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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Circuit Court Judge

Case No. 2015-CP-07-00218

Sharon Denise Anderson, Plaintiff ..... Respondent,

v.

Linda Jenkins Holmes, Defendant ..... Appellant.

BRIEF OF APPELLANT

McAngus Goudelock & Courie
Helen F. Hiser, S.C. Bar No.: 76124
Megan McNeely, S.C. Bar No.: 101637
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Appellant Linda Jenkins Holmes

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED WHEN DENYING HOLMES' RULE 60(B) MOTION?

STATEMENT OF THE CASE

On January 30, 2015, Respondent Sharon Denise Anderson ("Anderson") filed a Complaint against Appellant Linda Jenkins Holmes ("Holmes") seeking to recover damages arising out of an automobile accident in Beaufort, South Carolina. (Summons and Complaint, filed January 30, 2015, R. pp. 15-22) ("Complaint"). An affidavit of service was filed on April 3, 2015, stating that service had been executed on Holmes along with an affidavit of default. (Aff. of Service, R. p. 23, and Aff. of Default, filed April 3, 2015, R. pp. 27-28). Anderson moved for entry of default judgment against Holmes pursuant to Rule 55, SCRCP, asserting that Holmes had been served and that no answer or responsive pleading had been filed. (Motion for Entry of Default, filed April 3, 2015, R. pp. 24-26). The Honorable Jerri Ann Roseneau, Clerk of Court, found Holmes to be in default and ordered that a hearing be held to determine damages. (Entry of Default, filed April 8, 2015, R. p. 14). The case was subsequently referred to the Honorable Marvin H. Dukes, III for the damages hearing. (Order referring case, May 7, 2015, R. p. 13).

The damages hearing was held on May 8, 2015. (Order for Damages, filed May 14, 2015, R. pp. 5-10). Only Anderson, who testified, and her attorney were present at the hearing. (R. p. 5). The court awarded a total of $40,275.17 in damages to Anderson: $3,515.17 for medical expenses, $31,760.00 in lost wages, and $5,000 for pain and suffering. (R. pp. 6-7, 9).

On June 1, 2015, Holmes filed her Motion to Set Aside Default Judgment requesting that the court set aside the default judgment and allow the matter to proceed to trial because: (1) good cause existed to set aside the entry of default and/or default judgment; (2) any default was due to mistake and/or excusable neglect; (3) the motion to set aside default was made in a reasonable time after the discovery of the default; (4) Holmes was improperly and/or

insufficiently served; (5) Holmes was improperly placed into default without proper notice or service; and (6) valid defenses exist to Anderson's claims. (Motion to Set Aside Judgment, R. pp. 39-40).

In her Memorandum in Support, Holmes argued that good cause existed to set aside the default judgment because Anderson's counsel had been engaged in settlement negotiations with Omni Insurance Company ("Omni"), insurance carrier for Holmes, over the course of several months. (Defendant's Memorandum in Support of Set Aside, entered June 23, 2015, R. pp. 43-46). However, Anderson did not serve Omni with the Complaint or provide any notice to Omni of the filed lawsuit. Holmes alleged that Anderson's failure to provide notice to Omni of the subsequently filed lawsuit or damages hearing constituted mistake and/or excusable neglect. (R. p. 46). Holmes also asserted that valid defenses existed as to Anderson's claims because the evidence presented to the trial court did not support the amount of damages awarded. (Id.). Additionally, the motion to set aside was filed the same day that Omni learned about the default. (R. p. 44). Anderson filed a response in opposition. (Plaintiff's Memorandum in Opposition to Defendant's Motion, R. pp. 52-61). A hearing on the motion to set aside default judgment was held on August 26, 2015.[1]

On August 26, 2015, Holmes filed a Supplemental Memorandum in Support of her Motion to Set Aside Default. (Supplemental Memorandum, filed August 26, 2015, R. pp. 71-82). This memorandum, raising the issue of fraud and misrepresentation on the part of Anderson, addressed specific issues with Anderson's testimony regarding her alleged damages at the May 8, 2015 hearing before Judge Dukes. (Id.). Incorporating her initial motion and memorandum, Holmes also argued that the underlying order and judgment should be set aside

