Electronic Form 4

So Ordered

s/Letitia H. Verdin, SC Judge 2162

Electronically signed on 2021-03-08 19:39:03 page 3 of 3

FORM 4
ORDER GRANTING RESPONDENT'S
MOTION TO VACATE ENTRY OF
DEFAULT AND MOTION TO DISMISS
February 16, 2021

Bobby Leopard et al
PLAINTIFF(S)

Perry Wendell Barbour
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:

This matter was before the court on Plaintiffs' Motion for Default Judgment and Damages and Defendant's Motions to Vacate Entry of Default and Dismiss. After considering the Wham factors, this court grants Defendant's Motion to Vacate Entry of Default and orders that Defendant's filed Answer be entered. Furthermore, this court grants Defendant's Motion to Dismiss on the basis that the statute of limitations has passed in this matter. Accordingly, the court finds that it is unnecessary to address Plaintiff's Motion for Default Judgment and Damages.

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 02/16/2021 .

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.



Cherokee Common Pleas

Case Caption: Bobby Leopard , plaintiff, et al VS Perry Wendell Barbour

Case Number: 2020CP1100632

Type: Order/Electronic Form 4

So Ordered

s/Letitia H. Verdin, SC Judge 2162

Electronically signed on 2021-02-16 15:51:40 page 3 of 3

**ORDER OF DEFAULT AND
ORDER FOR HEARING TO
ASCERTAIN DAMAGES
December 16, 2020**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)
)
Bobby E. Leopard, Donna Harris and)
Luther Harris,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour,)
)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-00632

**ORDER OF DEFAULT AND ORDER FOR
HEARING TO ASCERTAIN DAMAGES**

THIS matter is before the Court upon the filing of an Affidavit of Default against the Defendant, Perry Wendell Barbour, by Plaintiffs’ attorney in the above-captioned action.

IT APPEARS that the Defendant, Perry Wendell Barbour, was duly served with a Summons and Complaint on September 15, 2020.

IT APPEARS that more than thirty (30) days have elapsed since such service.

IT APPEARS that the Defendant, Perry Wendell Barbour, has not filed an answer, demurrer, or other pleadings as required by the Summons, and that Defendant is in default pursuant to the South Carolina Rules of Civil Procedure as evidenced by the Plaintiff’s Affidavit of Default filed on November 9, 2020.

IT FURTHER APPEARING that a hearing to ascertain damages pursuant to Rule 55 of the South Carolina Rules of Civil procedure should be held to determine the amount owed the Plaintiff.

THEREFORE, based upon the above facts, this Court finds that

1. The above Defendant, Perry Wendell Barbour, is in default.
2. That default judgment and damages hearing shall be held by the Court to make findings of fact and conclusions of law and to enter those findings of fact and conclusions of law

into a final order and judgement of the Court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, Perry Wendell Barbour, is hereby in default and a judgment in an amount to be determined at a damages hearing to be held shall be filed in favor of the Plaintiff.

**PRESIDING JUDGE
THE COURT OF COMMON PLEAS**

Gaffney, South Carolina

Date: November 10, 2020

I SO MOVE:

s/Donald L. Smith

Donald L. Smith (Bar # 6699)

Attorney for the Defendant

122 N. Main St.

Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com



Cherokee Common Pleas

Case Caption: Bobby Leopard , plaintiff, et al VS Perry Wendell Barbour

Case Number: 2020CP1100632

Type: Order/Entry of Default

So Ordered

Brandy W McBee, Clerk of Court for Cherokee
County by Kimberly Brasier

Electronically signed on 2020-12-16 10:04:20 page 3 of 3

**ORDER OF DEFAULT AND
ORDER FOR HEARING TO
ASCERTAIN DAMAGES
November 12, 2020**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)
)
Bobby E. Leopard, Donna Harris and)
Luther Harris,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour,)
)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-00632

**ORDER OF DEFAULT AND ORDER FOR
HEARING TO ASCERTAIN DAMAGES**

THIS matter is before the Court upon the filing of an Affidavit of Default against the Defendant, Perry Wendell Barbour, by Plaintiffs’ attorney in the above-captioned action.

IT APPEARS that the Defendant, Perry Wendell Barbour, was duly served with a Summons and Complaint on September 15, 2020.

IT APPEARS that more than thirty (30) days have elapsed since such service.

IT APPEARS that the Defendant, Perry Wendell Barbour, has not filed an answer, demurrer, or other pleadings as required by the Summons, and that Defendant is in default pursuant to the South Carolina Rules of Civil Procedure as evidenced by the Plaintiff’s Affidavit of Default filed on November 9, 2020.

IT FURTHER APPEARING that a hearing to ascertain damages pursuant to Rule 55 of the South Carolina Rules of Civil procedure should be held to determine the amount owed the Plaintiff.

THEREFORE, based upon the above facts, this Court finds that

1. The above Defendant, Perry Wendell Barbour, is in default.
2. That default judgment and damages hearing shall be held by the Court to make findings of fact and conclusions of law and to enter those findings of fact and conclusions of law

into a final order and judgement of the Court.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendant, Perry Wendell Barbour, is hereby in default and a judgment in an amount to be determined at a damages hearing to be held shall be filed in favor of the Plaintiff.

**PRESIDING JUDGE
THE COURT OF COMMON PLEAS**

Gaffney, South Carolina

Date: November 10, 2020

I SO MOVE:

s/Donald L. Smith

Donald L. Smith (Bar # 6699)

Attorney for the Defendant

122 N. Main St.

Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

SUMMONS AND COMPLAINT
August 27, 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)
)
Bobby E. Leopard, Donna Harris and)
Luther Harris,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-

**SUMMONS
(JURY TRIAL DEMANDED)**

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your **ANSWER** to said Complaint on the Plaintiffs’ attorney at 122 N. Main Street, Anderson South Carolina, 29621 within thirty (30) days after the service hereof, exclusive of the day of service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

s/Donald L. Smith
Donald L. Smith, (SC Bar#6699)
Attorney for Plaintiff
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

Anderson, South Carolina
August 27, 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)
)
Bobby E. Leopard, Donna Harris and)
Luther Harris,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-

**COMPLAINT
(JURY TRIAL DEMANDED)**

Bobby Leopard, Donna Harris and Luther Harris by and through their undersigned attorney, complaining of the Defendant, alleges:

1. That Plaintiffs were, at all times pertinent to this action, citizens and residents of the County of Cherokee, State of South Carolina.
2. That based on information and belief, Defendant Perry Wendell Barbour was, at all times pertinent to this action, a resident of the County of Martinsville, State of Virginia.
3. That substantial acts and omissions alleged herein occurred in the County of Cherokee, South Carolina.
4. That on or about June 10, 2016, Plaintiff Luther Harris and Defendant Barbour were involved in an automobile accident.
5. That Plaintiff was traveling southbound on U.S. Interstate 85, when he came to a stop due to traffic which resulted from a motor vehicle accident further up the road, in the County of Spartanburg, South Carolina.
6. That Defendant Barbour was also traveling southbound on U.S. 85 at that time, in the same lane, though he was behind Plaintiff.
7. That Defendant failed to maintain a proper lookout; and, smashed into the rear of

Plaintiffs' vehicle with such force that Plaintiffs' Harris and Leopard were knocked unconscious.

8. That Plaintiffs suffered bodily injuries and/or an aggravation of a pre-existing condition which have resulted in pain and suffering, permanent injury, mental anguish, expense of medical and related care and treatment and loss of earnings.

9. That Defendant Barbour admitted to being at fault for the accident.

FOR A FIRST CAUSE OF ACTION: NEGLIGENCE

10. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-9 above.

11. That Defendant owed Plaintiffs a duty of care to operate his tractor trailer in a reasonably safe manner.

12. That Defendant breached his duties to Plaintiffs and other people traveling on the highway in the following ways:

- a) In operating a motor vehicle at a speed that was excessive for the circumstances then and there prevailing;
- b) In failing to maintain a proper lookout;
- c) In failing to maintain proper control of the vehicle;
- d) In failing to bring the vehicle to a stop when it was apparent that failing to do so would result in an accident;
- e) In operating said vehicle in a highly improper manner in view of the circumstances then and there existing;
- f) In not being mentally and physically alert to the impending dangers;
- g) In failing to swerve, or change the course of the vehicle, when it was apparent, or should have been apparent by the exercise of due care, that a catastrophe was

inevitable; and

- h) For failing to exercise the reasonable degree of care which a reasonable and prudent person would exercise under the same or similar circumstances.

13. That Defendant's breach of the duty he owed Plaintiffs factually and proximately caused Plaintiffs' damages, including but not limited to actual damages such as hospital/medical expenses, lost income, but also pain and suffering, permanent impairment and mental anguish.

14. That Plaintiffs are entitled to recover from Defendant for damages caused by Defendant's negligent, grossly negligent and reckless acts.

FOR A SECOND CAUSE OF ACTION: RECKLESSNESS

15. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-14 above.

20. That the acts and/or omissions of Defendant, including but not limited to failing to maintain a proper lookout and control of his vehicle, constitute a willful, wanton, and reckless disregard for the health and safety of Plaintiffs.

21. That Defendant's recklessness factually and proximately caused Plaintiffs' damages, including by not limited to actual damages such as hospital/medical expenses, lost income, but also pain and suffering, permanent impairment and mental anguish.

22. That Plaintiffs are entitled to recover from Defendant for damages caused by Defendant's recklessness.

FOR A THIRD CAUSE OF ACTION: DAMAGES

23. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-22 above.

24. That as a direct and proximate result of the negligence, gross negligence,

willfulness, wantonness, and reckless of Defendant, Plaintiffs suffered numerous injuries.

25. That as a direct and proximate result of the negligence, gross negligence, willfulness, wantonness and recklessness of Defendant, Plaintiff Luther Harris has suffered the following:

- a. Physical pain and suffering, including but not limited to:
 1. Concussion with loss of consciousness of 30 minutes or less
 2. Post-concussion syndrome
 3. Abnormalities of Gait and Mobility
 4. Chronic Headache
 5. Right Shoulder Pain
 6. Right Leg Pain
 7. Neck pain or Cervicalgia
 8. Lower back pain or Dorsalgia
 9. Cervical degenerative disc disease and spondylosis exacerbated by the Motor Vehicle Accident;
 10. Lumbar degenerative disc disease and spondylosis exacerbated by Motor Vehicle Accident
 11. Post-Traumatic Stress Disorder (PTSD)
- b. Economic damages, including but not limited to lost income:
 1. Future medical expenses in the amount of \$40,000.00, taking into account potential periodic trigger point injections and other medicinal therapies.
 2. Lost wages to be determined.

- c. Psychological distress;
- d. Permanent impairment;
- e. Loss of enjoyment of life; and,
- f. Punitive damages.

26. That as a direct and proximate result of the negligence, gross negligence, willfulness, wantonness, and reckless of the Defendant, Plaintiff Bobby Leopard has suffered the following:

- a. Physical pain and suffering, including but not limited to:
 - 1. Concussion with loss of consciousness of 30 minutes or less
 - 2. Post-concussion syndrome
 - 3. Chronic Lower Back Pain
 - 4. Knee Pain
 - 5. Neck Pain
 - 6. Ankle Pain
 - 7. Sacroiliitis
 - 8. Cervical Spondylosis with radiculopathy
 - 9. Cervicalgia
 - 10. Lumbar spondylosis with radiculopathy
 - 11. Central and Peripheral Vertigo
 - 12. Closed Head Injury
 - 13. Chronic Headache
 - 14. Mild Lumbar Levoscoliosis
 - 15. Post Traumatic Syndrome Disorder (PTSD)

16. Anxiety
 17. Depression
 18. Traumatic Brain Injury and Memory Impairment
 - b. Economic damages, including but not limited to lost income:
 1. Future medical expenses in the amount of \$735, 621.00.
 2. Potential future medical expenses with placement of spinal cord stimulator of \$750,000.00
 3. Lost wages to be determined;
 - c. Psychological distress;
 - d. Permanent impairment;
 - e. Loss of enjoyment of life; and,
 - f. Punitive damages.
27. That Plaintiff is entitled to recover actual and punitive damages from Defendant in an amount to be determined by this Court.

FOR A FOURTH CAUSE OF ACTION: LOSS OF CONSORTIUM

28. Plaintiffs re-allege and incorporate herein all of the allegations contained in paragraphs 1-27 above.
29. That Plaintiff, Donna Harris, is the spouse of Luther Harris.
30. That as a direct and proximate result of the acts of negligence, gross negligence, recklessness, willfulness and wantonness of Defendant described herein, Plaintiff, Donna Harris, has suffered the loss of Luther Harris's companionship, advice, counsel, experience, knowledge, and judgment in managing the affairs of himself and of his wife, in addition to the loss of his ability to earn support for the maintenance, care and protection, of his wife, and all other damages, both

actual and punitive, in a sum to be determined by this Court.

FOR A FIFTH CAUSE OF ACTION: PUNITIVE DAMAGES

31. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-30 above.

32. That the acts and/or omissions of Defendant, as stated above, were outrageous and were taken with such reckless disregard for the safety, well-being and lives of Plaintiffs.

33. That as a direct and proximate result of the willful, wanton and/or reckless acts and/or omissions of Defendant, Plaintiffs suffered physical injuries and/or aggravation of existing condition(s), permanent impairment, mental anguish and/or anxiety.

