THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable James O. Spence,
Lexington County

CASE NO. 2009-CP-32-5373

RECEIVED
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SC Court of Appeals

Regions Bank ....Plaintiff

vs.

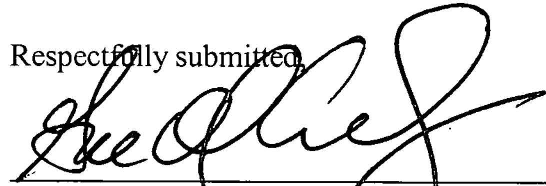
William S. Owens, David S. Hostetler,
Roland G. Paddy and Greer State Bank.. Defendants

OF WHOM:
William S. Owens is...Appellant
and
Regions Bank, Roland G. Paddy
and Greer State Bank are...Respondents

PETITION FOR REHEARING

The Appellant/Petitioner, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for a rehearing of its decision filed April 10, 2013 and received by Appellant's counsel on April 12, 2013. The basis of this Petition for Rehearing is the attached Memorandum of Law.

Respectfully submitted,



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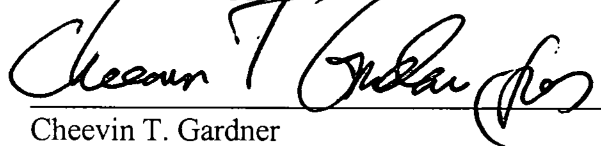

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April 19, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable James O. Spence,
Lexington County

CASE NO. 2009-CP-32-5373

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OF WHOM:
William S. Owens is...Appellant
and
Regions Bank, Roland G. Paddy
and Greer State Bank are...Respondents

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING

The Appellant moves the Court for a rehearing pursuant to Rule 221 of the South Carolina Appellate Court Rules. The basis of this Petition for Rehearing is as follows:

1. The Court's decision that Owens did not raise the issue of an entry of default by the Clerk of Court prior to the Order of the Master referring this case is erroneous as a matter of law. The error being that lack of jurisdiction can be raised at any time. Further, Appellant raised this issue when he requested he be allowed to file a late Answer before the Master.

2. The Court erred in finding that Owens did not demonstrate good cause. The error being that the Court was required to consider the *Wham* factors in deciding whether good cause was shown after an explanation was offered.

3. The Court erred as a matter of law in upholding the Master's decision which relied on *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 529 (Ct. App. 2002). The basis of this error is that *Pilgrim* had been withdrawn and that case had no application to the facts of this matter because there was neither an attorney or insurance company in default as cited in the Opinion.

I. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN RULING THAT OWENS DID NOT RAISE THE ENTRY OF DEFAULT ISSUE BEFORE THE TRIAL COURT.

This Court found that Owens should have raised the issue that the Lexington County Clerk of Court did not formally enter a default against Owens before the proceeding before the Master-In-Equity.[1] Appellant believes that this was a jurisdictional issue which can be raised at any time either in this Court, the Master-in-Equity's Court or in the Supreme Court. The facts of this case are compelling since an entry of default was never entered prior to the referral to the Master.

On March 2, 2010, Judge William P. Keesley signed an Order of Reference referring this matter to the Lexington County Master-in-Equity, James O. Spence. In his Order, Judge Keesley noted:

> AND IT FURTHER APPEARING that Defendant William[s] S. Owens and Defendant David S. Hostetler have failed to file responsive pleadings to the Summons and complaint herein and are in default, pursuant to the Affidavits of Default and Non-Military Service filed herein <u>or that shall be filed soon</u>. (R. pp. 30-31)

[1] Plaintiff's counsel put the "cart before the horse." He had the case referred to the Master before holding Owens in default or filing an affidavit of default.

It is undisputed that at the time the Order of Reference to the Master-in-Equity was executed and filed neither the Clerk of Court of Lexington County nor Plaintiff's counsel had entered a default against William S. Owens. Further, the Affidavit of Default signed by Regions Bank's counsel was not filed until March 19, 2010 -- 17 days after the Order of Reference referred this case to the Master in Equity without the consent of Owens. (R. pp. 30-31; R. pp. 44-45).[2]

Counsel believes that such actions created a lack of subject matter jurisdiction in that the case could not be referred to the Master-in-Equity because there was no official entry of default and there had been no consent by Owens to refer it to the Master-in-Equity.