[1] This hearing was not recorded so no transcript is available.

due to either mistake, inadvertence, surprise, or excusable neglect or fraud, misrepresentation, or other misconduct of the adverse party. (R. p. 71). Holmes contends that Anderson made several statements under oath at the damages hearing which were either fraudulent or blatant misrepresentations of the facts. (R. pp. 72-77). Specifically, Anderson stated that: (1) she was written out of work by a physician; (2) the damage sustained by her car was severe, resulting in doors not opening; (3) her car was severely damaged and totaled; and (4) she was terminated from her position at Red Roof Inn due to the accident. (Id.). Holmes asserted that Anderson's testimony, and subsequent damages award, is not supported by, and actually contradicted by, evidence submitted by Holmes, and therefore that a meritorious defense exists as to the damages. (Id.).

On September 11, 2015, the court entered a Form 4 Order, denying Holmes' motion. (Form 4 Order, R. pp. 3-4). Holmes timely appealed to this Court.

FACTS

This case arises out of an automobile accident in Beaufort, South Carolina on October 7, 2013. (R. p. 16). Anderson was initially treated at Beaufort Memorial Hospital for right hip pain and right ankle pain. (R. pp. 96-104). Less than two hours after arriving, she was diagnosed with a myofascial strain, a hip contusion, and ankle sprain and was discharged to home self care with instructions to follow up with a private physician as needed for pain. (Id.). Anderson was not given any work restrictions.

More than two weeks after the accident, Anderson next sought medical treatment at Carey Chiropractic. (R. pp. 105-110). She attended just six sessions and was released on November 20, 2013, with the medical notes stating that her complaints were resolved. (Id.). None of the records from Carey Chiropractic contain work restrictions. (Id.). Anderson has not

sought additional medical treatment since her last day of treatment with Carey Chiropractic in November 2013. (Hr'g Tr. p. 7, line 23 – p. 8, line 5, R. pp. 89-90).

At the hearing, Anderson testified that she worked forty hours a week earning ten dollars at hour as a front desk clerk at the Red Roof Inn in Beaufort, South Carolina. (Hr'g Tr. p. 9, lines 11-23, R. p. 91). To support her claim for lost wages, she testified that she was terminated because she was taken out of work by a treating physician due to the accident and that Red Roof Inn did not want to hold her position open until she was released from medical care. (Hr'g Tr. p. 8, line 17 – p. 9, line 2, R. p. 90). She asserted that she was unemployed as a result of the accident from October 7, 2013 until April 15, 2015. (Hr'g Tr. p. 9, lines 14-20, R. p. 91).

However, Anderson was actually terminated from her position at Red Roof Inn on October 14, 2013 for performance issues completely unrelated to her automobile accident. (R. pp. 123-126). According to Crystabel Anselmo, Anderson's former supervisor, Anderson was terminated for: (1) forgetting to charge Expedia credit cards on a regular basis; (2) failing to collect payment from a guest for $90.00 worth of rented movies; (3) improperly charging a guest's credit card, resulting in an uncollectible balance; (4) having a shortage of $20.00 in her register on October 11, 2013; and (5) failing to inform her manager that she would be absent from work on October 13, 2013. (R. pp. 123-124). Anderson never presented medical records or a doctor's note with work restrictions to her supervisor. (R. p. 124).

Although Omni contested liability, it entered into settlement negotiations with Anderson's counsel after the accident. (R. p. 128). These settlement negotiations spanned several months. At no time during settlement negotiations did Anderson's counsel mention lost wages. (Id.). Instead, counsel demanded $20,000 to settle the case. As part of the demand, Anderson presented medical bills totaling $3,515.17. (R. p. 129). Omni continued negotiations

as to the demand but did provide Anderson with a check totaling $322.10 for property damage to her vehicle. (Id.).