34. That the conduct of Defendant, as stated above, justifies an award of punitive damages for each and every claim of Plaintiffs set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for a judgment against Defendant for actual damages, punitive damages, future medical expenses, permanent impairment, the costs of this action, attorney fees, and for such other and further relief as the Court may deem just and proper as determined by a jury.

s/Donald L. Smith
Donald L. Smith, (SC Bar#6699)
Attorney for Plaintiffs
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

Anderson, South Carolina
August 27, 2020.

AFFIDAVIT OF DEFAULT
November 10, 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)
)
Bobby E. Leopard, Donna Harris and)
Luther Harris,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-00632

AFFIDAVIT OF DEFAULT

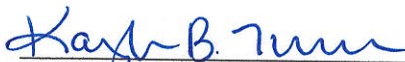
PERSONALLY appeared before me, Donald L. Smith, who after first being duly sworn, states that he is the attorney for Plaintiffs in the above entitled action; that although the Defendant, Perry Wendell Barbour, was duly served with a copy of the Summons and Complaint in the above captioned matter on September 15, 2020, by and through Natasha Thomas, Office of General Counsel, SC Department of Motor Vehicles, pursuant to Section 15-9-350 of the 1976 Code of Laws of South Carolina, and thirty (30) days have passed, and no answer or any other type pleading has been filed by or on behalf of the Defendant, Perry Wendell Barbour, and he is in default.

Respectfully Submitted,



Donald L. Smith (Bar # 6699)
Attorney for the Defendant
122 N. Main St.
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

SWORN TO BEFORE ME THIS
11th day of November 2020.



Kayleigh B. Turner
Notary Public for the State of South Carolina
My Commission Expires: July 19, 2027.

APPELLANTS'
MOTION FOR ENTRY OF DEFAULT
November 28, 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)
)
Bobby E. Leopard, Donna Harris and)
Luther Harris,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-00632

MOTION FOR ENTRY OF DEFAULT

NOW COMES Plaintiffs, by and through their undersigned counsel, and move for an order granting an Entry of Default against the Defendant Perry Wendell Barbour. The grounds for such Motion are as follows:

As evidenced by the Affidavit of Service for Defendant Perry Wendell Barbour, served September 15, 2020; and, the Affidavit of Default, filed November 10, 2020, Plaintiffs hereby request for an entry of default against Defendant, Perry Wendell Barbour.

s/Donald Smith
Donald L. Smith (SC Bar #6699)
Attorney for Plaintiff
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

Anderson, South Carolina
November 28, 2020.

Kayleigh B. Turner
Notary Public for the State of South Carolina
My Commission Expires: July 19, 2027.

**CERTIFICATE OF SERVICE
FOR ORDER OF DEFAULT
December 17, 2020**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)
)
Bobby E. Leopard, Donna Harris and)
Luther Harris,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour,)
)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-11-00632

CERTIFICATE OF SERVICE

THE UNDERSIGNED person deposes and says that he served an **ORDER OF DEFAULT AND ORDER FOR HEARING TO ASCERTAIN DAMAGES** and this Certificate of Service for the aforementioned on Perry Wendell Barbour, via the United States Postal Service utilizing his last known address shown below:

s/Donald L. Smith
Donald L. Smith (SC Bar#6699)
Attorney for Plaintiff
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

MAILED TO:

Perry Wendell Barbour
130 Valentine Court
Martinsville VA 24112-0731

Anderson, South Carolina
December 16, 2020.

**RESPONDENT'S MOTION TO
VACATE ENTRY OF DEFAULT
February 11, 2021**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHEROKEE	)	Docket No.: 2020-CP-11-00632
)	
)	
BOBBY E. LEOPARD, DONNA)	
HARRIS AND LUTHER HARRIS,)	
)	
Plaintiffs,)	
)	
vs.	)	MOTION TO VACATE
	)	ENTRY OF DEFAULT
PERRY WENDELL BARBOUR,)	
)	
Defendant.)	

TO BOBBY E. LEOPARD, DONNA HARRIS AND LUTHER HARRIS AND THEIR ATTORNEY, DONALD L. SMITH:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendant, would move before the Court, at such time and place as the Court may hereinafter direct, for an Order setting aside the entry of default dated December 16, 2020 and entered by Brandy W. McBee, as Clerk of Court for Cherokee County. This motion is based upon Rule 55(c) of the South Carolina Rules of Civil Procedure, pursuant to which a Court may set aside an entry of default upon a showing of “good cause”. This Defendant would assert that “good cause” exists in this particular matter inasmuch as the present action is a duplication of another action presently pending before the South Carolina Court of Appeals which was originally filed in Spartanburg County, but was dismissed followed by an appeal. This Defendant would further assert that this motion is timely made in light of the fact that notice was given only on February 1, 2021 to the insurer for the Defendant, that a meritorious defense exists in the form of the application of the statute of limitations and the fact there would be no prejudice to the Plaintiffs if the motion were granted inasmuch as discovery would not have been started and the Courts are

at this time not holding in person hearings. For the above reasons, this Defendant would pray that the Court set aside the entry of default and permit the parties to engage in such litigation as is necessary.

TURNER PADGET GRAHAM & LANEY, P.A.

s/ David L. Moore, Jr.

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Greenville, South Carolina
February 11, 2021

ATTORNEYS FOR DEFENDANT

**BRIEF IN SUPPORT OF
RESPONDENT'S MOTION TO SET
ASIDE ENTRY OF DEFAULT
February 11, 2021**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)
)
)
BOBBY E. LEOPARD, DONNA)
HARRIS AND LUTHER HARRIS,)
)
Plaintiffs,)
)
vs.)
)
PERRY WENDELL BARBOUR,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

Docket No.: 2020-CP-11-00632

**BRIEF IN SUPPORT OF
MOTION TO SET ASIDE
ENTRY OF DEFAULT**

On June 16, 2016, Luther Harris, Bobby Leopard and Jerry White were injured when the vehicle they were riding in was struck by a truck being operated by Perry Barbour on behalf of Southland Transportation Company while each vehicle was traveling south on interstate 85 in Cherokee County. Luther Harris and his wife, Donna Harris, and Bobby Leopard filed suit in Spartanburg County on June 7, 2019 seeking damages for injuries they sustained in that accident. (Jerry White was represented by another attorney in a separate action which has now been resolved.) Although that Complaint was timely filed, the Plaintiffs failed to timely serve the Complaint upon Perry Barbour within 120 days after filing as required by Rule 3 of the South Carolina Rules of Civil Procedure. Based upon the failure to properly commence the action, the Spartanburg Circuit Court dismissed the matter. The Plaintiffs in this action then appealed that ruling to the South Carolina Court of Appeals. That appeal is still pending.

After the appeal of the Spartanburg County litigation, the Plaintiffs filed a second suit in Cherokee County on August 27, 2020. Notice of this suit was not given to the insurer for the Defendant nor was notice given to his attorney, although that attorney was known to Plaintiffs' attorney. Instead, the Plaintiffs made service upon the Defendant through certified mail at 130 Valentine Court, Martinsville, Virginia 24112. This is the same address at which service was attempted in 2019 with the Spartanburg litigation and which the Plaintiffs had learned was an incorrect address for the Defendant. There is no indication that the Plaintiffs had made any other attempt to determine the whereabouts of the Defendant and simply served him at that address knowing that the matter would go into default. After the matter went into default, Plaintiffs' counsel then notified the insurance company for the Defendant that the matter was now in default and that a default judgment hearing was being scheduled.

Pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure, an entry of default can be set aside for "good cause." In the case of Wham v. Shearson Lehman Brothers, Inc., 298 S.C. 462, 381 S.E. 2nd 499 (1989), the South Carolina Supreme Court held that under Rule 55(c) a motion to set aside default should be granted on a much broader and liberal basis than would be required with regard to when a default judgment had been entered, which requires a showing of "excusable neglect". The factors to be considered with regard to a demonstration of "good cause" include (1) the timing of the defendant's motion for relief; (2) whether the defendant has a good and meritorious defense; and (3) the degree of prejudice to the plaintiffs if the motion is

granted. In this case, the Defendant has acted swiftly through its insurance company once notice was received by the insurance company of the alleged default through a February 1, 2021 letter from Don Smith, attorney for the Plaintiffs. Obviously, less than two weeks have elapsed since that letter was mailed. Additionally, this Defendant would have a meritorious defense in that the three-year statute of limitations as set forth in section 15-3-540 would be applicable since the accident in question occurred on June 16, 2016 and the Cherokee County Complaint was not filed until August 27, 2020. Also, the fact that an appeal had been taken of the Spartanburg County case involving the same parties and revolving around the same factual issues would indicate that this litigation is inappropriate pursuant to Rule 12(b)(8). Further, there would be no prejudice to the Plaintiffs by allowing this Defendant to answer. Litigation in this state has been stalled due to the COVID 19 outbreak. Moreover, if litigation were required, there is nothing to prevent the parties from engaging in discovery in order to prepare for that trial. Finally, as noted above, there are strong defenses to the effect that this matter should when properly considered be dismissed due to the applicable statute of limitations or the fact that there is other pending action on the same matter.

In light of the timely motion on the part of the Defendant to dismiss the entry of default, the strong affirmative defenses available and the absence of any prejudice to the Plaintiffs by granting this motion, this Defendant would request that the Court issue an order dismissing the entry of default, forgoing the default judgment hearing and allowing this matter to move forward on its merits.

TURNER PADGET GRAHAM & LANEY, P.A.

s/ David L. Moore, Jr.

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Greenville, South Carolina
February 11, 2021

ATTORNEYS FOR DEFENDANT

RESPONDENT'S ANSWER
February 11, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHEROKEE	)	Docket No.: 2020-CP-11-00632
)	
)	
BOBBY E. LEOPARD, DONNA)	
HARRIS AND LUTHER HARRIS,)	
)	
Plaintiffs,)	
)	
vs.	)	ANSWER
	)	(JURY TRIAL)
PERRY WENDELL BARBOUR,)	
)	
Defendant.)	

The Defendant, reserving his right to dismiss due to the existence of another pending identical action, would show unto the Court and Jury as follows:

FOR A FIRST DEFENSE

1. This Defendant would assert that the above action is the identical action now pending on appeal before the South Carolina Court of Appeals under appellate case number 2020-001110 which involves the same parties seeking damages against the same Defendant arising out of the same vehicular accident which is subject to dismissal pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE

2. This Defendant would assert that inasmuch as the accident giving rise to this litigation occurred on June 10, 2016 and this matter was not filed until August 27, 2020 that this action is barred pursuant to section 15-3-530 of the South Carolina Code which precludes actions which occur more than three years after the accrual of an action.

FOR A THIRD DEFENSE

3. The allegations of paragraph 1 of the Complaint are admitted on information and belief.

4. The allegations of paragraph 2 of the Complaint are denied.

5. The allegations of paragraphs 3 and 4 of the Complaint are admitted.

6. This Defendant would admit that Luther Harris was operating his vehicle on south Interstate Highway 85 in Cherokee County, South Carolina when it was involved in a collision with a vehicle being operated by this Defendant which was traveling in the same direction on the interstate highway. The remaining allegations of paragraphs 5 and 6 of the Complaint are denied.

7. The allegations of paragraph 7 of the Complaint are denied.

8. This Defendant lacks knowledge and information regarding what injuries may have been sustained by the Plaintiffs in the accident of June 10, 2016 and therefore require proof thereof. The remaining allegations of paragraph 8 of the Complaint are denied.

9. The allegations of paragraph 9 of the Complaint are denied.

AS TO THE FIRST CAUSE OF ACTION

10. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

11. In responding to paragraph 11 of the Complaint, this Defendant would acknowledge that all who operate their vehicles on the highways of South Carolina owe a duty to do so with care and in a reasonable manner.

12. The allegations of paragraphs 12, 13 and 14 of the Complaint are denied.

13. The remaining allegations of the First Cause of Action, not hereinabove expressly admitted, modified or explained, are denied.

AS TO THE SECOND CAUSE OF ACTION

14. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

15. The allegations of paragraphs 20, 21 and 22 of the Complaint are denied.

16. The remaining allegations of the Second Cause of Action, not hereinabove expressly admitted, modified or explained, are denied.

AS TO DAMAGES

17. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

18. The allegations of paragraph 24 of the Complaint are denied.

19. This Defendant lacks knowledge and information regarding the allegations of paragraphs 25 and 26 of the Complaint and therefore require proof thereof.

20. The allegations of paragraph 27 of the Complaint are denied.

AS TO THE FOURTH CAUSE OF ACTION

21. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

22. This Defendant lacks knowledge and information concerning the allegations of paragraph 29 of the Complaint and therefore require proof thereof.

23. The allegations of paragraph 30 of the Complaint are denied.

24. The remaining allegations of the Fourth Cause of Action, not hereinabove expressly admitted, modified or explained, are denied.

AS TO PUNITIVE DAMAGES

25. Those allegations set forth hereinabove, not inconsistent herewith, are incorporated herein as if set forth fully.

26. The allegations of paragraphs 32, 33 and 34 of the Complaint are denied.

27. This Defendant would request that the determination of punitive damages be made through a bifurcated procedure as provided by section 15-32-520 of the South Carolina Code and that such other limitations upon the assessment of punitive damages as are set forth in sections 15-32-520 and 15-32-530 be applied.

