

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
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SC 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.

RECORD ON APPEAL

Brett H. Bayne
MCANGUS GOUDELOCK & COURIE, LLC
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor
(29201)
Columbia, South Carolina 29211-2519
(803) 779-2300

Attorney for Appellant Nicolette S. Blue

George D. Jebaily
Suzanne H. Jebaily
JEBAILY LAW FIRM
Post Office Box 1871
Florence, South Carolina 29503
(843) 667-0400

Attorney for Respondent Thomas J.
Grossettis, Jr.

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GWENT, HAYES
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CLERK OF COURT
DILLON COUNTY

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON) AND FOR THE FOURTH JUDICIAL CIRCUIT
Thomas J. Grossetti, Jr.,) Case No.: 2015-CP-17-313
Plaintiff,)
vs.)
Nicolette S. Blue,)
Defendant.)

**ORDER OF ENTRY OF DEFAULT
JUDGMENT BY THE CLERK AS TO
DEFENDANT AND FOR
REFERRAL TO A SPECIAL REFEREE**
TRUE COPY

George D. Jernan
CLERK OF COURT
DILLON COUNTY

IT APPEARING from the Affidavit of George D. Jernan, attorney for the Plaintiff, from the Motion for Entry of Default Judgment and Referral to a Special Referee, that the Defendant in this matter has been duly served with a Summons and Complaint by certified mail and that more than thirty (30) days have elapsed during which time no responsive pleadings have been filed by the Defendant, nor anyone on their behalf nor has anyone appeared on their behalf in response to the Summons and Complaint.

IT FURTHER APPEARING that damages are unliquidated and therefore a hearing will need to be held to ascertain damages and that it would be more efficient for this Court and in the interest of justice to refer this matter to a Special Referee pursuant to S.C. Code Ann. §14-11-60 and §15-31-150 and Rule 53, SCRPC.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED

1. That the Defendant, is hereby adjudged to be in default.
2. That an Order of Default Judgment is recorded against the Defendant.
3. That this matter is referred to a Special Referee with the power to take testimony, make conclusions of law and findings of fact, decide any motions or other matters that might arise after the date of this Order, and issue a final Order in this matter.

4. Plaintiff's counsel has advised this Court that Richard L. Hinson, Esquire has consented to serve as Special Referee and the Court finds that he is an appropriate and suitable person to serve as such referee.

5. Jurisdiction of this entire matter shall be vested in the Special Referee as of the date of this Order to determine any and all matters that might arise concerning this case thereafter. This shall include not only the hearing itself but any motions concerning the case made prior to or subsequent to the hearing including, but not limited to, motion to set aside the default and any other motions that might be filed in this matter. Any appeal from the motions and from the Order or Orders of the Special Referee, if applicable, shall be directed to the South Carolina Court of Appeals.

6. That Defendant, is hereby adjudged to be in default and a judgment in such fashion and form as determined by the Special Referee shall be filed in favor of the Plaintiff.

AND IT IS SO ORDERED.

Chesterfield
Florence, South Carolina
August 27, 2015


Circuit Court Judge, Fourth Judicial Circuit

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

Thomas J. Grossetti, Jr.,)
)
Plaintiff,)
)
vs.)
)
Nicolette S. Blue,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 15-CP-17-313

ORDER AND JUDGMENT

Pursuant to an Order of Entry of Default and Referral to a Special Referee filed on August 31, 2015, this matter was referred to me as Special Referee for the purpose of conducting a hearing to determine damages.

The damages hearing was conducted at my office located at 105 Chase Street in Florence, South Carolina, on September 22, 2015, beginning at 1:00 p.m. George D. Jebaily, Esquire, was present on behalf of the Plaintiff, Thomas J. Grossetti, Jr. The Plaintiff, his mother, and a court reporter were also present. The required notice of the hearing was given to the Defendant via both regular mail and certified mail return receipt and was made a part of the record. However, the Defendant did not appear for the hearing.

DAMAGES

This matter arises out of an automobile accident that occurred on May 17, 2013, in Dillon County, when the Defendant disregarded a stop sign and caused her vehicle to violently collide with the Plaintiff's vehicle. The Plaintiff presented evidence in the form of sworn testimony from the Plaintiff and his mother (Angela Grossetti), as well as, exhibits consisting of medical bills, medical reports, photographs, diagrams, and other documents.

Based on the testimony and evidence presented, I find that the Plaintiff's injuries and damages were proximately caused by the accident and the conduct of the Defendant. In considering all the evidence and the demeanor and credibility of the witnesses, I award the Plaintiff actual damages in the amount of Sixty-five Thousand Eighty-eight and 84/100 Dollars (\$65,088.84).¹ I further find that the conduct of the Defendant in disregarding the stop sign was reckless and grossly negligent, and as a result, I award the Plaintiff punitive damages in the amount of Ten Thousand and 00/100 Dollars (\$10,000.00).

JUDGMENT

Judgment shall be entered in favor of the Plaintiff against the Defendant in the amount of Seventy-five Thousand Eighty-eight and 84/100 Dollars (\$75,088.84).

IT IS SO ORDERED.

Florence, South Carolina
September 23, 2015



Richard L. Hinson
Special Referee

¹ The Plaintiff's actual damages are computed as follows: causally related medical bills and wages (\$5,088.84); pain and suffering during and immediately after the accident (\$5,000); pain and suffering for the summer following the accident (\$25,000); loss of enjoyment of life related to the inability to participate in college athletics (\$25,000); and continued intermittent pain since the summer after the accident (\$5,000).

STATE OF SOUTH CAROLINA)

COUNTY OF)

Thomas J. Grossetti, Jr.,)

Plaintiff(s))

vs.)

Nicolette S. Blue,)

Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

CASE No.