On September 18, 2014, Anderson's counsel, continuing to negotiate, again contacted Omni, this time speaking with a supervisor about settlement. (R. p. 128). In his affidavit, Anderson's counsel stated that he informed Omni on September 18, 2014 that he was filing a lawsuit against Holmes. (R. p. 68). He also asserted that he asked to speak with a manager because communications had resulted in an impasse. (Id.). Anderson's counsel states that he was disconnected and that two later attempts to contact Omni, allegedly made on October 16, 2014 and November 9, 2014, went unanswered. (Id.).

However, according to Omni, the company attempted to contact Anderson's counsel on December 2, 2014, December 16, 2014, January 9, 2015, February 4, 2015, February 26, 2015, April 16, 2015, and May 7, 2015, to continue negotiations but counsel was never available. (R. pp. 128-135). On each occasion, Ms. McDonald was advised that Anderson's counsel was unavailable, so she left voicemail messages requesting that Anderson's counsel return her calls. Additionally, Omni mailed a letter to counsel on April 2, 2015 requesting a demand but received no response. (R. pp. 129, 132-135).

At no time did Anderson's counsel provide notice that a lawsuit had been filed, send a courtesy copy, or provide notice of the damages hearing to Omni. The Rule 60(b) motion was filed the same day that Omni was notified of judgment against Holmes.

STANDARD OF REVIEW

"The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP. An appeal may then be taken from the denial of this motion." Winesett v. Winesett, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985).

Pursuant to Rule 60(b), SCRCP, a court may relieve a party from a final judgment upon a finding of mistake, inadvertence, surprise, or excusable neglect, or fraud misrepresentation, or other misconduct of an adverse party. When determining whether to set aside a default judgment, courts look at the following 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 the other parties. Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001).

A motion for relief under Rule 60 must be brought within a reasonable time, or, if seeking relief based on fraud or misrepresentation, within one year after the judgment. Rule 60(b)(5), SCRCP. Additionally, the defendant must present a meritorious defense. Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988). A meritorious defense does not need to guarantee a victory at trial. Graham v. Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978). Instead, it must simply raise a question of law that is worthy of a judicial inquiry or raise a controversy regarding essential facts arising from conflicting or doubtful evidence. Id., at 453, 248 S.E.2d at 599.

The standard for appellate review is abuse of discretion. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). "An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

ARGUMENTS

I. The trial court erred by denying Defendant's Rule 60(b) motion.

A. The failure of Anderson's counsel to notify Omni of the filed lawsuit or damages hearing constituted surprise, excusable neglect, mistake, or inadvertence.

The failure of Anderson's counsel to inform Omni of the filing of the lawsuit and subsequent damages hearing constituted surprise, excusable neglect, mistake, or inadvertence. Accordingly, Holmes' Rule 60(b) motion should have been granted, default judgment set aside, and the case should have proceeded to trial. At a minimum, a new damages hearing was warranted. It is undisputed that Anderson's counsel had engaged in settlement discussions with Omni over the course of several months following the accident. Even after the Complaint had been filed, Omni, unaware of the lawsuit, continued to reach out to Anderson's counsel and inquire about the status of settlement negotiations. (R. pp. 128-135).

Courts in South Carolina have held that the failure to notify an insurance company, like Omni in the case at hand, about the filing of a complaint can result in mistake, surprise, inadvertence or excusable neglect as contemplated by Rule 60, SCRCP. In Edwards v. Ferguson, the plaintiff and defendant were involved in a single-vehicle automobile crash. 254 S.C. 278, 175 S.E.2d 224 (1970). The defendant failed to report the crash to State Farm, his insurance carrier. Instead, State Farm learned of the incident only after the plaintiff's attorney contacted the insurance company seeking to engage in settlement discussions. The subsequent settlement negotiations were unsuccessful and, as a result, the plaintiff filed a complaint for damages. The defendant, who had been served, never provided notice to State Farm of the pending lawsuit and never filed an answer. The trial court determined that the plaintiff's counsel had informed State Farm via a telephone call that a lawsuit had been filed and served on the defendant. Although the plaintiff's counsel alerted State Farm to the filing of the lawsuit, he

failed to serve a copy of the pleadings on State Farm, instead waiting until the matter was in default to send the complaint. Judgment was entered in favor of the plaintiff, and the defendant moved under Section 10-1213 of the 1962 code of Laws of South Carolina to set aside judgment based on mistake, inadvertence, surprise, or excusable neglect.[2] The lower court refused to set aside the judgment.

