THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2012-212812

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

APPELLANTS' PETITION FOR REHEARING
Unpublished Opinion No. 2013-UP-442
Filed November 27, 2013

COME NOW THE APPELLANTS who would pursuant to S.C.A.C.R. 221, petition this Court for a rehearing on the grounds set forth below.

I. Background

This is a medical malpractice case filed by Respondent. Initially, on January 15, 2010, Plaintiff filed a Notice of Intent to File suit pursuant to S.C. Code Ann. §15-79-125. **R.13.** The filing was given case number **2010-CP-26-395**. Additionally Plaintiff

filed answers to rule 33(b) standard interrogatories.[1] Counsel did not use the plaintiff's real name, but rather he used the name *Jane AP Doe*. This "pre suit" filing case number, 395, was different from the case number given the law suit which was subsequently filed on June 11, 2010. The actual law suit was given case number 2010-CP-26-**5146**. On March 24, 2010, in case 2010-CP-26-395, plaintiff's counsel sent a letter sent to the Appellants giving them notice of mediation pursuant to S.C. Code Ann. §15-79-125. **R. 24.** The date which had been set for mediation was April 27, 2010. **Id.** This correspondence predated Appellants' learning of the identity of the plaintiff. Appellant, Halla Jaraki, stated that on April 1, 2010, in case 2010-26-395, she filed a letter she had sent to plaintiff's counsel asking for information in order to identify the plaintiff correctly.[2] **R. 103.** Mrs. Jaraki told Respondent's counsel that she did not have a patient by the name of *Jane AP Doe* in their data base. In her letter, Appellant requested the name; address; date of birth; social security number; and a copy of the patient's driver's license. **Id.** Further, in case 2010-26-395, Dr. Omar Jaraki testified by affidavit that he had sent a letter dated March 24, 2010, to plaintiff's counsel asking for the same information requested in the letter sent by Mrs. Jaraki. **R. 104.** Appellants did not attend the mediation on April 27, 2010, as they had not yet learned even the identity of the plaintiff by that date.

After the scheduled date for mediation had passed, on May 3, 2010, Respondent finally sent a letter to Appellants providing the actual name of the plaintiff: *Amanda Peele*. **R. 106.** This was in response to Appellants' letters asking for the name of the

[1] When naming his first potential witness in the interrogatory responses, plaintiff's counsel wrote: "Jane AP Doe. Plaintiff in this action. Her expected testimony is in accordance with the facts known and damages sustained." **R. 24.** Thus, this "disclosure" provided nothing by way of information regarding plaintiff's identity.

[2] Though filed on April 1, 2010, the letter was actually dated March 31, 2010. **R. 103.**

plaintiff. This letter referenced case *2010-26-CP-395*. On May 14, 2010, an "Order Terminating Pre-litigation Mediation," was signed by mediator John Breeden. **R. 1.** Respondent did not offer to mediate the case again after disclosing the identity of the plaintiff.

The Law Suit: Case 2010-CP-26-5146

On June 11, 2010, civil action *Jane AP Doe v. Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology & Arrhythmias Consultant and Institute of Electrophysiology, PC.* was filed. This filing was given case number *2010-CP-26-5146.* This action was served on Dr. Jaraki on June 28, 2010; **R. 41,** ¶ 2, and it was served on Mrs. Jaraki the next day on June 29, 2010. **R. 45, ¶ 2** . On July 9, 2010, eleven (11) days after service, a letter from Dr. Jaraki to plaintiff's counsel was filed with the Court (and sent to plaintiff's counsel according to Dr. Jaraki) requesting identification of *Jane AP Doe.* **R. 108.** The letter stated that the name; address; date of birth; social security number and a copy of the driver's license were all needed in order to respond to the complaint. **Id.**

On November 22, 2010, a motion for relief from default was filed by Appellants. **R. 39.** A hearing was held on March 7, 2011, on defendant's motion. On March 10, 2011, a Form 4 order was filed denying defendants' motion and granting plaintiff's motion for default. A written order denying the motion for relief was entered May 20, 2011. In the Court's opinion, it is stated,

> The letters filed by the Defendants with the Clerk of Court were not responsive pleadings and therefore the Defendants are in default. Furthermore, this court has inherent authority to enforce the Provision of S.C. Code Ann § 15-79-125 . . . and the Court hereby enforces the requirements of S.C.

> Code Ann. § 15-79-125 by prohibiting the filing of responsive pleadings.

R. 4. Therefore, Appellants argued that the trial Court never analyzed this case as to whether "good cause" existed or not with regard to setting aside the entry of default pursuant to S.C.R.C.P 55. The Court stopped its analysis when it found that the letters did not constitute a responsive pleading. Moreover, the Court erroneously diverted the process by interjecting S.C. Code Ann. § 15-79-125, the pre-filing statute dealing with Notice of Intent to File Suit.