2015-CP-17 313

Submitted By: George D. Jebaily
Address: PO Box 1871, Florence, SC 29503

SC Bar #: 2965
Telephone #: 843-667-0400
Fax #: 843-661-6424
Other:
E-mail: gjebaily@jebailylaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|--|
| <p>Contracts</p> <input type="checkbox"/> Constructions (100)
<input type="checkbox"/> Debt Collection (110)
<input type="checkbox"/> Employment (120)
<input type="checkbox"/> General (130)
<input type="checkbox"/> Breach of Contract (140)
<input type="checkbox"/> Other (199) | <p>Torts - Professional Malpractice</p> <input type="checkbox"/> Dental Malpractice (200)
<input type="checkbox"/> Legal Malpractice (210)
<input type="checkbox"/> Medical Malpractice (220)
Previous Notice of Intent Case #
20 -NI- _____
<input type="checkbox"/> Notice/ File Med Mal (230)
<input type="checkbox"/> Other (299) | <p>Torts - Personal Injury</p> <input type="checkbox"/> Assault/Slander/Libel (300)
<input type="checkbox"/> Conversion (310)
<input checked="" type="checkbox"/> Motor Vehicle Accident (320)
<input type="checkbox"/> Premises Liability (330)
<input type="checkbox"/> Products Liability (340)
<input type="checkbox"/> Personal Injury (350)
<input type="checkbox"/> Wrongful Death (360)
<input type="checkbox"/> Other (399) | <p>Real Property</p> <input type="checkbox"/> Claim & Delivery (400)
<input type="checkbox"/> Condemnation (410)
<input type="checkbox"/> Foreclosure (420)
<input type="checkbox"/> Mechanic's Lien (430)
<input type="checkbox"/> Partition (440)
<input type="checkbox"/> Possession (450)
<input type="checkbox"/> Building Code Violation (460)
<input type="checkbox"/> Other (499) |
| <p>Inmate Petitions</p> <input type="checkbox"/> PCR (500)
<input type="checkbox"/> Mandamus (520)
<input type="checkbox"/> Habeas Corpus (530)
<input type="checkbox"/> Other (599) | <p>Administrative Law/Relief</p> <input type="checkbox"/> Reinstate Drv. License (800)
<input type="checkbox"/> Judicial Review (810)
<input type="checkbox"/> Relief (820)
<input type="checkbox"/> Permanent Injunction (830)
<input type="checkbox"/> Forfeiture-Petition (840)
<input type="checkbox"/> Forfeiture-Consent Order
<input type="checkbox"/> Other (899) | <p>Judgments/Settlements</p> <input type="checkbox"/> Death Settlement (700)
<input type="checkbox"/> Foreign Judgment (710)
<input type="checkbox"/> Magistrate's Judgment (720)
<input type="checkbox"/> Minor Settlement (730)
<input type="checkbox"/> Transcript Judgment (740)
<input type="checkbox"/> Lis Pendens (750)
<input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)
<input type="checkbox"/> Confession of Judgment (770) | <p>Appeals</p> <input type="checkbox"/> Arbitration (900)
<input type="checkbox"/> Magistrate-Civil (910)
<input type="checkbox"/> Magistrate-Criminal (920)
<input type="checkbox"/> Municipal (930)
<input type="checkbox"/> Probate Court (940)
<input type="checkbox"/> SCDOT (950)
<input type="checkbox"/> Worker's Comp (960)
<input type="checkbox"/> Zoning Board (970)
<input type="checkbox"/> Public Service Comm. (990)
<input type="checkbox"/> Employment Security Comm (991)
<input type="checkbox"/> Other (999) |
| <p>Special/Complex /Other</p> <input type="checkbox"/> Environmental (600)
<input type="checkbox"/> Automobile Arb. (610)
<input type="checkbox"/> Medical (620)
<input type="checkbox"/> Other (699) | | | |
| <input type="checkbox"/> Pharmaceuticals (630)
<input type="checkbox"/> Unfair Trade Practices (640)
<input type="checkbox"/> Out-of State Depositions (650)
<input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)
<input type="checkbox"/> Sexual Predator (510) | | | |

Submitting Party Signature: _____

Date: June 1, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA/234 (10/2014)

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FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus; or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

COUNTY OF DILLON

Thomas J. Grossetti, Jr.,

Plaintiff,

vs.

Nicolette S. Blue,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Civil Action Number: 2015-CP-17-~~313~~

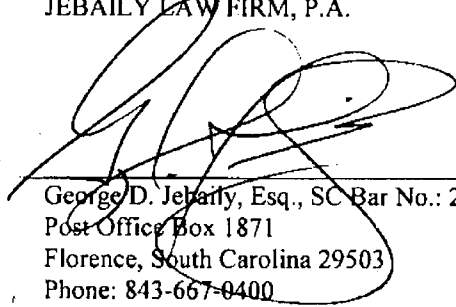
SUMMONS

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscribed, George D. Jebaily, Esq. and Brian S. Yost, Esq. of Jebaily Law Firm, P.A., Post Office Box 1871, Florence, South Carolina 29503 within THIRTY (30) DAYS after the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint, within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

JEBAILY LAW FIRM, P.A.