28. The remaining allegations of the Complaint, not hereinabove expressly admitted, modified or explained, are denied.

WHEREFORE, having answered the Complaint, this Defendant would pray that it be dismissed with costs.

TURNER PADGET GRAHAM & LANEY, P.A.

s/ David L. Moore, Jr.

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Greenville, South Carolina
February 11, 2021

ATTORNEYS FOR DEFENDANT

**RESPONDENT'S
MOTION TO DISMISS
February 11, 2021**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHEROKEE	)	Docket No.: 2020-CP-11-00632
)	
)	
BOBBY E. LEOPARD, DONNA)	
HARRIS AND LUTHER HARRIS,)	
)	
Plaintiffs,)	
)	
vs.	)	MOTION TO DISMISS
)	
PERRY WENDELL BARBOUR,)	
)	
Defendant.)	

TO: BOBBY E. LEOPARD, DONNA HARRIS AND LUTHER HARRIS AND THEIR ATTORNEY, DONALD L. SMITH:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for the Defendant, would move before the Court, at such time and place as the Court may hereinafter direct, for an Order dismissing the above matter pursuant to Rule 12(b)(8) inasmuch as the exhibits attached hereto demonstrate that there is another action pending in the South Carolina Court of Appeals between the same parties concerning the same claims, and that, therefore, this action is inappropriate. The attached documents demonstrate that the Plaintiffs to this action have appealed an order dismissing their action in Spartanburg County, South Carolina involving claims asserted with regard to the accidents of June 10, 2016 involving this same Defendant which has yet to be ruled upon.

Signature on next page

TURNER PADGET GRAHAM & LANEY, P.A.

s/ David L. Moore, Jr.

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Greenville, South Carolina
February 11, 2021

ATTORNEYS FOR DEFENDANT

**APPELLANTS' RESPONSE
IN OPPOSITION TO
RESPONDENT'S MOTION TO
SET ASIDE ENTRY OF DEFAULT
February 16, 2021**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)
)
Bobby E. Leopard, Donna Harris and)
Luther Harris,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-00632

**PLAINTIFFS’ RESPONSE IN
OPPOSITION TO BARBOUR’S
MOTION TO SET ASIDE ENTRY OF
DEFAULT**

Plaintiffs, by and through their undersigned counsel, respectfully submit this Opposition to Defendant’s Motion to Set Aside Entry of Default, and in support of which, allege the following:

STATEMENT OF FACTS

On June 10, 2016, Plaintiffs were traveling southbound on U.S. Interstate 85, when they came to a stop due to traffic which resulted from a motor vehicle accident further south on 85 in the County of Spartanburg, State of South Carolina. Barbour, driving a truck owned by Southland, was also traveling southbound on U.S. 85 at that time. Without warning, Barbour’s truck smashed into the rear of Plaintiffs’ vehicle. The impact was such that all four (4) occupants were knocked out and found by the trooper in the grass outside the vehicle. As a result of Barbour’s negligence, gross negligence and reckless acts, Plaintiffs sustained injuries that necessitated medical attention.

On June 7, 2019, Plaintiffs filed action for damages (hereinafter, Spartanburg action) against Barbour and Southland Transportation for the injuries they sustained as a result of the wreck. Unfortunately, due to the carrier’s insurer dragging the negotiations over a lengthy period of time and negligence and/or mistake by the United States Postal Service, the Summons and Complaint were served beyond the prescribed period under Rule 3 of the SCRCPP, despite having been posted within 120 days after filing the complaint.

Plaintiffs, thereafter, attempted to serve Barbour through the Office of the General Counsel of the South Carolina Department of Motor Vehicle (SCDMV), pursuant to S.C. Code Ann. § 15-9-350 in relation to §15-9-370. SCDMV accepted service upon Barbour and mailed the same to Barbour's residence. When the SCDMV attempted to notice Mr. Barbour that it had accepted service on a lawsuit against him, it was returned to sender. (Exhibit 1-Stamped Returned Envelope).

On November 8, 2019, Mr. Alan Jones, Esquire of Turner Padgett Graham & Laney PA, filed an Answer and a Motion to Dismiss on behalf of Southland, alleging Plaintiffs failed to properly and timely file their Summons and Complaint. Southland contended it was not served within the period required under Rule 3 SCRPC. Plaintiffs opposed Southland's Motion to Dismiss on November 26, 2019, invoking good cause and equity consideration.

On December 23, 2019, Mr. Jones, filed a Motion to Dismiss, on behalf of Barbour alleging failure to properly and timely serve the Summons and Complaint. Mr. Jones was substituted by Mr. David Moore, Esquire, whose main contention was alleging there was no case at all since there was no proper and timely service of a Summons and Complaint. On March 10, 2020, the Court agreed with Mr. Moore, granting the Motion to Dismiss based on Rule (12)(b)(2), (4) and (5) SCRPC. The Court ruled as follows:

The Barbour's **MOTION to DISMISS** pursuant to Rules **12(b)(2), (4), and (5)**, SCRPC, should be and **IS** therefore **GRANTED** for failure of the Plaintiffs to commence this action with effective service upon the Barbour within the applicable limitations period.

(Exhibit 2-Form 4, dated March 10, 2020).

Plaintiffs moved for reconsideration of the Order on March 20, 2020, which was subsequently denied. Plaintiffs appealed the Spartanburg action against Southland and Barbour.

Pursuant to the Order, dated March 10, 2020, Plaintiffs filed the instant case on August 27, 2020. On September 18, 2020, Plaintiffs served the Summons and Complaint via certified/return receipt mail to SCDMV. SCDMV sent Barbour a copy of the processes, but the same were returned to its office marked "Return to Sender Not Deliverable as Addressed Unable to Forward".

After a lapse of more than thirty-five (35) days following the service of the Summons and Complaint, and complying with the requirements of Section 15-9-380 of the 1976 Code of Laws, Plaintiffs filed an Affidavit of Default on November 10, 2020. They moved for an Order of Entry of Default on November 28, 2020. On December 16, 2020, the Court issued its Order of Default and Order for Hearing to Ascertain Damages.

Approximately two (2) and a half months after Barbour had accepted service of the Summons and Complaint through the SCDMV, Mr. Moore, Esquire filed a Rule 55 (c) SCRCPP, Motion to Vacate Entry of Default and Motion to Dismiss on February 11, 2021. He also, belatedly filed, an Answer on the same date. These two (2) motions are aimed at denying Plaintiffs their right to be compensated for the injuries sustained at the hands of Barbour. Thus, this Response in Opposition to Barbour's Motion.

ARGUMENT

BARBOUR HAD NO MERITORIOUS DEFENSE HAVING BEEN IN DEFAULT.

The standard for granting relief from an entry of default under Rule 55(c) SCRCPP is mere "good cause." This standard requires a party seeking relief from an entry of default under Rule 55(c) SCRCPP to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for

relief; (2) whether the [defaulting party] has a meritorious defense; and (3) the degree of prejudice to the Plaintiffs if relief is granted. *Sundown Operating Co.*, 383 S.C. at 607-08, 681 S.E.2d at 888 (citations omitted) as cited in Campbell v. City of North Charleston, Appellate No. 2017-001628 (S.C. Ct. App. July 22, 2020).

Applying the above-mentioned factors to the instant case, Plaintiffs submit:

A. Barbour's extensive delay

The instant Summons and Complaint were filed on August 27, 2020 and served upon Barbour on September 18, 2020. No Answer or any responsive pleadings were filed by, or on behalf, of Barbour within the 30-day prescribed period by law. If Mr. Moore's contention, that he was hired by Barbour was true, then it only meant the latter had received and/or obtained a copy of the Summons and Complaint or acquired knowledge of its existence prior to consulting with Mr. Moore. Barbour had not presented a satisfactory reason for the extensive delay in filing a responsive pleading. It took more than four (4) months for Mr. Moore to file the Answer and Motion to Dismiss on behalf of Barbour.

The same thing is true with Barbour's Motion to Set Aside the Entry of Default. The Affidavit of Default in the instant case had been filed on November 10, 2020, and the Order for the Entry of Default was entered on, December 16, 2020. Barbour waited more than two (2) months from the filing of the Affidavit of Default for Barbour to oppose the same and pray to set aside the order.

Rule 55(c) SCRPC does not provide a specific time limit for the filing of a Motion to Set Aside an Entry of Default. The Fourth Circuit denied a Motion to Set Aside, determining that by waiting two (2) and one-half months between the date of entry of default and the motion, movant "did not act promptly." Consolidated Masonry & Fireproofing, Inc. v. Wagman

Construction Corporation, 383 F.2d 249, 251 (4th Cir. 1967). See also Nelson v. The Coleman Co., 41 F.R.D. 7 (D. S.C. 1966) (Simons, J) (even short delay not excused where circumstances showed lack of intent to act promptly)

B. Lack of Meritorious Defense

In his Memorandum in Support of Motion to Set Aside Entry of Default, Mr. Moore averred Plaintiffs failed to provide him a copy of the Summons and Complaint, despite Plaintiffs having known he was Barbour's counsel in the Spartanburg action.

Plaintiffs submit, it is common knowledge, parties may change counsel at any given time. Mr. Moore has not presented any evidence to show he has the sole power and/or authority to represent Barbour in, all litigation against the latter.

Furthermore, Plaintiffs believe neither Mr. Moore nor his law office had had any contact with, nor had been hired by Barbour. This is evidenced by the fact Mr. Jones, the original counsel in the Spartanburg action, did not file an Answer on Barbour's behalf.

Plaintiffs believe service of the processes pursuant to S.C. Code Ann. § 15-9-370 is sufficient. To impose additional requirements upon Plaintiffs to serve Barbour's counsel is to burden them for abiding by the law.

C. Setting aside the Default Will Cause Great Injustice.

Plaintiffs sustained permanent injuries which necessitated medical attention that continues to this date. Plaintiffs endure physical pain and suffering, as they have since June 2016, as well as financial difficulties due to this protracted litigation. To set aside this Default Order would potentially eliminate the opportunity for Plaintiffs to recover.

A dismissal of this case would allow the insurance company and the trucking company to avoid taking responsibility for an individual who appears to have no care in the world for

being responsible. Barbour has been ticketed in a significant number of traffic incidents. In fact, he has been tried in his absence on the majority of them-including in this case, in which he nearly killed all the passengers in Plaintiffs' vehicle. The following is a list of said tickets:

date	city/county	state	charge	case #	outcome
9/20/08		Virginia	Failure to obey highway sign	071GT0800453100	Guilty in absentia
10/19/07	Henry	Virginia	Speeding 48/35	089GT0700797900	Guilty in absentia
10/19/07	Henry	Virginia	Seat belt violation	089GT0700798000	Guilty in absentia
8/28/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
9/17/07	Montgomery	Virginia	Defective equipment generally	121GT0701637400	Guilty
9/30/03	Patrick	Virginia	Oper w/radar detect/jam device	141GT0300129200	Prepaid-Fine
5/28/04	Patrick	Virginia	Speeding 74/55	141GT0400068000	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey highway sign sleep	175GT0600711000	Guilty in absentia
1/16/08	Danville City	Virginia	Speeding 55/40	590GT0800067700	Guilty
		Kentucky	Driving on suspended	10-T-00307	
6/16/16	Spartanburg	South Carolina	Driving vehicle at greater speed than is re	5102P0362799	Guilty in absentia
6/23/11		Virginia	No county or city tag	GT11004149-00	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey high-sign sleep	175GT0600711000	Guilty in absentia
9/10/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
6/12/15	Danville City	Virginia	Speeding 53/40	590GT15006703-00	Guilty in absentia
1/21/95		Virginia	Illegal sunshading	089GT9500043700	Guilty in absentia

CONCLUSION

Barbour was properly served through the SCDMV. He did not have good cause for failing to answer the Summons and Complaint. Had he told the SCDMV he had moved (if he did), he would have had the opportunity to raise defenses.

This action is in a different county with a different case number. Since the actual Defendant did not answer the Summons and Complaint or file a motion in the first case, it was not commenced. Since there was no case, and this is it is a totally separate case, Plaintiffs had no duty to speak to a non-retained attorney.

Plaintiffs have suffered injustice at every turn to this point. The rules are clear, no response within 30 days = no affirmative defenses. Thus, there should be no delay in allowing Plaintiffs to pursue their damages hearing.

For the reasons stated herein, Barbour's Motion to Set Aside Entry of Default must be denied.

Respectfully submitted by:

s/Donald L. Smith

Donald L. Smith (Bar No: 6699)

Attorney for Plaintiffs

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Anderson, SC
February 16, 2021

**APPELLANTS' RESPONSE
IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS
February 16, 2021**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE)	
)	
Bobby E. Leopard, Donna Harris and Luther Harris,	)	Case No.: 2020-DR-11-00632
)	
Plaintiffs,	)	PLAINTIFFS’ RESPONSE IN
vs.	)	OPPOSITION TO BARBOUR’S
	)	MOTION TO DISMISS
Perry Wendell Barbour,)	
)	
Defendant.)	
_____)	

Plaintiffs, by and through their undersigned counsel, respectfully submit this Opposition to Defendant’s Motion to Dismiss, and in support of which, allege the following:

STATEMENT OF FACTS

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On June 7, 2019, Plaintiffs filed action for damages (hereinafter referred as Spartanburg action) against Barbour and Southland Transportation for the injuries they sustained as a result of the wreck. Unfortunately, due to the carrier’s insurer dragging the negotiations over a lengthy period of time and negligence and/or mistake by the United States Postal Service, the Summons and Complaint were served beyond the prescribed period under Rule 3 of the SCRPC, despite having been posted within 120 days after filing the complaint.

