THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2012-CP-40-1901

Desiree D. Beatty,

Respondent,

v.

Pyong Han Cho, Appellant.

FINAL BRIEF OF RESPONDENT

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June 17, 2013

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE DEFAULT JUDGMENT AGAINST APPELLANT SHOULD BE SET ASIDE DUE TO MISTAKE, INADVERTANCE, SURPRISE, OR EXCUSABLE NEGLECT.

2. WHETHER THE DEFAULT JUDGMENT AGAINST APPELLANT SHOULD BE SET ASIDE DUE TO FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT OF AN ADVERSE PARTY.

STATEMENT OF THE CASE

On March 12, 2012, the Respondent, Desiree Beatty, filed a negligence lawsuit in Richland County against Appellant, Pyong Han Cho, for injuries she sustained when she was rear-ended by the Appellant on or about August 6, 2011. On April 14, 2012, service was made by a process server on the Appellant by leaving a copy with Diana Cho, a member of the Appellant's residence who was over the age of eighteen (18). Appellant did not answer the complaint within thirty (30) days or anytime thereafter.

Respondent moved for an order of default which was granted by the Honorable James R. Barber, III on June 14, 2012. A damages hearing was held on August 9, 2012. Appellant was notified of the damages hearing in a letter dated July 16, 2012. According to the lower court's order for damages of August 9, 2012, Respondent testified that she was injured when she was struck from the rear by the Appellant; that she continued to have pain from her injuries; she incurred medical costs; and, lost wages from the time she missed at work. The Honorable G. Thomas Cooper, Jr., in his August 9, 2012 order did give judgment to the Respondent in the amount of twenty thousand dollars ($20,000.00).

On August 30, 2012, Appellant's counsel did send to the clerk of court Appellant's Motion for Relief from Judgment seeking relief under Rule 60(b)(1) and Rule 60(b)(4) of the *South Carolina Rules of Civil Procedure*. Appellant in its August 30 motion did not request relief under Rule 60(b)(3). The Honorable L. Casey Manning heard Appellant's Motion for Relief on November 6, 2012. In a form order dated November 8, 2012, Judge Manning denied Appellant's request to be relieved from Judge Cooper's damages order granting judgment to the Respondent.

FACTS

On or about August 6, 2011, Desiree Beatty, Respondent, was injured in a motor vehicle accident when she was struck from behind by a vehicle being driven by Pyong Han Cho, Appellant. (R. p. 3) Ms. Beatty received treatment for her injuries sustained in the August 6 accident from August 7, 2011 through September 29, 2011. (R. p. 3) During that timeframe, she was treated by the emergency room at Providence Hospital, Lexington Family Practice and Advance Healthcare Solutions. (R. p. 3) Additionally, Ms. Beatty missed work from August 7, 2011 through August 31, 2011 because of the injuries she sustained in this accident. (R. p. 3)

Ms. Beatty filed a claim against Appellant's insurance company, Government Employees Insurance Company ("GEICO"). (R. p. 24). At that time, Jennifer Delong was assigned as the adjuster on the claim. (R. p. 24) On January 24, 2012, the adjuster for the insurance company made an offer. Ms. Beatty did not accept GEICO's offer nor ever made a counter-demand. (R. p. 25-26) Respondent's counsel and Ms. Delong had no further conversations regarding settlement. (R. p. 25-26) Ms. Beatty, thereafter,

through counsel, filed suit. (R. p. 25) The Summons and complaint were properly served on Appellant through personal service on Diana Cho, a named insured, and a member of Mr. Cho's residence. (R. p. 20) Appellant did not Answer and Respondent moved for an Order of Default which was granted. (R. p. 5-6) Counsel for Respondent initiated no further communications with Ms. Delong after suit was filed. (R. p. 25-26) There is no evidence that Ms. Delong ever inquired from Respondent's counsel whether this matter was in suit. (R. p. 24-26)

