THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
Case No. 2010-CP-26-5146

Jane "AP" Doe,

Respondent,

v.

Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology and Arrhythmias Consultant, Institute of Electrophysiology, P.C.,

Defendants

Of Whom

Omar Jaraki and Halla Jaraki, are

Appellants

FINAL BRIEF OF APPELLANTS

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II. May defendants' failure to follow the pre-suit mediation process set out at, inter alia, S.C. Code Ann. §15-79-125, constitute a basis for the Trial Court to prohibit the filing of a responsive pleading or otherwise allowing the defendant to defend against the action in a subsequent law suit?

STATEMENT OF THE CASE

On January 15, 2010, in case 2010-CP-26-395, Plaintiff filed a Notice of Intent to File Suit pursuant to S.C. Code Ann. §15-79-125. The complaint named *Jane AP Doe* as the plaintiff. Counsel did not use the party's real name. On May 14, 2010, an "Order Terminating Pre-litigation Mediation" from mediator John Breeden issued. On June 11, 2010, the civil action *Jane AP Doe v. Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology & Arrhythmias Consultant and Institute of Electrophysiology, PC,* was filed and given case number 2010-CP-26-5146. On October 12, 2010, an affidavit of default was filed by plaintiff's counsel. On November 22, 2010, a motion for relief from default was filed by defendants. On March 7, 2011, a hearing was held on defendant's motion for relief. On March 10, 2011, a form-Order/Disposition of Motions-was filed denying defendants' motion and granting plaintiff's motion for default. A written order denying the motion for relief was entered May 20, 2011. On June 2, 2011, Appellants filed a timely Motion to Reconsider. A Form 4 Order denying Appellants' motion to reconsider was entered August 17, 2011 and an Appeal was taken. Following an objection by Respondent this Court dismissed the appeal on December 8, 2011, as interlocutory.

A damages hearing was held on April 9, 2012, before the Honorable Benjamin H. Culbertson, Judge. At that hearing Judge Culbertson awarded Respondent damages in the amount of $179,090.00. A Form 4 Order affirming the award was entered on April 10, 2012. Appellants filed a motion for clarification on or about April 19, 2012, seeking a determination of whether the damages were actual, or punitive, or a combination thereof. On July 26, 2012, Judge Culbertson signed an order of July 26, 2012, stating that the

damages awarded were "actual" damages.

ARGUMENT I

I. The letters filed by the defendants with the Clerk of Court were answers, or at minimum, constituted steps which Appellants took to "otherwise defend" this action and were therefore legally sufficient to avoid default under S.C.R.C.P. 55. (Question I)

In this argument, Appellants assert that letters they sent to plaintiff's counsel within the thirty (30) day period following the date of service of the complaint, seeking additional information about the identity of the plaintiff, were legally sufficient to constitute a responsive pleading. Moreover, the letters indicated that the Appellants had undertaken efforts to "otherwise defend" the action in order to avoid default under S.C.R.C.P. 55. Lastly, when the identity of the plaintiff had been properly disclosed, the Appellants needed assurances that they had the requisite permission to discuss Respondent's medical records with their own counsel.

Background

A. The Notice of Intent to File Suit: Case 2010-CP-26-395

This is a medical malpractice case filed by Respondent. Initially, on January 15, 2010, Plaintiff filed a Notice of Intent to File suit pursuant to S.C. Code Ann. §15-79-125. **R.13.** The filing was given case number **2010-CP-26-395**. Additionally Plaintiff filed answers to rule 33(b) standard interrogatories.[1] Counsel did not use the plaintiff's real name, but rather he used the name *Jane AP Doe.* This "pre suit" filing case number, **395**, was different from the case number given the law suit which was subsequently filed

[1] When naming his first potential witness in the interrogatory responses, plaintiff's counsel wrote: "Jane AP Doe. Plaintiff in this action. Her expected testimony is in accordance with the facts known and damages sustained." **R. 24.** Thus, this "disclosure" provided nothing by way of information regarding plaintiff's identity.

