

Cynthia Bales, as Personal Representative of the
 Estate of Frank Bales

Abel Martinez-Martinez

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or
	<input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: This case was before the Court on September 10, 2013, for a hearing on Defendant's Motion for Relief from Default Judgment pursuant to Rule 60(b), SCRPC. At the hearing, Defendant renewed his Motion to Vacate Entry of Default pursuant to Rule 55(c). After careful consideration of the evidence and arguments presented, this Court hereby GRANTS Defendant's Motion for Relief from Default Judgment and GRANTS Defendant's Motion to Vacate Entry of Default. Defendant is hereby GRANTED leave to file an Answer and the case shall proceed on its merits.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

FILED
 2013 SEP 25 PM 4:01
 JOLEE ARMSTRONG
 CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 CYNTHIA D. BALES, as Personal)
 Representative of the Estate of)
 FRANK R. BALES,)
)
 Plaintiff,)
)
 v.)
)
 ABEL MARTINEZ MARTINEZ)
 and the SOUTH CAROLINA)
 DEPARTMENT OF)
 TRANSPORTATION,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE 9TH JUDICIAL CIRCUIT
 CASE NO.: 2010-CP-10-8631

ORDER

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 JULIE J. ARNSTROM
 CLERK OF COURT
 BY _____

THIS MATTER was before the Court on Defendant’s Motion for Relief from Default Judgment pursuant to South Carolina Rule of Civil Procedure 60(b). The case is currently pending appeal before the South Carolina Court of Appeals as of May 15, 2012, and on August 30, 2013, the South Carolina Court of Appeals remanded the case to this Court with instructions to rule on Defendant’s Rule 60(b) Motion for Relief from Default Judgment. Pursuant to the South Carolina Court of Appeals Order, a hearing was conducted before the South Carolina Court of Common Pleas for the Ninth Judicial Circuit on September 10, 2013. Present on behalf of the Plaintiff were Attorneys Eric Poulin and Akim Anastopoulo and present on behalf of the Defendant was Attorney Mike Ethridge. Also present were Attorney Cal Watson for Turner Padgett Graham & Laney, PA, Janice Holmes for Allstate Indemnity Company, and Ross Shealy for Joseph Weston who have filed Motions to Intervene. At the hearing, Counsel for the Defendant Martinez renewed their request for relief from the entry of default, as well as from the default judgment.

Following this Court’s denial of Defendant’s Motion to Reconsider, Defendant requested this hearing pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure requesting this Court grant relief from the Order of Default Judgment filed March 2, 2012. After hearing testimony and reviewing the evidence on the record, and for the reasons more fully articulated

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below, this Court finds that Defendant is entitled to relief from default judgment pursuant to Rule 60(b) and, therefore, this Court hereby **GRANTS** Defendant's Motion for Relief from Default Judgment and vacates the Order filed in this matter on March 2, 2012, that entered judgment against Defendant in the amount of One Million Nine Hundred Thousand and 00/100 Dollars (\$1,900,000.00). This Court also **GRANTS** Defendant's renewed Motion for Relief from Default, thereby setting aside the Entry of Default filed October 4, 2011.

FACTUAL/PROCEDURAL BACKGROUND

Plaintiff's husband, Frank R. Bales, was killed as a result of an auto/motorcycle collision that occurred on October 15, 2008. According to Plaintiff's Complaint, Defendant Martinez disregarded a traffic signal, causing Defendant's vehicle to strike and fatally injure Mr. Bales. After the accident, Plaintiff retained Counsel Chris Beiring who initiated wrongful death settlement discussions with Defendant's insurance company, Allstate, and their counsel, Attorney Florence. Shortly thereafter, Attorney Beiring withdrew as counsel and Plaintiff's current counsel, Akim Anastopoulo, was retained. Evidence was presented at the September 10, 2013, hearing that Attorney Anastopoulo was aware of the settlement discussions and he drafted a letter that was sent to opposing counsel, Attorney Florence, stating that no settlement had been agreed upon and that Plaintiff's Attorney was in the process of serving the Defendant via publication. Attorney Anastopoulo represented in the letter to Attorney Florence that upon the completion of said service he would notify opposing counsel, as well as send him a copy of the Affidavit. Defendant Martinez was served through publication by the Berkeley Independent on May 2, May 9, and completed on May 16, 2011. Attorney Florence never received notification from Attorney Anastopoulo that service had been effectuated; neither did he receive a notification from the Court, as he was not Counsel of Record for Defendant Martinez.