BY:


George D. Jebaily, Esq., SC Bar No.: 2965
Post Office Box 1871
Florence, South Carolina 29503
Phone: 843-667-0400
Fax: 843-661-6424
E-mail: gjebaily@jebailylaw.com

&

Brian S. Yost, Esq., SC Bar No.: 100883
Post Office Box 1871
Florence, South Carolina 29503
Phone: 843-667-0400
Fax: 843-661-6424
E-mail: byost@jebailylaw.com

FILED
GWENTYBATH
2015 JUN -4 AM 10: 56
CLERK OF COURT
DILLON COUNTY

Florence, South Carolina
June /, 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DILLON)
)
 Thomas J. Grossetti, Jr.,)
)
 Plaintiff,)
 vs.)
)
 Nicolette S. Blue,)
)
 Defendant.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE FOURTH JUDICIAL CIRCUIT
 Civil Action Number: 2015-CP-17- **313**

COMPLAINT

FILED
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 CLERK OF COURT
 DILLON COUNTY

JURISDICTIONAL STATEMENT

The Plaintiff, complaining of the Defendant herein, would respectfully show unto this court that:

1. At all relevant times herein, the Plaintiff was a citizen and resident of the State of South Carolina, County of Dillon.
2. Upon information and belief the Defendant is a citizen and resident of the State of South Carolina, County of Dillon.
3. The events hereinafter described occurred in Dillon County, South Carolina.
4. This Court has jurisdiction over the parties and matters in controversy.

FACTUAL ALLEGATIONS

5. The Plaintiff hereby repeats and realleges the allegations contained in each and every paragraph above as if repeated verbatim herein.
6. That, on May 17, 2013, Plaintiff Grossetti was driving a 2004 Pontiac car in an northerly direction on North 8th Street, approaching the intersection of East Washington Street.
7. That, at or about the same time, Defendant Blue was driving her 1998 GMC sports utility vehicle east on E. Washington Street, approaching the same intersection.
8. That, as Plaintiff Grossetti lawfully passed through the intersection, Defendant Blue failed to stop for the stop sign controlling her route and entered the intersection before the Plaintiff had cleared the intersection.

9. That, as a result, Defendant Blue struck the rear driver's side of the Plaintiff's vehicle causing Plaintiff Grossetti's vehicle to spin.

10. The impact from the Defendant's vehicle propelled Plaintiff Grossetti violently about the inside of his vehicle.

11. That, as a result of the collision, the Plaintiff sustained injuries and damages.

FOR A FIRST CAUSE OF ACTION
NEGLIGENCE

12. The Plaintiff hereby repeats and realleges the allegations contained in each and every paragraph above as if repeated verbatim herein.

13. That the Defendant had, or should have had, adequate opportunity to perceive the intersection, the stop sign, and Plaintiff Grossetti's vehicle; and that the injuries and losses which the Plaintiff sustained were directly and proximately caused by the negligent, grossly negligent, careless, reckless, willful, and wanton acts and/or omissions of the Defendant in one or more of the following particulars, to wit:

- a. In failing to obey a controlling stop sign; in violation of §56-5-2330 of the Code of Laws of South Carolina (1976, as amended);
- b. In failing to yield the right of way at an intersection to the vehicle approaching on the right; in violation of §56-5-2310 of the Code of Laws of South Carolina (1976, as amended);
- c. In failing to properly equip the said motor vehicle with adequate and safe brakes and/or steering mechanism; in violation of §56-5-4410 of the Code of Laws of South Carolina (1976, as amended); and if so properly equipped in failing to properly utilize them;
- d. In failing to keep a proper look out; in violation of §56-5-1520 of the Code of Laws of South Carolina (1976, as amended);
- e. In failing to maintain proper control over the aforesaid motor vehicle;
- f. In operating a motor vehicle with a reckless disregard for the rights and safety of others, and especially the rights and safety of the Plaintiff;

- g. In failing to take advantage of any last clear chance to avoid striking the Plaintiff, when the Defendant saw, or should have seen, the Plaintiff in the roadway;
- h. In colliding with the motor vehicle operated by the Plaintiff;
- i. In failing to take any evasive action, by any means, to keep from striking the Plaintiff;
- j. In failing to exercise that degree of care and caution which a reasonable and prudent person would have exercised under the same or similar circumstances;
- k. Was guilty of other negligent acts and omissions not specifically alleged but to be proven at trial; and
- l. Violated the laws, statutes, and ordinances of the State of South Carolina.

Which negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant directly and proximately caused the injuries and losses of the Plaintiff as is hereafter set forth.

DAMAGES

14. That, as the direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts and/or omissions of the Defendant, the Plaintiff:

- a. Was struck by the Defendant's motor vehicle;
- b. Was severely, seriously, painfully and permanently injured;
- c. Suffered injuries, bruises, contusions and lacerations about various parts of his body, head and/or extremities;
- d. Was hospitalized for a period of time;
- e. Was subjected to the administration of strong and potent drugs and medications;
- f. Suffered extreme, painful and dangerous injuries to his foot, shoulder, head, and other parts of his body from which the Plaintiff is informed and believes may have permanent adverse effect and disability;
- g. Has incurred and will incur in the future, substantial medical and doctor bills due to his injuries;
- h. Is informed and believes that his earning capacity has been and will be forever impaired;
- i. Has been prevented from performing his usual and ordinary household duties; and

j. Has incurred lost wages.

All to his damage, both actual and punitive, in an amount to be determined by the trier of facts.

15. The Plaintiff is informed and believes that he is entitled to a judgment against the Defendant in a sum sufficient to compensate him for his actual damages, for such punitive damages as may be assessed by the court, for the costs of this action, and for such other and further relief as the court may deem just and proper.

WHEREFORE, the Plaintiff prays for judgment against the Defendant in a sum sufficient to compensate his for his actual damages, for such punitive damages as may be assessed by the court, for the costs of this action, and for such other and further relief as the court may deem just and proper.

JEBAILY LAW FIRM, P.A.

