IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons
Circuit Court Judge

Trial Court Case No.: 2021-CP-20-0264
Appellate Case No. 2023-001458

John Dabeck.....Respondent,

v.

Larry Deon Ashford and Wesco International, Inc.,
of which Larry Deon Ashford is the .....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did Larry Deon Ashford show good cause warranting relief from a default judgment against him based on his prompt and repeated efforts to engage his former employer to defend this action?

2. Did the circuit court err in finding that Ashford had not satisfied the factors set forth in *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct. App. 1989) in this case where he promptly sought relief, there was minimal prejudice to the plaintiff in light of the harm to Ashford, and the circuit court entered a default judgment of $1,000,000 that was not supported by the evidence in the record based on its belief that it was required to give the plaintiff the amount requested in a default case?

STATEMENT OF THE CASE AND FACTS

This appeal stems from a default judgment in the amount of $1,000,000 entered against a truck driver, Larry Deon Ashford, following an accident with John Dabeck, resulting in $22,020.14 in medical expenses. (Order of Damages, R. at ____). Dabeck filed his complaint on June 25, 2021, alleging negligence claims against Ashford as well as claims for negligent entrustment and negligent hiring, negligent training, and negligent supervisions against Ashford's alleged employer, WESCO International, Inc.[1] (Complaint, R. at ____). Ashford was served on July 6, 2021. (Affidavit of Service, R. at ____). Dabeck filed an affidavit of default on September 10, 2021. (Affidavit of Default, R. at ____). On September 30, 2021, Dabeck filed a motion seeking damages. (Motion, R. at ____).

The circuit court ordered the entry of default on October 8, 2021. (Entry of Default, R. at ____). After several continuances, the circuit court took up the issue of damages on March 31, 2022. (Order, R. at ____). Ashford appeared at the hearing *pro se*. (*Id.*). Dabeck and his wife testified generally as to damages and the effects of the accident on Dabeck. (3/31/2022 Tr. 5:9-17:17, R. at ____). After the hearing, Dabeck submitted a summary of his medical bills, showing a total of $22,020.14. (Summary, R. at ____). Neither Dabeck nor his attorney sought any particular award. Ashford addressed the Court as to his own recollection of the accident, his own injuries, and his frustration that the company he used to work for had not appeared or done anything in response to what he described as "letters" about this lawsuit. (3/31/2022 Tr. 19:7-20:20, R. at ____). Following this very brief presentation, the circuit court ruled, "Well, based upon the

[1] As reflected in the record, Ashford's direct employer was Express Employment Professionals, which had contracted with WESCO. (Ashford Aff. at ¶ 2, R. at ____). WESCO was dismissed as a party by stipulation on September 12, 2022. (Stipulation, R. at ____).

testimony and evidence presented and considering the trauma testified by your client, I find an appropriate award of actual damages to be one million dollars." (3/31/2022 Tr. 21:5-8, R. at ____). A formal order followed on April 4, 2022. (Order, R. at ____).

On September 2, 2022, Ashford, now represented by counsel, filed a motion to set aside the entry of default and the default judgment on the following grounds: Rule 4(d)(1), (7), & (8), SCRCP; Rule 55(c), SCRCP; Rule 60(b)(1), (3) & (4), SCRCP; and *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008). (Motion, R. at ____). In support of the motion, Ashford submitted an affidavit outlining his efforts to make WESCO aware of the lawsuit, including notifying WESCO of the accident, calling WESCO upon service of the complaint, faxing a copy of the complaint with a request that it be sent to WESCO's insurer, attempting to get his own counsel after WESCO had allowed the matter to fall into default, notifying WESCO of the damages hearing, and reporting the result of the damages hearing to WESCO. (Affidavit, R. at ____).

