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.

FINAL BRIEF OF APPELLANTS

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
July 26, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

South Carolina Rules on Civil Procedure (SCRCP)

STATEMENT OF ISSUES

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT RELIEF FROM ENTRY OF DEFAULT.

II. WHETHER THE CIRCUIT COURT ERRED IN NOT FINDING RESPONDENT WAIVED HIS AFFIRMATIVE DEFENSE.

III. WHETHER THE DOCTRINE OF EQUITABLE ESTOPPEL APPLIES IN THE INSTANT CASE.

IV. THE CIRCUIT COURT ERRED IN NOT APPLYING THE UNCLEAN HAND DOCTRINE AGAINST RESPONDENT.

STATEMENT OF FACTS

On June 10, 2016, Appellants 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. Respondent, driving a truck owned by Southland Transportation Company, was also traveling southbound on U.S. 85 at that time. Without warning, Respondent's truck smashed into the rear of Appellants' 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 Respondent's negligence, gross negligence and reckless acts, Appellants sustained injuries that necessitated medical attention.

On June 7, 2019, Appellants filed action for damages (hereinafter referred as Spartanburg action) against Respondent 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 Padget 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. Appellants opposed Southland's Motion to Dismiss on November 26, 2019, invoking good cause and equity considerations.

Appellants thereafter attempted to serve Respondent 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 Respondent and mailed the same to Respondent's residence. When the SCDMV attempted to notice Mr. Respondent that it accepted service on a lawsuit against him, it was returned to sender. (R., p. 96).

Respondent failed to respond to the lawsuit served upon him by and through the Office of General Counsel within thirty (30) days. Thereafter, Appellants 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 Respondent, 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, Appellants' argument regarding the fact Respondent 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 Respondents' **MOTION** to **DISMISS** pursuant to Rules **12(b)(2)**, **(4)**, and **(5)**, SCRCP, should be and **IS** therefore **GRANTED** for failure of the Appellants to commence this action with effective service upon the Respondents within the applicable limitations period.

(R., p. 99).

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

Pursuant to the Order, dated March 10, 2020, Appellants filed the instant case on August 27, 2020. (R., p. 17). On September 15, 2020, Appellants served the Summons and Complaint on the SCDMV via certified mail. SCDMV sent Respondent 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, Appellants filed an Affidavit of Default on November 10, 2020 (R., p. 26), and moved for Order of Entry of Default

on November 28, 2020. (R., p. 28). On December 16, 2020, this court issued its Order of Default and Order for Hearing to Ascertain Damages. (R., p. 10).

Five (5) days prior to the scheduled damages hearing, Mr. Moore, Esquire filed a Rule 55 (c) SCRCP Motion to Vacate Entry of Default and Motion to Dismiss on February 11, 2021. (R., pp. 32-38 & pp. 45-46). He also belatedly filed an Answer on the same date. (R., pp. 40-43). The goal of these two (2) motions was to deny Appellants their right to be compensated for the injuries sustained at the hands of Respondent. The Court ruled in favor of Respondent's position, which Appellants moved for reconsideration. (R., p. 62-81). The Court denied said reconsideration in its Order, dated March 9, 2021. (R., p. 2-4).

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 Circuit judge. *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The Circuit 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).

ARGUMENTS

I.

THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT RELIF FROM ENTRY OF DEFAULT.

Appellants aver the Circuit Court erred in granting Respondent relief from entry of default based on procedural and substantial laws.

A. The Circuit Court applied the wrong standard.

Appellants submit the Circuit Court had mistakenly applied the wrong standard in vacating the entry of default against Respondent. In the instant case, default order has been entered against Respondent on December 16, 2020. (R., p. 10-12). Respondent sought relief from judgment by moving to vacate the default order under Rule 55 (c) of the SCRCP. (R., p. 31-38). But since an Order of Default has already been entered, Respondent should have applied Rule 60(b) instead. Therefore, his reliance on Rule 55(c) SCRCP and the "good cause" standard was incorrect.

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 Circuit court must also consider: (1) the timing of the motion for relief; (2) whether the Respondent 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 Circuit 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 Circuit court. *Williams v. Stalnaker*, 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), SCRCP. 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), SCRCP. 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.

Furthermore, Respondent is not entitled to relief from the default order under Rule 60(b) since the Rule requires a more stringent standard. In this case, Respondent has not alleged any mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation or misconduct on the part of Appellants to warrant a relief from the order in his favor. In fact, if there is any misconduct involved in this case, it is that of Respondent's deliberate and knowing disregard of traffic laws.

B. Respondent did not satisfy the WHAM factors.

In its Form 4/Order, the Circuit Court granted Respondent's Motion to Vacate Entry of Default, ruling that Appellants failed to establish the WHAM factors. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). Appellants argue otherwise.

In granting relief for entry of default under Rule 55(c) of the SCRCP, courts rely on a two-step analysis: 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 Appellants *Wham, supra.* Respondent failed to satisfy all three (3) aforementioned factors.