Upon review, the South Carolina Supreme Court determined that the trial court had abused its discretion in failing to set aside the judgment because the defendant satisfied the two required prongs: (1) mistake, inadvertence, surprise, or excusable neglect and (2) presentation of a meritorious defense. "State Farm stands in the shoes of the defendant so far as liability is concerned in spite of the fact that the company for fourteen months was completely unaware that the collision had occurred, and in spite of the fact that the defendant has obviously failed to cooperate, to the prejudice of the company." Id. at 278, 175 S.E.2d at 226.

The South Carolina Court of Appeals addressed similar facts in McClurg v. Deaton. 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008). In McClurg, the defendant, an employee for New Prime, was involved in an automobile accident. Zurich North America ("Zurich"), insurer for New Prime, was notified of the accident and upon receipt of a letter of representation from the plaintiff's counsel, engaged in settlement discussions over the course of several months. The plaintiff's counsel informed Zurich several times of his intent to file suit if the case could not be resolved. Although Zurich asked him to hold off on filing the suit while negotiations continued, the plaintiff's counsel proceeded to file a complaint against the individual defendant, not New Prime, without informing Zurich. Meanwhile, plaintiff's counsel and Zurich continued to exchange messages regarding settlement, even after the complaint was filed, but plaintiff's

[2] Section 10-1213 of the 1962 Code of Laws of South Carolina was later codified as Section 15-27-130 of the 1976 Code). Center v. Center, 269 S.C. 367, 370, 237 S.E.2d 491, 493 (1977). "Rule 60(b) is

counsel never mentioned the filing of the complaint or provided a courtesy copy to Zurich. The individual defendant failed to answer the complaint, and default judgment was entered in favor of the plaintiff. Zurich learned of the complaint only after it received a copy of the default judgment against the individual defendant in the mail. A Rule 60(b) motion was filed but denied by the trial court.

On appeal, this Court, relying heavily on Edwards for the proposition that the failure to put an insurance company on notice of a subsequent lawsuit after actively engaging in settlement negotiations could warrant the setting aside of default judgment, found that the failure of the plaintiff's counsel to inform Zurich of the pending lawsuit satisfied the surprise or excusable neglect requirement under Rule 60(b)(1). "An insurer may, under the proper circumstances, be entitled to an order setting aside a default judgment where the insurer is involved in ongoing negotiations with a claimant but is not informed that the defendant has been served with a summons and complaint." McClurg, 380 S.C. at 571, 671 S.E.2d at 92 (*citing* Edwards, 254 S.C. 278, 175 S.E.2d 224). Accordingly, because Zurich, after entering into settlement negotiations with the plaintiff, had not been given notice of the filed complaint, this Court found surprise or excusable neglect. Moreover, this Court noted that "given this history of contact and negotiations between counsel and Zurich, most notably the representations made by counsel to Zurich, the conduct of the [plaintiff's] counsel in failing to simply notify Zurich of the complaint filed against [the defendant] raises serious concerns for this court and quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3)." Id. at 573, 671 S.E.2d at 92-93.

Applying the holdings from Edwards and McClurg to the analogous facts of this case necessitates a finding of mistake, surprise, inadvertence or excusable neglect on the part of Holmes and Omni. Here, Omni, just like the insurance companies in the above-discussed cases,

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substantially the same as Code § 15-27-130." Rule 60, SCRCP, notes.

entered into settlement negotiations with Anderson's counsel over the course of several months. Demands and offers were exchanged several times. Although Anderson's counsel contends that communications stopped after September 18, 2014, Omni called the office of Anderson's counsel on the following dates: December 2, 2014, December 16, 2014, January 9, 2015, February 4, 2015, February 26, 2015, April 16, 2015, and May 7, 2015. (R. pp. 128-135). Each time, Omni was informed that counsel was not available and left a message for counsel instead. (Id.). On April 2, 2015, Omni sent a letter to Anderson's counsel seeking a demand to resolve the case. (Id.). Omni never received a response to either its repeated calls or the April 2 letter. In light of Omni's numerous attempts to contact Anderson's counsel, it is clear that Omni still considered settlement to be a viable option.

