

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 2012-212373 (S.C. Ct. App. filed November 27, 2013)

Jane RM Doe, Respondent

v.

Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia
Consultants, Cardiology and Arrhythmias Consultant,
Institute of Electrophysiology, P.C.

Of whom Omar Jaraki and Halla Jaraki are the Petitioners

PETITION FOR A WRIT OF CERTIORARI

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SC Court of Appeals

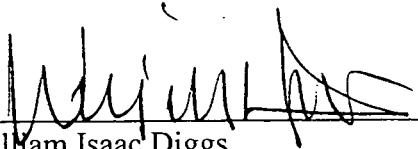
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COME NOW THE PETITIONERS, who would, by and through their undersigned counsel, pursuant to S.C.A.C.R. 242, petition this Court for a Writ of Certiorari to review the opinions of the South Carolina Court of Appeals in the cases of

CERTIFICATION BY COUNSEL

This is to certify that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals.



William Isaac Diggs

QUESTIONS PRESENTED

1. Did the Court of Appeals err in overlooking the fact that the letters mailed by petitioners seeking additional information about respondent's identity did constitute an answer which was sufficient to avoid default judgment?
2. Did the trial commit error and abuse its discretion when it ruled that the Petitioners had failed to establish good cause to be relieved from default judgment pursuant to S.C.R.C.P. 60?

STATEMENT OF THE CASE

Respondent initiated this action on January 27, 2010, with the filing of a summons and complaint alleging causes of action for assault; battery; intentional infliction of emotional distress; negligent infliction of emotional distress; invasion of privacy; breach of contract; breach of fiduciary duty; unfair trade practices; negligent supervision; and spoliation of evidence. **R. 7.** On April 30, 2010, respondent filed an affidavit of default along with her notice of motion and motion for default judgment. **R. 152.** The Clerk of Court for Horry County filed an entry of default therewith. On November 3, 2010, a damages hearing was held before the Honorable Benjamin H. Culbertson, Judge, and a judgment was entered in the amount of \$100,000.00 in actual damages and \$100,000.00 in punitive damages. **R. 116.** On November 22, 2010, a motion to be relieved from default judgment was filed by the Petitioners and on November 30, 2010, an amended motion for relief from default judgment was filed. **R. 17.** A hearing on the amended motion for relief from default judgment was held before Judge Culbertson on May 21, 2012. On even date therewith Judge Culbertson denied the Petitioners' motion and awarded damages in the amounts above stated. After hearing oral arguments on November 6, 2013, the Court of Appeals affirmed by unpublished opinion filed

November 27, 2013. A timely motion for rehearing was denied by order filed January 27, 2014.

When Plaintiff initiated this matter, she alleged several causes of action against the Petitioners, all of which stemmed from an alleged improper touching of Respondent's breast by defendant, Omar Jaraki, during a medical examination.¹ Respondent testified that Dr. Jaraki "cupped" her breasts and played with her nipples while attempting to place test leads on her chest for an EKG. **R. 36**. Respondent testified that she thought the proper way to lift the breast was to use either the side of the hand or the back side of the hand while lifting. She learned this later after a nurse from a different office lifted her breast with the side of her hand in order to place the EKG leads on her body. **R. 76, lines 4-9**. She stated that Dr. Jaraki would "cup" her breast to lift it in order to place the leads for the EKG underneath. **R. 76, line 17** *id.* The basic difference is that with Dr. Jaraki she had no clothes on her top, while the nurse felt underneath her top garment. *Id.* Respondent's counsel described how Respondent demonstrated for the Court the lifting of her breast for the EKG lead placement. **R. 79, lines 18-20**.

