THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

Case No. 2011-CP-40-3456

David Barnhill, Appellant,

v.

Lesa Michelle Gaffney and Jimmy Emmanuel Dessaure, III, Defendants,

Of whom Jimmy Emmanuel Dessaure, III is Respondent.

BRIEF OF APPELLANT

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2. DID THE LOWER COURT ABUSE ITS DISCRETION IN SETTING ASIDE THE DEFAULT JUDGMENT AGAINST RESPONDENT DESSAURE UNDER RULE 60(B)?

STATEMENT OF THE CASE

On May 26, 2011, in the Court of Common Pleas for Richland County, David Barnhill filed a negligence cause of action against Lesa Michelle Gaffney and Jimmy Emmanuel Dessaure, III. (R. pp. 12-13) On June 1, 2011, Charlene Sloan, an employee of the Law Office of Barry B. George and a person over the age of eighteen (18), did personally mail the Summons and Complaint to Defendant Dessaure, III. The Summons and Complaint served on Defendant Dessaure were mailed postage prepaid, Certified Mail with Restricted Delivery and Return Receipt requested to Jimmy Emmanuel Dessaure, III at 36 Roosevelt Street, Estill, South Carolina 29918. (R. p. 4) Defendant Gaffney was served by a process server on June 2, 2011. (R. p. 39)

The Domestic Return Receipt was returned showing acceptance by Defendant Dessaure with a date of acceptance of June 16, 2011. (R. p. 4). Pursuant to Rules 6(e) and 12(a) of the South Carolina Rules of Civil Procedure, the last date prescribed for Answers from Defendant Gaffney and Defendant Dessaure were July 4, 2011 and July 21, 2011, respectively.

M. Rita Metts, Esquire was hired by AllState Insurance to defend Defendant Gaffney in this action. Ms. Metts filed an Answer on June 30, 2011, hereafter "Original Answer" (R. p. 14). In the original Answer, Ms. Metts used the terms "The Defendants" (three times) and "The Defendant" (four times) interchangeably. At no point in the Original Answer was a Defendant identified by either "Gaffney" or "Dessaure." (R. p. 14)

On October 25, 2011, an amended answer was filed by Ms. Metts specifying the answer as that of Defendant Gaffney and listing herself as "Attorney for Gaffney." An

answer was never filed on behalf of Defendant Dessaure. Defendant Dessaure admits that he did not file an answer because he thought the matter was concluded. (R. p. 21) Defendant Dessaure had been previously been represented by J. Todd Rutherford, Esquire for injuries he sustained in this same accident.

There is no evidence in the record that upon service on Defendant Dessaure of the Summons and Complaint that Defendant Dessaure either contacted Attorney Rutherford to inquire how he should proceed or turned over the Summons and Complaint to his insurance company. (R. pp. 20-21)

Plaintiff moved before the Court for an Order of Default against Defendant Dessaure. (R. p. 1) In an order dated February 8, 2012, the Honorable James R. Barber, III found that Defendant Dessaure was in default and directed the Clerk of Court for Richland County to schedule a damages hearing. (R. p. 2) A damages hearing was subsequently scheduled for June 6, 2012 before the Honorable J. Ernest Kinard, Jr. On May 22, 2012, Plaintiff provided notice to Defendant Dessaure of the damages hearing in compliance with Rule 55 and Rule 5(a) of the South Carolina Rules of Civil Procedure (R. p. 10).

Defendant did not appear for the damages hearing. Judge Kinard heard testimony from Plaintiff Barnhill regarding how the accident occurred and the extent of his injuries and medical bills. In an order filed with the clerk on June 8, 2012, Judge Kinard awarded a default judgment against Defendant Dessaure in the amount of fifteen thousand dollars ($15,000.) (R. pp. 10-11)

On June 22, 2012, a Motion to be Relieved of Default was filed by William H. Bowman, III, Esquire on behalf of "the Defendant." (R. pp. 16-17) The body of the

motion did not specify for which Defendant the matter was being filed. The motion neither referred to the defendant as Defendant Dessaure or Defendant Gaffney. In fact, on the case records management system for Richland County, the motion is listed as on behalf of Defendant Gaffney.