BY: 

George D. Jebaily, SC Bar No.: 2965
Post Office Box 1871
Florence, South Carolina 29503-1871
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&

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Florence, South Carolina 29503-1871
Phone: (843) 667-0400
Fax: (843) 661-6424
E-mail: byost@jebailylaw.com

ATTORNEYS FOR PLAINTIFFS

Florence, South Carolina

June / , 2015

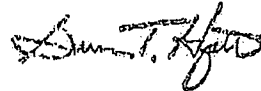
STATE OF SOUTH CAROLINA)
 COUNTY OF DILLON)
 Thomas J. Grossetti, Jr.,)
 Plaintiff,)
 v.)
 Nicolette S. Blue,)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FOR THE FOURTH JUDICIAL CIRCUIT

Civil Action Number: 2015-CP-17-313

PROOF OF SERVICE

A CERTIFIED
 TRUE COPY



CLERK OF COURT
 DILLON COUNTY

PERSONALLY APPEARED before me Brian S. Yost, who, upon being duly sworn, deposes and says that on June 10, 2015 a Civil Action Coversheet, Summons and Complaint, Plaintiff's First Set of Interrogatories to Defendants, Plaintiff's First Set of Requests for Production to Defendants and Notice of Deposition of Defendant was mailed to the Defendant, Nicolette S. Blue, by restricted, certified mail, return receipt requested and that the attached receipt was signed by the Defendant on June 12, 2015.

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return this card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Signature <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>Nicolette S. Blue</i> O. Date of Delivery <i>6/12/15</i></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If YES, enter delivery address below:</p>
<p>1. Article Addressed to:</p> <p><i>Nicolette S. Blue 2130 Nelson Drive Dillon, SC 29536</i></p>	<p>3. Service Type</p> <p><input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Priority Mail Express®</p> <p><input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery</p> <p>4. Restricted Delivery? (Extra Fee) <input checked="" type="checkbox"/> YES</p>
<p>2. Article Number (Transfer from service label)</p>	<p><i>7014 0150 0000 5031 0100</i></p>

FILED
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 2015 JUN 18 AM 10:35
 CLERK OF COURT
 DILLON COUNTY

SWORN to before me this 16 day of June, 2015.

[Signature]
 Brian S. Yost

[Signature]
 Notary Public for South Carolina
 My Commission Expires : February 4, 2018

STATE OF SOUTH CAROLINA

COUNTY OF DILLON

Thomas J. Grossetti, Jr.,

Plaintiff,

vs.

Nicolette S. Blue

Defendant.

FILED
GWEN T. HYATT
IN THE COURT OF COMMON PLEAS
2015 AUG 3 10 30 AM
FOR THE FOURTH JUDICIAL CIRCUIT
CASE NO.: 2015-CP-17-313
CLERK OF COURT
DILLON COUNTY

CERTIFICATE OF SERVICE

I, the undersigned employee of Jebaily Law Firm, P.A., hereby certify that I have served the Defendant with *Plaintiff's Motion and Order Information Form and Cover Sheet and Plaintiff's Motion for Entry of Default Judgment by Clerk as to Defendant and for Referral to a Special Referee, Affidavit of Default, and proposed Order of Entry of Default Judgment* by depositing the same in the United States Postal Service as follows:

**Certified Mail - Return Receipt
Requested - Restricted Delivery**

Nicolette S. Blue
2130 Nelson Drive
Dillon, SC 29536

Christina B. Stewart
Christina B. Stewart
Paralegal for George D. Jebaily

August 20, 2015

Florence, South Carolina

ACERTIFIED
TRUE COPY

Gwen T. Hyatt

CLERK OF COURT
DILLON COUNTY

STATE OF SOUTH CAROLINA

COUNTY OF DILLON

Thomas J. Grossetti, Jr.,

Plaintiff,

vs.

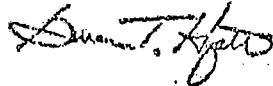
Nicolette S. Blue,

Defendant.

FILED
GWEN T. BYRNE
IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT
2015 AUG 31 AM 11:09
CLERK OF COURT Case No.: 2015-CP-17-313
DILLON COUNTY

AFFIDAVIT OF DEFAULT

ACERTIFIED
TRUE COPY



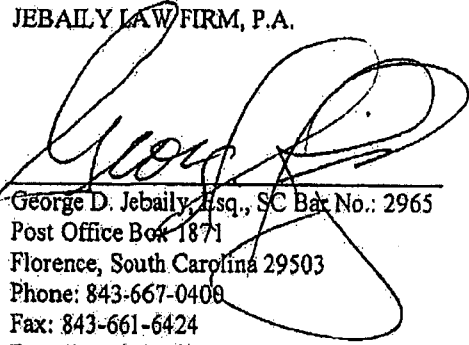
PERSONALLY APPEARED before me George D. Jebaily, who, being duly sworn deposes
DILLON COUNTY

and says:

1. I am a practicing attorney with the Jebaily Law Firm, P.A. of Florence, South Carolina.
2. I am the attorney of record for the Plaintiff, and on his behalf I brought an action against the above-captioned Defendant. The Complaint was dated June 1, 2015 and was served on the Defendant, Nicolette S. Blue on June 12, 2015 by certified mail. Please refer to the attached Proof of Service.
3. More than thirty (30) days have elapsed since service of the said Summons and Complaint and there has been no appearances made by anyone on behalf of the Defendant. In addition, the Defendant has failed to file an Answer, Notice of Appearance, Motion or other pleadings in this matter and is now, and has been, in default.
4. Your affiant saith nothing further.

JEBAILY LAW FIRM, P.A.

BY:


George D. Jebaily, Esq., SC Bar No.: 2965
Post Office Box 1871
Florence, South Carolina 29503
Phone: 843-667-0400
Fax: 843-661-6424
E-mail: gjebaily@jebailylaw.com

SWORN to before me this 20th
day of August, 2015

Christina Stewart
Notary Public for South Carolina
My Commission Expires: February 4, 2018

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS

THOMAS J. GROSSETTI, JR.,)
)
Plaintiff,)

Civil Action No. 2015-CP-17-00313

vs.)