on June 11, 2010. The actual law suit was given case number 2010-CP-26-**5146**. On March 24, 2010, in case 2010-CP-26-395, plaintiff's counsel sent a letter sent to the Appellants giving them notice of mediation pursuant to S.C. Code Ann. §15-79-125. **R. 24.** The date which had been set for mediation was April 27, 2010. **Id.** This correspondence predated Appellants' learning of the identity of the plaintiff. Appellant, Halla Jaraki, stated that on April 1, 2010, in case 2010-26-395, she filed a letter she had sent to plaintiff's counsel asking for information in order to identify the plaintiff correctly.[2] **R. 103.** Mrs. Jaraki told Respondent's counsel that she did not have a patient by the name of *Jane AP Doe* in their data base. In her letter, Appellant requested the name; address; date of birth; social security number; and a copy of the patient's driver's license. **Id.** Further, in case 2010-26-395, Dr. Omar Jaraki testified by affidavit that he had sent a letter dated March 24, 2010, to plaintiff's counsel asking for the same information requested in the letter sent by Mrs. Jaraki. **R. 104**. Appellants did not attend the mediation on April 27, 2010, as they had not yet learned even the identity of the plaintiff by that date.

After the scheduled date for mediation had passed, on May 3, 2010, Respondent finally sent a letter to Appellants providing the actual name of the plaintiff: *Amanda Peele.* **R. 106.** This was in response to Appellants' letters asking for the name of the plaintiff. This letter referenced case *2010-26-CP-395*. On May 14, 2010, an "Order Terminating Pre-litigation Mediation," was signed by mediator John Breeden. **R. 1**. Respondent did not offer to mediate the case again after disclosing the identity of the plaintiff.

B. The Law Suit: Case 2010-CP-26-5146

[2] Though filed on April 1, 2010, the letter was actually dated March 31, 2010. **R. 103.**

On June 11, 2010, civil action *Jane AP Doe v. Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology & Arrhythmias Consultant and Institute of Electrophysiology, PC,* was filed. This filing was given case number *2010-CP-26-5146.* This action was served on Dr. Jaraki on June 28, 2010; **R. 41,** ¶ 2, and it was served on Mrs. Jaraki the next day on June 29, 2010. **R. 45, ¶ 2** . On July 9, 2010, eleven (11) days after service, a letter from Dr. Jaraki to plaintiff's counsel was filed with the Court (and sent to plaintiff's counsel according to Dr. Jaraki) requesting identification of *Jane AP Doe*. **R. 108**. The letter stated that the name; address; date of birth; social security number and a copy of the driver's license were all needed in order to respond to the complaint. **Id.**

It is important to note that this letter was made in reference to action *2010-CP-26-**5146**, **not 395.***[3] Mrs. Jaraki testified by affidavit that she sent a letter seeking the same information to Respondent's counsel. **R. 45.** It too was filed with the Court. She stated this information was needed in order to identify the patient; it was also necessary due to the sensitive nature of medical records themselves. **Id.** On July 20, 2010, a letter was sent from plaintiff's counsel denying that he received the letters sent by the Jarakis to him in this case. **R. 109.**[4] Contesting this claim by counsel, both Dr. and Mrs. Jaraki filed affidavits stating that they had mailed the letters to plaintiff's counsel.[5] **R. 41-48.**

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[3] Respondent has argued that plaintiff's name had been provided to the Appellants by this (July 9th, 2010) date. However, again, Appellants point out that that identification was with respect to civil action **395**. The Appellants did not assume nor did they know that the identity of the complainant in action 395 was one in the same as the plaintiff in civil action 5146. Regardless, Appellants' letter of September 20, 2010, indicates that they were aware of plaintiff's identity and knew they needed her permission to discuss her medical records with defense counsel. **R 104** .