If there is lack of jurisdiction, there is no power to act. Accordingly, the Master-in-Equity's judgment on the Order of Default was a complete nullity and had no legal effect. This lack of jurisdiction cannot be waived by consent and can be questioned for the first time on appeal. See *Petroleum Transportation Co. v. Public Service Commission*, 255 S.C. 419, 179 S.E.2d, 326 (1971). Further, if there is a lack of jurisdiction there is no power to issue a ruling. See *S.C. Dept. of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 675 S.E. 2d 756 (S.C.App. 2009). See, also, *Thomas and Howard v. T.W. Graham*, 318 S.C. 286, 457 S.E.2d 340 (Ct.App. 1995) (a void judgment is a complete nullity and has no legal effect).

In this case, the due process defects in the procedure caused prejudice and warrant reversal. *Chastain v. Hiltabidle*, 781 S.C. 501, 673 S.E.2d 826 (Ct.App. 2009). It is axiomatic that in order for the circuit court to refer a matter to the Master-in-Equity, an entry of default must have been filed prior to the Order of Reference. The Supreme Court of this

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[2] It seems elementary that a default must be entered prior to Order of Reference or at the very least Appellant had the right to be notified and heard prior to Judge Keesley referring the case to the Master. (Due process demands it.)

state has held on numerous occasions that judgments were void where an itemized verified statement of account was not attached to a complaint which made it so deficient as to not entitle the plaintiff to a judgment. (That situation is analogous to this one.) See *Knight v. Martin*, 230 S.C. 460, 96 S.E. 2d 473 (1957) and *H.W. Carriker Co. v. Johnson*, 286 S.E.2d 140 (S.C. 1982).

Finally, Owens was entitled to relief from the Order as a matter of right. In *Richardson Construction Co. v. Meek Engineering & Construction, Inc.*, 313 S.C. 360, 262 S.E. 2d 913 (1980), the Supreme Court noted: "Relief from default judgment when grounded upon a lack of jurisdiction is not discretionary but a matter of right."

Here, the Master-in-Equity lacked jurisdiction (subject matter and otherwise) to hear this case because no entry of default had been filed in the Lexington County Clerk of Court's Office and the Order of Reference had been signed 17 days prior to the Affidavit of Default being entered. (A serious procedural defect.) Finally, Owens had not consented to such an Order of Reference. This lack of jurisdiction is not waivable and may be raised at any time. (See Order of Reference, R. pp. 30-31; and Affidavit of Default as to Defendant William Owens, R. pp. 44-45).

Also, these same issues were raised by Owens when he filed a request for a late Answer. Such request for a late Answer was encompassed in Defendant Owens' Memorandum in Support of His Motion to Set Aside Default and Leave to File Answer because no default was ever entered. (R. pp. 54-61). Owens requested he be allowed to file a late Answer <u>before being held in default</u>.[3]

[3] Neither the court nor Plaintiff's counsel had filed an entry of default or affidavit of default <u>prior</u> to the Order of Referral.

In sum, Appellant suggests to the Court that it was erroneous for the Court to find that the issue of the entry of default had not been raised when such issue was raised and can be raised at any time because of the subject matter jurisdiction of the Master-in-Equity to be referred a case prior to the filing of an Affidavit of Default. It follows, if there is no entry of default filed with the Clerk and the Order of Reference filed by the circuit judge was prior to the Affidavit of Default, there cannot be an order holding an individual in default. This procedural defect cannot be over looked. The Master clearly lacked jurisdiction to hear this case and as a result his Order should be overturned because it is void.

II. THE COURT ERRED IN FINDING THAT OWENS DID NOT DEMONSTRATE GOOD CAUSE.

In its Opinion, this Court found that good cause had not been shown because Owens had executed a Power of Attorney to a co-Defendant.