AFFIDAVIT OF KIM COFRESI

NICOLETTE S. BLUE,)
)
Defendant.)

PERSONALLY APPEARED BEFORE ME, the undersigned, Kim Cofresi, who, after being duly sworn, deposes and states:

1. I am over the age of eighteen.
2. I am of sound mind to swear this affidavit.
3. I am employed by Omni Indemnity Company.
4. I was one of the employees in charge of handling the claim file for the above referenced case.
5. Omni received notice of this claim on or around May 21, 2013.
6. Following notice of the claim, Omni began adjusting the claim and began a course of settlement negotiations with Plaintiff and/or Plaintiff's attorney.
7. I called Plaintiff's counsel on January 27, 2015 to check on the status of our then current offer to settle. During this phone call I spoke with Christina (who represented herself as Mr. Jebaily's assistant) and Mr. Jebaily. I was informed that if we did not offer the policy limits he would file suit within two weeks.
8. I called Plaintiff's counsel on February 24, 2015 to check if suit had been filed

pursuant to the January 27 conversation. I spoke to Christina and was informed they were in the process of filing suit unless we paid policy limits. Christina informed me she would forward a copy of the Summons and Complaint when the suit was filed.

9. I monitored the case closely on an ongoing basis to determine if suit had been filed.

10. On June 10, 2015, Lasheena High (another adjuster in our office) again called Plaintiff's counsel. I spoke with Mr. Jebaily and he informed me suit had been filed. I asked him to forward me a copy of the Summons and Complaint and he agreed to do so. I provided him with our fax number to send the Summons and Complaint.

11. On June 10, 2015, Lasheena initiated another phone call wherein she left a voicemail for Christina asking that Christina forward the Summons and Complaint.

12. On June 24, 2015 we had not yet received the Summons and Complaint. I called Plaintiff's counsel again and provided the fax number for sending a copy of the Summons and Complaint.

13. On July 29, 2015 we had still not yet received the Summons and Complaint. I called Plaintiff's counsel and left a voicemail for Christina asking her to forward a copy of the Summons and Complaint.

14. On August 20, 2015, we had still not yet received the Summons and Complaint. I called Plaintiff's attorney and spoke with Christina. She informed me that she would speak to Mr. Jebaily and call me back. She never called back.

15. On September 22, 2015, I again left a voicemail for Christina with contact information for the Summons and Complaint.

16. On October 2, 2015, Plaintiff's counsel sent a copy of the Summons,

Complaint, Order for Entry of Default Judgment, and the Default Judgment. This was received by Omni on October 5, 2015.

17. Plaintiff's counsel refused to provide a copy of the Summons and Complaint so that it could be handled in an appropriate manner.

18. Plaintiff's counsel apparently filed a lawsuit on June 1, 2015.

19. Plaintiff's counsel never provided Omni with a copy of this lawsuit despite numerous conversations with Plaintiff's counsel.

20. During each of these phone calls, I spoke to employees in Plaintiff's counsel's office and/or Plaintiff's counsel directly or left messages for one or both.

21. During each of the phone calls with Christina or Mr. Jebaily, I was informed the Summons and Complaint would be provided.


22. Plaintiff's counsel never informed Omni the matter was in default despite numerous conversations with Plaintiff's counsel about the Summons and Complaint.

23. Plaintiff's counsel never informed Omni of any default damages hearing in this matter despite numerous conversations with Plaintiff's counsel about the Summons and Complaint.

24. In fact, I contacted Plaintiff's counsel on six different occasions immediately before and after the suit was apparently filed to obtain a copy of the Summons and Complaint—each and every one of these requests was willfully ignored by Plaintiff's counsel.

25. I believe Plaintiff's counsel failed to provide Omni with a copy of the Summons and Complaint to induce a default in this matter despite numerous attempts by Omni to obtain the Summons and Complaint prior to the matter entering default.

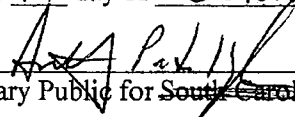
FURTHER, AFFIANT SAYETH NAUGHT.



Kim Cofresi

SWORN TO AND SUBSCRIBED BEFORE ME

This 14th day of October, 2015.



Notary Public for ~~South Carolina~~ Georgia

My Commission Expires: 2/9/18



STATE OF SOUTH CAROLINA

COUNTY OF DILLON

Thomas J. Grossetti, Jr.,

Plaintiff,

vs.

Nicolette S. Blue,

Defendant.

FILED
 GWEN T. HYATT
) IN THE COURT OF COMMON PLEAS
 2015 AUG 31 AM 11:19) FOR THE FOURTH JUDICIAL CIRCUIT
)
 CLERK OF COURT Case No.: 2015-CP-17-313
 DILLON COUNTY
) **MOTION FOR ENTRY OF DEFAULT**
) **JUDGMENT BY CLERK AS TO**
) **DEFENDANT AND FOR**
) **REFERRAL TO A SPECIAL REFEREE**

TO: THE HONORABLE GWEN T. HYATT, CLERK OF COURT, DILLON COUNTY:

NOW COMES the undersigned attorney for the Plaintiff and pursuant to the attached Affidavit, moves the Clerk of this Court for an entry of default judgment as to the Defendant Nicolette S. Blue pursuant to Rule 55(a), SCRCP and requests that the Clerk shall enter the default in this matter upon the calendar/file book.

The Plaintiff also moves for a hearing to determine damages against the Defendant, Nicolette S. Blue, as the Plaintiff believes it would be more efficient for this Court and in the interest of justice to refer this matter to a Special Referee pursuant to S.C. Code Ann. §14-1-60 and §15-31-150 and Rule 53, SCRCP.