Plaintiffs thereafter attempted to serve Barbour through the Office of the General Counsel of the South Carolina Department of Motor Vehicle (SCDMV), pursuant to S.C. Code Ann. § 15-9-350 in relation to §15-9-370. SCDMV accepted service upon Barbour and mailed the same to Barbour's residence. When the SCDMV attempted to notice Mr. Barbour it had accepted service upon him, it was returned to sender. (Exhibit - Stamped Returned Envelope).

On November 8, 2019, Mr. Alan Jones, Esquire of Turner Padgett Graham & Laney PA, filed an Answer and a Motion to Dismiss on behalf of Southland, alleging Appellants failed to properly and timely file their Summons and Complaint. Southland contended it was not served within the period required under Rule 3 of the SCRCP. Plaintiffs opposed Southland's Motion to Dismiss on November 26, 2019, invoking good cause and equity consideration.

On December 23, 2019, Mr. Jones, filed a Motion to Dismiss, on behalf of Barbour, alleging failure to properly and timely serve the Complaint. Mr. Jones was substituted by David Moore, Esquire, whose main contention was the lack of proper service meant the action was never commenced.

9 Now, under Rule 3 when you don't have -- when you
 10 don't reach that 120-day period there's actually no
 11 commencement of the lawsuit, so that in this situation
 12 they've not complied with Rule 3 where you have to file and
 13 serve. They filed, but they didn't serve properly on a
 14 timely basis. So there is no commencement of this
 15 particular action.

(Motion to Dismiss Transcript p. 4, 17.21).

There was no case since there was no proper and timely service of Complaint. On March 10, 2020, the Court agreed with Mr. Moore and granted the Motion to Dismiss based on Rule (12)(b)(2), (4) and (5). The Circuit court ruled as follows:

The Barbour's **MOTION** to **DISMISS** pursuant to Rules **12(b)(2)**, **(4)**, and **(5)**, SCRCP, should be and **IS** therefore **GRANTED** for

failure of the Plaintiffs to commence this action with effective service upon the Barbours within the applicable limitations period.

(Exhibit- Form 4, dated March 10, 2020).

Plaintiffs moved for reconsideration of the Order on March 20, 2020, which was subsequently denied. Plaintiffs appealed the Spartanburg action against Southland and Barbour.

The Spartanburg action was dismissed without prejudice. The law of that case is it never began due to the failure to serve Defendants according to Rule 3 of the SCRPC. Plaintiffs filed the instant case on August 27, 2020. On September 18, 2020, Plaintiffs served the Summons and Complaint via certified mail to the SCDMV. SCDMV sent a copy of the processes to Defendant Barbour but they were once again returned to its office marked "Return to Sender Not Deliverable as Addressed Unable to Forward".

After a lapse of more than thirty-five (35) days following the service of the Service and Complaint, and compliance with the requirements of Section 15-9-380 of the 1976 Code of Laws, Plaintiffs filed an Affidavit of Default on November 10, 2020 and moved for Order of Entry of Default on November 28, 2020. On December 16, 2020, this court issued its Order of Default and Order for Hearing to Ascertain Damages.

Plaintiffs served notice of the Damages Hearing on February 1, 2021. The notice was served on the Defendant at his last known address and upon Defendant's insurance company. Defense Counsel stated in the first case he was retained by Defendant Barbour. However, defense counsel stated he was responding on behalf of the insurance company because he never was retained in the first action. He doesn't know where Defendant Barbour is. Regardless, he filed two motion and an answer two and a half months following the expiration of the time for serving a motion or an answer. This is Response in Opposition to Barbour's Motion.

ARGUMENT

In his Motion to Dismiss, Defendant sought the dismissal of the instant case based on a pending appeal on a matter between the same parties. However, Mr. Moore has always taken the position that the Spartanburg action had not commenced. Thus, he should not be allowed to argue that there was a first case. His argument is opposite to what he argued in the Spartanburg action.

In his Order, dated March 10, 2020, Judge Cole of the Spartanburg Circuit Court dismissed the Spartanburg action saying the failure to serve was the cause for the dismissal:

The Barbour's **MOTION** to **DISMISS** pursuant to Rules **12(b)(2)**, **(4)**, and **(5)**, SCRPC, should be and **IS** therefore **GRANTED** for failure of the Plaintiffs to commence this action with effective service upon the Barbour's within the applicable limitations period.

(Exhibit- Form 4, dated March 10, 2020).

Nothing in the Order indicated the dismissal was with prejudice.

Well-established is the doctrine that res judicata precludes the parties from relitigating issues actually litigated and those that might have been litigated in the first action. Town of Sullivan's Island v. Felger, 318 S.C. 340, 457 S.E.2d 626 (Ct. App. 1995). In order for the doctrine of res judicata to apply, the following elements must be shown: (1) the identities of the parties are the same as the prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Garris v. Governing Bd. of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998); Lowe v. Clayton, 264 S.C. 75, 212 S.E.2d 582 (1975); Wold v. Funderburg, 250 S.C. 205, 157 S.E.2d 180 (1967).

In the present case, however, Plaintiffs submit Defendant has failed to establish the third element. The third factor to consider is whether the original action was judged on the merits of the case; and, whether that judgment was a final judgment. Final judgment does not occur when

the case is settled by the parties on their own; where the judge decides a motion; or makes some other determination that does not resolve the case based on the facts and evidence of the case.

This means that the final judgment must concern the actual facts giving rise to the claim.

In the Spartanburg action, the dismissal of the case was based on notice issues—failure to properly and timely serve defendants. It was not a judgment on the merits of the case. As such, subsequent litigation as to whether Defendant is liable would not be barred.

Since the dismissal in the Spartanburg action was without prejudice, Plaintiffs believe this case may continue.

CONCLUSION

For the above and foregoing reasons, Plaintiffs move for this Court to deny Defendant's Motion to Dismiss and allow Plaintiffs an opportunity to have their case heard in court and decided not based on technicality. In the alternative, Plaintiffs prays this Court hold the instant case in abeyance pending the resolution of the appeal on the Spartanburg action.

Respectfully submitted by:

s/Donald L. Smith

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Anderson, SC
February 16, 2021.

**APPELLANTS' MOTION FOR
RECONSIDERATION
February 26, 2021**

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)
)
Bobby E. Leopard, Donna Harris and)
Luther Harris,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Defendant,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-DR-11-00632

**PLAINTIFFS’ MOTION FOR
RECONSIDERATION OF THE
ORDER GRANTING MOTION TO
VACATE AND MOTION TO DISMISS**

Plaintiffs, by and through their undersigned counsel, respectfully move this Court to reconsider its Order, dated February 16, 2021, granting Defendant’s Motion to Set Aside Default Judgment and Defendant’s Motion to Dismiss, and allege the following in support of this Motion:

STATEMENT OF FACTS

On June 10, 2016, Plaintiffs were traveling southbound on U.S. Interstate 85, when they came to a stop due to traffic which resulted from a motor vehicle accident further south on 85 in the County of Spartanburg, State of South Carolina. Defendant, driving a truck owned by Southland Transportation Company, was also traveling southbound on U.S. 85 at that time. Without warning, Defendant’s truck smashed into the rear of Plaintiffs’ vehicle. The impact was such that all four (4) occupants were knocked out and found by the trooper in the grass outside the vehicle. As a result of Defendant’s negligence, gross negligence and reckless acts, Plaintiffs sustained injuries that necessitated medical attention.

On June 7, 2019, Plaintiffs filed action for damages (hereinafter referred as Spartanburg action) against Defendant and Southland Transportation for the injuries they sustained as a result of the wreck. Unfortunately, negotiations with the carrier were delayed due to a variety of reasons offered by the adjuster, a workers’ compensation claim which had yet to be resolved and a delay by

the U.S. Postal Service in mailing the certified mailing done pursuant to the long-arm statute, all of which led to the Summons and Complaint being served beyond the prescribed period under Rule 3 of the SCRCP.

The aforementioned mailing delay caused the service for Southland Transportation Company to be received by the Secretary of State on Wednesday October 9, 2019. Based on Southland being incorporated in North Carolina, service could be made in that manner pursuant to S.C. Code Ann. §15-9-245. The certified mailing was mailed on Friday October 4, 2019. However, the Anderson Post Office forwarded the certified letter, return receipt requested on Monday October 7, 2019. The two-day delay resulted in the service being two days late.

On November 8, 2019, Mr. Alan Jones, Esquire of Turner Padgett Graham & Laney PA, filed an Answer and a Motion to Dismiss on behalf of Southland, alleging Appellants failed to properly and timely serve their Summons and Complaint. Southland contended it was not served within the period required under Rule 3 of the SCRCP. Plaintiffs opposed Southland's Motion to Dismiss on November 26, 2019, invoking good cause and equity considerations.

Plaintiffs thereafter attempted to serve Defendant through the Office of the General Counsel of the South Carolina Department of Motor Vehicle (SCDMV), pursuant to S.C. Code Ann. § 15-9-350 in relation to §15-9-370. SCDMV accepted service on behalf Defendant and mailed the same to Defendant's residence. When the SCDMV attempted to notice Mr. Defendant that it accepted service on a lawsuit against him, it was returned to sender. (Exhibit-Stamped Returned Envelope).

Defendant failed to respond to the lawsuit served upon him by and through the Office of General Counsel within thirty (30) days. Thereafter, Plaintiffs moved for an Entry of Default. The Clerk recognized the default and scheduled an Order of Reference was clocked.

On December 23, 2019, nearly two (2) months after the last day to timely file a response, Mr. Jones filed a Motion to Dismiss, on behalf of Defendant, alleging a failure to properly and timely serve the Complaint. Mr. Jones was substituted by Mr. David L. Moore, Esquire, whose main contention was the failure to serve the pleadings within the requisite 120-day period meant the case had never been commenced. The failure to commence implicitly said there had never been a case. Without a case, Plaintiffs' argument regarding the fact Defendant had not timely raised his affirmative defenses relating to the Statute of Limitations and the related issue of service, was a nullity. On March 10, 2020, the Spartanburg Circuit court granted the Motion to Dismiss based on Rule (12)(b)(2), (4) and (5). The Spartanburg Circuit court ruled as follows:

The Defendants' **MOTION to DISMISS** pursuant to Rules **12(b)(2), (4), and (5)**, SCRCF, should be and **IS** therefore **GRANTED** for failure of the Plaintiffs to commence this action with effective service upon the Defendants within the applicable limitations period.

(Exhibit-Form 4, dated March 10, 2020).

Plaintiffs moved for reconsideration of the Order on March 20, 2020, which was subsequently denied. Plaintiffs appealed the Spartanburg action against Southland and Defendant.

Pursuant to the Order, dated March 10, 2020, Plaintiffs filed the instant case on August 27, 2020. On September 15, 2020, Plaintiffs served the Summons and Complaint on the SCDMV via certified mail. SCDMV sent Defendant a copy of the processes, but the same was returned to its office marked "Return to Sender Not Deliverable as Addressed Unable to Forward" on September 25, 2020. Since he had not changed his address, there was nowhere to forward the mailing.

After complying with the requirements of Section 15-9-380 of the 1976 Code of Laws and a lapse of more than thirty (30) days upon filing of the Complaint, Plaintiffs filed an Affidavit of Default on November 10, 2020 and moved for Order of Entry of Default on November 28, 2020. On December 16, 2020, this court issued its Order of Default and Order for Hearing to Ascertain Damages.

Five (5) days prior to the scheduled damages hearing, Mr. Moore, Esquire filed a Rule 55 (c) SCRCF Motion to Vacate Entry of Default and Motion to Dismiss on February 11, 2021. He also belatedly filed an Answer on the same date. The goal of these two (2) motions was to deny Plaintiffs their right to be compensated for the injuries sustained at the hands of Defendant. The Court ruled in favor of Defendant's position. Thus, Plaintiffs file this Motion for Reconsideration of the ultimate prejudice that could be absorbed by parties to a lawsuit-the termination of their action for damages.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct.App. 1988). An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App. 1997). Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to set aside the entry of default.

The standard for granting relief from an entry of default is "good cause". Rule 55(c), SCRCP. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation of good cause for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App. 1989). The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App. 1994).

ARGUMENTS

I.

IT WAS ERROR OF LAW FOR THE COURT TO SET ASIDE THE DEFAULT JUDGMENT AND SUBSEQUENTLY DISMISS THE CASE.

Defendant waived his right to raise affirmative defenses.

In his motions, Defendant raised the defense of the simultaneous pendency of an action involving the same parties in seeking to have the Default Order (Judgment) set aside, and eventual dismissal of the case. Plaintiffs believe Defendant has waived his right to such action.

The law is well-settled that failure to raise objections under Rule 12(b)(2) through (5) in either a responsive pleading or by Rule 12(b) motion will waive the right to make an objection. Rule 12(h) South Carolina Rules on Civil Procedure (SCRCP).

Plaintiffs filed their Complaint on August 27, 2020. A copy of the Summons and Complaint was served upon Defendant, by and through the Office of the General Counsel of South Carolina Department of Motor Vehicle (hereinafter referred as SCDMV), who accepted service on September 18, 2020. On December 16, 2020, Plaintiffs obtained an Order of Default for Defendant's failure to file any responsive pleadings within the time requirement.