In the instant case. Owens, a 79 year old high school graduate and welder, was served with the Summons and Complaint in this action at his welding business in Myrtle Beach, South Carolina. (Depo. of Owens, R. p. 390, lines 1-10). Owens immediately contacted Paddy who had previously convinced Owens to invest in the subject property. (Depo. of Owens, R. p. 396, lines 20-25). (Owens had previously given Paddy $100,000 for investment since the property had drinkable water on it that Paddy planned to bottle and sell). (Depo. of Owens, R. p. 368, lines 10-20). Once suit was filed, Paddy told Owens that he had hired a lawyer in Columbia and that he would take care of the lawsuit. Paddy stated in his deposition that, "I was looking out for him and myself." (Depo. of Paddy, R. p. 517, line. 3). Paddy also admitted that he told Owens that he had a lawyer in Columbia. (Depo. of Paddy, R. p. 515, lines 24-25). Owens asserts that Paddy told him that he "didn't have to worry" and that he and his lawyer would "take care of it." (Depo. of Owens, R. p. 394, line

25 and R. p. 395, line 1). More specifically, Owens has stated that Paddy indicated to him that he would have his attorney answer the Plaintiff's Complaint on both their behalves. (Affidavit of William Owens, R. p. 49).

Further, when Owens moved for reconsideration of the order before the Master, the Court found: "The facts indicate Owens made a unilateral mistake in assumption that Paddy would file an Answer on Owens' behalf." (Order Denying Defendant's Motion for Reconsideration dated March 9, 2011, R. p. 18). Appellant asserts to this Court that a unilateral mistake does constitute good cause for a late Answer (especially when there has been no entry of default under SCRCP 55(c)) and that this Court committed an error of law in failing to find that a unilateral mistake was good cause under the more liberal standard allowed under SCRCP 55(c). Appellant points to *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011). (A party should give a reason why the vacation of the default entry would serve the interest of justice).[4] See also, *ITC Commercial Funding, LLC. v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (2011). (Appellant's reason for not answering was appropriate under SCRCP 55(c) but not under SCRCP 60(b).)

In sum, because Appellant had a reason (and there was no entry of default), the Court should have applied the *Wham* factors and was required to do so under the law. See *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Here, Owens put forth a reason for his failure to Answer timely and this Court had to as a matter of law consider the *Wham* factors. The failure to do so is error and this Court should reconsider its decision because the *Wham* factors were not considered in the Court's Opinion.

[4] Here, there was never an entry of default, thus, the vacating of the Order is in the interest of justice.

If the *Wham* factors had been considered, those factors would have required reversal of the Master. Since there was never an entry of default by the Clerk, the timing of the motion for relief was thus open. Owens had a meritorious defense and the prejudice to Owens was extreme in that an Order of Default was entered against him without a trial. It follows that in order for the *Wham* factors to be even considered, the entry of default must have been entered first. (This did not happen in this matter.) Finally, when it became apparent to Owens that he was late in answering, he immediately took action upon notice by the Master-in-Equity that a hearing was to be held -- he hired counsel.[5]

III. THE CITATION OF *PILGRIM V. MILLER*, 350 S.C. 637, 567 S.E.2d 529 (Ct. App. 2002) WAS AN ERROR OF LAW.

This Court noted that the Master cited *Pilgim* for the proposition that a defendant's mistaken belief that a fellow defendant would file an answer on his behalf does not meet the good cause standard. Appellant believes this to be error in that the law is clear that once a reason is given for the default, then the *Wham* factors must be considered regardless of the reason.

This Court in affirming the Master's Order denying Owens' Motion to set aside the default, noted the citation of *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 529 (Ct. App. 2002) was appropriate. Appellant suggests this was an error of law. The Supreme Court vacated *Pilgrim* on July 23, 2009 in the case of *Bage LLC v. Southeastern Roofing Co. of Spartanburg*, 383 S.C. 49, 681 S.E.2d 867 (2009). Further, the citation of *Pilgrim* is wholly inappropriate in this case because Owens was not an attorney or an insurance company as was cited in *Pilgrim*. In fact, Owens is an elderly man with limited experience and education in legal matters who relied on Paddy to assist him with this lawsuit. Imputing

[5] There has never been a standard established by the Appellate Courts in filing a late Answer.