1. Respondent has not established good cause for the delay.

Respondent 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. By law, Respondents were in default. Appellants were exercising their right under the law, to move for (and obtain) an entry of default.

Furthermore, Respondent has not presented a satisfactory explanation for not filing a responsive pleading, and for the default. Neither did he offer a notarized affidavit explaining his failure to respond within 30 days.

Respondent contends Appellants failed to and/or did not attempt to determine his correct address. This argument is a clear attempt to shift the burden onto Appellants. It is not, nor may it be considered, a good cause to relieve Respondent from default. Respondent was served by certified mail and through the SCDMV according to the laws of the State. Rule 4 SCRCP and SC Code Ann. § 15-9-370.

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

2. Respondent failed to establish the WHAM factors.

Appellants posit Respondent did not establish any of the WHAM factors in his motion.

a) Timeliness of the motion

The facts of the case show the following:

i. On August 27, 2020, Appellants filed the Summons and Complaint.
ii. On September 15, 2020, the processes were served to Respondent through SCDMV
iii. Thirty-days elapsed with Respondent not filing any Answer, responsive pleading or a motion.
iv. On November 10, 2020, Appellants filed an Affidavit of Default, and moved for Entry of Default on November 28, 2020.

v. On December 16, 2020, the Circuit Court entered an Order of Default and Order for Hearing to Ascertain Damages.
vi. On February 11, 2021, Respondent filed Motion to Vacate the Entry of Default as well as moved for the dismissal of the case.
vii. On February 16, 2021, Circuit Court granted Respondent's Motion to Vacate Entry of Default.

It took Respondent four (4) months to address Appellants' Complaint, and two (2) months to respond to Plaintiff's Affidavit and Motions. Respondent took an inordinately long time in filing his Motion to Vacate and/or Set Aside Judgment.

While Rule 55(c) does not provide a specific time limit for the filing of a motion to set aside an entry of default, South Carolina courts have decided in several cases that a two-month gap between the entry of default and the motion to set aside is not a timely filing. 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, Respondent failed to act promptly in seeking relief.

b. Meritorious Defense

Mr. Moore, purportedly representing Respondent, raised several defenses such as statute of limitations, pendency of a similar action on appeal, and failure of service.

In his Memorandum in Support of Respondent's Motion to Set Aside Entry of Default, Respondent raised the defense of statute of limitations barring the present action. (R., p. 35). However, this defense has been waived when Respondent 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.

On the issue of pendency of appealed action, Mr. Moore who represented the employer in the Spartanburg case, took the position that no such action commenced. In the instant case however, Mr. Moore cited the Spartanburg as a prior action to support his attempt for relief from default judgment, in effect recognizing the existence of the Spartanburg action. Respondent should not be permitted to employ conflicting theories or to change his theory of the case. This practice has been frowned upon by the Court 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, Respondent has not provided a defense for his grossly negligent and/or reckless driving that caused severe physical injuries on Appellants. Respondent has shrouded himself with procedural arguments, never addressing the substance of the claims raised against him.

Finally, Mr. Moore contends he was not provided a copy of the Complaint, despite his involvement in the Spartanburg action. Appellants however treated the instant case as a new action based on Mr. Moore's theory that the Spartanburg action has not commenced.

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

c. Prejudice to Appellants

Appellants believe they would be highly prejudiced with the setting aside of the entry of default. It would close the door for Appellants to pursue their claims against Respondent. Appellants 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.

Appellants maintain Respondent should not be allowed to succeed in avoiding his liability, while violating the very same procedural laws he takes refuge on.

II.

THE CIRCUIT COURT ERRED IN NOT FINDING RESPONDENT HAS WAIVED HIS RIGHT TO RAISE AFFIRMATIVE DEFENSE.

In seeking to have the Default Order (Judgment) against him set aside, Respondent raised the defense of the pendency of an action involving the same parties. Appellants assert Respondent 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).

The instant Complaint was filed on August 27, 2020 and served upon Respondent, by and through the Office of the General Counsel of South Carolina Department of Motor Vehicle (hereinafter referred as SCDMV). SCDMV General Counsel accepted service on September 18, 2020. No Answer or any responsive pleadings was filed by or on behalf of Barbour within the 30-day prescribed period by law. On December 16, 2020, Appellants obtained an Order of Default for Respondent'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, Respondent filed his Motion to Vacate or Set Aside Default Judgment, Motion to Dismiss and Answer. In all three pleadings, Respondent raised the defense of pendency of action (appeal) between same parties and statute of limitations. Rule 12 (h)(1) of SCRCP[1] specifically includes pendency of action as one of the waivable defenses, while Rule 8 (c) SCRCP[2] considers statute of limitations as an affirmative defense which must be specifically pled.

[1] Rule 12(h)(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.