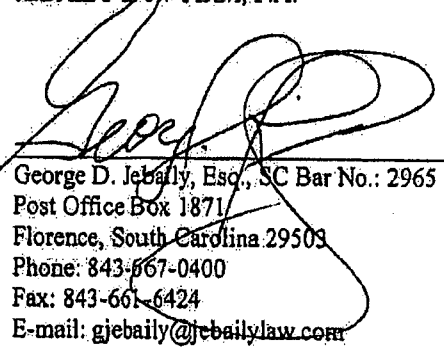
ACERTIFIED
 GWEN T. HYATT
 DILLON COUNTY

Richard L. Hinson, Esquire, has consented to serve as Special Referee and the Plaintiff is informed and believes he is an appropriate and suitable person to so serve. The Plaintiff requests the Special Referee to hear this matter and any matters hereinafter relating to the case and file a final Order appealable only to the Court of Appeals.

Pursuant to Rule 11(a), SCRCP, Plaintiff's counsel certifies that consultation with Defendant Nicolette S. Blue concerning this motion would serve no useful purpose or could not be timely held.

JEBAILY LAW FIRM, P.A.

BY:



George D. Jebaily, Esc., SC Bar No.: 2965
Post Office Box 1871
Florence, South Carolina 29509
Phone: 843-667-0400
Fax: 843-661-6424
E-mail: gjebaily@jebailylaw.com

Florence, South Carolina

August 20, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS

THOMAS J. GROSSETTI, JR.,)

Civil Action No. 2015-CP-17-00313

Plaintiff, *A CERTIFIED TRUE COPY*

vs.

MOTION TO SET ASIDE DEFAULT

NICOLETTE S. BLUE,)

Defendant, *CLERK OF COURT DILLON COUNTY*

FILED
GWENT HYATT
2015 OCT 15 PM 1:04
CLERK OF COURT
DILLON COUNTY

TO: THOMAS J. GROSSETTI, JR, PLAINTIFF, AND GEORGE D. JEBAILY,
ATTORNEY FOR PLAINTIFF:

You will please take notice that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, Defendant, Nicolette S. Blue, and Omni Indemnity Company, by and through its undersigned counsel, will move before the Presiding Judge of the Court of Common Pleas, Dillon County, for an order setting aside any entry of default and/or default judgment against this Defendant pursuant to Rules 55(c) and 60(b) of the South Carolina Rules of Civil Procedure. The basis of this motion is as follows: (1) there exists good cause to set aside the entry of default and/or default judgment in this case; (2) the default occurred due to mistake and/or excusable neglect; (3) this motion has been made within a reasonable time of the discovery of the default; (4) this Defendant was improperly and/or insufficiently served; (5) this Defendant was improperly placed into default without proper notice and without proper service; and, (6) this Defendant has valid defenses to the Plaintiff's Complaint. Accordingly, Defendant, Nicolette S. Blue, requests that this Court set aside any entry of default and/or default judgment, deny any motions by the Plaintiff for entry of default and/or default judgment, and allow this

matter to proceed to trial.

This motion may be supported by affidavits, memoranda, briefs and evidence which may be received and/or required by the Court.

MCANGUS GOUDELOCK & COURIE, L.L.C.



Brett H. Bayne, Bar No: 100018
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor (29201)
Columbia, South Carolina 29211-2519
(803) 779-2300

ATTORNEYS FOR DEFENDANT, NICOLETTE
S. BLUE AND OMNI INDEMNITY COMPANY

October 8, 2015

FILED
GWEN T. HYATT

STATE OF SOUTH CAROLINA 16 JAN 13 AM 11:17
COUNTY OF DILLON CLERK OF COURT } IN THE COURT OF COMMON PLEAS
DILLON COUNTY }

THOMAS J. GROSSETTI, JR.,

Civil Action No. 2015-CP-17-00313

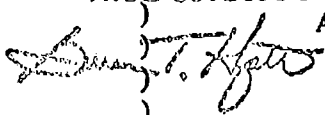
Plaintiff,

v.

ACERTIFIED DEFENDANT'S MEMORANDUM IN
TRUE COI SUPPORT OF MOTION TO SET
ASIDE DEFAULT

NICOLETTE S. BLUE,

Defendant.



CLERK OF COURT
DILLON COUNTY

This matter comes before this court on Defendant's Motion to Set Aside Default Judgment. The underlying motion was filed on or around October 8, 2015 immediately following receipt of the Order of Default from opposing counsel. This memorandum discusses in detail the mandatory set aside required by McLurg due to mistake, inadvertance, surprise, and/or excusable neglect.

In determining whether to set aside a default under Rules 55(c) and 60(b), our courts have noted 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 the other parties. Tobias v. Rice, 379 S.C. 357, 366, 665 S.E.2d 216, 221 (Ct.App.2008); Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App.2001); Hill v. Dotts, 345 S.C. 304, 309, 547 S.E.2d 894, 897 (Ct.App.2001); New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 378 (Ct.App.1993). Additionally, our courts have stated "We have held that Section 10--1213¹ should

¹ Revised to S.C. Code Ann. 15-27-130 of the 1976 Code. It provided "at any time within one year of notice thereof" the circuit court may relieve a party from a judgment "taken against him through his mistake, inadvertence or excusable neglect." It was repealed in 1985 and replaced in part by Rules 55 and 60.

be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits." Gaskins v. California Ins. Co., 195 S.C. 376, 11 S.E.2d 439 (1940). Further, the Fourth Circuit has set out that "no cognizable prejudice inheres in requiring a plaintiff to prove a defendant's liability, a burden every plaintiff assumes in every civil action filed..." Colleton Prep. v. Hoover, 616 F.3d 413, 419 (2010).

First, Defendant filed for the requested relief just three days after it was notified of the default judgment. Therefore, promptness of the requested relief is not at issue.