On June 28, 2012, an Amended Motion to be Relieved of Default was filed by attorney Bowman. (R. pp. 18-19) In the amended motion, the Defendant is identified as that of Defendant Dessaure. A hearing on the motion was scheduled in front of the Honorable Alison Renee Lee for August 14, 2012. Defendant Desssaure filed an affidavit on August 10, 2012. (R pp. 20-23)

After hearing arguments from both sides, the matter was taken under advisement by Judge Lee. In an order dated September 7, 2012, Judge Lee vacated the Order of Default Judgment against Defendant Dessaure finding that the Amended Answer filed by Defendant Gaffney did not serve as a withdrawal of the Answer of Defendant Dessaure. (R. pp. 6-8)

On September 24, 2012, Plaintiff filed a Motion to Reconsider which was subsequently denied by Judge Lee on October 12, 2012. (R. p. 9)

FACTS

On October 17, 2010, Appellant Barnhill was the passenger in a vehicle being driven by Respondent Dessaure that was backing into a private driveway. (R. p. 10) The vehicle being driven by Defendant Gaffney struck the vehicle of Respondent Dessaure in the roadway injuring Appellant Barnhill who was a passenger. (R. pp. 10-11; R. p. 35)

ARGUMENTS

I. BECAUSE THE LOWER COURT'S ORDER AFFECTED APPELLANT'S SUBSTANTIAL RIGHTS TO A "JUST, SPEEDY AND INEXPENSIVE DETERMINATION" OF ITS CIVIL ACTION; DETERMINATION OF THE CIVIL ACTION IN ACCORDANCE WITH THE RULES OF CIVIL PROCEDURE; AND, APPELLANT'S RIGHT TO CHOOSE HIS DEFENDANTS, THE COURT IN EFFECT DETERMINED APPELLANT'S ACTION. THEREFORE, THIS CASE IS IMMEDIATELY APPEALABLE UNDER S.C. CODE ANN. § 14-3-330.

"The right of appeal arises from and is controlled by statutory law." Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707, 708 (2005) (citing North Carolina Federal Sav. and Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 347 S.E.2d 97 (1986). "The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330 (1976)" Id. An appellate court shall review upon appeal:

> (2) an order affecting a substantial right made in action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be take or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action; (3) a final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment.

S.C. Code Ann. § 14-3-330 (1976).

"[The South Carolina Rules of Civil Procedure] shall be construed to secure the just, speedy and inexpensive determination of every action." Rule 1, SCRCP. "[A]ll pleadings shall be so construed to do substantial justice to all parties." Rule 8, SCRCP. In this matter, the lower court did not construe the pleadings to do "substantial justice to

all parties." The lower court found that Defendant Gaffney's Amended Answer did not withdraw the previous answer filed by attorney Metts; even though, it is obvious that attorney Metts did not intend to Answer for Respondent Dessaure and did not represent Respondent. When the lower court allowed Respondent to hang its hat on this technicality; not consider Defendant Gaffney's Amended Answer as a withdrawal of an answer on behalf of Respondent; and, file an amended answer over a year after Defendant Dessaure was served it affected Appellant's substantial right to have the civil action proceed within accordance of the Rules of Civil Procedure. Additionally, the order of the lower court determined the action, its mode of trial and prevented a judgment from which a direct appeal could be taken.

The "right of the plaintiff to choose [his] defendant is a substantial right within the meaning of [§ 14-3-330]. Neeltec Enterprises, Inc. v. Long, 397 S.C. 563, 725 S.E.2d 926, 928 (2012). Appellant chose to make Respondent Dessaure a party to this action because Appellant believes Respondent was negligent in the operation of his vehicle. Appellant filed suit and served said suit on Respondent in accordance with the rules. Respondent's attorney does not dispute that service was proper in this matter. (R. p. 27, ll. 19-20). Respondent upon service of the Summons and Complaint neither contacted an attorney nor turned the suit over to his insurance company. Respondent at no time intended to file an Answer. The lower court, by allowing the Respondent at such a late date to amend its answer, affects the Appellant's right to choose who he sues and have that Defendant respond in accordance with the rules of civil procedure.

II. THE LOWER COURT CLEARLY ABUSED ITS DISCRETION IN SETTING ASIDE THE DEFAULT JUDGMENT IN THAT RESPONDENT DESSAURE'S ACTIONS DID NOT AMOUNT TO EXCUSABLE NEGLECT AND APPELLANT WOULD BE GREATLY PREJUDICED BY NOT ALLOWING THE AMENDED ANSWER FILED BY DEFENDANT TO SERVE AS A WITHDRAWAL OF THE ORIGINAL ANSWER AS TO RESPONDENT.