On February 11, 2021, one hundred sixty-eight days (168) days after the filing of the Complaint, Defendant filed his Motion to Vacate or Set Aside Default Judgment, Motion to Dismiss and Answer. In all three pleadings, Defendant raised the defense of pendency of action (appeal) between same parties. However, since Rule 12 (h)(1) of SCRCPP specifically includes pendency of action as one of the waivable defenses. In this case, since Defendant failed to file his Answer and Motions within the period required by Rule 12 (a), Defendant is deemed to have waived this defense.

The same can be argued with regards to Defendant's allegation that the instant action is barred by statute of limitation. Defendant avers he can raise the three-year statute of limitations for tort cases as meritorious defense. Statute of limitations is an affirmative defense which must be specifically pled. Rule 8 (c) SCRCPP.

A Motion to Dismiss, under Rule 12(b) must be made before answering, and within the time-period for answering, the Complaint. Based on the service date of September 18, 2020, Defendant's Motion to Dismiss must have been filed by October 18, 2020. The February 11 filing, therefore, was untimely, resulting in a waiver of defenses Rules 12(b)(2), (4), and (5), SCRCPP, relied upon by the Court in its decision. Defendant cannot now be awarded for sleeping on his rights by granting him relief based on defenses he has waived.

Rule 12(h) of the SCRCF relates to the fact that you can waive your defenses to the statute of limitations or failure to serve the pleadings within the necessary 30 days. Specifically, it holds the following:

- (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Defendant did not have the defenses used by the Court in dismissing Plaintiffs' claims at his disposal. His failure to respond within 30 days failed to preserve his defenses, thereby waiving them.

Equitable estoppel may be applied in the instant case precluding the application of the statute of limitations.

Plaintiffs submit the mere allegation of statute of limitations does not automatically warrant dismissal of a case. Plaintiffs believe the doctrine of equitable estoppel applies in the instant case. Under South Carolina law:

A defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct. Such inducement may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary. The defendant's conduct may also involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue.

Kleckley v. Nw. Nat. Cas. Co., 338 S.C. 131, 136--137 (2000).

In the instant case, while Plaintiffs attempted to comply with the statute of limitations with the Spartanburg action, they were prevented from pursuing the same due to Defendant's

inaccurate mailing address. It will be established in the latter part of this Motion that Defendant has a propensity not only in driving recklessly but also in intentionally providing incorrect mailing address and/or contact detail in his driver's license to avoid prosecution.

That doctrine has been described as "a standard of fair dealing applied by the courts." As applied to the statute of limitations, its central premise is that *Delson v. Minoque* (E.D.N.Y. 1961) 190 F. Supp. 935, 937.

one cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute [of limitations], and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.

Howard v. West Jersey S. S. R. Co. (1928) 102 N.J. Eq. 517, 141 A. 755, 757-58, *aff'd. mem.* 104 N.J. Eq. 201, 144 A. 919 (1929).

Cited in City of Bedford v. James Leffel Co., 558 F.2d 216 (4th Cir. 1977).

II.

DEFENDANT MISTAKENLY APPLIED THE WRONG STANDARD IN SETTING ASIDE THE JUDGMENT.

Plaintiff believes Defendant had mistakenly applied the wrong standard in seeking to vacate the default judgment against him. In the case of *Sundown v. Intedge Industries*, the Court differentiated the standard for granting relief from judgment under Rule 55(c) and Rule 60(b) of the SCRCP. Sundown v. Intedge Industries, 383 S.C. 601 (S.C. 2009). To quote:

The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App. 1989). The trial court need

not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App. 1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Williams v. Stalaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App. 1994).

Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCF. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App. 1987). Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or "other misconduct of an adverse party." Rule 60(b), SCRCF. The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default.

Sundown, supra.

In the instant case, default order has been entered against Defendant on December 16, 2020. Defendant sought relief from judgment by moving to vacate the default order under Rule 55 (c) of the SCRCF. But since an Order of Default has already been entered, Defendant should have applied Rule 60(b) instead. Therefore, his reliance on Rule 55(c) SCRCF and the "good cause" standard was incorrect.

The truth of the matter is Defendant never made an appearance in the Spartanburg matter. The previous representative for Sentry Insurance did not answer for Defendant. He did not answer because he no longer worked for the insured, Southland Transportation Company. Since Defendant no longer worked for the company, and had no contact with defense counsel, he did not file an answer on his behalf.

Defense counsel's sudden departure from the law firm did not make Defendant compliant

with aiding in Sentry's defense. Defendant has not participated in either of these actions. In essence, the Court is allowing a non-party (Sentry Insurance) to participate in the defense of a near catastrophic wreck. Counsel for Sentry has alleged he was retained by Defendant. However, he makes no reference to him whatsoever. On the same token, defense counsel discusses how he and the insurance company were allegedly due notice of the Summons and Complaint of a new action when Plaintiffs complied with the State statute regarding service of a non-resident.

Furthermore, Defendant is not entitled to relief from the default order under Rule 60(b) since the Rule requires a more stringent standard, and Defendant has not shown mistake, fraud, excusable neglect, surprise nor misconduct of the Plaintiff is attendant in the instant case.

III.

DEFENDANT IS NOT ENTITLED TO RELIEF OF ENTRY OF DEFAULT UNDER RULE 55 (c) SCRCP.

There is no question Defendant failed to file an answer, any responsive pleading or a motion to dismiss within thirty (30) days of the service of summons and complaint upon him, through the SCDMV. As such, Defendants were technically in default. Plaintiffs were well within their right to move for (and obtain) an entry of default.

Assuming arguendo that Defendant has properly sought relief under Rule 55 (c) SCRCP, Plaintiff maintains Defendant has not presented a satisfactory explanation for the default. **The named defendant did not offer a notarized affidavit explaining his failure to respond within 30 days.** The Court's conclusory statement the Wham factors were controlling, was not substantiated with any analysis because Defendant could not satisfy any of the factors.

- A. Plaintiff failed to present sufficient proof of good cause for relief from default under Rule 55 (c).**

Plaintiffs assert Defendant was properly adjudged in default for failing to comply with the time requirements of Rule 12 (a) SCRCPP. Defendant did not provide justifiable reason for not filing a responsive pleading.

That Plaintiff failed to and/or did not attempt to determine Defendant's correct address is not a good cause to relieve Defendant from default. Defendant was served with the processes by certified mail, at his last known address: 130 Valentine Court, Martinsville, VA 24112. This is evidenced by his driver's license. As a resident of the State of Virginia, Defendant is bound by its laws. Any license holder under Virginia laws is mandated to notify the Department of any change of address. Virginia Code §46.2-324 (Exhibit 1- Code of Virginia, Title 46.2, Chapter 3). Since Defendant presented a driver's license with the Virginia address, Plaintiffs (and the SCDMV) can safely assume Defendant may be found in the said address.

Defendant's gross negligence and/or reckless behavior is evident in this case. He knew he had an obligation to keep his contact information updated under the Virginia laws, but has continuously refused to do so. Through diligent search, Plaintiff discovered this Defendant had a number of traffic infractions in which he was found guilty in absentia, presumably due to the inability of plaintiffs to reach out to him. (Exhibit- List of Defendant's traffic violations).

If Defendant wanted to defend himself against suit, he had a duty of due diligence to ensure the DMV knew where to find him. His failure to ensure the SCDMV had the proper address, or accepted service if he simply wouldn't accept service, shows a callous disregard for society.

By asking Plaintiffs to locate Defendant's correct address, Mr. Moore and the insurance carrier are placing a heavy burden upon Plaintiffs who have already suffered from Defendant's grossly negligent and/or reckless acts.

Defendant's grossly negligent and/or reckless conduct has caused the delay.

Generally, motions to set aside a default judgment should be accompanied by one or more affidavits explaining the circumstances leading to the default. The motion, affidavits, or accompanying proposed answer should also establish that the defendant has a viable defense to the action, such as by controverting the factual allegations of the complaint. Defendant has not done any of the aforesaid acts.

Furthermore, Plaintiffs maintain Mr. Moore has not established his status in this case. He claimed he was retained by Defendant, but he has failed to submit evidence to prove the same. Plaintiffs reiterate their position that if it were true Defendant retained Mr. Moore's services, then Defendant must have received the processes or had knowledge of the same. As such, it took Defendant sometime to hire a counsel to defend his case, and yet, Defendant has not provided a satisfactory explanation for the default.

In sum, the law requires Defendant to provide a reason, a "good cause", for the delay in responding to Plaintiffs' Complaint (as well as the succeeding motions) and as such, he should not be rewarded for his failure to comply with the law.

B. The Wham factors did not weigh in favor of relief.

As mentioned in the previous section, courts rely on a two-step analysis in determining whether to grant relief for an entry of default under Rule 55(c) of the SCRCP: First is to provide for a "good cause" explanation for the default; and then satisfy the three (3) factors mentioned in the Wham case: (a) timeliness; (b) meritorious defense; and, (3) degree of prejudice to Plaintiffs Wham, supra. Defendant failed to satisfy all three (3) aforementioned factors.

a) Timeliness of the motion

Plaintiffs reiterate their position that Defendant took an inordinately long time in filing

his Motion to Vacate and/or Set Aside Judgment. Plaintiffs filed the Summons and Complaint on August 27, 2020 and served Defendant on September 15, 2020 through SCDMV. Defendant did not submit an Answer nor any motion within the 30-day period prescribed under Section ___ of the SCRPC. Neither did Defendant submit a response to Plaintiffs' Affidavit of Default and Motion for Entry of Default, which were filed on November 10, 2020. It took Defendant four (4) months to address Plaintiffs' Complaint, and two (2) months to respond to Plaintiff's Affidavit and Motions.

Rule 55(c) does not provide a specific time limit for the filing of a motion to set aside an entry of default. The Fourth Circuit denied a motion to set aside, determining that by waiting 2 ½ months between the date of entry of default and the motion, movant "did not act promptly." *Consolidated Masonry & Fireproofing, Inc.*, 383 F.2d 249, 251 (4th Cir. 1967). See also *Nelson v. The Coleman Co.*, 41 F.R.D. 7 (D. S.C. 1966) (Simons, J) (even short delay not excused where circumstances showed lack of intent to act promptly). The Courts in the cases of *Richardson v. P.V.* 383 S.C. 610, 613 (S.C. 2009), and *Rodriguez v. Gutierrez*, 391 S.C. 323 (S.C. Ct. App. 2011) denied relief to the movants who filed their respective motion two (2) months from the entry of default.

In sum, Defendant failed to act promptly in seeking relief.

b. Meritorious Defense

In his Memorandum in Support of Defendant's Motion to Set Aside Entry of Default, Mr. Moore raised the defense of statute of limitations barring the present action. To this end, Plaintiffs submit this defense has been precluded when Defendant failed to file his answer or motion within the period set forth by law, thereby making the insufficiency of service, and the associated statute of limitations, moot.

Mr. Moore brought the issue of the Spartanburg action being pending on appeal. In that same action, Mr. Moore, who represented the trucking company which employed herein Defendant, insisted no such action has commenced. In the instant case, Mr. Moore relied on the Spartanburg action to support his attempt for relief from default judgment, the very action he denounced as non-existent. Mr. Moore should not be allowed to change his theory of the case. The Court has ruled on this matter in the case of *Hayne Federal Credit Union*. Hayne Federal Credit Union v. Bailey, 327 S.C. 242 (S.C. 1997). The Court ruled:

It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory. However, the truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly-discovered evidence.

Ibid.

There is no newly discovered evidence presented in this case. And more importantly, the dismissal of the Spartanburg action was without prejudice to filing another action. Thus, the pendency of an appeal on the Spartanburg action is not a good defense to the plaintiff's claims that might allow you to avoid liability altogether.

Furthermore, in both the Spartanburg action and in the present case, Defendant has not provided a defense for his grossly negligent and/or reckless driving that caused severe physical injuries on Plaintiffs. Defendant has shrouded himself with procedural arguments, never addressing the substance of the claims raised against him.

And finally, Plaintiffs address what could be the only "defense" presented by Mr. Moore—Plaintiffs failure to provide Mr. Moore a copy of the Summons and Complaint. Mr. Moore argues Plaintiffs have known he was Defendant's counsel in the Spartanburg action and therefore, should have been provided a copy of the Complaint.

Bearing in mind Mr. Moore's theory that the Spartanburg action has not commenced and thus a nullity, Plaintiffs submit this case should be treated as a new action. Under Rule 4(d)(1), summons and complaint may be served upon the defendant as follows:

(d)(1) Individuals. Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

Nothing in the law mandates Plaintiffs to deliver a copy of the Summons and Complaint upon Mr. Moore, who has not established his authority to represent Defendant, either by appointment or by law. Plaintiffs served Defendant, through the SCDMV as required under SC Code Ann. § 15-9-370, in relation to Rule 4(d)(7) of the SCRCF. To impose additional requirements upon Plaintiffs is to burden them for abiding by the law.

c. Prejudice to Plaintiffs

Plaintiffs maintains to set aside the judgment would eliminate the opportunity for Plaintiffs to pursue their claims against Defendant. Plaintiffs have sustained injuries which necessitated medical attention that continues to date. They had to endure physical pain and suffering as well as financial difficulties due to this protracted litigation. The Court in the previous Spartanburg action allowed Defendant to avoid the fact he was in default and allowed him to file dispositive motions despite the fact they were not filed within the thirty-day window. Defendant had a duty to assert his affirmative defenses within thirty days, otherwise they are considered waived. Plaintiffs believe the Court in the Spartanburg action committed an error of law when he failed to do so.