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

Under the Rule, a Respondent must file an Answer within 30-day period. 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, Respondent's Motion to Dismiss must have been filed by October 18, 2020. The February 11, 2021 filing, therefore, was untimely, resulting in a waiver of defenses Rules 12(b)(2), (4), and (5), SCRCP, relied upon by the Court in its decision. Respondent cannot now be awarded for sleeping on his rights by granting him relief based on defenses he has waived.

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

III.

EQUITABLE ESTOPPEL MAY BE APPLIED IN THE INSTANT CASE PRECLUDING THE APPLICATION OF THE STATUTE OF LIMITATIONS.

A. Equitable estoppel precludes Respondent's Defenses.

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

> A Respondent 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 Respondent'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 Respondent'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).

Appellants aver they complied with South Carolina procedural rules when they initially brought their claims against Respondent in Spartanburg. They were prevented from pursuing the same due to Respondent's inaccurate mailing address.

Appellants have shown Respondent had 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. Appellants discovered Respondent 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 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 sun-shading	089GT9500043700	Guilty in absentia

Clearly, Respondent 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.

By working as a truck driver using South Carolina roads, Respondent is presumed to know and abide by its laws. Under S.C. Code Ann. §s 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, Respondent made himself available for SCDMV to notice in case of any motor vehicle accident. Respondent did not provide correct contact details nor updated his mailing address The fact he never changed his address with the state DMV is proof positive that he drives without regard for those around him. (as evidenced in the Incident Report).

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

> 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).

Due to his reckless and willful disregard of the laws of this State, Respondent should not be allowed to benefit from the defenses and/or advantages available under the very law he violates.

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

The courts have barred inequitable reliance on statute of limitations applying the maxim "no man may take advantage of his own wrong". Glus v. Brooklyn E. District Terminal, 359 US 231 (1959), 79 S.Ct. 760, 762, 3L.Ed 2d 770 (1959). In the cited case, the Court refrained from dismissing Petitioner's Complaint based on Respondent's claim that the same was barred by Statute of Limitations, where Petitioner argued Respondent induced the delay in filing through its misrepresentation.

The Court in Glus declared:

> Despite the delay in filing his suit petitioner is entitled to have his cause tried on the merits if he can prove that respondent's responsible agents, agents with some authority in the particular matter, conducted themselves in such a way that petitioner was justifiably misled into a good-faith belief that he could begin his action at any time within seven years after it had accrued.

Glus, supra.

Applying the above ruling in the instant case, it may be argued considering Respondent's history, his willful, wanton, and deliberate failure to provide a current mailing address can only be seen as a misrepresentation with objective of escaping his liability for reckless tortious actions.

Appellants believe that the Barbour's successful withholding of his actual addresses caused the statute to be an issue, when it would not have been had he kept the State or Appellants

aware of his location given the opportunity given by South Carolina for Respondents to take their products on the highways of this State.

In an out-of-state case that bears resemblance to the instant action, the New York Supreme Court, using the "interest of justice" doctrine, allowed the filing of a third complaint, where Plaintiff's initial complaint was filed within the Statute of Limitations but where service was defective. Henneberry v. Borstein, 2012 NY Slip Op. 00235 [91 AD3d 493].

The Plaintiff in the above-cited case filed a legal malpractice and breach of fiduciary complaint against Respondent 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 Respondents 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, Respondents 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, Respondent 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. Respondents 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 Respondents by hiring process server within the 120-day time requirement, Respondents' 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 Plaintiff failed to show good cause for failure to serve her respective processes within the 120 days, using the "interest of justice" standard, it may grant Plaintiff's extension of time to serve where the statute of limitations had expired in order to avoid "harsh result" to the Plaintiff.

IV.

THE CIRCUIT COURT ERRED IN NOT APPLYING THE UNCLEAN HAND DOCTRINE AGAINST RESPONDENT.

Appellants submit 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 Respondent. 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).

Respondent is bound by both Virgina and South Carolina laws. As a resident of the State of Virginia, he is mandated to notify the Department of any change of address. Virginia Code §46.2-324 (R., p. 107). Since Respondent presented a driver's license with the Virginia address, Appellants (and the SCDMV) can safely assume Respondent may be found in the said address.

As a motorist who ply the streets and highways of South Carolina, Respondent is expected to abide by its laws. He knew he had an obligation to keep his contact information

updated under both laws. He has continuously violated the laws and evaded responsibility as evidenced by the number of traffic infractions in which he was found guilty in absentia, presumably due to the inability of Appellants to reach out to him. (R., p. 110).

CONCLUSION

Based on the foregoing, and in the interest of justice, Appellants move for this Court to reverse the Circuit Court's Orders, dated February 16, 2021 and March 9, 2021, and remand the case to allow the parties litigate this matter on its merit.

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

Anderson, South Carolina
July 26, 2021.

RECEIVED
Jul 26 2021
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.

CERTIFICATE OF COUNSEL

I HEREBY CERTIFY that aside from correction of pagination in the Table of Authorities and the body of the brief to conform to the Record on Appeal, this Final Brief of the Appellants in the above-captioned case complies with Rule 211 (b) SCACR.

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
July 26, 2021