The evidence shows that Omar Jaraki, M.D., was served with the law suit on February 26, 2010. **R. 19, ¶ 2**. Petitioner, Halla Jaraki, was served on March 5, 2010. **R. 23, ¶ 2**. The Petitioners are originally from Syria. **R. 121, lines 15-16**. Because of that fact, they did not understand Respondent's use of the initials "RM" and the name, "Jane RM Doe." Upon being served with the complaint, they did not understand the identity of the plaintiff, **R. 19** (Dr. Jaraki Affidavit paragraph 4), so they sought additional

¹ Defendant Omar Jaraki is a cardiologist and practiced medicine in Horry County under the business names *Cardiology & Arrhythmia Consultants*; *Cardiology and Arrhythmias Consultant*; and the *Institute of Electrophysiology, P.C.*. Defendant Halla Jaraki is the wife of Omar Jaraki and has worked in her husband's medical practice as a member of his support staff.

information about the plaintiff's identity. Petitioners wrote a letter to plaintiff's counsel on March 24, 2010, which was within the 30 day period of time following Dr. Jaraki's receipt of the summons and complaint. A copy of the letter was filed with the clerk of court on April 1, 2010. **R. 157** (Id. paragraph 6). Plaintiff's counsel has stated, however, that he did not receive the letter.²

Defendants' affidavits show that they were confused by the captioning of the case which included a plaintiff by the name of "Jane RM Doe." Defendants knew that they had never treated any patient by such a name so they wrote a letter asking for additional information concerning the identity of the plaintiff. Moreover, defendant, Omar Jaraki had been sued before and that plaintiff had used a proper name, thus, he was not familiar with the "John Doe" designation in the litigation setting. **R. 19** (Affidavit of Dr. Jaraki at paragraph 3). Dr. Jaraki's letter stated

I have to have the following to identify your plaintiff correctly if he or she existed in our records. I do not find anybody by name Jane RM Doe. I need the following and every item of the following: Name; Address; Date of Birth; Social security number; a copy of the driver license To positively identify your plaintiff due to the sensitive nature of medical records. Until I receive all the above information about this matter I cannot answer any further question.

R. 157. (Letter dated March 24, 2010).³ A second identical letter was clocked in the

² A review of the Court file in the office of the clerk of court shows that the letter was not placed in the file even though it was clearly clocked with the clerk's office on April 1, 2010. There is no evidence at this point to explain why the letter was not in the Court's file at the time plaintiff filed its affidavit of default.

³ See 42 U.S.C. § 1320d-1320d-9; and The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules

clerk's office the same date and bore both Petitioners' signatures. **R. 26.** Halla Jaraki stated in her affidavit that she mailed the letter to Respondent's counsel. **R. 23.** On April 30, 2010, Respondent filed her Affidavit of default and her Notice of Motion and Motion for Default Judgment, and an entry of default was filed by the Clerk of Court. On August 16, 2010, **R. 151 – 152,** the clerk's office mailed an Order Disposition of Motion clocked August 12, 2010 to Respondent's counsel.

On September 20, 2010 a letter was mailed from Dr. Jaraki to Respondent's counsel again asking for information about Jane RM Doe, denying that he could find information about this person. **R.158.** A letter was also sent from Halla Jaraki asking for information about patient Jane *RM Doe* and further denying that she could find such a patient in the office records. On September 29, 2010 a Notice was mailed to Halla Jaraki regarding the motion and default judgment. **R. 161.** On October 28, 2010 a letter from Respondent's counsel to the Petitioners was mailed stating that the two letters from September 20, 2010 were never received by his office. **R. 160.** Additionally counsel provided a patient number for the plaintiff regarding her identity. The mailing also included notice of the damages hearing to be held on November 2, 2010. **Id.** On October 29, 2010 a letter was mailed and filed by Halla Jaraki stating, "A response to the above legal action was submitted to the court and your office on April 1, 2010...."

Judgment was entered on November 3, 2010 in the amount of \$100,000.00 actual damages and \$100,000.00 punitive damages. The following day, on November 4, 2010, after having hired counsel, the Petitioners filed formal answers. **R. 123, lines 8-10.** On November 22, 2010, Petitioners filed their Motion to be relieved from default judgment.

