THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

The Honorable Richard L. Hinson, Special Referee

Case No. 2016-000246

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

v.

Nicolette S. Blue,.....Appellant.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES RAISED BY APPELLANT

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

Ib. Appellant presented a meritorious defense to the trial court.

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

STATEMENT OF THE CASE

On June 4, 2015, Respondent Thomas J. Grossetti, Jr. ("Respondent") filed a Complaint against Appellant Nicolette S. Blue ("Appellant") seeking to recover damages arising out of an automobile accident in Dillon County, South Carolina on May 17, 2013. (Summons and Complaint filed June 4, 2015) ("Complaint"). A Proof of Service was filed on June 18, 2015, indicating that service had been executed on Appellant. (Aff. Of Service, filed June 18, 2015). No Answer was filed. Thereafter, Respondent filed an Affidavit of Default and a Motion for Entry of Default on August 31, 2015. (Aff of Default and Motion for Entry of Default, filed August 31, 2015). Respondent moved for default pursuant to Rule 55, SCRCP, on the grounds that Appellant had been served and that no answer or responsive pleading had been filed. 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, filed August 31, 2015). The Order for Entry of Default vested jurisdiction of this matter with the Special Referee. The Order provides 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, filed August 31, 2015.)

The damages hearing in this matter was conducted by the Special Referee on September 22, 2015 in Florence, South Carolina. (Order and Judgment, signed September 23, 2015). Only Respondent, who testified, his mother, and his attorney were present at the hearing. Id. 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. Id. A copy of the Order and Judgment was provided to Appellant's insurance company on or around October 5, 2015.

On October 8, 2015, Appellant filed her Motion to set Aside Default Judgment requesting 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) Appellant was improperly and/or insufficiently served; (5) Appellant was improperly placed into default without proper notice or service; and (6) valid defenses exist to Respondent's claims. (Motion to Set Aside Judgment, pp. 1-2).

In her Memorandum in Support, Appellant argued that good cause existed to set aside the default judgment because Respondent's counsel had been engaged in settlement negotiations with Omni Insurance Company ("Omni"), insurance carrier for Appellants, over the course of several months. (Appellant's Memorandum in Support of Set Aside, filed January 11, 2016). However, Respondent did not serve Omni with the Complaint or provide any notice to Omni of the filed lawsuit. Appellant alleged that Respondent's failure to provide notice to Omni of the subsequently filed lawsuit or damages hearing constituted mistake and/or excusable neglect. (Appellant's Memorandum in Support of Set Aside, filed January 11, 2016). Appellant also asserted that valid defenses existed as to Respondent's claims because the evidence presented to the trial court did not support the amount of damages awarded. (Appellant's Memorandum in Support of Set Aside, filed January 11, 2016). Additionally, the motion to set aside was filed just days after Omni learned about the default. (Appellant's Memorandum in Support of Set Aside, filed January 11, 2016). A hearing on the motion to set aside default judgment was held on January 11, 2016.

The Special Referee denied Appellant's Motion to Set Aside Default Judgment on the same day as the hearing—January 11, 2016. Appellant timely appealed to this Court.

FACTS

This case arises out of an automobile accident in Dillon County, South Carolina on May 17, 2013. (Summons and Complaint). Although Omni contested liability, at some point after the accident, Respondent's counsel engaged in settlement negotiations with Omni—Appellant's insurance carrier. The record is undisputed that Omni tried on numerous occasions to contact Respondent's counsel to discuss resolution, settlement, and a possible lawsuit. Specifically, as set out in the prior sworn affidavit of Kim Cofresi, Omni contacted Respondent's counsel on eight (8) different occasions between January 2015 and September 2015. (Aff. of Kim Cofresi, dated October 14, 2015). **This included six (6) calls after the Complaint was filed seeking information about the claim and discussing settlement options**. Id. Five (5) of the eight (8) calls either occurred with Respondent's attorney, Respondent's attorney's assistant. On three (3) calls, a voicemail was left for Respondent's attorney (and never returned). Id.