The motion was heard on March 23, 2023. At the hearing, Ashford argued that he demonstrated good cause for purposes of Rule 60 because he had responded as best he could to the complaint, but that WESCO had failed to respond despite repeated efforts by Ashford. (3/23/2023 Tr. 2:6-5:10, 6:2-25, R. at ____). Ashford also argued that that he took action with respect to the complaint promptly and promptly filed a motion once the insurer became aware of this action, that Dabeck was not unduly prejudiced, and that there was a meritorious defense as to damages because the award was excessive in light of the evidence to which the circuit court responded that in a default case "the Court, as the trier of fact, [is] basically constrained to issue an order requesting what the plaintiff wants." (3/23/2023 Tr. 7:1-8:3, R. at ____).[2] Ashford then

[2] Ashford conceded he did not have a meritorious defense as to liability. (3/23/2023 Tr. 7:2-5, R. at ____).

argued that the circuit court had the discretion to grant relief. (3/23/2023 Tr. 21:23-23:5, Memorandum in Support, R. at ____). The circuit court denied the motion by Form 4 order dated March 27, 2023 (Order. R. at ___), later explaining in a more formal order issued May 21 that there was no good cause and that Ashford had failed to establish the factors articulated in *Wham*, 298 S.C. at 465, 381 S.E.2d at 501-02 (Order, R. at ____).

Ashford moved to reconsider on April 6, 2023, arguing that he had established good cause and that the circuit court failed to exercise its discretion with respect to whether there was a meritorious defense as to the amount of damages because the circuit court believed it was required to give Dabeck what he wanted and because the award was not supported by the evidence at the damages hearing. (Motion, R. at ____). Following a hearing on August 17, 2023, the motion was denied by Form 4 order filed on August 17, 2023. This appeal followed.

STANDARD OF REVIEW

Ultimately, "excusable neglect and a meritorious defense must exist before the moving party is entitled to have a default judgment vacated." *Thompson v. Wilder*, 272 S.C. 563, 567, 253 S.E.2d 108, 110 (1979); *Hodges v. Fanning*, 266 S.C. 517, 519, 224 S.E.2d 713, 714 (1976). This appeal challenging the denial of a motion seeking relief from the entry of default, and a default judgment is subject to an abuse of discretion standard. *Fassett v. Evans*, 364 S.C. 42, 49–50, 610 S.E.2d 841, 845 (Ct. App. 2005); *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 162–63, 375 S.E.2d 321, 322–23 (Ct. App. 1988); *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987) ("The courts of this state have consistently held relief from default is solely within the sound discretion of the trial judge."). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *In re*

Est. of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997), *quoted in Fassett*, 364 S.C. at 49-50, 610 S.E.2d at 845.

In addition, "courts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits." *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 567, 274 S.E.2d 290, 292 (1981). Under South Carolina case law, "the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default." *Ricks*, 293 S.C. at 374-75, 360 S.E.2d at 536.

ARGUMENTS

I. Under the facts of this case, the circuit court erred in failing to find that Ashford had established good cause warranting relief from default.

As a general matter,

> 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). 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."

Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009) (citations and quotation omitted). When a defendant has made "a good faith mistake of fact" and has not attempted "to thwart the judicial system," a court may vacate a default judgment. *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986).

Here, Ashford made the requisite showing of good cause as a result of either inadvertence or excusable neglect. Ashford is not a lawyer. He is a former truck driver who did everything he could think of in response to the "letters" from Dabeck's counsel. He repeatedly called the only contact number he had for WESCO, he faxed the complaint to WESCO with instructions to get it to WESCO's insurer within days of service and well before an answer was due, and he attempted

to contact a lawyer prior to the damages hearing. (Affidavit, R. at ____). He appeared at the damages hearing and made his argument about not knowing what to do about the "letters" and wondering if WESCO had gotten them. (3/3/12022 Tr. 20:10-16, R. at ____). There is no indication that he attempted to thwart the judicial system, but rather that he did not know how to navigate it.

Given this history, this case is different than *Sundown* because there, the defendant waited to forward the summons and complaint until after the time to answer had expired. *Sundown Operating Co.*, 383 S.C. at 610, 681 S.E.2d at 889. This case is closer to *Ricks*, 293 S.C. at 375, 360 S.E.2d at 537, in which good cause was found where the defendant "acted reasonably by contacting her attorney and her insurance agent and, again, contacting her attorney upon discovering problems with her insurance agent." Ashford acted immediately in the only way he knew how—by repeatedly calling and immediately forwarding the Complaint to WESCO.