On January 30, 2015, unbeknownst to Omni, Anderson's counsel filed the Complaint against Holmes. Despite engaging in months of settlement negotiations with Omni, her counsel failed to serve Omni with the Complaint or even inform Omni that the Complaint had been filed. Anderson's counsel had ample opportunity to do so as Omni contacted counsel's office on at least five separate occasions after the Complaint was filed. Moreover, Omni attempted to contact Anderson's counsel at least three times in the months immediately preceding the filing date. The failure of Anderson's counsel to respond to Omni's inquiries does not discharge the burden to notify Omni.

Although disputed by Omni, Anderson's counsel asserts that he informed Omni via telephone that a lawsuit was going to be filed. Informing Omni that a lawsuit *would be filed* is not the same as notifying Omni that the Complaint *had been filed* or providing copies of the Complaint to the insurance company. Anderson's assertion of notice, even if taken as true, does not absolve Anderson from the responsibility to notify Omni that formal legal proceedings had

been filed against its insured. In Edwards, the South Carolina Supreme Court held that the judgment should be vacated even though counsel informed State Farm that the summons, notice, and complaint ***had been served*** on the defendant the previous day. The failure to provide a copy of the lawsuit to the insurance company supported the setting aside of default judgment; merely communicating that a lawsuit was filed was not sufficient. Nor did the inaction of the individual defendant justify the failure to provide notice by counsel to the insurance company. Edwards, 254 S.C. at 282, 175 S.E.2d at 226.

Applying the holdings from Edwards and McClurg, Anderson's counsel cannot actively engage in settlement negotiations and then seek to quietly recover through default in a lawsuit without providing notice to the insurance company. Ongoing negotiations with counsel give the insurance company, such as Omni in this case, reasonable belief that it would be notified of any subsequently filed lawsuit. Moreover, any effort by Anderson's counsel to ignore attempts by Omni at communication after the filing of the lawsuit is exactly the type of behavior that the McClurg court considered to constitute potential fraud or misrepresentation in Rule 60(b)(3).

B. Holmes presented a meritorious defense to the trial court.

Holmes presented a meritorious defense to the trial court and thus was entitled to relief under Rule 60(b).[3] A meritorious defense does not need to be an absolute defense. Mictronics, 345 S.C. at 511, 548 S.E.2d at 226. Instead, it simply must be worthy of a hearing because it raises "a real controversy as to essential facts arising from conflicting or doubtful evidence." Graham, 272 S.C. at 453, 248 S.E.2d at 599. "[T]he key inquiry is merely whether the materials submitted to the trial court reflect, in any way, that a contest on the merits might render different

[3] The McClurg court ultimately did not vacate the lower court's ruling, even upon the finding of mistake or surprise, because the defendant failed to show a meritorious defense. 380 S.C. at 575, 671 S.E.2d at 94. Unlike the defendants in McClurg, Holmes not only raised the issue of a meritorious defense, she also submitted affidavits and other evidence to support the meritorious defense.

results than the results reached by the default judgment." McClurg, 395 S.C. 85, 94, 716 S.E.2d 887, 892 (2011) (Toal, J., dissenting).

The trial court awarded Anderson total damages in the amount of $40,275.17. He allocated the damages as follows: (1) $3,515.17 for medical expenses; (2) $31,760.00 for lost wages (79 weeks and 2 days of unemployment calculated from her testimony that she previously earned $10 an hour and worked 40 hours a week); and (3) $5,000.00 for pain and suffering.