On February 24, 2015, Omni was informed by Respondent's counsel that a copy of the Summons and Complaint would be provided "when the suit was filed" (which was not done). Id. On June 10, 2015, Omni spoke with Respondent's attorney who stated he would fax a copy of the Summons and Complaint (which was not done despite providing the fax number). Id. On June 10, 24 and July 29 Omni requested a copy of the Summons and Complaint from Respondent's attorney (which was never provided). Id. On August 10, Omni spoke with Christina in Respondent's attorney's office and requested a copy of the Summons and Complaint. Christina said she needed to speak with Respondent's

attorney and "would call us back" (she never did). Id. On September 22, Omni left another voicemail requesting a copy of the Summons and Complaint (it was never returned). Id. Then on October 5, 2015, Omni received a copy of the Summons, Complain, Order for Entry of Default, and Default Judgment. Id.

Interestingly, the Default Judgment hearing was held on September 22, 2015—**the same day after Omni had called Respondent's attorney to check on the status of the Summons and Complaint**. Id. The Order states that "Appellant did not appear for the hearing" despite Respondent's counsel receiving numerous phone calls, including one the day before the hearing, to try and ascertain the status of the claim and obtain a copy of any potential suit documents. Also of interest, the Affidavit of Default was signed on August 20, 2015 by George D. Jebaily who represented Appellant had not made an appearance. While that is technically factually accurate, **Omni had contacted Mr. Jebaily on that very same day** (August 20), as well as many times prior, and spoke to Christina who was to speak to Mr. Jebaily. Id. Mr. Jebaily, or his office, therefore knew on August 20 that Omni was attempting to appear and defend this matter and chose instead to file an Affidavit of Default indicating no appearance had been made without any notice to Omni.

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. Microtronics, 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 Respondent's counsel to notify Omni of the filed lawsuit or damages hearing constituted surprise, excusable neglect, mistake, or inadvertence.

The failure of Respondent's counsel to inform Omni of the filing of the lawsuit and subsequent damages hearing constituted surprise, excusable neglect, mistake, or inadvertence. Accordingly, Appellant's 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 Respondent'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 Respondent's counsel and inquire about the status of settlement negotiations. (Aff. of Kim Cofresi, dated October 14, 2015).

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. Omni had a reasonable expectation notice of suit would be given based on the communications from Respondent's counsel. Edwards v. Ferguson, 254 S.C. 278, 175 S.E.2d 224, *requires* a set aside in this case[1]. In Edwards, the defendant failed to report

[1] Edwards also permits Omni to raise issues that affect Omni as Omni "stands in the shoes of the Appellant so far as liability is concerned..."

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 plaintiff's counsel "...orally informed...State Farm on the phone...that summons, notice, and complaint had been served[2] on the Appellant..." The trial judge in Edwards even found as a matter of fact that State Farm was informed of the service by Respondent's counsel. 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.[3] The lower court refused to set aside the judgment.

Despite the clear notice to State Farm, **the South Carolina Supreme Court set aside the default judgment because State Farm was not given a copy of the law suit.** In doing so, the Supreme Court of South Carolina 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. The Court also stated "State Farm stands in the

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[2] In the present case, Respondent's counsel only told Omni he was going to *file* a complaint and that he had *filed* a complaint but never told Omni a complaint was *served.* Nevertheless, it is clear that informing of *service* is even more significant than simply threatening a suit. Therefore, *Edwards* actually goes further than the facts of the present case.

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

shoes of the Appellant so far as liability is concerned in spite of the fact that the company...was completely unaware...and in spite of the fact that the Appellant has obviously failed to cooperate, to the prejudice of the company." In sum, Edwards, a Supreme Court case, stands for the proposition that an insurance company acts with excusable neglect, mistake, and/or inadvertence when a Respondent fails to provide a copy of the lawsuit to the insurance company *after telling the insurance company about the lawsuit*. In the present case, that is exactly what occurred—Respondent's counsel informed Omni of the pending lawsuit and failed to provide a copy to Omni[4]. Therefore, Edwards clearly requires the default be set aside.