One of Appellant's contentions is that Appellant should be relieved of the default and damages orders because Mr. and Mrs. Cho speak limited English. (R. p. 50, ll 10-12) However, according to their affidavits, they both were able to speak with Ms. Beatty for three hours following the accident; Mr. and Mrs. Cho possessed enough English to pass a driver's license test; and, they were able to read and sign their Affidavits in this matter. (R. p. 22-23; R. p. 20-21; R. p. 56, ll 11-12) Despite the claim that they spoke limited English, Diana Cho, the named insured, **mailed a copy of the Summons and Complaint to GEICO** (R. p. 25, ¶ 26; Appellant's Brief p. 3)

STANDARD OF REVIEW

[M]otions for relief under Rule 60(b) are addressed to the discretion of the court and appellate review is limited to determining whether the trial court abused its discretion." *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 124, 441 S.E.2d 835, 840 (Ct. App. 1994) "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456, 458 (Ct. App. 2005) (citing *Perry v.*

Heirs at Law of Gadsden, 357 S.C. 42, 590 S.E.2d 502 (Ct.App.2003)). "The decision to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court." *Id.* (citing *Bowman v. Bowman,* 357 S.C. 146, 151, 591 S.E.2d 654, 656 (Ct.App.2004))

"Rule 60(b)(1), SCRCP, [] provides relief to a party from final judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect. To obtain relief from a default judgment, the movant must also show a meritorious defense." *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.,* 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990) (citing *Mitchell Supply Co. v. Gaffney,* 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988)). "A motion for relief pursuant to Rule 60(b)(1) is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Id.*

ARGUMENTS

I. BECAUSE APPELLANT PROVIDED A COPY OF THE SUMMONS AND COMPLAINT TO HIS INSURANCE COMPANY AND BECAUSE THE APPELLANT DOES NOT HAVE A MERITORIOUS DEFENSE, THE DEFAULT JUDGMENT OF THE LOWER COURT SHOULD BE UPHELD.

Appellant argues that "the default judgment against appellant should be set aside due to mistake, inadvertence, surprise or excusable neglect." (Appellant's Brief p. 5) Appellant's argument is solely based on the case of *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970). In *Edwards*, the insured driver never informed his insurance company of the motor vehicle accident he had had nor did he forward the summons and

complaint on to the insurance company. *Id.* at 280. Service was made on the insured driver through personal service on the insured's father who was illiterate. *Id.* The plaintiff in that matter was a passenger in the insured's vehicle which was in a one car crash where it was in dispute as to who was driving the vehicle. *Id.* The insured never forwarded process on to his insurance company. *Id.*

The court in *Edwards,* after finding that a meritorious defense existed, relieved the defendant of default, holding that the lower court had abused its discretion in upholding the default judgment. *Id. Edwards* can be differentiated from the facts at issue in this appeal. Additionally, the Appellant here does not have a meritorious defense.

Appellant here claims he has limited English. However, he was able to carry a conversation on with Respondent for three hours following the collision. (R. p. 22, ¶ 5). He, along with his wife, read and understood enough of the English language to sign the affidavits in this matter, which in themselves contain legal terms. (R. p. 22; R. p. 20-21) And, Mr. Cho understood enough of the English language to be able to obtain a driver's license. However, that argument is moot because according to the adjuster for the insurance company, Appellant mailed to the insurance company a copy of the Summons and Complaint in this matter. (R. p. 26, ¶ 26)

Respondent believes this court should turn to the cases of *Cowan v. Allstate Ins. Co.*, 357 S.C. 625, 594 S.E.2d 275 (2004) and *Hill v. Dotts*, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001). In *Cowan*, counsel for the Plaintiff filed a lawsuit on the Defendant and served him properly. *Cowan*, 357 S.C. at 625. Plaintiff did not provide a copy of the Summons and Complaint to the Defendants insurance company. *Id.* The court in Cowan found that the "cooperation clause" of § 38-77-142(B) between an insured and his

insurance cannot be extended to an innocent third party. *Id.* There is no duty for a third party to notify an insurance company that a suit has been filed. *Id.*

The Court in *Hill* found that :

> [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 than is applied to an attorney. 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. Accordingly, [a party's] failure to understand the legal process is not excusable neglect under Rule 60(b).