The damages award is not only wholly unsupported by the record, it is directly contradicted by the evidence. Anderson made several statements under oath that were either fraudulent or blatant misrepresentations of the evidence. Accordingly, her fraudulent conduct demands the setting aside of default judgment. First, Anderson testified about her alleged lost wages. It is undisputed that Anderson had worked at the Red Roof Inn prior to the automobile accident and that she is no longer employed at the hotel. At the damages hearing, Anderson informed the court that she was terminated from the Red Roof Inn due to the injuries allegedly sustained in the accident. She testified that, "I lost my job because in the amount time that I was due to be released it wasn't on their time basically. So I lost it because of that. And they didn't want to wait until I was done." (Hr'g Tr. p. 8, line 14 – p. 9, line 2, R. p. 90). She asserted that she could not work beginning October 7, 2013, the day of the accident and, after her termination, could not find subsequent employment until April 15, 2015. (Hr'g Tr. p. 9, lines 14-17, R. p. 91).

As evidenced by the medical records submitted to the trial court, none of Anderson's treating physicians wrote her out of work. In fact, she did not receive a single work restriction. (R. pp. 96-104). Right after the accident, she sought treatment at Beaufort Memorial Hospital. (Id.). Her medical records indicated that she should seek follow up care if any pain persisted but

that her symptoms had improved. (Id.). In fact, she was released only two hours after seeking treatment at Beaufort Memorial Hospital. (Id.). There were absolutely no limitations placed on Anderson at that time.

More than two weeks after her accident, she sought treatment at Carey Chiropractic. (R. pp. 105-110). After only six visits, Anderson was fully released. (Id.). Again, these medical records contain absolutely no work restrictions or doctor's notes limiting her activity.

While her medical records create a conflict warranting the setting aside of the judgment, the strongest evidence that casts doubt on her testimony is Red Roof Inn's employment records. Anderson was terminated from her position at Red Roof Inn based on performance issues, not because of work restrictions received from a treating physician. (R. pp. 123-126). In support of the Rule 60(b) motion, Holmes submitted not only the termination documents from Red Roof Inn but also an affidavit from Anselmo, Plaintiff's former supervisor. Anselmo stated that Anderson was terminated on October 14, 2013 (one week after the automobile accident) for failing to charge Expedia credit cards on a regular basis, failing to collect payment from a guest for movie rentals, improperly charging a guest's credit card resulting in an uncollectible balance, having a $20.00 shortage in her cash register on October 11, 2013, and failing to show for work on October 13, 2013 without following proper call-in procedures. (R. pp. 124-125).

Anselmo confirmed that, not only was Anderson not terminated due to medical issues, she never even submitted medical records or a doctor's note indicating she had any work restrictions after her accident. These records directly contradict Anderson's testimony that she lost her job due to her work restrictions. Moreover, Anderson actually worked on October 11, 2013, which is directly contrary to the testimony at the damages hearing that she was held out of work from October 7, 2013 forward. The evidence presented by Holmes at the trial level

regarding the alleged lost wages of Anderson raises "a real controversy as to essential facts arising from conflicting or doubtful evidence." Graham, 272 S.C. at 453, 248 S.E.2d at 599. Moreover, Anderson's fraudulent and patently false testimony alone warrants reversal of the lower court's decision.

The lost wages award constitutes over 75% of her total award from the court. Therefore, her false testimony had a considerable impact on the amount of damages she received as Judge Dukes relied directly on that testimony when awarding Anderson over $30,000 in lost wages. (Hr'g Tr. p. 11, lines 6-11, R. p. 92). By presenting evidence of her intrinsic fraud to the court, Holmes raised a meritorious defense. This evidence would have produced different results as to her lost wages damages had the court been aware of the actual reason for her termination. *See* McClurg, 395 S.C. at 94, 716 S.E.2d at 892 (Toal, J., dissenting).[4]

Curiously, Anderson never mentioned lost wages in any settlement discussions with Omni nor did she present evidence of lost wages during her negotiations. Her final calculation of lost wages is approximately ten times her medical bills. Surely the largest portion of her alleged damages would have been considered when making demands during the settlement phase. Instead, Anderson waited until no one could investigate or refute her testimony to increase the damages she sought.