[4] The July 20, 2010, letter that Respondent's counsel sent to the Appellants was apparently intended to provide the information sought regarding the plaintiff's identification. However, the letter actually confirms that Amanda Peele was the plaintiff in case ***395* only.** It fails to state

In his July 20th letter, Respondent's counsel identifies the proper name and identify of the plaintiff in case 5146. However, counsel goes on to state the following:

> For clarification purposes, my client's date of birth is 8/2/66 and your medical record number for her according to your records is 0000362. Any additional information requested on my client will need to be made ***through formal discovery requests. If you have retained legal counsel*** to represent you in this matter, please let me know their name or have them contact me directly.

R. 109. Emphasis added. It is reasonable to assume that counsel's use of the terms "formal discovery requests" and retained "legal counsel" reminded the reader of the formal nature of the proceedings against Appellants. It also brought to fore applicable rules of discovery and thus, requisite disclosure of confidential medical records of former patients.

On September 20, 2010, Appellant Halla Jaraki sent al letter to plaintiff's counsel *asking for notarized permission from Amanda Peele to discuss her medical record with her "counselors" and any agency or person necessary.* **R. 110**. The same request was sent from Dr. Jaraki to counsel regarding the confidentiality issue relating to Respondent's medical records. **R. 111.** Respondent ignored the requested notarized permission allowing the Appellants to discuss Amanda Peele's medical records with third parties. Rather than responding to that request, plaintiff's counsel filed an affidavit of default on October 12, 2010. **R. 37.** We submit the affidavit erroneously ignored both the communications Appellants had had with Respondent's counsel, and the privacy concerns expressed by Appellants with respect to Amanda Peele's medical records. Also,

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affirmatively, and could have done a better job in confirming, that Amanda Peele was also the plaintiff in case 5146 as well.

[5] The affidavits were made a part of the record before the Court at the hearing had on Appellant's motion for relief from default which was held on March 7, 2011.

the affidavit was factually incorrect.[6] Appellants' letter relating to the identity of the plaintiff was a reasonable and necessary step to take while simultaneously indicating their intent to "otherwise defend" against the allegations contained in respondent's complaint.

C. The Hearing on Relief from Default

On November 22, 2010, a motion for relief from default was filed by Appellants. **R. 39.** A hearing was held on March 7, 2011, on defendant's motion. During the hearing, Respondent's counsel told the trial Court that,

> We filed a notice of intent to file suit against the defendants...over a year ago. ***We heard back from the Defendant***. He did not know who the Plaintiff, who the Plaintiff was by the name, by the caption." . . . And we sent him a letter on March 24, 2010, telling him who the parties were identifying Ms. Peel.

Emphasis added. **R. 62, line 21 – R. 63, line 3**. Thus, at this hearing, counsel miss-spoke. While stating that he had indeed, "heard back from the Defendant" (a position he later ***denied*** by stating he had not received Appellant's letters, see **R. 70, lines 12 – 14)** counsel seemed to say that he had provided identity information prior to the mediation conference date, but not the date of the mediation itself. **R. 63, lines 6 – 8.**[7] This of course is incorrect and a reversal of what occurred. Notice of the date was provided, but not the identity of plaintiff. The trial Judge clearly relied on this erroneous identification timeline, see e.g. **R. 65, lines 14 – 24**, (where Judge Culbertson states, "And he notified him back in March as to whom the Plaintiff was and they required the mediation)."

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[6] Paragraph "3" of the affidavit states in part, "no Answer, Motion or Notice of Appearance has been made therein; and that said Defendants are now in default." **R. 37,** ¶ 3.The Appellants had "otherwise defended" the action pursuant to S.C.R.C.P. 55 we submit.

[7] Counsel stated, "On May 3, 2010, we sent him a letter advising him that Judge Breeden was going to hold the pre-suit mediation. **R. 63, lines 6 – 8.** The pre-suit mediation was set for April 27, 2010.