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 counsel never mentioned the filing of the complaint or provided a courtesy

[4] Respondent's counsel also was contacted by Omni the day before the default damages hearing and was not informed of a pending hearing against its insured.

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[5]. McLurg sets out in clear language that failing to provide a copy of the lawsuit

[5]The Court of Appeals also called into question actions of Respondent's counsel for misrepresentation and/or misconduct under Rule 60(b)(3) because of the history of communication and negotiation between the parties and the Respondent's counsel's concealment of the action from Zurich despite communications after the action was filed. The undersigned does not make such allegations in the present case but would point out to the court that discussions were had between the parties *after* the date of filing and Respondent's attorney never informed Omni the suit had been filed.

following negotiations and notice of potential filing constitutes excusable neglect and/or surprise[6]. Therefore, the reason for failure to act promptly is not at issue.

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 Appellant and Omni. Here, Omni, just like the insurance companies in the above-discussed cases, entered into settlement negotiations with Respondent's counsel over the course of several months. Demands and offers were exchanged several times. Further Omni contacted Respondent's counsel on at least eight (8) additional occasions and either spoke to someone in his office or left messages—including on the day of the damages hearing. Omni never received a response to any of its repeated calls. In light of Omni's numerous attempts to contact Respondent's counsel, it is clear that Omni still considered settlement to be a viable option.

On June 1, 2015, unbeknownst to Omni, Respondent's counsel filed the Complaint against Appellant. Despite engaging in months of settlement negotiations with Omni, Respondent's counsel failed to serve Omni with the Complaint or even inform Omni that the Complaint had been filed. Respondent's counsel had ample opportunity to do so as Omni contacted counsel's office on multiple occasions after the Complaint was filed. Moreover, Omni attempted to contact Respondent's counsel at least two times in the months immediately preceding the filing date. The failure of Respondent's counsel to respond to Omni's inquiries does not discharge the burden to notify Omni.

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[6] As noted above and, Respondent's counsel informed Omni that a suit may be filed and that suit had been filed. Therefore, the discussion in McLurg of discussing or notifying of a pending lawsuit but failing to provide a copy to the insurance company is satisfied in the present case.

Respondent's counsel asserts that he informed Omni via 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. Respondent's assertion of notice, even if taken as true, does not absolve Respondent 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, Respondent'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 Respondent'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. Appellant presented a meritorious defense to the trial court.

Appellant presented a meritorious defense to the trial court and thus was entitled

to relief under Rule 60(b).[7] A meritorious defense does not need to be an absolute defense. Microtronics, 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 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 Special Referee awarded a total of $75,088.84 in damages: $65,088.84 in actual damages and $10,000.00 in punitive damages. Appellant has represented to the trial court that it intends to challenge both amount of medical bills incurred and extent of alleged injuries sustained which resulted in the inflated verdict rendered by the Special Referee. At the time of the hearing, Omni was still not in possession of any medical records presented at the hearing before the Special Referee.

c. Appellant 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. Microtronics, 345 S.C. at 510-11, 548 S.E.2d at 226.

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[7] 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.

Appellant presented valid arguments to the trial court for each of these four factors. As set forth above, the actions (or inaction) of Respondent'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. Respondent's counsel and Omni had actively engaged in settlement negotiations thus leading Omni to believe that it would receive notice of any filed lawsuit. Appellant presented intent to present 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 within days of when 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 Respondent in this matter. His 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. 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 Respondent to have a judgment set aside.

CONCLUSION

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

Respectfully submitted,
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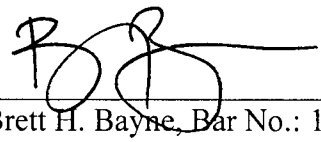

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The Honorable Richard L. Hinson, Special Referee

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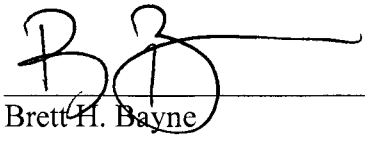
Nicolette S. Blue,.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that the Final Brief of Appellants contained all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the April 15, 2014, revised order concerning personal identifying information and other sensitive information in appeal court findings from the South Carolina Supreme Court.



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