THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Richard L. Hinson, Special Referee

Case No. 2015-CP-17-313
Appellate Case No. 2016-000246

Thomas J. Grossetti, Jr. .....Respondent

v.

Nicolette S. Blue .....Appellant

INITIAL BRIEF OF RESPONDENT

George D. Jebaily
Suzanne H. Jebaily
Jebaily Law Firm, P.A.
Post Office Box 1871
Florence, SC 29503
Phone: (843) 667-0400
Attorneys for Respondent

Brett H. Bayne
McAngus, Goudelock & Courie, LLC
1320 Main Street
Meridian, 10th Floor
Columbia, SC 29201
Attorney for Appellant

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STATEMENT OF THE CASE

On June 4, 2015 Respondent Thomas J. Grossetti, Jr., filed a Summons and Complaint against Appellant-Defendant Nicolette S. Blue seeking to recover damages arising out of an automobile accident in Dillon County, South Carolina on May 17, 2013. (Summons and Complaint). Defendant was insured by Omni Indemnity Company. (Omni) Respondent served Defendant with Summons and Complaint by certified mail on June 12, 2015. Proof of Service was filed on June 18, 2015, indicating service had been perfected. (Aff. of Service). No answer or responsive pleadings were filed. Thereafter, Respondent mailed an Affidavit of Default and a motion for Entry of Default on August 20, 2015. The Affidavit and Motion were filed on August 31, 2015. (Aff. of Default and Motion for Entry of Default). An Order for Entry of Default was signed on August 27, 2015 and filed with the Clerk of Court on August 31, 2015. (Order for Entry of Default). The Order vested jurisdiction of this matter with the Special Referee and provided that any appeal from the Order of the Special Referee "shall be directed to the South Carolina Court of Appeals." (Order for Entry of Default).

Respondent served the Appellant with the Order for Entry of Default and Notice

of Hearing on damages on September 2, 2015 by certified mail. Appellant signed for service on September 4, 2015. The damages hearing was held on September 22, 2015 in Florence, South Carolina. Respondent and his mother were present at the hearing, testified, and presented evidence in support of a damages award. Appellant failed to appear at the September 22, 2015 hearing and did not present any evidence contesting damages. (Order and Judgment).

The Special Referee awarded a total of $75,088.84 in damages; $65,088.84 in actual damages and $10,000.00 in punitive damages. (Order and Judgment) Appellant filed Motion to Set Aside Default, along with a supporting Memorandum on October 9, 2015. (Motion to Set Aside Default).

STATEMENT OF FACTS

This matter arises from a hearing on damages after default was entered on August 31, 2015 against Appellant for failure to answer Respondent's Summons and Complaint. As a result of Appellant's default, the facts alleged in Respondent's Complaint are deemed admitted and incorporated by reference herein. (Summons and Complaint). *See Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90, 757 S.E.2d 557 (Ct. App. 2014) ("A defendant in default admits liability but not the damages . . . .") (Citations omitted).

Appellant contradicts his own evidence in asserting that Omni was not informed a Summons and Complaint had been filed in this matter. The Summons and Complaint was filed on June 4, 2015. Appellant was notified six days later on June 10, 2015. (Aff. of Kim Cofresi, ¶10).

Finally, Appellant's discussion about Omni's attempts to appear and defend this

claim is argumentative. There are no documents or pleadings in the record to show Appellant made an appearance prior to entry of default.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. . . . The judge's findings are equivalent to a jury's findings in a law action." *Townes Associates Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 774 (1976). Referral to a Special Referee does not change the scope of review. *Bodiford v. Spanish Oak Farms, Inc.*, 317 S.C. 539, 455 S.E.2d 194 (1995). "In an action at law, the appellate court will correct any error of law, but it will affirm the Special Referee's factual findings unless there is no evidence that reasonably supports those findings." *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). The power to set aside a default judgment is solely within the discretion of the Special Referee and will not be disturbed on appeal absent a clear showing of abuse of discretion. *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009). "An abuse of discretion occurs when: (1) a judge's ruling has no evidentiary support; or (2) the judge's ruling was controlled by some error of law." *Ransom v. S. C. Water Resources Commission,* 321 S.C. 211, 213, 467, S.E.2d 463, 465 (1996).