It can also be inferred from the record that WESCO, while not served as a party, had knowledge of the claim and had been in contact with Dabeck's counsel. (8/17/23 Tr. 8:19-9:4, R. at ____). Relief from default is essentially equitable in nature. *Id.* Equity suggests that relief is appropriate in this case for two reasons: (1) "equity aids the vigilant and diligent," *Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989), and (2) "one who seeks equity must do equity," *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 250, 715 S.E.2d 348, 353 (Ct. App. 2011). Here, Ashford was vigilant and diligent, albeit unsophisticated, and Dabeck was well aware of WESCO's role did nothing to remedy the situation. Under the circuit court's orders, Ashford is left with a $1,000,000 judgment against him despite the equities at play. This Court should not allow that result to stand.

II. Ashford established a meritorious defense as to damages and the circuit court failed to exercise its discretion with respect to the damages awarded in this case, resulting in an award that is grossly excessive considering the evidence presented at the damages trial.

Once Ashford established good cause, the circuit court was then required to 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*, 298 S.C. at 465, 381 S.E.2d at 501–02. Here, Defendant promptly moved for relief within ten days of when WESCO's insurer became aware of the default judgment. (3/23/2023 Tr. 5:14-22, R. at ____). In addition, there is minimal prejudice to Dabeck given the grave prejudice to Ashford. *See Williams v. Watkins*, 384 S.C. 319, 327, 681 S.E.2d 914, 918 (Ct. App. 2009) ("Finally, we find the degree of prejudice Williams will suffer if relief is granted is not so high as to outweigh the other factors, and we note the law favors the resolution of disputes based upon all parties having their day in court." (quotation omitted)).

The more compelling question here is whether Ashford presented a meritorious defense as to the amount of damages. On this issue, the circuit court failed to exercise its discretion, believing that it was required to give the plaintiff what it requested, and further abused its discretion in reaching an award that was not supported by the evidence.

It is well-settled that "a defaulting defendant does not concede the Amount of liability." *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 240, 246 S.E.2d 880, 881 (1978); *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90, 757 S.E.2d 557, 558 (Ct. App. 2014). As a general matter,

> [A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion

> or a real controversy as to essential facts arising from conflicting or doubtful evidence.

Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978).

"[W]hether a meritorious defense as to damages alone and not as to liability is an adequate basis for the grant of Rule 60 relief" has not been decided by South Carolina's appellate courts. *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011). There is no case determining "whether a party demonstrating a meritorious defense to the damages awarded in the default proceeding would be entitled to have the entire judgment set aside or merely the damages award." *Id.*

Chief Justice Toal would have reached the issue in *McClurg* and found that the amount of a damages award can constitute a meritorious defense for purposes of the Rule 60 analysis, citing the following authority:

> In support of my position, I note other courts have recognized that an allegation relating to the amount of damages satisfies the meritorious defense requirement. *See, e.g., Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.,* 843 F.2d 808, 812 (4th Cir.1988) (discussing the meritorious defense raised: "[a]lthough these statements address the amount, rather than the propriety, of Augusta's claim, we believe that taken together they are a sufficient proffer of a meritorious defense"); *Wainwright's Vacations, LLC v. Pan American Airways Corp.,* 130 F.Supp.2d 712, 719 (D.Md.2001) (discussing *Augusta Fiberglass* and concluding, "[t] he company has raised a viable dispute about the amount it owes Pan Am"); *Esteppe v. Patapsco & Back Rivers Railroad,* 2001 U.S. Dist. LEXIS 7112, 2001 WL 604186 (D.Md.2001) (appellant raised a meritorious defense "by contradicting the amount claimed by plaintiff"). There are many instances, and this case is an example, where a defendant does not contest liability, but contests the extent of damages owed. Restricting the scope of a meritorious defense to liability alone incentivizes a party who may otherwise concede liability to deny any wrongdoing. I do not believe our courts wish to encourage that practice. At oral argument before this Court, there was concern that allowing a meritorious defense to damages might impede the finality of judgments, in that any discrepancy between actual damages and awarded damages could be a basis for setting aside a default judgment. I note

> that a meritorious defense to the amount of damages awarded must first be accompanied by a showing that the action filed meets the requirements of Rule 60(b)(1)–(5), SCRCP.