Plaintiff moved for an entry of default, which was granted by the Court on October 4, 2011, and asked the Court to schedule a hearing to determine and enter judgment upon the proper amount of damages. Plaintiff sent notice of the hearing to Defendant's last known address and filed proof of the same with the Clerk, neither of which was served on Attorney Florence. During that time, Allstate retained Attorney Weston to represent them in the matter and Attorney Florence was relieved as counsel. At the hearing for damages on January 11, 2012, Plaintiff's counsel was present and Attorney Weston appeared on behalf of Allstate. The Court

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heard oral argument and received evidence and subsequently entered a Final Judgment in favor of the Plaintiff in the amount of One Million Nine Hundred Thousand and 00/100 Dollars (\$1,900,000.00) on March 2, 2012.

On January 11, 2012, the same day as the damages hearing, Attorney Weston filed a Motion to Vacate Default and Default Judgment, pursuant to South Carolina Rules of Civil Procedure Rules 55 and 60. This Court entered an Order denying Defendant's Motion to Vacate Default on February 15, 2012, prior to entering the Final Judgment. Attorney Weston filed a Motion for Reconsideration on March 15, 2012, requesting the Court reconsider the amount of damages awarded to the Plaintiff as a result of the damages hearing, including punitive damages. The Motion for Reconsideration was denied on April 17, 2013. Defendant's Rule 60(b) Motion for Relief from Default Judgment was filed April 26, 2013, which this Court heard on September 10, 2013.

LAW/ANALYSIS

In addressing a motion made pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure, the Court is required to consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties. *McClurg v. Deaton*, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct.App. 2008). A prima facie showing of a meritorious defense is a necessary component of prevailing on a Rule 60(b) motion. *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887-88 (2011).

Under *Edwards v. Ferguson*, this Court finds Allstate to be a lawful party with standing to bring this action in the name of the Defendant Martinez. 254 S.C. 278, 175 S.E.2d 224 (1970). Allstate "stands in the shoes of the defendant so far as liability is concerned" and, similar to *Edwards*, was unaware of the filing of the suit to the prejudice of the company. *Id.* As stated in *McClurg*, "[t]he *Edwards* case makes clear that a Rule 60(b) motion is properly made by an insurer under such circumstances." *McClurg v. Deaton*, 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct.App. 2008).

This Court heard argument and reviewed evidence demonstrating that, based on Plaintiff Attorney's conduct and actions, it was reasonable for Attorney Florence to believe he would be provided a copy of the Affidavit of Service or a copy of any pleadings when filed. *See McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct.App. 2008). Defendant filed with the Court an affidavit of Attorney Florence testifying as to the representation made by Attorney Anastopoulo

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and his reliance on the same, which resulted in Attorney Florence's, or Allstate's, failure to answer. The failure to answer led to the Entry of Default and, later, the Final Judgment against the Defendant. South Carolina case law has held that these actions constitute the surprise or neglect requirement under Rule 60(b)(1) and, in some cases, may establish the misrepresentation and misconduct element under Rule 60(b)(3). *Id.*

There is no question that relief was sought by Allstate promptly as the Motion for Relief from Default Judgment was filed with the Court on April 26, 2012, well within the one (1) year limit contemplated in Rule 60(b). Additionally, Plaintiff's Attorney could indicate no prejudice to their client that would result if the default judgment were set aside. In weighing the interests of a final judgment against the need to provide a fair and just resolution of the case, the Court finds that the need to provide a fair and resolution of this case prevails.