Likewise, in the present case, the Court disregarded the fact Defendant once again

ignored the complaint lodged against him despite having notice of the suit, overlooked Defendant could not use the affirmative defenses to avoid default, and ignored the fact Plaintiffs suffered the ultimate prejudice by having their case for damages dismissed even though the Judge specifically recognized the prejudice which would result to Plaintiffs if Defendant's motions were granted, and allowed the insurance carrier to respond to the default judgment.

C. Defendant has come to court with unclean hands.

Plaintiffs submits that the doctrine of unclean hands applies in this case. This doctrine precludes a party from recovering in equity if he acted unfairly in a matter which is the subject of the litigation to the prejudice of the defendant. Wilson v. Landstrom, 281 S.C. 260 (1984), 315 S.E.2d 130, citing Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E. (2d) 735 (1943).

Plaintiffs aver Defendant knowingly and willingly made himself available to the jurisdiction of SCDMV when he decided to work as a truck driver, plying South Carolina roads. Under S.C. Code Ann. §§ 15-9-350 and 15-9-370, a non-resident driver who operates his/her motor vehicle on the public highways, streets or public roads or anywhere within the State, is deemed to subject himself/ herself under the jurisdiction of SCDMV. As such, Defendant made himself available for SCDMV to notice in case of any motor vehicle accident. That Defendant did not provide correct contact details and/or updated mailing address is a blatant disregard of the laws in South Carolina. It has already been established in the previous section Defendant has also violated Virginia laws.

Plaintiffs discovered Defendant has had a significant number of traffic incidents, a majority of which have been tried in his absence.

date	city/county	state	charge	case #	outcome
9/20/08		Virginia	Failure to obey highway sign	071GT0800453100	Guilty in absentia
10/19/07	Henry	Virginia	Speeding 48/35	089GT0700797900	Guilty in

					absentia
10/19/07	Henry	Virginia	Seat belt violation	089GT0700798000	Guilty in absentia
8/28/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
9/17/07	Montgomery	Virginia	Defective equipomnt generally	121GT0701637400	Guilty
9/30/03	Patrick	Virginia	Oper w/radar detect/jam device	141GT0300129200	Prepaid-Fine
5/28/04	Patrick	Virginia	Speeding 74/55	141GT0400068000	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey highway sign sleep	175GT0600711000	Guilty in absentia
1/16/08	Danville City	Virginia	Speeding 55/40	590GT0800067700	Guilty
		Kentucky	Driving on suspended	10-T-00307	
6/16/16	Spartanburg	South Carolina	Driving vehicle at greater speed than is re	5102P0362799	Guilty in absentia
6/23/11		Virginia	No county or city tag	GT11004149-00	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey high-sign sleep	175GT0600711000	Guilty in absentia
9/10/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
6/12/15	Danville City	Virginia	Speeding 53/40	590GT15006703-00	Guilty in absentia
1/21/95		Virginia	Illegal sunshading	089GT9500043700	Guilty in absentia

Clearly, Defendant is a habitual traffic violator, which his employer knew or should have known. They hired him to drive a semi for them. They disregarded his driving record and allowed him to drive a deadly weapon. The fact he never changed his address with the state DMV is proof positive that he drives without regard for those around him.

For this Court to allow Defendant, a habitual violator, to take refuge in the doctrine of statute of limitations when he failed to answer or file a motion within the requisite 30 days (or 100 days for that matter) is to condone his unlawful behavior.

Courts have allowed the filing of Complaints beyond the statute of limitations in the interest of justice.

Henneberry v. Borstein, 2012 NY Slip Op. 00235 [91 AD3d 493]

This case bears some similarity with the facts of this case. The Plaintiff in the above-cited case filed a legal malpractice and breach of fiduciary complaint against Defendant Attorneys and law firm by filing a summons with notice on November 19, 2007, well within the three-year statute of limitations. Plaintiff arranged for a licensed process server to serve Defendants on March 13, 2008, within 120 days of the filing of the summons with notice. Two affidavits of service were filed to the court. On April 19, 2008, Defendants submitted a notice of appearance and demanded for a copy of the complaint, which Plaintiff served upon them on April 28, 2008. Alleging defective service and lack of personal jurisdiction, Defendant sought to dismiss the case on November 7, 2008, while Plaintiff moved for an extension of time to effect proper service.

In her desire to protect her claims in the event the first complaint is terminated, Plaintiff filed a second complaint in 2009, which contained substantially the same claims. Defendants moved to dismiss the 2009 case raising identical action pending before the court.

Both cases were dismissed: the first case for improper service (dismissed without prejudice), and the 2009 action based on the pendency of another identical action. It should be noted that in the first case, while the court dismissed the complaint, the court granted Plaintiff's motion for extension of time to serve his complaint.

Plaintiff thereafter filed the third action on February 11, 2010, which was dismissed for untimeliness. Plaintiff appealed all three orders.

In ruling in favor of the Plaintiff, the Supreme Court in New York County applied the "interest of justice" in granting Plaintiff the opportunity to pursue her action. The Supreme Court took into consideration Plaintiff's attempt to serve Defendants by hiring process server within

the 120-day time requirement, Defendants knowledge/awareness of the action as soon after the filing of the complaint and that her complaint sets forth actionable claims.

In Henneberry, the New York Supreme Court ruled that even though Plaintiffs failed to show good cause for failure to serve their respective processes within the 120 days, using the “interest of justice” standard, it may grant Plaintiffs extension of time to serve where the statute of limitations had expired in order to avoid “harsh result” to the Plaintiffs.

CONCLUSION

Defendant failed to provide a good cause explanation for his failure to file an or a Motion within the thirty-day period required by law, he is precluded from raising the affirmative defenses of statute of limitations and pendency of appeal. Defendant cannot rely on them as meritorious defense when he has slept on his rights. The substantial prejudice to the plaintiffs would crush any prejudicial arguments made by Defendant, especially given his second chance at responding to the service of an S&C was also a willful and wanton refusal to respond to his implicit acceptance of service. Defendant also believes the court misapplied the standard in setting aside the default by granting the relief based on the less stringent standard in Rule 55 (c) instead of Rule 60 (b).

Based on the foregoing, and in the interest of justice, Plaintiffs move for this Court to reconsider its Order, dated February 16, 2021, and allow the parties litigate this matter. Plaintiffs believe allowing this case stand in abeyance while the appellate action takes its course would be far less prejudicial to either party. The Court’s goal is to have cases tried on the merits. Both parties would benefit from having the other’s motions (dismissal and default) denied so that the merits of the wreck on I-85 could be addressed by a jury of the parties’ contemporaries. Plaintiffs believe disregarding the default judgment while granting the insurance carrier a

dismissal based on the defenses he waived according to the Rules is not representative of due process.

s/Donald L. Smith
Donald L. Smith (SC Bar#6699)
Attorney for Plaintiff
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

Anderson, South Carolina
February 26, 2021.

NOTICE OF APPEAL
March 11, 2021

RECEIVED

Mar 11 2021

SC Court of Appeals

FORM 1
NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

Letitia H. Verdin, Judge

Case No. 2020-CP-1100632

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

Appellants,

v.

Perry W. Barbour,

Respondent.

NOTICE OF APPEAL

The undersigned counsel respectfully appeals Judge Letitia H. Verdin's challenged Form 4/Orders, dated February 16, 2021 and March 9, 2020, respectively.

Submitted by:

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
March 10, 2021

Other Counsel of Record

Mr. David L. Moore, Jr., Esquire
Turner Padgett Graham & Laney, PA
Post Office Box 1509
Greenville, SC 29602

Perry W. Barbour
130 Valentine Court
Martinsville VA 24112

EXHIBITS

**LETTER FROM SCDMV TO
APPELLANTS' COUNSEL
RE: SERVICE TO RESPONDENT
October 8, 2020**



**S. C. DEPARTMENT OF
MOTOR VEHICLES**

OFFICE OF GENERAL COUNSEL

P.O. Box 1498, Blythewood, S.C. 29016: (803) 896-9900, Fax: 896-9901

October 8, 2020

Donald L. Smith, Esquire
122 North Main Street
Anderson, SC 29621

Re: *Luther Harris Donna Harris and Bobby Leopard v. Perry Wendell Barbour*
Case No.: 2020-CP-11-00632, DMV 20-421

To Whom it May Concern:

The notice of service and copy of the Summons and Complaint in the above-referenced action were sent via certified mail on September 15, 2020 to Defendant Perry Wendell Barbour and returned to this office marked "Return to Sender Not Deliverable as Addressed Unable to Forward" by the U.S. Postal Service.

In accordance with the provisions of Section 15-9-380 of the 1976 Code of Laws, as amended, I am today sending notice of service and a copy of the Summons and Complaint to Defendant Perry Wendell Barbour. Enclosed are: (1) the original certified mail envelope (**with** the return receipt card), (2) a photocopy of the open mail envelope, and (3) the Affidavit of Mailing. These documents will be filed by you with the Clerk of Court.

If you have any questions, please contact me at 803-896-9900.

Sincerely,

Natasha Thomas, Paralegal
Office of General Counsel
For: Director, South Carolina Department of Motor Vehicles

Enc.

**AFFIDAVIT OF
MS. NATASHA THOMAS
October 8, 2020**

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

PERSONALLY appeared before me, Natasha Thomas, who, first being duly sworn, deposes and says that:

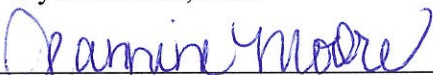
This Affidavit is made in compliance with Section 15-9-380 of the Code of Laws of South Carolina;

1. I am the designated representative of the Director of the South Carolina Department of Motor Vehicles;
2. On September 14, 2020, in accordance with the provisions of Sections 15-9-350 or 15-9-360 of the 1976 Code of Laws of South Carolina, the Summons and Complaint in an action styled *Luther Harris Donna Harris and Bobby Leopard v. Perry Wendell Barbour, Case No.: 2020-CP-11-00632, DMV 20-421*, was received by the South Carolina Department of Motor Vehicles;
3. On September 15, 2020, a copy of the Summons and Complaint was sent to Perry Wendell Barbour certified mail 130 Valentine Court Martinsville, VA 24112 which is the address furnished by Plaintiff's attorney.
4. On September 25, 2020, said copy of the Summons and Complaint was returned to the South Carolina Department of Motor Vehicles by the U.S. Postal Service marked "Return to Sender Not Deliverable As Addressed Unable to Forward," and is attached hereto; and
5. On October 8, 2020, a copy of the Summons and Complaint was sent to Perry Wendell Barbour by open mail to the same address with sufficient postage attached thereto.



Natasha Thomas, Paralegal
For: Director, S.C. Department of Motor Vehicles

Sworn to and subscribed before me this 8th day of October, 2020


Notary Public of South Carolina
My Commission Expires: May 28, 2024

**PROOF OF SERVICE BY
CERTIFIED MAIL (GREEN CARD)
September 18, 2020**

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Perry Wendell Barbour
130 Valentine Court
Martinsville, VA 24112

20-401

7013 2250 0001 0887 0772

COMPLETE THIS SECTION ON DELIVERY

A. Signature

x *PN*

- Agent
 Addressee

B. Received by (Printed Name)

Perry Barbour

C. Date of Delivery

9-18-2020

D. Is delivery address different from item 1? Yes

If YES, enter delivery address below:

- No

3. Service Type

- Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C.O.D.

4. Restricted Delivery? (Extra Fee)

- Yes

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

**APPELLANTS' LETTER TO
SENTRY SELECT INSURANCE,
February 1, 2021**

ATTORNEY OFFICE OF DONALD SMITH

122 N. Main St.
Anderson SC 29621
attorneydonaldsmith@gmail.com

Donald L. Smith, Esquire

Telephone: (864) 642-9284
Facsimile: (864) 642-9285

February 1, 2021

Sentry Select Insurance Co.
Attn.: Claims
1800 North Point Drive
Stevens Point, WI 54481

**RE: Luther Harris, Donna Harris and Bobby Leopard vs.
Perry Wendell Barbour and Southland Transportation Co.
C.A. No.: 2020-CP-11-00632
Claim No.: 61A171897-952**

To Whom It May Concern:

Please find enclosed a copy of the Notice of Hearing, Motion for Default Judgment, Entry of Default, Order of Default and Order to Ascertain Damages, Certificates of Service for these documents, as well as the Summons and Complaint. This hearing is to determine Plaintiffs' respective damages in conjunction with the previously issued Order to Ascertain Damages. I have enclosed a Certificate of Service for the mailing of these documents as well.