Id. S.C. at 310(citations omitted)

Under a 60(b)(1) motion, for the moving party to recover, the moving party must also make a "prima facie showing of a meritorious defense." *McClurg v. Deaton*, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008). Appellant does not have one in this matter. According to Appellant's counsel in the record below, "Mr. Cho rear-ended Ms. Beatty. There's really no dispute about that." (R. p. 50, ll 2-3). Counsel further went on to say "liability is not a question." (R. p. 53, l. 13).

II. BECAUSE THERE WAS NOT FRAUD ON BEHALF OF RESPONDENT OR RESPONDENT'S COUNSEL, APPELLANT IS NOT ENTITLED TO RELIEF FROM DEFAULT JUDGMENT.

Appellant, in his motion to set aside the default judgment in the lower court, did not plead that he was entitled to relief under Rule 60(b)(3) of the South Carolina Rules of Civil Procedure; therefore, this matter is not properly before this court. This court, therefore, should not consider the Appellant's argument as to Rule 60(b)(3).

Appellant argues that his motion as to Rule 60(b)(3) should be granted because Respondent's counsel continued to negotiate with GEICO after filing suit. It is unequivocally denied and there is no evidence to suggest otherwise that Respondent's counsel continued to negotiate with GEICO after Respondent had filed suit. After Appellant made his first offer, Respondent did not accept nor counter demand Appellant's offer. There is absolutely no evidence that Respondent's counsel wrote or called Appellant's insurance company expressing a desire to continue discussing settlement in this matter. Respondent in no way engaged Appellant in settlement negotiations. Appellant contends that voice mail messages were left with Respondent's counsel. Respondent at that time did not have a phone with voice mail capabilities. There additionally is no evidence that Appellant ever made a second offer or that further negotiations ensued.

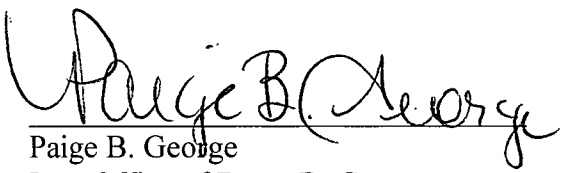
Appellant turns to the case of *McClurg v. Deaton*, to support its Rule 60(b)(3) argument. *McClurg* can be differentiated from the facts in the present case. In *McClurg*, counsel for the Plaintiff filed suit in October and then continued to initiate calls to the insurance company from November of that year until June of the following year. *Id.* 380 S.C. at 568. The court there held that the conduct of counsel constituted an appearance of ongoing negotiations; and therefore, should have been provided a copy of suit papers. *Id.* In the present case, after Respondent filed suit, all communications with the insurance company ended. It is clear that Respondent did not intend and did not attempt to give the appearance that negotiations were ongoing. Therefore, *McClurg*, is not applicable to the facts at hand. Additionally, as argued above, Appellant does not have a meritorious defense.

Respondent in this matter had no duty to advise the insurance company that suit papers had been filed.

CONCLUSION

Service was proper in this matter and Appellant did not Answer within the allotted time. Therefore, for the reasons stated, this Court should uphold the order of the lower court.

Respectfully submitted,



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June 18, 2013

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PROOF OF SERVICE

I certify that I have served Respondent's Final Brief on Pyong Han Cho by depositing a copy of it in the United States Mail, postage prepaid, on June 20, 2013, addressed to his attorney of record, John M. Grantland, Esquire, Post Office Box 6648, Columbia, South Carolina 29260.

June 20, 2013

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PROOF OF SERVICE

I certify that I have served Certificate of Compliance with Rule 211(b) on Pyong Han Cho by depositing a copy of it in the United States Mail, postage prepaid, on June 20, 2013, addressed to his attorney of record, John M. Grantland, Esquire, Post Office Box 6648, Columbia, South Carolina 29260.

June 20, 2013

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CERTIFICATE OF COUNSEL

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

June 17, 2013

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