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 REPLY BRIEF OF APPELLANT

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APPELLANTS' RESPONSE TO RESPONDENTS ARGUMENT I

(1) The letters filed by the defendants with the Clerk of Court were legally sufficient to avoid default.

Respondent argues that the letters did not constitute an answer, that Appellants did not make a "Rule 8" argument below and it wasn't specifically ruled on by the Court, and that the letters filed by Appellants did not satisfy Rule 55. *Brief of Respondent* at pages 6-18. Appellants submit the respondent's argument is without merit and the lower Court should be reversed.

Plaintiff failed to timely tell the Jaraki's 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 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**. Respondent's allegations were horrendous; she claimed that Appellant Omar Jaraki placed his finger inside of her. **R. 28, ¶ 15 .** She asserted such was done for other than medical reasons. Id. Appellants' counsel argued below,[1]

> . . . certainly knowing who the Plaintiff is doesn't alleviate or doesn't undermine one's right to generally deny the allegations with respect to a complaint, frames the issues sufficiently, I would submit, under our rules to avoid being held in default under Rule 55. So, ... that's the issue that Your Honor has to decide today whether the letter on July the 9th constitutes sufficiently an answer to avoid being

[1] This argument is in response to the trial Court's erroneous statement that the Appellant had been informed of the plaintiff's identity "back in March" Tr. 6, lines 19-20. However, as of the mediation date, Appellants had not been informed of the identity of the plaintiff. **R. ___ .**

> placed in t default in the action, and I would submit that it does. . . .

R. 66, lines 8- 16. We submit the statement by Dr. Jaraki constitutes an answer and a denial as argued by Appellants quoted above. Moreover, both Dr. Jaraki and his wife, Halla, are from Syria. They reasonably did not understand plaintiff's use of a pseudonym or anagram to conceal the identity of the plaintiff.

Respondent also argues there was no ruling by the Court on this issue and therefore it is not properly before the Court. *Brief of Respondent* at page 12. Appellants respectfully submit that when they argued that the letters were "sufficient to avoid default," it can reasonably understood that the Appellants were arguing that the letters were reasonably sufficient to avoid default ***under the applicable rules of civil procedure*** and that when the Court says "no" you are wrong in this instance, that the Court is specifically ruling on the fact that the letters do not comply with S.C.R.C.P. 7 and/or 8.

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."[2] Both letters sent by the Jaraki's, that of Dr. Jaraki and

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

> 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.

that of his wife, state that they cannot find such a patient as "Jane AP Doe" in their records. **R. 107; R. 108**, respectively. 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. It was error for counsel to file the affidavit of default we respectfully submit. We respectfully submit that the letters of July 9, 2010, stated in effect, that defendants lacked sufficient knowledge to answer the complaint and thus, a general denial was pled. **Id.** Even if the letters are technically slightly deficient to constitute an answer, we submit "good cause" has been shown here because Appellants did not have knowledge about the identity of the plaintiff.

APPELLANT'S REPLY TO RESPONDENT'SARGUMENT II

The element of the existence of a meritorious defense to the Respondent's claims is preserved to enable this Court to conduct an appellate review of this case wherein Appellants seek relief from the entry of default. (Reply to Respondent's argument II).

Respondent has argued that the Appellants have not preserved the issue of a meritorious defense. See *Brief of Respondents* at page 20 – 22. However, respondent did not make this argument below when it filed its *Memorandum in Opposition to Motion to be Relieved from Default Judgment.* **R. 54-55.** *In Re Dickey*, 395 S.C. 336, 355, 718 S.E.2d 739 (2011) ("As a threshold matter, we note that Respondent for the first time on appeal challenges the appointment of Robert Bogan as a Special Prosecutor[fn10] and the Panel's method of questioning witnesses during the hearing.[fn11] Accordingly, we find these arguments are not properly before this Court)." Appellants submit that it is the Respondent who has waived the right to pursue this argument at the appellate level. Even assuming that respondent may raise this argument for the first time on appeal, Appellants respectfully submit that respondent's argument is without merit.