An amended motion was filed on November 30, 2010.⁴ **R. 16.** A hearing was held on May 21, 2012 on an amended motion for relief from default judgment. Petitioners argued that the letter was “an answer, a responsive pleading that was filed basically denying the allegations in the complaint...” **R. 124, lines 10 – 12.** Additionally, Petitioners argued that the timeliness of the motion and Dr. Jaraki’s denial of the allegations warranted relief from default judgment pursuant to Rule 60. *Id.*, **R. 124, lines 17 - 20.** Judge Culbertson heard the motion and denied the same from the bench, indicating at that time that a form 4 order would be forth coming. That order was filed May 29, 2012. **R. 1.** We submit that the Court committed error in both respects.

ARGUMENT I

THE COURT OF APPEALS SHOULD HAVE HELD THAT THE LETTERS MAILED BY PETITIONERS SEEKING ADDITIONAL INFORMATION ABOUT RESPONDENT’S IDENTITY CONSTITUTED AN ANSWER WHICH WAS SUFFICIENT TO AVOID DEFAULT

S.C.R.C.P. 7 governs pleadings. This rule states in part

[t]here shall be a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14, and there shall be a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer; and there may be a reply to affirmative defenses as provided in Rule 8(c).

When the summons and complaint were served on the defendants, they responded in writing with a letter requesting additional identifying information about the plaintiff. **R.**

⁴ The initial motion for relief cited grounds enumerated in “Rule 60(b).” The amended motion cited “Rule 60(b)(1) including mistake, inadvertence, surprise, or excusable neglect.”

157. This was not unreasonable given the privacy concerns of medical patients under HIPAA⁵ and responsibilities had by treating physicians. Respondent's counsel did not provide Petitioners with any assurance or notice waiving plaintiff's confidentiality. See *In Re Broderick*, 34 Kan. App. 2d 695, 702-704, 125 P.3d 564 (2005) (45 C.F.R. § 162.512(e) authorizes four methods to obtain the protected health information none of which are present in this case.

Under such circumstances, we submit that Petitioners' writing must be treated as an answer. As for treating the Petitioners as being in default, S.C.R.C.P. 55 states in part

(a) 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).

Emphasis added. We submit that the written letter from the Petitioners to the Respondent's counsel and filed with the Court constitutes an answer as contemplated by Rule 7 and it was an attempt to "otherwise defend" the action.

The phrase 'otherwise defend' is not defined ... but is generally considered to refer "to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits. ... "A default by a defendant consequently arises only when the defendant has failed to contest the allegations raised in the complaint," making default judgment proper against the defendant when "liability has been admitted or 'confessed' by the omission of statements refuting the plaintiffs claims." *Equable Ascent Fin, LLC v. Christian*, 196 Ohio App.3d 34, 962 N.E.2d 322 (2011); and see cases collected and cited therein: *Heritage Realtors*

⁵ HIPAA permits release of records "in response to a subpoena, discovery request, or other lawful process." 45 C.F.R. § 164.512(e)(1)(ii). *Mezu v. Morgan State University*, 11-2396 (4th Cir. 9-14-2012)

v. *Kahmann* (Apr. 26, 1993), 12th Dist. No. CA92-09-082, 1993 WL 128116 (deciding that by contesting the case through a motion for change of venue, the defendant had "otherwise defend[ed]" so as to avoid default judgment); *Murphy v. Alhajj* (June 3, 1999), 8th Dist. No. 74198, 1999 WL 359197 (determining that the defendant's motion to consolidate three small-claims cases and transfer them to the general division of the civil docket, to which the defendant attached an affidavit from his attorney explaining why the plaintiff was not entitled to the money he sought, coupled with the defendant's presence at the first hearing in the small-claims court, "indicated that the complaint was contested," the defendant otherwise defended, and default judgment was not proper); *Stradiot Specialty, Inc. v. Am. Calendar Co., Inc.*, 11th Dist. No. 2004-L-162, 2007-Ohio-3364, 2007 WL 1881309 (stating that a defendant's "motion to dismiss and a motion to transfer the matter to a foreign jurisdiction" as well as the defendant's attempt "to file an untimely answer" and "motion for summary judgment" meant that the defendant had otherwise defended against the plaintiffs claims and "could not be held in default").