With highest regards, I remain
Very truly yours,



Donald L. Smith
DLS/ds
Enclosures

**CERTIFIED LETTER FROM
SCDMV TO RESPONDENT
October 25, 2019**



**S. C. DEPARTMENT OF
MOTOR VEHICLES**

OFFICE OF GENERAL COUNSEL

P.O. Box 1498, Blythewood, S.C. 29016: (803) 896-9900, Fax: (803) 896-9901

October 25, 2019

USPS Tracking # 7005 0390 0004 4634 3314

Perry Wendell Barbour
130 Valentine Court
Martinsville, VA 24112

Re: *Luther Harris, Donna Harris and Bobby Leopard v. Perry Wendell Barbour and Southland Transportation Co.*
Case No.: 2019-CP-42-02092, DMV 19-510

Dear Mr. Barbour:

In accordance with the provisions of Section 15-9-350 of the Code of Laws of South Carolina (1976), this office has received the enclosed **Summons and Complaint** in the above-referenced action. Under South Carolina law, this has the same legal effect as if you had been served with these documents personally.

Section 15-9-350 of the 1976 Code of Laws of South Carolina, as amended, provides that:

“The acceptance by a nonresident of the rights and privileges conferred by the laws in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways, the streets of any incorporated municipality or the public roads of this State or anywhere within this State, or the operation by such nonresident of a motor vehicle on any such public highways, streets, or public roads or anywhere within this State other than as so permitted or regulated shall be deemed equivalent to the appointment by such nonresident of the Director of the Department of Motor Vehicles or of his successor in office to be his true and lawful attorney upon whom may be served all summons or other lawful process in any action or proceeding against him growing out of any accident or collision in which such nonresident may be involved by reason of the operation by him, for him or under his control or direction, express or implied, of a motor vehicle on such public highways, Streets, or public roads or anywhere within this State. Such acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally.”

Sincerely,

Natasha Thomas, Paralegal
Office of General Counsel

For: Director, South Carolina Department of Motor Vehicles

Enclosure

cc: Donald L. Smith, Esquire
122 N. Main Street
Anderson, SC 29261

**ENVELOPE FROM SCDMV,
MARKED RETURN TO SENDER
November 21, 2020**



South Carolina Department of Motor Vehicles

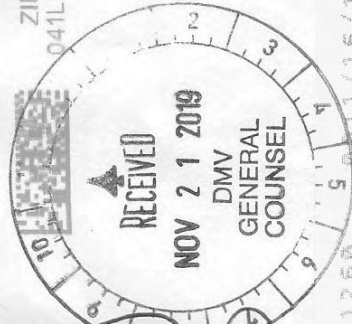
P.O. Box 1498
Blythewood, S.C. 29016

Form 103-A

Forwarding Service Requested

neopost
11/07/2019
US POSTAGE \$000

ZIP 29016
041L12204134



RTS

NIXIE 274 FE 1260 5 11/16/19
RETURN TO SENDER
NOT DELIVERABLE AS ADDRESSED
UNABLE TO FORWARD
EC: 29016149898 *0354-0804EM07442

11/16/19

CERTIFICATE OF SERVICE

October 25, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Luther Harris, Donna Harris and,)
Bobby E. Leopard,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour and)
Southland Transportation Co.)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-02092

CERTIFICATE OF SERVICE

THE UNDERSIGNED person deposes and says that he served the acceptance of service by the South Carolina Department of Motor Vehicles (SCDMV) on behalf of Defendant Perry Wendell Barbour, the envelope used by the SCDMV to forward the Summons to Defendant Barbour and the Summons that was effectively served on Defendant Barbour, upon the Clerk of Court for Spartanburg County by U.S. Mail at the address shown below with postage sufficient for the mailing; and, upon Defendant Southland Transportation Co., by and through its counsel of record, Alan G. Jones, Esquire, via the e-mail address below through the South Carolina e-filing system:

Alan G. Jones, Esq.
agjones@turnerpadget.com

s/Donald L. Smith 
Donald L. Smith (SC Bar#6699)
Attorney for Plaintiff
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

Clerk of Court
180 Magnolia Street
Spartanburg SC 29306

Anderson, South Carolina
November 26, 2019.

**FORM 4/ORDER, DATED
MARCH 10, 2020
C.A. No. 2019-CP-42-02092
Harris et. al. v. Barbour et. al.**

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS**

JUDGMENT IN A CIVIL CASE

CASE NO. 2019-CP-42-02092

Luther **HARRIS**, Donna **HARRIS**, and Bobby E. **LEOPARD**

Perry Wendell **BARBOUR** and **SOUTHLAND TRANSPORTATION Co.**,

PLAINTIFF(S)

DEFENDANT(S)

<p>Submitted by: the COURT</p>	<p>Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant</p>
---------------------------------------	--

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. See Page 2 for additional information.
- ACTION DISMISSED** (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other SC Code Section 15-3-530
- 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 OR **formal order to follow** Statement of Judgment by the Court:

This matter came before this court on motion of the defendants to dismiss the complaint pursuant to Rules 12(b)(1), (2), (4), and (5), SCRPC.

This is a civil action for the recovery of compensation for personal injury suffered by the plaintiffs resulting from a motor vehicle collision occurring on June 10, 2016. This action in tort based upon the negligent operation of a motor vehicle proximately causing injury to another is clearly an action which the Court of Common Pleas has subject matter jurisdiction to hear. "Subject matter jurisdiction is the power of a court to hear and determine cases of a general class to which the proceedings in question belong." Posey v. Proper Mold & Engineering, Inc., 378 SC 210 (App. 2008).

The limitations period for bringing this action is three years from the date of the event. S. C. Code Ann. Section 15-3-530(5).

A civil action is deemed commenced when the summons and complaint are filed with the clerk of court and served within the applicable limitations period or, if not served within the applicable limitations period, actual service is accomplished not later than 120 days after filing. Rule 3, SCRPC.

"Service of process on a foreign corporation not authorized to do business within this State ... is considered to have designated the Secretary of State as its agent upon whom process against it may be served in any action ... arising ... out of or in connection with the doing of any business within this State." S. C. Code Ann. Section 15-9-245.

A nonresident operating a motor vehicle in this State is deemed to have designated the Director of the Department of Motor Vehicles as his agent for service of process in any action against him arising out of a motor vehicle accident in which the nonresident was involved. S. C. Code Ann. Section 15-9-350.

"Service of a summons and complaint upon a defendant ... may be made by ... registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt." Rule 4(d)(8), SCRCF.

The record in this case reflects that the summons and complaint was filed with the clerk on June 7, 2019. Neither of the defendants was served prior to June 10, 2019 and therefore service must be accomplished not later than October 7, 2019 as required by Rule 3(a)(2), SCRCF. The summons and complaint were received by defendant Southland through certified mail on October 10, 2019, as shown by the certified mail return receipt, pursuant to Rule 4(d)(8), SCRCF. The summons and complaint was attempted on defendant Barbour by certified mail to the SCDMV on October 25, 2019 pursuant to S. C. Code Ann. Section 15-9-350.

Based upon consideration of the record, memoranda submitted, argument of counsel, and the applicable rules as well as statutory and case law, this Court finds that the defendants' **MOTION** to **DISMISS** pursuant to Rule **12(b)(1)**, SCRCF, should be and **IS** therefore **DENIED**.

The defendants' **MOTION** to **DISMISS** pursuant to Rules **12(b)(2)**, **(4)**, and **(5)**, SCRCF, should be and **IS** therefore **GRANTED** for failure of the plaintiff to commence this action with effective service upon the defendants within the applicable limitations period.

Counsel for defendants is requested to prepare and submit a proposed formal order for the Court's consideration.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil

Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.** **E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

J. DERHAM COLE, PRESIDING JUDGE 2053 03/03/2020
Judge Code **Date**

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney’s box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

DONALD L. SMITH, Esq.

DAVID L. MOORE, Esq.

ATTORNEY FOR THE PLAINTIFFS

ATTORNEY FOR THE DEFENDANTS

AMY W. COX, CLERK OF COURT

Court Reporter: **LINDA MOFFITT**

E-Filing Note: In E-Filing counties, 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 judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

**PROOF OF MAILING TO
RESPONDENT
FROM CLERK OF COURT
CHEROKEE COUNTY
February 16, 2021**



Mrs. Brandy W. McBee
Clerk Of Court, Cherokee County
Post Office Drawer 2289
Gaffney, S. C. 29342



FIRST-CLASS MAIL
\$00.51
ZIP 29340
041L11245001

Perry Wendell Barbour
130 Valentine Court
Martinsville, VA 24112

**EXCERPTS OF
CODE OF VIRGINIA
Title 46.2. Motor Vehicles
(law on applicants and
license holders)**

Code of Virginia
Title 46.2. Motor Vehicles
Subtitle II. Titling, Registration and Licensure
Chapter 3. Licensure of Drivers
Article 4. Obtaining Licenses, Generally

§ 46.2-324. Applicants and license holders to notify Department of change of address; fee

A. Whenever any person, after applying for or obtaining a driver's license or special identification card shall move from the address shown in the application or on the license or special identification card, he shall, within 30 days, notify the Department of his change of address. If the Department receives notification from the person or any court or law-enforcement agency that a person's residential address has changed to a non-Virginia address, unless the person (i) is on active duty with the armed forces of the United States, (ii) provides proof that he is a U.S. citizen and resides outside the United States because of his employment or the employment of a spouse or parent, or (iii) provides proof satisfactory to the Commissioner that he is a bona fide resident of Virginia, the Department shall (i) mail, by first-class mail, no later than three days after the notice of address change is received by the Department, notice to the person that his license and/or special identification card will be cancelled by the Department and (ii) cancel the driver's license and/or special identification card 30 days after notice of cancellation has been mailed.

B. The Department may contract with the United States Postal Service or an authorized agent to use the National Change of Address System for the purpose of obtaining current address information for a person whose name appears in customer records maintained by the Department. If the Department receives information from the National Change of Address System indicating that a person whose name appears in a Department record has submitted a permanent change of address to the Postal Service, the Department may then update its records with the mailing address obtained from the National Change of Address System.

C. There may be imposed upon anyone failing to notify the Department of his change of address as required by this section a fee of \$5, which fee shall be used to defray the expenses incurred by the Department. Notwithstanding the foregoing provision of this subsection, no fee shall be imposed on any person whose address is obtained from the National Change of Address System.

D. The Department shall electronically transmit change of address information to the Department of State Police, in a format approved by the State Police, for comparison with information contained in the Virginia Criminal Information Network and National Crime Information Center Convicted Sexual Offender Registry Files, at the time of the change of address. Whenever it appears from the records of the State Police that a person has failed to comply with the duty to register, reregister, or verify his registration information pursuant to Chapter 9 (§ 9.1-900 et seq.) of Title 9.1, the State Police shall promptly investigate and, if there is probable cause to believe a violation has occurred, obtain a warrant or assist in obtaining an indictment charging a violation of § 18.2-472.1 in the jurisdiction in which the person last registered, reregistered, or verified his registration information or in the jurisdiction where the person made application for change of address.

E. For any summons issued for a violation of this section, the court may, in its discretion, dismiss

the summons, where proof of compliance with this section is provided to the court on or before the court date.

1974, c. 347, § 46.1-368.1; 1989, c. 727; 1996, cc. 943, 994; 2002, cc. 767, 834; 2006, cc. 857, 914; 2010, cc. 25, 55; 2017, c. 670; 2020, c. 829.

The chapters of the acts of assembly referenced in the historical citation at the end of this section(s) may not constitute a comprehensive list of such chapters and may exclude chapters whose provisions have expired.

LIST OF RESPONDENT'S TRAFFIC VIOLATIONS

date	city/county	state	charge	case #	outcome
9/20/08		Virginia	Failure to obey highway sign	071GT0800453100	Guilty in absentia
10/19/07	Henry	Virginia	Speeding 48/35	089GT0700797900	Guilty in absentia
10/19/07	Henry	Virginia	Seat belt violation	089GT0700798000	Guilty in absentia
8/28/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
9/17/07	Montgomery	Virginia	Defective equipoment generally	121GT0701637400	Guilty
9/30/03	Patrick	Virginia	Oper w/radar detect/jam device	141GT0300129200	Prepaid-Fine
5/28/04	Patrick	Virginia	Speeding 74/55	141GT0400068000	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey highway sign sleep	175GT0600711000	Guilty in absentia
1/16/08	Danville City	Virginia	Speeding 55/40	590GT0800067700	Guilty
		Kentucky	Driving on suspended	10-T-00307	
6/16/16	Spartanburg	South Carolina	Driving vehicle at greater speed than is re	5102P0362799	Guilty in absentia
6/23/11		Virginia	No county or city tag	GT11004149-00	Guilty in absentia
5/2/06	Southampton	Virginia	Failure to obey high-sign sleep	175GT0600711000	Guilty in absentia
9/10/07	Mecklenburg	Virginia	Brakes-inoperative or missing	117GT0701512200	Guilty in absentia
6/12/15	Danville City	Virginia	Speeding 53/40	590GT15006703-00	Guilty in absentia
1/21/95		Virginia	Illegal sunshading	089GT9500043700	Guilty in absentia

SUMMONS AND COMPLAINT
Harris, et. al., vs. Barbour, et.al.,
2019-CP-42-02092
Filed June 7, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Luther Harris, Donna Harris and,)
Bobby E. Leopard,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour and)
Southland Transportation Co.)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.:

**SUMMONS
(JURY TRIAL DEMANDED)**

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your **ANSWER** to the said Complaint on the Plaintiff’s attorney at 122 N. Main Street, Anderson South Carolina, 29621 within thirty (30) days after the service hereof, exclusive of the day of service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

s/Donald L. Smith
Donald L. Smith, (SC Bar#6699)
Attorney for Plaintiff
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

Anderson, South Carolina
June 7, 2019 .