Furthermore, Respondent's counsel confused Appellant's counsel as well.[8] Appellants continued to argue that their letters constituted a general denial, **R. 66 lines 4 -5**; and that the Appellants' affidavits established a question of fact in the face of counsel's denial, as to whether the letters were mailed to, or received by, Respondent's counsel. **R. 66, lines 21 – 22.**

Respondent's counsel told the Court that, "we searched the court files every week to see what's going on in these kind of cases and he filed a letter with the clerk's office on July 9th saying he did not know who the client was again." **R. 63, lines 21 – 24**. Thus, Appellants' letters filed with the Court on July 9, 2010, coupled with this statement by Respondent's counsel and his own written response thereto, support the fact that Appellants' letters *were known to, and had been read by, counsel* for Respondent before he filed the affidavit of default.

On March 10, 2011, a Form 4 order was filed denying defendants' motion and granting plaintiff's motion for default. A written order denying the motion for relief was entered May 20, 2011. In the Court's opinion, it is stated,

> The letters filed by the Defendants with the Clerk of Court were not responsive pleadings and therefore the Defendants are in default. Furthermore, this court has inherent authority to enforce the Provision of S.C. Code Ann § 15-79-125 . . . and the Court hereby enforces the requirements of S.C. Code Ann. § 15-79-125 by prohibiting the filing of responsive pleadings.

R. 4 . Thus, the trial Court never analyzed this case as to whether "good cause" existed

[8]Appellants' counsel stated, "I can't speak to that. That generally would be a correct statement, Your Honor. . . ." [Y]ou've got a general denial that was filed with the clerk's office on July the 9th. **R. 65, line 25 – R. 66, line 5.** Subsequently, Appellants' counsel walked back on the "correct statement" acquiescence and he did say he "...was not willing to concede all this knowledge, etcetera, that Mr. Furr imputes to the Jarakis." **R. 67, lines 8 – 9.**

or not with regard to setting aside the entry of default pursuant to S.C.R.C.P 55. The Court stopped its analysis when it found that the letters did not constitute a responsive pleading. Moreover, the Court erroneously diverted the process by interjecting S.C. Code Ann. § 15-79-125, the pre-filing statute dealing with Notice of Intent to File Suit.

Appellants' Motion to Reconsider

On June 2, 2011, Appellants filed a timely Motion to Reconsider. The motion was based on the following grounds:

> (1) The letters filed by the defendants with the Clerk of Court were legally sufficient to avoid default;
>
> (2) Defendants failure to follow the pre-suit mediation process set out at, inter alia, 15-79-125 may not constitute a basis for the Court to prohibit the filing of a responsive pleading; and
>
> (3) notice of the identity of the plaintiff and a willing failure to attend the pre-suit mediation may not constitute a basis for holding the defendants in default under the facts of this case because the Court has (a) interjected a weighing of credibility of the affiants in their respective affidavits in the final order (b) without permitting them to testify in person before the Court at the hearing on relief from default or (c) allowing counsel or the defendants to be heard on the issue of credibility and (d) without notice to the defendants that the Court was going to do so in this instance.

R. 82. A form 4 order denying Appellants' motion to reconsider was entered August 17, 2011. **R. 9**. We submit that the Court erred when it denied Appellants' motion for relief from default and when it denied Appellants' motion to reconsider. The letters were sufficient to constitute a general denial under S.C.R.C.P. 55, and certainly expressed Appellants' intent to "otherwise defend" against the action. **R. 66, ones 13-21; R. 67, lines 13-16; and R 72, lines 12-17.** Furthermore, the issue of patient confidentiality exists in this case. For example, may the Appellants discuss plaintiff's medical records

with defense counsel? Lastly, Appellants submit that S.C. Code Ann. § 15-79-125 should not have entered into the Court's equation, because it interfered with the Court's analysis of whether good cause had been shown in support of setting aside the default pursuant to Rule 55.

STANDARD OF REVIEW

In *Sundown v. Intedge Industries*, 383 S.C. 601, 607-608, 681 S.E.2d 885 (2009), the Court discussed the standard of review for the setting aside of default under S.C.R.C.P. 55 and 60.

> "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 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. 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.