Second, Defendant has set out the reasons for the failure to respond. Specifically, as set out in the prior sworn affidavit of Kim Cofresi, Omni Indemnity Company (Defendant's Insurance Company) contacted Plaintiff's counsel on eight (8) different occasions between January 2015 and September 2015. *See* Exhibit A. **This included six (6) calls after the Complaint was filed seeking information about the claim and discussing settlement options.** Five (5) of the eight (8) calls either occurred with Plaintiff's attorney, Plaintiff's attorney's assistant. On three (3) calls, a voicemail was left for Plaintiff's attorney (and never returned).

On February 24, 2015, Omni was informed by Plaintiff's counsel that a copy of the Summons and Complaint would be provided "when the suit was filed" (which was not done). On June 10, 2015, Omni spoke with Plaintiff's attorney who stated he would fax a copy of the Summons and Complaint (which was not done despite providing the fax number). On June 10, 24 and July 29 Omni requested a copy of the Summons and Complaint from Plaintiff's attorney (which was never provided). On August 10, Omni spoke with Christina in Plaintiff's attorney's office and requested a copy of the Summons and Complaint. Christina said she needed to speak with Plaintiff's attorney and "would call us back" (she never did). On September 22, Omni left another voicemail requesting a copy of the Summons and Complaint (it was never returned).

Then on October 5, 2015, Omni received a copy of the Summons, Complain, Order for Entry of Default, and Default Judgment.

Interestingly, the Default Judgment hearing was held on September 23, 2015—one day after Omni had called Plaintiff's attorney to check on the status of the Summons and Complaint. The Order states that "Defendant did not appear for the hearing" despite Plaintiff'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. See Exhibit B. Also of interest, the Affidavit of Default was signed on August 20, 2015 by George D. Jebaily who represented Defendant had not made an appearance. See Exhibit C. 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. 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.

Omni had a reasonable expectation notice of suit would be given based on the communications from Plaintiff's counsel. Edwards v. Ferguson, 254 S.C. 278, 175 S.E.2d 224, requires a set aside in this case². In Edwards, the plaintiff's counsel "...orally informed...State Farm on the phone...that summons, notice, and complaint had been served³ on the defendant..." The trial judge in Edwards even found as a matter of fact that State Farm was informed of the service by Plaintiff's counsel. Despite the clear notice to State Farm, the court set aside the

² Edwards also permits Omni to raise issues that affect Omni as Omni "stands in the shoes of the defendant so far as liability is concerned..."

³ In the present case, Plaintiff'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.

default judgment because State Farm was not given a copy of the law suit. In doing so, the Supreme Court of South Carolina stated "State Farm stands in the shoes of the defendant 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 defendant 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 plaintiff 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—Plaintiff's counsel informed Omni of the pending lawsuit and failed to provide a copy to Omni⁴. Therefore, Edwards clearly requires the default be set aside.

Further, McLurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2009) clearly sets out the reasons for Omni/Defendant's failure to act is justified as excusable neglect and mistake. McLurg was decided after Edwards and relies heavily on the reasoning in Edwards. In McLurg, the plaintiff's counsel informed Zurich in writing he was going to file a lawsuit. While negotiations and attempted communications were ongoing, he filed the lawsuit without notifying Zurich or providing Zurich a copy of the lawsuit. The defendants defaulted and a judgment was entered. The Court of Appeals set aside the default. Specifically, the Court stated "...it is undisputed Zurich...entered into settlement negotiations with [plaintiffs] attorney...based on counsel's conduct and actions, it was reasonable for Zurich and New Prime to believe that...at the very least, that counsel would provide Zurich a copy of any pleadings in the matter when filed." The court went on to say "...the facts show [Zurich] was taken by surprise when...counsel failed to inform Zurich or New Prime of this action, thereby meeting the surprise

⁴ Plaintiff'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.

or excusable neglect requirement under Rule 60(b)(1)⁵. McLurg sets out in clear language that failing to provide a copy of the lawsuit following negotiations and notice of potential filing constitutes excusable neglect and/or surprise⁶. Therefore, the reason for failure to act promptly is not at issue.

Third, Defendant is required to show the existence of a meritorious defense. Plaintiff has asserted his damages include physical injury and medical bills. Defendant has contested the injury and medical bills from the outset of this case. Therefore, there is a potential meritorious defense to damages that has been presented to this court and will be presented at trial in this matter.

Fourth, and finally, the court must consider the prejudice to the other nonmoving parties. Specifically, prejudice to Plaintiff. Here there is no prejudice. First, the request for relief is timely filed. Second, there would be no need for a set aside had Plaintiff's counsel complied with the holdings in Edwards and McLurg. Third, the South Carolina Supreme Court and applicable Federal Courts have held that there is "a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits." See, for example, Tazco, Inc. v. Director, Office of Workers Compensation Program, U.S. Dep't of Labor, 895 F.2d 949, 950 (4th Cir.1990) ("The law disfavors default judgments as a general matter."); Consolidated Masonry & Fireproofing, Inc. v. Wagman Constr. Corp., 383 F.2d 249, 251 (4th Cir.1967) ("Generally a default should be set aside where the moving party acts with

⁵ The Court of Appeals also called into question actions of plaintiff'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 plaintiff'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 Plaintiff's attorney never informed Omni the suit had been filed.

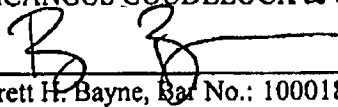
⁶ As noted above and, Plaintiff's counsel informed Omni that a suit may be filed and that suit had been filed. Therefore, the discussion in McLurg of discussing or notifying of a pending lawsuit but failing to provide a copy to the insurance company is satisfied in the present case.

reasonable promptness and alleges a meritorious defense.”). Additionally, in Colleton Prep. v. Hoover, 616 F.3d 413, 419 (2010), the Fourth Circuit found that “no cognizable prejudice inheres in requiring a plaintiff to prove a defendant’s liability, a burden every plaintiff assumes in every civil action filed.” Plaintiff cannot show there is any prejudice to setting aside the default. The Complaint in this matter was filed in June 2015. If the default is set aside, we would still not even be close to a trial roster or mediation deadline. Defendant is prepared to proceed immediately to discovery and a trial on the merits. Therefore, there is no delay that prejudices Plaintiff. And as set out above, there is no other prejudice to Plaintiff which exists.