ARGUMENT

I. **The Special Referee properly denied Appellant's Rule 60(b) Motion to Set Aside the Default Judgment due to mistake, inadvertence, surprise or excusable neglect, because Appellant had actual notice that a lawsuit had been filed and the Appellant was properly served with Notice of Hearing on damages.**

A party seeking to be relieved from a default judgment must do so under Rule

60(b), SCRCP. The standard for granting relief from a default judgment under this Rule is more rigorous than the "good cause" standard under Rule 55(c). *Sundown Operating Co., Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888-89 (2009). (Citations omitted.) "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.'" *Id.* "The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid default once the court has entered a judgment, which carries greater finality, and often occurs later than a clerk's entry of default." *Id.*

The parties in this case agree there has been no misconduct or misrepresentation on the part of Respondent's counsel:

> Mr. Bayne: There is clearly no malfeasance, misconduct or anything like that, or misleading. . . . I'm not trying to imply that.
>
> . . .
>
> Mr. Jebaily: We did file suit. We did let them know we filed suit. We did not send a copy of the summons and complaint. Those are, I think, facts that are not in dispute. And at no time was there any misrepresentations made to Omni, anything other than what the facts actually are. Are we in agreement?
>
> Mr. Bayne: Correct, there was no misrepresentation made by your office that it had – it had not been served yet or anything like that. Nothing like that was done. I agree 100 percent.

(Motion Hrg. Tr., p. 36, ll. 17-25; p. 37, ll. 11-22).

Appellant asserts grounds for relief solely under Rule 60(b)(1), SCRCP. "In determining whether to set aside a default judgment under Rule 60(b)(1) the trial judge should consider the following relevant factors: (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 other parties." *McClurg v. Deaton* (*McClurg I*), 380 S.C.

563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008) *affirmed McClurg v. Deaton (McClurg II),* 395 S.C. 85, 716 S.E.2d 887 (2011) (Citations omitted).

Appellant maintains the failure of Respondent to inform Omni that the lawsuit had been filed constitutes "surprise, excusable neglect, mistake, or inadvertence." (Initial Brief of Appellant, p. 6.). However, the record contains evidence that Omni was informed and had actual notice of the filed suit. Appellant submitted the affidavit of an Omni adjuster attesting to the fact that on June, 10, 2015, "I spoke with Mr. Jebaily and he informed me that suit had been filed." (Aff. Kim Cofresi, ¶10).

At the hearing on Appellant's Motion to Set Aside the Default (Motion to Set Aside) counsel also acknowledged that Omni was informed and had actual notice suit had been filed:

> "The Court: But one thing that does concern me is that paragraph 10 where the adjuster says, 'I spoke with Mr. Jebaily and he informed me suit had been filed.' And that was before there had been a default, correct?
>
> Mr. Bayne: Correct, that was nine days after it had been filed." (Motion Hrg. Tr., p. 28, ll. 1-6).

Notwithstanding evidence showing Respondent did inform Omni that a law suit had been filed, the alleged failure to inform Omni does not constitute grounds for relief. In fact, the record shows that Appellant's "main gripe" was the failure of Respondent to send Omni the "suit papers." (Motion Hrg. Tr., p. 28, ll. 12-14).

Appellant relies heavily on *Edwards v. Ferguson,* 254 S.C. 278, 175 S.E.2d 224 (1970) to support her claim that Respondent was obligated to send Omni a copy of the Summons and Complaint and failure to do so was grounds for relief under Rule 60(b)(1). In *Edwards,* the court held the insurer should have been provided a copy or served with the complaint because the insurer "stands in the shoes of the defendant so far as liability

is concerned." The court, deciding in favor of the insurer, reversed the denial of the insurer's motion to set aside the default judgment. *Edwards,* 254 S.C. at 282, 175 S.E.2d at 224.

As the Special Referee pointed out in his Order, *Edwards* is distinguishable and should not be controlling authority in this matter. *Edwards* was decided in 1970, prior to the adoption of the South Carolina Rules of Civil Procedure. *Narruhn v. Alea London, Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013). Rule 4, SCRCP, now governs the service of process in South Carolina and "assures the defendant of reasonable notice of the action." *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995). Rule 5(a), SCRCP, provides that "notice of any trial or hearing on unliquidated damages shall also be given to parties in default." *Id.* at 212, 456 S.E.2d at 901.

The record here shows that Respondent complied with the applicable law under Rule 4, SCRCP, in serving Appellant with the Summons and Complaint. In addition, Respondent provided Omni with actual notice on June 10, 2015, well within sufficient time for Appellant to appear and answer. (Aff. Kim Cofresi, #10, Motion Hrg. Tr., p. 28, ll. 1-6; p. 29, ll. 6-10; Proof of Service filed on June 18, 2015; Aff. Service, June 18, 2015). Respondent complied with applicable law under Rule 5(a), SCRCP, and served Appellant with notice of the hearing on unliquidated damages on September 2, 2015 by certified mail, restricted delivery. Appellant signed for receipt of the notice on September 4, 2015. (Notice of Hearing, Proof of Service).