We submit that Appellants' letters of July 9, 2010, sufficiently traversed the allegations in the complaint so as to constitute responsive pleadings and a general denial. Even if the letters failed to do so, the Appellants have "otherwise defended" against the action. Moreover, because of federal law privacy concerns, Appellants have shown good cause for their failure to file a timely answer because Respondent (1) did not timely disclose the identity of the Respondent and (2) she never supplied satisfactory assurance that plaintiff had consented to waive privacy interests in favor of Appellants' right to discuss litigation claims with counsel.

Discussion

Defendant Omar Jaraki was a licensed physician and cardiologist practicing

medicine in Horry County, South Carolina.[9] Defendant Halla Jaraki is Dr. Jaraki's wife and she assisted him in his medical practice in Conway, South Carolina, in a support staff role. Plaintiff is a past patient of Dr. Jaraki and has filed this action which includes numerous causes of action based on the same conduct which alleges that he improperly sexually penetrated her with his fingers during an office visit. **R. 28, ¶ 15.**

Prior to the mediation date, Plaintiff had failed to tell the Jarakis that *Jane AP Doe* was not the real name of the plaintiff in this action, and thus not the real name of Dr. Jaraki's patient. Counsel neglected to tell the defendants that the caption contained a *pseudonym or anagram.* The letter of correspondence filed by Dr. Jaraki on July 9, 2010, and which he mailed to plaintiff's counsel according to defendant's affidavit, contains a denial. The letter states referring to his patients' records, in part, "I do not find anybody by name *Jane AP Doe.*" **R. 108**. We submit this statement by Dr. Jaraki constitutes a denial under S.C.R.C.P. 8, and constitutes an effort to "otherwise defend" against this action as contemplated by S.C.R.C.P. 55. Both Dr. Jaraki and his wife, Halla, are from Syria. They reasonably did not understand plaintiff's use of a pseudonym or anagram such as *Jane AP Doe* to conceal the identity of the plaintiff.

S.C.R.C.P. 8 states in part, "If he [the defendant] is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and ***this has the effect of a denial.***"[10] Emphasis Added. Both letters sent by the Jarakis, that

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[9] Defendant's license to practice medicine has been temporarily suspended pending resolution of allegations which have been made against him of a nature such as those made in this litigation.

[10] Rule 8(b) is entitled "Defenses; Form of Denials." It reads as follows:

of Dr. Jaraki and that of his wife, state that they cannot find such a patient as "Jane AP Doe" in their records. Clearly, we submit, each defendant is stating that he and she lack sufficient knowledge to respond, and this equates with a general denial according to Rule 8. We respectfully submit, it was error for counsel to file the affidavit of default we respectfully submit, and it was error for the trial Judge to hold that Appellants' letters did not constitute a responsive pleading.

Further reason to reverse the lower court's order is that the letters sent by Appellants seeking identity information shows a clear intent to "otherwise defend" against the action as set forth in S.C.R.C.P. 55. This rule states in its pertinent part

> When a party against whom a judgment for affirmative relief is sought has failed to plead ***or otherwise defend*** as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book).

Emphasis added. Thus, it is not enough to simply not file an answer. There must be no effort to "otherwise defend" against the action.

> A party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

> "The phrase *otherwise defend* is not defined ... but is generally considered to refer "to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits. ... A default by a defendant consequently arises only when the defendant has failed to contest the allegations raised in the complaint," making default judgment proper against the defendant when "liability has been admitted or `confessed' by the omission of statements refuting the plaintiffs claims."

Equable Ascent Fin, LLC v. Christian, 196 Ohio App.3d 34, 36, 962 N.E.2d 322 (2011); and see cases collected and cited therein: *Heritage Realtors v. Kahmann* (Apr. 26, 1993), 12th Dist. No. CA92-09-082, 1993 WL 128116 (deciding that by contesting the case through a motion for change of venue, the defendant had "otherwise defend[ed]" so as to avoid default judgment); *Murphy v. Alhajj* (June 3, 1999), 8th Dist. No. 74198, 1999 WL 359197 (determining that the defendant's motion to consolidate three small-claims cases and transfer them to the general division of the civil docket, to which the defendant attached an affidavit from his attorney explaining why the plaintiff was not entitled to the money he sought, coupled with the defendant's presence at the first hearing in the small-claims court, "indicated that the complaint was contested," the defendant otherwise defended, and default judgment was not proper); *Stradiot Specialty, Inc. v. Am. Calendar Co., Inc.*, 11th Dist. No. 2004-L-162, 2007-Ohio-3364, 2007 WL 1881309 (stating that a defendant's "motion to dismiss and a motion to transfer the matter to a foreign jurisdiction" as well as the defendant's attempt "to file an untimely answer" and "motion for summary judgment" meant that the defendant had otherwise defended against the plaintiffs claims and "could not be held in default").