Petitioners' letter denies that they had treated any such patient as "Jane RM Doe" and thus necessarily denies the whole of the allegations made against them in the Respondent's complaint. **R. 157.** Thus it is unreasonable to conclude that they were not contesting the validity of the complaint's allegations. It was error for Respondent's counsel to file an affidavit of default and it was error for the clerk of court to enter a default against the Petitioners. The trial Court's ruling constitutes an abuse of discretion we respectfully submit and the Court of Appeals committed error when it affirmed the trial judge on this point.

ARGUMENT II

THE TRIAL COURT COMMITTED ERROR AND ABUSED ITS DISCRETION WHEN IT RULED THAT THE PETITIONERS HAD FAILED TO ESTABLISH GOOD CAUSE TO BE RECEIVED FROM DEFAULT JUDGMENT PURSUANT TO S.C.R.C.P. 60?

Traditionally, the law governing relief from default judgment has been "...liberally construed to see that justice is promoted and to strive for disposition of cases on their merits. The element of discretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default. 10 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, § 2685. *Ricks v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535 (Ct.App. 1987). Compare "We favor trial of issues on merit over securing judgment by slight technicalities." *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 339 S.E.2d 524 (Ct.App. 1986)

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. Rule 60(b), SCRPC. 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 the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. *Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App. 2001). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129

(Ct.App. 1991). Rodriguez v. Gutierrez 391 S.C. 323, 705 S.E.2d 94 (Ct.App. 2011). However, good cause existed in this case prior to the damages hearing and we submit the trial court made an error in overlooking the fact that default should not have been entered in this case.

Even if the Court did not err in allowing the entry of default to stand in this case, the judgment should have been set aside under rule 60. In Petitioners' case, the promptness element under Rule 60 is satisfied because they (Petitioners) were communicating with the Respondent within the 30 day window within which to respond. Moreover, they immediately sought relief from the default judgment within days of being notified about it. Petitioners acted promptly. However, there are reasons for failure to file a formal response without using caution. There was confusion caused by the use of the plaintiff's initials and the fact that Dr. Jaraki is a medical provider who is subject to the privacy constraints of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules.

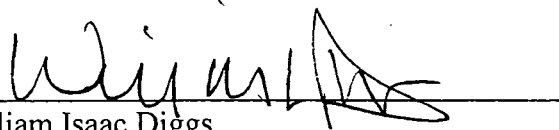
But for the Respondent's use of plaintiff's initials, the Petitioners would not have been confused about the plaintiff's identity. The Petitioners deny fully the Respondents allegations. **R. 27** (Proposed Answer). Thus, there is a meritorious defense. Lastly, there is no prejudice to the Respondent. No position would have changed by the time a trial could be had on the merits. S.C.A.C.R. 242(b) (1) states that the Court may grant the petition, "Where there are novel questions of law." Such a novel question is presented here. Petitioners have to comply with federal statutory law known as HIPAA and respond to civil allegations of an alleged former patient when a defendant does not recognize the plaintiff's identity. A medical provider may not simply respond regarding a

patient's complaint without knowing the identity of the patient and knowing that they are *responding with the patients' permission.*

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari. A novel question of law is presented containing the interplay between the federal HIPAA statutes and guidelines and state procedural law in medical malpractice actions.

Respectfully submitted,



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This 24 day of February, 2014
Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
Opinion No. 2013-UP-442
(Filed November 27, 2013)

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 Petitioners

CERTIFICATE OF SERVICE

This is to certify that I have this 26 day of February, 2014, deposited one copy of the Petition for Writ of Certiorari in the U.S. Postal Service with proper postage affixed thereto and addressed to opposing counsel as follows:

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