Edwards also preceded a legislative policy shift with the enactment of the Motor Vehicle Financial Responsibility Act of 1974, requiring mandatory minimal coverage and limits for all vehicles registered and licensed in South Carolina. Since then "our Supreme

Court has over the years adopted a policy of construing the Financial Responsibility Act strictly against insurers and liberally in favor of the injured in order to accomplish the purposes underlying the statute." *Shores v. Weaver*, 315 S.C. 347, 354, 433 S.E.2d 913 (Ct. App. 1993) (holding an insured's failure to notify the insurer about an accident, as required by the automobile insurance policy, could not defeat an innocent victim's recovery) *superceded by statute, but see Cowan v. Allstate Ins. Co.* 357 S.C. 625, 629, 594 S.E.2d. 275, 277 (2004) .

In 1997 the legislature amended the South Carolina Code to include sub-section 38-77-142(B) which specifically addresses an insurer's obligation to its insured when the insurer has actual notice of a lawsuit:

> If an insurer has actual notice of a motion for judgment or complaint having been served on an insured, the mere failure of the insured to turn the motion or complaint over to the insurer may not be a defense to the insurer, nor void the endorsement or provision, nor in any way relieve the insurer of its obligations to the insured, provided the insured otherwise cooperates and in no way prejudices the insurer.

S.C. Code Ann. § 38-77-142(B) 1976, as amended.

Our Supreme Court instructs us that "despite an insured's failure to comply with a cooperation clause requiring him to forward pleadings, **the insurer must honor all its obligations under the policy if it has actual notice of those pleadings**." (Emphasis added). "By providing that actual notice is sufficient, the statute effects a common sense resolution where, for example, an insured notifies its insurer by phone, but neglects to forward the pleadings." *Cowan,* 357 S.C. at 629, 594 S.E.2d. at 277. The sentence also provides that if the insured fails to cooperate in other ways to the prejudice of the insurance company, those acts may relieve the company of its obligation to the insured." *Id.*

Whereas *Edwards* required *service* of pleadings upon the insurer, section 38-77-142(B) provides that *actual notice* to the insurer is sufficient under most circumstances. Here, insurer, Omni, had actual notice the suit was filed, and Appellant has offered no evidence to demonstrate the insured's failure to cooperate. Indeed, the record is devoid of evidence regarding the insured's conduct, with the exception of Respondent's certified mail return receipts bearing her signature.

The second paragraph of section 38-77-142(B) suggests due diligence on the part of the insurer is required to obtain the insured's cooperation:

> Where the insurer has elected to provide a defense to its insured under such circumstances and files responsive pleadings in the name of its insured, the insured is not subject to sanctions for failure to comply with discovery pursuant to the South Carolina Rules of Civil Procedure unless it can be shown that the suit papers actually reached the insured, and the insurer has failed after exercising due diligence to locate the insured, and as long as the insurer provides such information in response to discover as it can without the assistance of the insured.

S.C. Code Ann. § 38-77-142(B) 1976, as amended.

The insured apparently failed to forward the filed and served pleadings to Omni. Yet Appellant presented no evidence of Omni's attempts to locate or contact its insured to obtain the pleadings. (Motion Hrg. Tr., p. 24, ll. 5-9). The affidavit submitted on behalf of Omni identifies no documented effort to communicate with its insured. (Aff. Kim Cofresi). Appellant offered no explanation why Omni failed to use known resources to obtain the filed pleadings in order to answer in a timely manner:

> The Court: Does she [adjuster] give any reason why she did not hire counsel once she knew that suit had been filed; or why she did not, knowing that th accident and parties lived in Dillon County, did not look it up to see what had been filed and take action? Does she give any indication in her affidavit as to why she didn't do that?
>
> Mr. Bayne: No.

The Court: Do you have any explanation for that?

Mr. Bayne: I do not. I've been given no information as to why they did not either go to Dillon County online to look it up, or hire counsel immediately on June 10 when they were told it was filed. . . . I do agree with you that once it's been filed, they were informed of that, it should have certainly probably raised a red flag.

(Motion Hrg. Tr., p. 28, ll. 21-15; p. 29, ll. 1-15).

"[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." *Hill v. Dotts,* 345 S.C. 304, 310, 547 S.E.2d 894 (Ct. App. 2001) quoting *Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988).