A showing of good cause contemplates a lesser standard than the, "... more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly

discovered evidence, fraud, misrepresentation, or `other misconduct of an adverse party," than setting aside a default Judgment pursuant to S.C.R.C.P. 60(b). *ITC Commercial Funding, LLC v. Crerar,* 393 S.C. 487, 713 S.E.2d 335 (Ct.App. 2011). While Appellants need not have shown an actual meritorious defense under rule 55 (see ITC Commercial Funding, LLC supra, at 393 S.C. at 494, "...although the Appellant may have had good cause to set aside the entry of default under Rule 55, SCRCP, [without showing a meritorious defense] she did not meet the standards established by Rule 60(b), SCRCP, to set aside the judgment,") the Appellants did proffer a meritorious defense. In the Answer filed with their motion for relief from default, Appellants filed an absolute denial of committing any tortuous acts against this Respondent. **R. 49-53.** Furthermore, federal law constrained Appellants' ability to act to a large degree,[11] and buffers Appellants' argument that good cause exists in this case so as to not hold them in default in this instance.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) pre-empts state law regarding any privacy or confidentiality rules relating to plaintiff's medical records. See *Holman v. Rasak*, 486 Mich. 429, 785 N.W.2d 98 (2010). Respondent did not provide an expert affidavit alleging a specific breach of standard of care by Dr. Jaraki. Rather she relied on S.C. Code § 15-36-100(C)(2)[12] and its "no special learning is needed to evaluate the conduct of the defendant" language. Thus

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[11] See 45 C.F.R. § 164.512, "Uses and disclosures for which an authorization or opportunity to agree or object is not required."

[12] This subsection reads as follows: "The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

Respondent's medical records had not played a role in this case prior to service of the complaint itself and respondent's counsel's letter discussing discovery issues. It was then that Appellants realized that privacy concerns with respect to plaintiff's medical records presented an issue front and center. **R. 111**.

For the foregoing reasons, the trial court should be reversed on this issue and this case remanded for resolution on the merits. Therefore, even if the letters proffered by Appellants were deficient as a matter of law as constituting an answer to the law suit, we submit that good cause has been shown for setting aside the entry of default.[13] The Appellants were in ongoing contact with Respondent's counsel and never "sat on their hands" to the prejudice of any party. Moreover, satisfactory assurance had not been provided by plaintiff respecting a waiver of privacy with respect to the medical records generated during the provision of medical services to the plaintiff.

ARGUMENT II

II Defendants failure to follow the pre-suit mediation process set out at, inter alia, S.C. Code Ann. § 15-79-125 may not constitute a basis for the Court to prohibit the filing of a responsive pleading. (Question II)

In the order denying defendants' motion for relief from default, the Court stated at page 3 of the Order,

> Furthermore, this Court has inherent authority to enforce the Provision of S.C. Code Ann. § 15-79-125, which requires Pre-Suit Mediation and the Defendants' failure to attend the Mediation deprived them of one more opportunity to discover the identity of the Plaintiff, and the Court hereby enforces the requirements of S.C. Code Ann 15-79-125 by prohibiting the filing of responsive pleadings.

[13] In this action, Respondent had filed a motion for entry of default because such had not been noted in the clerk's records. The Court simultaneously ruled that Respondent's motion would be granted, default entered, and Appellant's motion for relief therefrom would be denied.