[4] In McClurg, New Prime tried to argue that it had presented a meritorious defense when it informed the court that the plaintiff only made a $170,000 demand but that the court awarded $800,000 after the default judgment. 380 S.C. at 573-76, 671 S.E.2d at 94. The court determined that, even if this argument was a meritorious defense, it had not been raised to the lower court as a defense. Id. at 576, 671 S.E.2d at 94. Instead, it was used as evidence of settlement negotiations. Id. Here, unlike McClurg, Holmes argues that Anderson never mentioned lost wages until the hearing and thus raised the inconsistencies to the court as a defense.

C. Holmes has satisfied the four factors that courts examine when determining whether to set aside default judgment.

When determining whether to set aside a default judgment, courts look at the following 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 the other parties. Mictronics, 345 S.C. at 510-11, 548 S.E.2d at 226.

Holmes presented valid arguments to the trial court for each of these four factors. As set forth above, the actions (or inaction) of Anderson's counsel in failing to provide notice of the lawsuit to Omni supports a finding of mistake, surprise, or inadvertence and is the reason for any failure to act promptly. Anderson's counsel and Omni had actively engaged in settlement negotiations thus leading Omni to believe that it would receive notice of any filed lawsuit. By submitting evidence of Anderson's termination from the Red Roof Inn for performance issues to counter Anderson's fraudulent testimony at the damages hearing, Holmes presented a meritorious defense sufficient to warrant the granting of a Rule 60(b) motion.

The promptness with which relief was sought is not an issue in this case. The motion to set aside was filed on the exact same day that Omni first learned of the judgment entered against Holmes. This immediate filing satisfies the "reasonable time" provision in Rule 60(b)(5), SCRCP.

Finally, there is no prejudice to Anderson in this matter. Her counsel, with full knowledge of Omni's involvement, chose not to send notice of the lawsuit or damages hearing to the insurance company, in direct contravention of the holdings in Edwards and McClurg. Moreover, Anderson presented fraudulent testimony to the trial court and misrepresented the true reason for her unemployment. Anderson should not be able to reap the benefits of her deception based on a technicality. Instead, it is the policy of South Carolina courts as well as federal courts

to resolve cases on the merits. Caldwell v. Wiquist, 402 S.C. 565, 575, 741 S.E.2d 583, 588 (Ct. App. 2013) ("'We have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits.'" (*quoting* Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., 616 F.3d 413, 417 (4th Cir. 2010))). It would not be prejudicial for Anderson to have a judgment set aside that was based on her misrepresentations as she was never entitled to that award in the first place.

CONCLUSION

For all the reasons stated herein, this Court should reverse the decision of the trial court and grant Holmes' Rule 60(b) motion.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE

June 14, 2016

Helen F. Hiser, S.C. Bar No.: 76124
Megan McNeely, S.C. Bar No.: 101637
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Appellant Linda Jenkins Holmes

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Circuit Court Judge

Case No. 2015-CP-07-00218

Sharon Denise Anderson, Plaintiff ..... Respondent,

v.

Linda Jenkins Holmes, Defendant ..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellant of Linda Jenkins Holmes complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Linda Jenkins Holmes complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

June 14, 2016

McAngus Goudelock & Courie

Helen F. Hiser, S.C. Bar No.: 76124
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Appellant Linda Jenkins Holmes

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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PROOF OF SERVICE

I certify that I have served the **Brief of Appellant** and the **Reply Brief of Appellant** Linda Jenkins Holmes on Sharon Denise Anderson, by depositing a copy of it in the United States Mail, postage prepaid, on June 14, 2016, addressed to her attorney of record:

Clifford Bush, III, Esquire
Law Office of Clifford Bush III, LLC
28 Old Jericho Road
Beaufort, South Carolina 29906

Michaela Shepherd

Michaela Shepherd
Legal Assistant to Helen F. Hiser
McANGUS GOUDELOCK & COURIE LLC
735 Johnnie Dodds Blvd., Suite 200
PO Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Appellant

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Attorneys for Appellant