On June 2, 2011, Appellants filed a timely Motion to Reconsider. The motion was based, *inter alia*, on the following grounds:

> (1) The letters filed by the defendants with the Clerk of Court were legally sufficient to avoid default;
>
> (2) Defendants failure to follow the pre-suit mediation process set out at, inter alia, 15-79-125 may not constitute a basis for the Court to prohibit the filing of a responsive pleading; and

R. 82. A form 4 order denying Appellants' motion to reconsider was entered August 17, 2011. R. 9. An appeal was taken to this Court and on November 6, the matter was orally argued. On November 27, 2013, this Court filed its unpublished opinion affirming the trial judge.

II. Grounds for Rehearing

Appellants submitted the following issued for review in this direct appeal.

> I. Were the letters filed by the defendants with the Clerk of Court an answer, or at minimum, were they efforts to "otherwise defend" this action under S.C.R.C.P. 55?
>
> II. May defendants' failure to follow the pre-suit mediation process set out at, inter alia, S.C. Code Ann. §15-79-125, constitute a basis for the Trial Court to prohibit the filing of a responsive pleading or otherwise

allowing the defendant to defend against the action in a subsequent law suit?

A. The Letters Were Sufficient to Avoid Default

In its opinion this Court stated in part, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book)."Rule 55(c), SCRCP (setting forth the standard for granting relief from an entry of default as "good cause"); ... the good cause standard under Rule 55© requires a party seeking relief from an entry of default to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice) ... *Hill v. Dotts*, 345 S.C.304, 308-09, 547 S.E.2d 894, 896 (Ct. App. 2001)(holding that the defendant's letter to plaintiff's counsel did not qualify as an answer because it did not mention or deny any of the fourteen specific allegations of negligence and recklessness set forth in the complaint)." Appellants respectfully submit that this Court overlooked the fact that the letter in *Hill v. Dotts*, was actually an implied admission if not an overt acknowledgment of fault. The letter stated, "In answer to your Complaint, I did not have insurance. I was driving my uncle's car. I am very sorry about Mrs. Hill and my uncle. It wasn't something I had planned to happen." 345 S.C. at 306.

In Appellants' case, the letter was generally a denial stating they had not treated a patient by the name of Jane AP Doe. Moreover, the Appellants were dealing with confidential information of medical patients as medical care providers. Appellants would request this Court to rehear this matter and conclude that the letters submitted by them were a sufficient response to avoid the entry of default

B. Failure to Mediate May Not Cause Default in this Case

This Court did not directly address this issue. However, regarding the issue of default generally, this Court stated, "... the good cause standard under Rule 55(c) requires a party seeking relief from an entry of default to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice); . . . in determining whether to grant relief from an entry of default, once a party has given 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 . . . an abuse of discretion arises where the judgment is controlled by an error of law or is based on factual conclusions that are without evidentiary support...The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." This Court thus did not directly address the use of the mediation failure in the Notice part of the dispute as a ground for imposing default in the subsequent civil litigation.

In the instant case, plaintiff's counsel wrote a letter advising defendants of the scheduled mediation. **R. 105.** There was no court order in effect at that time. Moreover, we submit that no bad faith, willful disobedience or gross indifference to a party's rights has been shown in this instance. Sub-section "F" of the statute reads

> (F) Participation in the pre-litigation mediation pursuant to this section does not alter or eliminate any obligation of the parties to participate in alternative dispute resolution ***after the civil action is initiated***. However, there is no requirement for participation in more than one alternative dispute resolution forum following the filing of a summons and complaint to initiate a civil action in the matter.

Emphasis added. Because Appellants were unaware of the plaintiff's identity as of April 27, 2010, the date of the scheduled mediation, we submit that no sanction should have been imposed upon them. However, the proper sanction to be imposed in this instance we

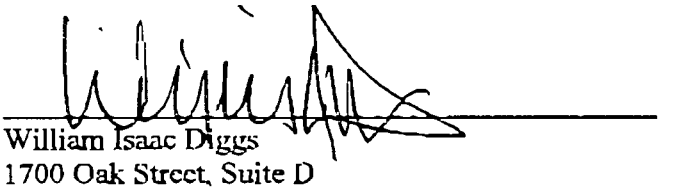
submit, if any, would be to allow the plaintiff to file her lawsuit and then ***compel use*** of the latter alternative dispute resolution forum contemplated by S.C. Code Ann. § 15-79-125, we respectfully submit. We respectfully request that this Court revisit this issue and grant a rehearing on it.

Conclusion

For the foregoing reasons, Appellants would respectfully request a rehearing on these issues in this matter.

Respectfully submitted,

LAW OFFICES OF WILLIAM ISAAC DIGGS



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ATTORNEY FOR THE APPELLANTS

This 12 day of December, 2013
Myrtle Beach, South Carolina

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
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CERTIFICATE OF SERVICE

This is to certify that I have this 12 day of December, 2013, deposited one copy of the Petition for Rehearing in the U.S. Postal Service with proper postage affixed thereto and addressed to opposing counsel as follows:

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