negligence to a defaulting Defendant because of his attorney or insurance company is vastly different than a man of limited education such as Owens relying upon his friend to assist him in this case. Insurance companies and attorneys are sophisticated in the matter of litigation and understand that Answers must be filed promptly. Owens did not understand this, nor as has been indicated before, did he ever get served with an entry of default. He took action immediately after being advised of a hearing. South Carolina Rule of Civil Procedure 55(c) provides that good cause should be liberally constructed to promote justice and have cases decided on the merits. The citation of a case (Pilgrim) that was vacated by the South Carolina Supreme Court was error especially in an attempt to draw an analogy to Owens who was neither an attorney or an insurance company and as a result, Pilgrim certainly had no application in this case.

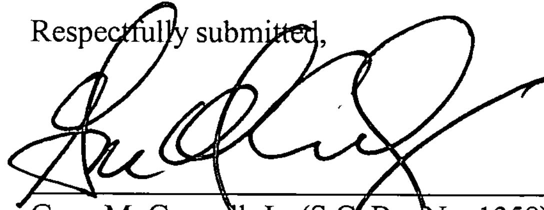
CONCLUSION

In this case, the trial court was without jurisdiction to decide this matter in that the Order of Reference was issued prior to the Affidavit of Default being filed by counsel for the Bank. Further, because there was no jurisdiction, the Master-in-Equity was without authority to hear the case. A case may only be referred to the Master in this state under two conditions: (1) consent by the parties; or (2) default by the defendants. In this case, Owens gave no consent nor was he consulted about the Order of Reference and an entry of default had not been entered. Accordingly, the Court did not have jurisdiction and the Order holding Owens in default was void.[6]

Further, Owens showed good cause and the Order of this Court finding *Pilgrim* was applicable was an error of law in that *Pilgrim* had been withdrawn by the Supreme Court.

[6] It follows to be held in default you must have been declared in default, which simply didn't happen in this case.

Respectfully submitted,



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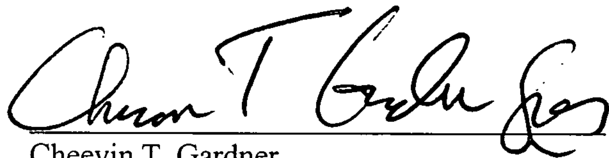

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April 19, 2013

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James O. Spence, Master in Equity, Lexington County

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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the Petition for Rehearing and Memorandum in Support of Petition for Rehearing on the Respondents, through their attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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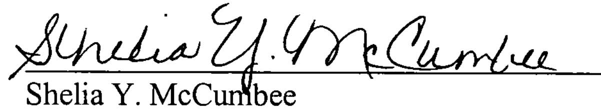
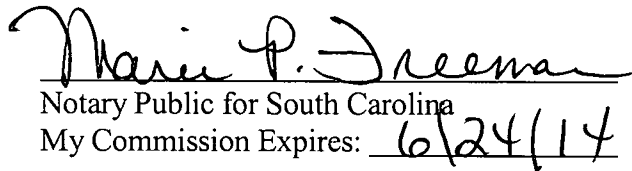
DATE OF MAILING: April 19, 2013



Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 19th day of April, 2013



Notary Public for South Carolina
My Commission Expires: 6\24\14

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April 19, 2013

The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
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RECEIVED
APR 22 2013
SC Court of Appeals

Re: *Regions Bank v. William S. Owens, et al.*
Appellate Case No. 2011-193586
Case No. 2009-CP-32-5373
Our File No. 2011-0150C

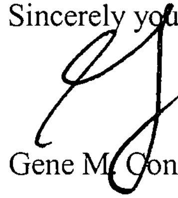
Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Appellant's **Petition for Rehearing, Memorandum of Law in Support of Petition for Rehearing** and **Proof of Service** of same in the above-captioned matter. I enclose our check for $25.00 for the filing fee. Please return a filed copy to this office in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated document on Respondents through counsel of record.

With best regards, I am

Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Stephen P. Groves, Sr., Esquire
R. Bruce Wallace, Esquire
William Wesley Johnson, Jr. Esquire
S. Brook Fowler, Esquire
Cheevin T. Gardner, Esquire