Id. at 97–98, 716 S.E.2d at 893–94 (2011) (Toal, C.J. dissenting); ***see also*** *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (finding in appeal from a sales and use tax challenge that defaulting party had presented a meritorious defense that its assessed taxes were too high). This is consistent with the general rule that, in the absence of South Carolina authority, South Carolina courts consider the construction applied to the Federal Rules of Civil Procedure. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."). In addition, the Rules of Civil Procedure preserve the ability to challenge the sufficiency of the evidence in matters decided without a jury. Rule 52(b), SCRCP ("When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.").

Here, the circuit court declined to consider the question because it believed it was constrained "to issue an order requesting what the plaintiff wants." (3/23/2023 Tr. 7:1-8:3, R. at ____). This failure to exercise discretion is an abuse of discretion. *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997); *CEL Prod., LLC v. Rozelle*, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004) ("A failure to exercise discretion amounts to an abuse of that discretion. When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred." (citations omitted)).

Under South Carolina law, it is well established that the determination of the amount of damages is an issue for the factfinder, but that determination must be based on the evidence. *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559–60, 671 S.E.2d 79, 85–86 (Ct. App. 2008) ("As a general rule, the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy. Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." (citations and quotations omitted)). Here, Dabeck presented evidence of approximately $22,000 in medical bills, and the Circuit Court awarded $1,000,000. Ashford argued that the award was not supported by the evidence such that the default judgment should be vacated.

A plaintiff bears the burden of proof as to damages. *See generally Miller v. City of W. Columbia*, 322 S.C. 224, 231, 471 S.E.2d 683, 687 (1996) (holding verdicts must be supported by evidence and not "caprice, passion, prejudice, or other considerations not found on the evidence"). It is incumbent upon the plaintiff to present evidence to support an award, even if the defendant is in default. *Howard*, 271 S.C. at 240, 246 S.E.2d at 881 (vacating default damages award where plaintiff failed to present evidence of damages); *Wells Fargo Bank, N.A.*, 408 S.C. at 90, 757 S.E.2d at 558; *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012)

As stated in *Howard*,

> It is common knowledge at the bench and bar that in a tort action the amount stated in the prayer for relief often bears little relation to the amount which the plaintiff is entitled to recover. The prayer in an action may not serve as a substitute for proof. The plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence.

271 S.C. at 240, 246 S.E.2d at 881. The circuit court granted well in excess of any numbers presented by Dabeck at the damages hearing. Then, when challenged by way of Ashford's motion, the circuit failed to exercise its discretion to consider a lesser amount and impermissibly shifted the burden of proof to Ashford, ruling that "his only 'meritorious defense' is on the damages issue but he provided no evidence in support of that defense." (Order, R. at ____).

Dabeck's evidence at the hearing consists of twelve pages of testimony and one summary. (3/31/2022 Tr. 5:9-17:17, Summary, R. at ____). The testimony showed that he was 25 years old and received treatment from an emergency room once relating to the accident. He further testified that he saw a primary care doctor and physical therapist after the accident for soft tissue injuries to his neck and back. His non-psychiatric medical bills totaled $22,020.14. He also testified that he received psychiatric care at a cost of $400/month. He did not present any evidence as to follow-up visits or supplemental treatments or any medical costs projections or other evidence that might show a need for future medical treatment. Nor did he present evidence showing surgical intervention was warranted or could be expected. None of this evidence supports an award of $1,000,000.

The meritorious defense raised by Ashford and the question at issue is that the award is not supported by the evidence. The circuit court erred in finding that it did not have the discretion to award less than $1,000,000 and that Ashford was required to present his own evidence showing that number was too high as a matter of law.

CONCLUSION

Ashford asks that this Court to "closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits." *Renney*, 275 S.C. at 567, 274 S.E.2d at 292. He acted reasonably for a person in his circumstances in

response to the complaint, WESCO failed to take action, and now he is left with a $1,000,000 judgment against him that is not supported by the evidence. As such this matter should be reversed and remanded either for a full determination on the merits or a new trial on damages.

Respectfully submitted,

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