Respondent moved for relief under Rule 60(b) of the South Carolina Rules of Civil Procedure (SCRCP). Rule 60(b) states, in part, that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for ... mistake, inadvertence, surprise or excusable neglect." "Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. Rodriguez v. Gutierrez, 391 S.C 323, 331, 705, S.E.2d 94, 99 (Ct. App. 2011) (citing Sundown Operating Co. v. Intedge Indus. Inc., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009)). "In determining whether to grant a motion under Rule 60(b), the circuit court should consider: (1) the promptness with which relief is sought; (2) the reasons for failing to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party." Id.

The Court of Appeals in Rodriguez, laid out the standard of review for relief from a Rule 60(b) order:

> The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court. The circuit court's decision will not be disturbed absent a clear showing of an abuse of that

> discretion. An abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support.

Id. 391 S.C. at 329, 705 S.E.2d at 98 (citing Thompson v. Hammond, 299 S.C. 116, 199, 382 S.E.2d 900, 902-903 (1989); Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 162-163, 375 S.E.2d 321, 322-323 (Ct. App. 1988); Goodson v. Am. Bankers Ins. Co., 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988))

Unlike Rule 55, "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." Id. "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief. Id. (citing Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991)

Respondent contends that he should be granted relief under Rule 60(b)(1), SCRCP. (R. p. 28, ll. 2-5) Respondent argues that because he had retained an attorney to represent himself for injuries he sustained in the same accident and believed the matter was concluded that that amounts to excusable neglect. Id. However, upon receipt of the Summons and Complaint, Respondent made no attempt to contact either Mr. Rutherford or Appellant's counsel to determine what he should do with the process he received. The Summons and Complaint very clearly states that the Defendant must answer within thirty (30) days or will be held in Default.

Respondent was originally served with the Summons and Complaint on June 16, 2011. Respondent made no type of appearance in this matter until Respondent's attorney

filed a Motion to be Relieved from the Order of Default Judgment on June 22, 2012. The appearance by the Respondent was only made after his insurance company had been notified of the default judgment against their insured, more than a year after he was originally served. Appellant contends that Respondent's position that he believed the matter was concluded does not amount to excusable neglect or mistake and is not a valid reason for failing to act promptly in this matter.

"[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard that is applied to an attorney." Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) (citing Goodson v. Am. Bankers Ins. Co., 295 S.C. 400, 403, 368 S.E.2d 687, 689). "It is always a matter of regret that a party should not have his day in court. However, ... [where] **the appellant was duly served with the summons and complaint, [i]t was his duty to answer the complaint... [Therefore,] [h]e must suffer the consequence of his failure to answer.**" Id. (citing Williams v. Ray, 232 S.C. 373, 383-84, 102 S.E.2d 368, 373 (1958). Respondent's failure to understand the legal process does not amount to excusable neglect under Rule 60(b).

Respondent argues that he has a meritorious defense in that Defendant Gaffney has conceded fault because she has settled with Appellant. (R. p. 29, ll. 14-17) Appellant's settlement with Defendant Gaffney does not absolve Respondent of fault in this matter.

Appellant would be prejudiced by (1) not allowing Defendant Gaffney's Amended Answer to serve as a withdrawal of an Answer on behalf of Respondent and (2) by allowing Defendant to file an Amended Answer at such a late date. Appellant

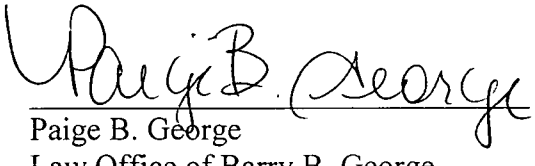
properly filed and served the Summons and Complaint on Respondent. Respondent subsequently made no action. It would be inequitable and would prejudice Appellant to allow the mistake of Attorney Metts to be taken as intent of Respondent to file an Answer and absolve him of default.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

June 3, 2013



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

June 4, 2013

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PROOF OF SERVICE

I certify that I have served Certificate of Compliance with Rule 211(b) on Jimmy Emmanuel Dessaure, III by depositing a copy of it in the United States Mail, postage prepaid, on June 4, 2013, addressed to his attorney of record, William H. Bowman, III, Rogers Townsend and Thomas, P.C., Post Office Box 100200, Columbia, South Carolina 29202.

June 4, 2013

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