Appellants do have a meritorious defense and they properly preserved the element of the existence of a meritorious defense in this case as part of the motion for relief from default filed by them below. As stated in the Brief of Appellant,

> 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).

Brief of Appellant at p. 13. On October 12, 2010, an affidavit of default was filed by plaintiff's counsel and on November 22, 2010, a motion for relief from default was filed by the Appellants. **R. 39**. That filing included, *inter alia*, an affidavit by Appellant, Omar Jaraki, M.D. and a proposed Answer by Appellants in the event the Court determined that good cause existed, or that the letters did not constitute an answer. **R. 49-53**. In both the affidavit and the answer, Appellants asserted that they had not harmed the plaintiff in any way and denied the allegations contained in the complaint. Thus, a meritorious defense existed in this case.

Initially, in the affidavit that Dr. Jaraki filed in support of his motion for relief from default, he stated,

> 12. . . . [C]ontrary to Mr. Furr's statement, I did mail "Exhibit A" to him on July 9, 2010, and I filed a copy of the letter with the Court on that date. I believe that my letter should be treated as both an answer and notice of appearance. The letter generally denies that I treated "Jane AP Doe" and therefore denies the allegations made in the complaint.
>
> 13. Even now, ***knowing of the true identity of the plaintiff, I deny that I committed any inappropriate conduct and I deny all of the allegations contained within the complaint which allege misconduct*** or errors on my part, or on the part of any of the defendants.

R. 42. Emphasis added. Attached therewith was Appellants' proposed Answer. In their proposed responsive pleading Appellants denied every substantive allegation and denied causing any harm to the plaintiff. **R. 49-53**. This satisfies the meritorious defense element in setting aside a default under S.C.R.C.P. 55, we respectfully submit.

APPELLANT'S REPLY TO RESPONDENT'SARGUMENT III

The Court may not strike a responsive pleading in a medical malpractice lawsuit due to a defendant's failure to participate in pre-suit mediation before the malpractice action has been filed under the circumstances presented by this case. (Response to Respondent's Argument III).

In the Brief of Appellant, Appellants argued

> 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.

Brief of Appellant at page 20. It is important to note that as of the date the mediation was to be held, April 27, 2010, (1) the Appellants had not been told the real name of the plaintiff, and (2) no court order had been issued requiring the Appellants to attend the mediation. The routine practice in Appellants' judicial circuit (the Fifteenth Judicial Circuit) is to schedule an ADR Sanctions Roster Meeting and at that roster meeting, the Court will order a mediation if it has not been scheduled or held by the time of that meeting. See e.g. ADR Roster Meeting for April 22, 2013, in Horry County, South Carolina. [3]

Moreover, all of the cases cited by the Respondent involve circumstances where the alleged misconduct occurred *after* the litigation had commenced, not *before* it had commenced. As argued in the Brief of Appellants, the Court should have tailored relief in a manner which was justifiable or more appropriate for the severity or lack thereof of the

[3] See, e.g. http://publicindex.sccourts.org/horry/courtrosters/RosterDetails.aspx?CourtAgency=26002&RosterID=104&RosterCode=MO; or http://www.horrycounty.org/depts/legalserv/cocFiles/rosters.asp,

alleged mis-conduct. Rather than doing so, however, the Court ordered that Appellants were to be denied the right to defend against the allegations made against them by the respondent. **R. 4.**

CONCLUSION

For the foregoing reasons, the arguments presented by the Respondent in this matter are without merit. Appellants would respectfully request this Court that it reverse the Order denying Appellants motion for relief from default under S.C.R.C.P. 55 and to remand the case for resolution on the merits by jury trial.

Respectfully submitted,

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

CERTIFICATE OF COUNSEL

This is to certify that the Final Reply Brief of Appellant complies with the requirements Rule 211(b), SCACR. Additionally, counsel certifies that the Final Reply 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 24th day of May, 2013
Myrtle Beach, South Carolina

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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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