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG)	
)	
Luther Harris, Donna Harris and,	)	Case No.:
Bobby E. Leopard,)	
)	
Plaintiffs,)	
vs.	)	COMPLAINT
	)	(JURY TRIAL DEMANDED)
Perry Wendell Barbour and)	
Southland Transportation Co.)	
)	
Defendant.)	
_____)	

Luther and Donna Harris, as well as, Bobby Leopard, by and through their undersigned attorney, complaining of the Defendants, allege:

1. That Plaintiffs Luther and Donna Harris were, at all times pertinent to this action, a citizen and resident citizens and residents of the County of Spartanburg, State of South Carolina.
2. That Plaintiff Bobby E. Leopard was, at all times pertinent to this action, a citizen and resident of the County of Spartanburg, State of South Carolina.
3. That based on information and belief, Defendant Perry Wendell Barbour was, at all times pertinent to this action, a resident of the County of Martinsville, State of Virginia. He is employed by Defendant Southland Transportation Co., as a truck driver.
4. That Defendant Southland Transportation Co., by directing its business activities to, and thereby causing Plaintiffs harm in, the County of Anderson, State of South Carolina, is subject to the jurisdiction of this Court. Defendant company provides trucking for the transport of goods.

5. That the substantial acts and omissions alleged herein occur in the County of Spartanburg, South Carolina.

6. That on or about June 10, 2016, Plaintiff Luther Harris and Defendant Barbour were involved in an automobile accident.

7. That Plaintiff was traveling southbound on U.S. Interstate 85, when he came to a stop due to traffic which resulted from a motor vehicle accident further up the road, in the County of Spartanburg, South Carolina.

8. That Defendant Barbour was also traveling southbound on U.S. 85 at that time, in the same lane, though he was behind Plaintiff.

9. That Defendant failed to maintain a proper lookout; and, smashed into the rear of Plaintiff's vehicle with such force that Plaintiffs' Harris and Leopard were ejected through the front wind shield.

10. That Plaintiffs suffered bodily injuries and/or an aggravation of a pre-existing condition which have resulted in pain and suffering, mental anguish, expense of medical and related care and treatment and loss of earnings.

11. That at the time of the collision, Defendant Barbour was acting within the scope of his employment as a truck driver of Defendant Southland Transportation Co., a trucking company.

12. That Defendant Barbour admitted to being at fault for the accident.

13. That Defendant Southland has a duty to hire only competent drivers and to train its drivers in the safe operation of their vehicles.

FOR A FIRST CAUSE OF ACTION: NEGLIGENCE

14. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-13 above.

15. That Defendants owed Plaintiffs a duty of care to operate their tractor trailer in a reasonably safe manner.

16. That Defendants breached their duties to Plaintiffs and other people traveling on the highway in the following ways:

- a) In operating a motor vehicle at a speed that was excessive for the circumstances then and there prevailing;
- b) In failing to maintain a proper lookout;
- c) In failing to maintain proper control of the vehicle;
- d) In failing to bring the vehicle to a stop when it was apparent that failing to do so would result in an accident;
- e) In operating said vehicle in a highly improper manner in view of the circumstances then and there existing;
- f) In not being mentally and physically alert to the impending dangers;
- g) In failing to swerve, or change the course of the vehicle, when it was apparent, or should have been apparent by the exercise of due care, that a catastrophe was inevitable; and
- h) For failing to exercise the reasonable degree of care which a reasonable and prudent person would exercise under the same or similar circumstances.

17. That Defendants' breach of the duty they owed Plaintiffs factually and proximately caused Plaintiffs' damages, including but not limited to actual damages such as hospital/medical expenses, lost income, but also pain and suffering and mental anguish.

18. That Plaintiffs are entitled to recover from Defendants for damages caused by Defendants' negligent, grossly negligent and reckless acts.

FOR A SECOND CAUSE OF ACTION: RECKLESSNESS

19. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-18 above.

20. That the acts and/or omissions of Defendants, including but not limited to failing to maintain a proper lookout and control of his vehicle, constitute a willful, wanton, and reckless disregard for the health and safety of Plaintiffs.

21. That Defendants recklessness factually and proximately caused Plaintiffs' damages, including by not limited to actual damages such as hospital/medical expenses, lost income, but also pain and suffering and mental anguish.

22. That Plaintiffs are entitled to recover from Defendants for damages caused by Defendants' recklessness.

**FOR THIRD CAUSE OF ACTION: RESPONDEAT SUPERIOR
(Against Defendant Southland Transportation Co.)**

23. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-22 above.

24. That the above-described acts of Defendant Barbour, (i.e. recklessly driving the truck, etc.) were committed while he was acting as an agent, servant and/or employee of Defendant Southland Transportation Co. (hereinafter referred as Defendant Southland).

25. That the above-described acts of Defendant Barbour were committed within the scope of his agency and while furthering the interests of Defendant Southland.

26. That as the principal for Defendant Barbour, Defendant Southland is responsible for all of the acts committed by Defendant Barbour within the scope of his agency.

**FOR FOURTH CAUSE OF ACTION:
NEGLIGENT HIRING, SUPERVISION AND RETENTION
(as against Defendant Southland Transportation, Co.)**

27. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-26 above.

28. That at all times material, Defendant Barbour was either directly or through its agents, under the direction, supervision and control of Defendant Southland.

29. That Defendant Southland had a duty to ascertain the competence of its drivers and make sure their drivers are qualified to operate a commercial tractor trailer before hiring them.

30. That Defendant Southland, either directly or through its agent, failed to train or negligently trained its drivers, in particular Defendant Barbour, when Defendant Southland knew or should have known that Defendant Barbour could pose a threat of harm to the public in general and to Plaintiffs in particular.

31. That Despite this knowledge, Defendant Southland, either directly or through its agent, failed to exercise reasonable care in hiring, training, supervising and retaining its drivers in the safe operation of their vehicles.

32. That as a direct and proximate cause of the acts described above, Plaintiffs have not only suffered the injuries described therein, but resulting pain and suffering, physical inconvenience and discomfort, loss of time, loss of income, mental anguish, expenses incurred

due to medical treatment, and loss of enjoyment of life. These losses are permanent and continuing; and, they will have losses in the future.

FOR FIFTH CAUSE OF ACTION: DAMAGES

33. Plaintiffs re-allege and incorporate herein by reference the allegations contained in paragraphs 1-32 above.

34. That as a direct and proximate result of the negligence, gross negligence, willfulness, wantonness, and reckless of Defendants, Plaintiffs suffered numerous injuries.

35. That as a direct and proximate result of the negligence, gross negligence, willfulness, wantonness, and reckless of the Defendants, Plaintiff Luther Harris has suffered the following:

a. Physical pain and suffering, including but not limited to:

1. Initial concussion with loss of consciousness of 30 minutes or less
2. Post-concussion syndrome
3. Abnormalities of Gait and Mobility
4. Concussion with Loss of Consciousness of 30 minutes or less
5. Post-Concussion Syndrome
6. Chronic Headache
7. Right Shoulder Pain
8. Right Leg Pain
9. Neck pain or Cervicalgia
10. Lower back pain or Dorsalgia
11. Cervical degenerative disc disease and spondylosis exacerbated by the Motor Vehicle Accident;

12. Lumbar degenerative disc disease and spondylosis exacerbated by Motor Vehicle Accident

13. Post Traumatic Stress Disorder (PTSD)

b. Economic damages, including but not limited to lost income:

i. Future medical expenses in the amount of \$40,000.00, taking into account potential periodic trigger point injections and other medicinal therapies.

ii. Lost wages to be determined.

c. Psychological distress;

d. Loss of enjoyment of life; and,

e. Punitive damages.

36. That as a direct and proximate result of the negligence, gross negligence, willfulness, wantonness, and reckless of the Defendants, Plaintiff Bobby Leopard has suffered the following:

a. Physical pain and suffering, including but not limited to:

1. Initial concussion with loss of consciousness of 30 minutes or less
2. Post-concussion syndrome
3. Chronic Lower Back Pain
4. Knee Pain
5. Neck Pain
6. Ankle Pain
7. Sacroiliitis
8. Cervical Spondylosis with radiculopathy

9. Lumbar spondylosis with radiculopathy and Cervicalgia
10. Central and Peripheral Vertigo
11. Closed Head Injury
11. Chronic Headache
12. Mild Lumbar Levoscoliosis
13. Post Traumatic Syndrome Disorder (PTSD)
14. Central and Peripheral Vertigo
15. Anxiety
16. Depression
17. Traumatic Brain Injury and Memory Impairment

b. Economic damages, including but not limited to lost income:

- i. Future medical expenses in the amount of \$57, 896.00.
- ii. Lost wages to be determined.

c. Psychological distress;

d. Loss of enjoyment of life; and,

e. Punitive damages.

37. That Plaintiff is entitled to recover actual and punitive damages from Defendant in an amount to be determined by this Court.

FOR SIXTH CAUSE OF ACTION: LOSS OF CONSORTIUM

38. Plaintiff re-alleges and incorporates herein all of the allegations contained in paragraphs 1-37 above.

39. That Plaintiff, Donna Harris, is the spouse of Luther Harris.

40. That as a direct and proximate result of the acts of negligence, gross negligence, recklessness, willfulness and wantonness of Defendants described herein, Plaintiff, Donna Harris, has suffered the loss of Luther Harris's companionship, advice, counsel, experience, knowledge, and judgment in managing the affairs of himself and of his wife, in addition to the loss of his ability to earn support for the maintenance, care and protection, of his wife, and all other damages, both actual and punitive, in a sum to be determined by this Court.

41. That all of which injuries and loss caused damage to Plaintiff Donna Harris in an amount to be determined by this Court.

FOR SEVENTH CAUSE OF ACTION: PUNITIVE DAMAGES

42. Plaintiff re-alleges and incorporates herein by reference the allegations contained in paragraphs 1-41 above.

43. That the acts and/or omissions of Defendants, as stated above, were outrageous and were taken with such reckless disregard for the safety, well-being and life of Plaintiffs.

44. That as a direct and proximate result of the willful, wanton and/or reckless acts and/or omissions of Defendants, Plaintiffs suffered physical injuries and/or aggravation of existing condition, mental anguish and/or anxiety.

45. That the conduct of Defendants, as stated above, justifies an award of punitive damages for each and every claim of Plaintiffs set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a judgment against Defendants for actual damages, punitive damages, the costs of this action, attorney fees, and for such other and further relief as the Court may deem just and proper as determined by a jury.

{SIGNATURE TO FOLLOW}

s/Donald L. Smith

Donald L. Smith, (SC Bar#6699)

Attorney for Plaintiff

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Anderson SC 29621

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Anderson, South Carolina

June 7, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Luther Harris, Donna Harris and,)
Bobby E. Leopard,)
)
Plaintiffs,)
vs.)
)
Perry Wendell Barbour and)
Southland Transportation Co.)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-02092

CERTIFICATE OF SERVICE
(JURY TRIAL DEMANDED)

THE UNDERSIGNED person deposes and says that he served Plaintiffs' Summons and Complaint upon Defendant Southland Transportation Co., by and through South Carolina Secretary of State Mark Hammond, and Defendant Perry Wendell Barbour by placing copies thereof in an envelope, addressed to the parties at the addresses shown below, which envelopes were sealed, certified/returned receipt postage thereon fully prepaid, and deposited in the United States Mail at Anderson, South Carolina, and that there is regular communication by the United States Mail between the place of mailing and the place addressed as follows:

A copy of the Summons and Complaint has been served upon Defendant Southland Transportation Co., by certified/returned receipt, at its last known address.

October 4, 2019

s/Donald L. Smith
Donald L. Smith (SC Bar#6699)
Attorney for Plaintiff
122 N. Main Street
Anderson SC 29621
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Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

MAILED TO:

Honorable Mark Hammond
Secretary of State
SC Secretary of State's Office
1205 Pendleton Street, Suite 525
Columbia, SC 29201

Perry Wendell Barbour
130 Valentine Court
Martinsville VA 241120731

Southland Transportation Co.
7925 Highway 601 North
Boonville, NC 27011

NOTICE OF APPEAL
Harris, et. al., vs. Barbour, et.al.,
2019-CP-42-02092
Filed August 3, 2020

**FORM 1
NOTICE OF APPEAL**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Case No. 2019-CP-42-02092

RECEIVED
Aug 11 2020
SC Court of Appeals

Luther Harris, Donna Harris,
Bobby Leopard and Jerry White,

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

NOTICE OF APPEAL

The undersigned counsel respectfully appeals Judge J. Derham Cole's challenged Form 4/Orders, dated March 10, 2020 and July 14, 2020, respectively.

Submitted by:

s/Donald L. Smith
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Anderson, South Carolina
July 31, 2020

Other Counsel of Record

Mr. David L. Moore, Jr., Esquire
Turner Padgett Graham & Laney, PA
Post Office Box 1509
Greenville, SC 29602

CERTIFICATE OF COUNSEL

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.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certify that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material, as provided under Rule 210(g) of SCACR. Exhibits that have been duplicated in motions filed by any of the parties were eliminated for conciseness.

Submitted by:

s/Donald L. Smith

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Anderson, South Carolina

July 21, 2021

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Jul 21 2021

SC Court of Appeals