Appellant concedes that Omni did nothing to obtain the filed pleadings on its own, but solely relied on Respondent to provide them with a copy. This reliance has no legal basis if the insurer has actual notice that suit has been filed and is unreasonable in 2015, when multiple resources are available from which pleadings can be obtained. Omni is in the business of providing automobile insurance to consumers like the insured and can not claim ignorance of or inexperience with the legal system as an excuse for its own inaction. It strains credulity that Omni would reasonably expect Respondent to assist Omni in defending this claim. While Appellant alleges efforts to "appear and defend" this case, phone calls from an adjuster to discuss settlement or request documents do not constitute an answer to a complaint or an appearance. (*See Hill,* 345 S.C. 304, 547 S.E.2d 894). Omni had access to defense counsel and could have easily protected its interest by hiring defense counsel to defend this case. They made a choice not to hire a lawyer to protect their interest and cannot now complain because they don't like the

choice they made.

Because "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 consequences of his failure to answer." *Hill,* 345 S.C. at 310, 547 S.E.2d at 897, quoting *Williams v. Ray,* 232 S.C. 373, 383-84, 102 S.E.2d 368, 373 (1958). Having received actual notice of the filed pleadings and in providing no evidence of due diligence in obtaining the pleadings from known resources or in securing the cooperation of its insured, Omni should be required to honor all its obligations under the policy issued to its insured, and the denial of Appellant's 60(b) Motion should be affirmed. *See* S. C. Code Ann. § 38-77-142(B).

II. The Special Referee properly denied Appellant's Rule 60(b) Motion to Set Aside the Default Judgment because Appellant failed to provide any evidence of a meritorious defense.

The most compelling distinction between *Edwards* and this case is the existence of a meritorious defense in *Edwards* and the absence of a meritorious defense in this matter. *Edwards* was not decided solely on the basis of the insured's failure to notify the insurer, but was also grounded on the existence of a meritorious defense. *McClurg v. Deaton* (*McClurg I*), 380 S.C. 563, 575, 671 S.E.2d 87, 93 (Ct. App. 2008) citing *Edwards* at 283, 175 S.E.2d at 226 (". . .in order to vacate a judgment, there must be a showing (1) that the judgment was taken against the defendant through his mistake, inadvertence, surprise or excusable neglect, and (2) that there is a showing of a prima facie meritorious defense").

Of the four relevant factors a trial judge should consider when determining whether to set aside a default judgment, "[i]t is clear that a meritorious defense is more than merely a factor to consider under certain 60(b) grounds. . . ." *McClurg I,* 380 S.C.

at 574, 671 S.E.2d at 93. "In particular, our courts have held that in order to obtain relief from a default judgment under Rule 60(b)(1) or 60(b)(3), not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense." *Id.* citing *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 341, 644 S.E.2d 793, 798 (Ct. App 2007) (noting relief from a default judgment under Rule 60(b)(1) is available "upon a showing of excusable neglect and a meritorious defense. . . ."); *Mitchell Supply Co v. Gaffney,* 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988) (noting the existence of a meritorious defense was a requirement under S.C. Code Ann. § 15-27-130, the precursor to Rule 60(b)(1), SCRCP, that Federal cases interpreting Federal Rule 60(b)(1) require a meritorious defense, and that the South Carolina Rules of Civil Procedure have not changed this requirement).

Appellant's failure to provide any evidence of a meritorious defense is fatal to its request for relief under Rule 60(b)(1). Despite assertions in **Facts** to the contrary, the record contains no evidence that Omni, or counsel on its behalf, contested liability in this matter. The only evidence in the record, the affidavit of the Omni adjuster, indicates the parties were attempting to negotiate a settlement. (Aff. Kim Cofresi). Further, in the hearing on Appellant's Motion to Set Aside Default, **counsel acknowledged Omni did not contest liability** but would contest the extent and measure of damages and necessity of medical care. (Motion Hrg. Tr., p. 30, ll 15-18). When questioned by the Special Referee on how the meritorious defense is presented in Appellant's motion, counsel replied:

> Mr. Bayne: Sure, it's presented very briefly and not with any specificity, but simply that we plan to challenge both the extent of the

physical injury and the necessity of some of the medical bills that were incurred. . . . It's a challenge to the underlying evidence that was presented that reached the - - that allowed you to reach the conclusion that you reached. (Motion Hrg. Tr., p. 31, ll. 24-25; p. 32, ll. 1-3; ll. 10-13)

. . .