R. 4, last paragraph. Appellants asked the trial Court to reconsider this holding. **R. 82**. The Court sanctioned Appellants for allegedly failing to follow the prelitigation process by striking defendants' right to file a responsive pleading in this matter, thereby placing defendants in default. We respectfully submit that failure to follow the mediation procedure contained within S.C. Code Ann. § 15-79-125 does not justify placing a defendant in default or striking a defendant's responsive pleading. This is especially so when the identity of the plaintiff was not known by the date of the scheduled mediation hearing.

When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly. *See Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996). Therefore, the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case. *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct.App. 1990). Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). *Griffin Grading v. Tire Service Equipment*, 334 S.C. 193, 198-99, 511 S.E.2d 716 (Ct.App. 1999). In the instant case, plaintiff's counsel wrote a letter advising defendants of the scheduled mediation. **R. 105**. There was no court order in effect at that time. Moreover, we submit that no bad faith, willful disobedience or gross indifference to a party's rights has been shown in this instance. Sub-section "F" of the statute reads

> (F) Participation in the pre-litigation mediation pursuant to this section does not alter or eliminate any obligation of the parties to participate in alternative dispute resolution ***after the civil action is initiated***. However, there is no requirement for participation in more than one alternative dispute resolution forum following the filing of a summons and complaint to initiate a civil action in the matter.

Emphasis added. Because Appellants were unaware of the plaintiff's identity as of April 27, 2010, the date of the scheduled mediation, we submit that no sanction should have been imposed upon them. However, the proper sanction to be imposed in this instance we submit, if any, would be to allow the plaintiff to file her lawsuit and then ***compel use*** of the latter alternative dispute resolution forum contemplated by S.C. Code Ann. § 15-79-125, we respectfully submit.

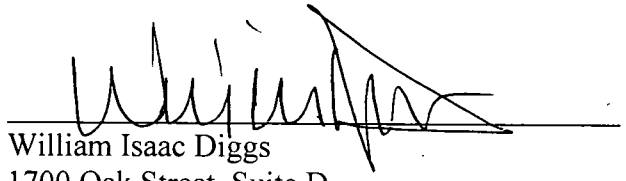
By doing what the Court did at the trial level, and by-passing the "good cause analysis," the Court's action was tantamount to striking the Appellants' answer and holding them in default. This was error we respectfully submit. Appellants assert that the pre-litigation process was intended to reduce frivolous law suits. It was not intended to eliminate the right of a party to defend against liability. The lower Court's sanction, respectfully, was in opposition to the purpose of the legislation, and with all due respect, the result was too harsh in this instance. We respectfully ask this Court to reverse the lower Court's Order and allow the litigation to be resolved on the merits.

CONCLUSION

For the foregoing reasons, the Appellants would respectfully request this Court to reverse the Order denying Appellants relief from default under S.C.R.C.P. 55 and to remand the case for resolution on the merits by trial by jury.

Respectfully submitted,

LAW OFFICES OF WILLIAM ISAAC DIGGS



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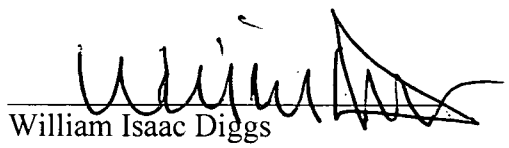
CERTIFICATE OF COUNSEL

This is to certify that the Final Brief of Appellant complies with the requirements Rule 211(b), SCACR. Additionally, counsel certifies that the Final Brief of Appellant is in compliance with the Supreme Court's August 13, 2007 order regarding personal data identifiers and sensitive information.



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This 29th day of April, 2013
Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
Case No. 2010-CP-26-5146

Jane "AP" Doe,

Respondent,

v.

Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology and Arrhythmias Consultant, Institute of Electrophysiology, P.C.,

Defendants

Of Whom

Omar Jaraki and Halla Jaraki, are Appellants

CERTIFICATE OF SERVICE

This is to certify that I have this 30 day of April, 2013, deposited one copy of the Final Brief and Final Reply Brief in the U.S. Postal Service with proper postage affixed thereto and addressed to opposing counsel as follows:

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