Turning to the final factor, the Court addresses whether the Defendant has made a prima facie showing of a meritorious defense such that granting relief from default judgment is proper under Rule 60(b) of the South Carolina Rules of Civil Procedure. Testimony was presented in addition to an affidavit that the Defendant "testified during a recorded statement that the traffic light was green when he went through the intersection at the time of the accident." *See Affidavit of Teresa Miller*.. The South Carolina Supreme Court has held

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 real facts arising from conflicting or doubtful evidence.

Thompson v. Hammond, 299 S.C. 116,120, 382 S.E.2d 900, 903 (1989) (quoting *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)). This Court finds that this defense, along with Defendant's allegation that of an intervening or superseding cause, satisfies the meritorious defense requirement.

During the hearing on September 10, 2013, Defendant renewed the Motion to Vacate the Entry of Default pursuant to South Carolina Rules of Civil Procedure Rule 55(c), in conjunction with their Rule 60(b) motion. Rule 55(c) provides that an entry of default may be set aside for "good cause shown." In order to satisfy the "good cause" requirement, South Carolina courts

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should utilize the factors relevant to a Rule 60(b) analysis, i.e. mistake, fraud, inadvertence, excusable neglect, surprise, newly discovered evidence, and misrepresentation. However, these factors are relevant “only inasmuch as proof of any one of these factors is sufficient to show ‘good cause.’” *Sundown Operating Co., Inc. v. Intedg Industries, Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 889 (2009).

South Carolina courts recognize the standard for relief under Rule 60(b) is “more rigorous” than that needed for relief under Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App.1987). This Court finds that the Defendant is entitled to relief under the higher standard of Rule 60(b) as a result of the actions of Attorney Anastopoulo and that such relief is proper under the factors in *McClurg*. As the South Carolina Court of Appeals has previously stated, “[a] litigant should not unnecessarily be forced into default as a consequence of having reasonably relied upon the word of his fellow, particularly when no innocent party will suffer if the default is opened.” *Id.* at 375, 360 S.E.2d at 537 (citing *Sears, Roebuck & Company v. Ramey*, 170 Ga.App. 873, 318 S.E.2d 740 (1984)). For the same reasons that this Court finds satisfy the standard for setting aside the default judgment, this Court cites in vacating the entry of default.

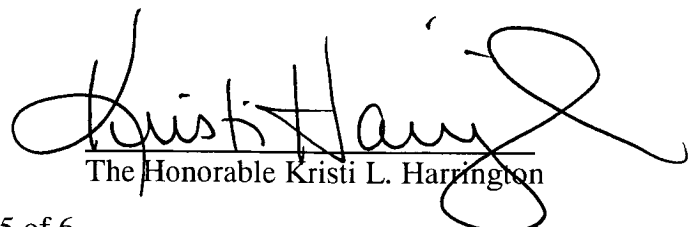
Based on this record, and consistent with the statutory and common law of South Carolina, this Court finds the Defendant has satisfied the requirements of Rule 60(b) and Rule 55(c) of the South Carolina Rules of Civil Procedure and the justice of the case requires that this matter be tried on its merits.

IT IS THEREFORE ORDERED that the Entry of Default filed October 14, 2011, and Default Judgment ordered March 2, 2012, be set aside and the Defendant is granted leave to answer the Complaint.


IT IS HEREBY ORDERED, ADJUGED, AND DECREED THAT THE ENTRY OF DEFAULT AND DEFAULT JUDGMENT BE SET ASIDE WITH LEAVE TO THE DEFENDANT TO ANSWER AND THE ISSUES TRIED ON THE MERITS.

IT IS SO ORDERED.

This 24th day of September, 2013


The Honorable Kristi L. Harrington

Presiding Judge Court of Common Pleas
Ninth Judicial Circuit


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