The Court: Has there been any evidence by affidavit or otherwise by the insurance company as to why they believe –not just believe, but why they believe they will be able to prove or present to a finder of fact that the damages were not what they were supposed to be and that they have a meritorious defense other than just generally we think it's too much money, or we think some of the bills are unnecessary? Is there any evidence, direct evidence, as to what would be presented at trial on those issues?

Mr. Bayne: No, other than the sort of nebulous we plan to contest the damages and the - - we plan to contest the injury and the extent of the medical bills and damages. There's not a specific , you know, we believe the third chiropractor was - - just giving a hypothetical - - we believe the second or third chiropractor was unnecessary kind of thing. We don't have any specific allegation in the memorandum or in the affidavit that sets out the specific medical bills or injuries we plan to contest. Just simply that that would be the defense that we would put forward - - a concession of liability and then a defense to damages. (Motion Hrg. Tr., p. 32 ll 24-25; p. 33, ll 1-24).

A meritorious defense need not be a perfect one or one guaranteed to prevail at trial, but it must raise a real controversy as to the law or facts arising from conflicting evidence. *McClurg I,* 380 S.C. at 575, 671 S.E.2d at 94. A party making a motion under Rule 60(b) 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) cited in *McClurg I,* 380 S.C. at 575, 671 S.E.2d at 94.

Appellant offers no facts that would support a finding of a meritorious defense. No affidavit or other cognizable factual material has been presented to suggest that Respondent's damages are not what they should be. Appellant's contention that the damages are inflated is mere speculation. In fact, Appellant's counsel acknowledges that

he was not even in possession of the medical records the Special Referee considered in reaching his judgment. Appellant may believe Omni has a meritorious defense, but that belief can not be substituted for a presentation of facts that would show a meritorious defense. *See Dawkins v. Fields,* 354 S.C. 58, 68, 580 S.E.2d 433 (2003) (noting assertions made upon information and belief are not evidence).

III. This Court may affirm the Special Referee's Order denying Appellant relief under Rule 220(c), SCACR for any reason appearing in the record.

Our Supreme Court has specifically declined to decide "whether a meritorious defense as to damages alone and not as to liability is an adequate basis for the grand of Rule 60(b) relief. . . and "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." *McClurg v. Deaton (McClurg II),* 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011) Even if Appellant had presented a meritorious defense on the issue of damages, it is still an unanswered question of law as to whether that is sufficient grounds to set aside the default judgment.

CONCLUSION

The record shows Appellant had actual notice that a lawsuit had been filed well before time for default. Appellant was properly served and timely notified of the hearing on damages after the entry of default. Appellant made a choice not to hire counsel to protect its interest or to answer Respondent's Complaint. Appellant's sole reliance on Respondent to provide a copy of the suit papers, instead of handling this matter on their own, was not reasonable in light of many other available resources. Having received actual notice of the filed pleadings and in failing to take any action to obtain the pleadings from known resources, hire defense counsel, or secure the cooperation of its insured,

Appellant's insurer must now honor all its obligations under the policy.

Appellant admits liability and presents no evidence of a meritorious defense on the issue of damages. The meritorious defense requirement exists so the parties do not spend time, effort, and money to litigate a case when there is no evidence to indicate the result would be different from the result obtained in the default judgment. Appellant has not shown any evidence of a genuine factual controversy in this matter.

"Generally a default should be set aside where the moving party acts with reasonable promptness and alleges a meritorious defense." *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 616 F. 3d 413, 417 (4th Cir. 2010). (Citation omitted). However, in this case Appellant presented no evidence of a defense on the merits for either liability or damages. Setting aside the default judgment and requiring the parties to litigate the case would be an unfortunate waste of judicial resources.

For these reasons and for any additional sustaining grounds appearing in the record pursuant to Rule 220(c) of the South Carolina Appellate Court Rules, the Special Referee's Order denying Appellant's Motion to Set Aside Default Judgment should be affirmed.

Respectfully submitted,

George D. Jebaily
Suzanne H. Jebaily
Jebaily Law Firm
Post Office Box 1871
Florence, South Carolina 29503
843-667-0400
Gjebaily@jebailylaw.com
Sjebaily@jebailylaw.com
Attorneys for Respondent

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CERTIFICATE OF COUNSEL

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

Respectfully submitted,

George D. Jebaily
Suzanne H. Jebaily
Jebaily Law Firm, P.A.
Post Office Box 1871
Florence, South Carolina 29503
843-667-0400
Attorneys for Respondent

May 4, 2016