Conclusion

For all the foregoing reasons, the default judgment entered by this court must be set aside Pursuant to McLurg, Edwards, and all other case law cited herein, and the South Carolina Rules of Civil Procedure, the default must be set aside for excusable neglect, inadvertence, and/or mistake and the matter should proceed equitably on the merits.

MCANGUS GOUDELOCK & COURIE, L.L.C.


Brett H. Bayne, Bar No.: 100018
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor (29201)
Columbia, South Carolina 29211-2519
(803) 779-2300

ATTORNEYS FOR OMNI INDEMNITY
COMPANY AND DEFENDANT, NICOLETTE S.
BLUE

January 8, 2016

EXHIBIT A

FILED
GWEN T. HYATT

2016 JAN 13 AM 11:18

STATE OF SOUTH CAROLINA
COUNTY OF DILLON

IN THE COURT OF COMMON PLEAS
CLERK OF COURT
DILLON COUNTY

THOMAS J. GROSSETTI, JR.,
Plaintiff,

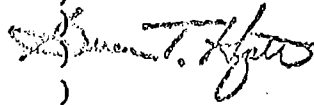
Civil Action No. 2015-CP-17-00313

vs.

NICOLETTE S. BLUE,
Defendant.

AFFIDAVIT OF KIM COFRESI

A CERTIFIED
TRUE COPY



CLERK OF COURT

PERSONALLY APPEARED BEFORE ME, the undersigned, Kim Cofresi, who, after

being duly sworn, deposes and states:

1. I am over the age of eighteen.
2. I am of sound mind to swear this affidavit.
3. I am employed by Omni Indemnity Company.
4. I was one of the employees in charge of handling the claim file for the above referenced case.
5. Omni received notice of this claim on or around May 21, 2013.
6. Following notice of the claim, Omni began adjusting the claim and began a course of settlement negotiations with Plaintiff and/or Plaintiff's attorney.
7. I called Plaintiff's counsel on January 27, 2015 to check on the status of our then current offer to settle. During this phone call I spoke with Christina (who represented herself as Mr. Jebaily's assistant) and Mr. Jebaily. I was informed that if we did not offer the policy limits he would file suit within two weeks.
8. I called Plaintiff's counsel on February 24, 2015 to check if suit had been filed

pursuant to the January 27 conversation. I spoke to Christina and was informed they were in the process of filing suit unless we paid policy limits. Christina informed me she would forward a copy of the Summons and Complaint when the suit was filed.

9. I monitored the case closely on an ongoing basis to determine if suit had been filed.

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Complaint, Order for Entry of Default Judgment, and the Default Judgment. This was received by Omni on October 5, 2015.

17. Plaintiff's counsel refused to provide a copy of the Summons and Complaint so that it could be handled in an appropriate manner.

18. Plaintiff's counsel apparently filed a lawsuit on June 1, 2015.

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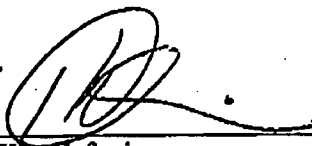
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23. Plaintiff's counsel never informed Omni of any default damages hearing in this matter despite numerous conversations with Plaintiff's counsel about the Summons and Complaint.

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25. I believe Plaintiff's counsel failed to provide Omni with a copy of the Summons and Complaint to induce a default in this matter despite numerous attempts by Omni to obtain the Summons and Complaint prior to the matter entering default.

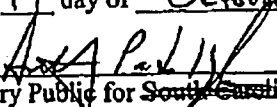
FURTHER, AFFIANT SAYETH NAUGHT.



Kim Cofresi

SWORN TO AND SUBSCRIBED BEFORE ME

This 14th day of October, 2015.



Notary Public for ~~South Carolina~~ Georgia

My Commission Expires: 2/2/18



EXHIBIT B

FILED

STATE OF SOUTH CAROLINA
COUNTY OF DILLON

IN THE COURT OF COMMON PLEAS

2015 JAN 13 AM 11:10
CLERK
DILLON CO

DOCKET NO.: 15-CP-17-313

Thomas J. Grossetti, Jr.,

Plaintiff,

vs.

Nicolette S. Blue,

Defendant.

A CERTIFIED
TRUE COPY
ORDER AND JUDGMENT

CLERK OF COURT
DILLON COUNTY

Pursuant to an Order of Entry of Default and Referral to a Special Referee filed on August 31, 2015, this matter was referred to me as Special Referee for the purpose of conducting a hearing to determine damages.

The damages hearing was conducted at my office located at 105 Chase Street in Florence, South Carolina, on September 22, 2015, beginning at 1:00 p.m. George D. Jebaily, Esquire, was present on behalf of the Plaintiff, Thomas J. Grossetti, Jr. The Plaintiff, his mother, and a court reporter were also present. The required notice of the hearing was given to the Defendant via both regular mail and certified mail return receipt and was made a part of the record. However, the Defendant did not appear for the hearing.

DAMAGES

This matter arises out of an automobile accident that occurred on May 17, 2013, in Dillon County, when the Defendant disregarded a stop sign and caused her vehicle to violently collide with the Plaintiff's vehicle. The Plaintiff presented evidence in the form of sworn testimony from the Plaintiff and his mother (Angela Grossetti), as well as, exhibits consisting of medical bills, medical reports, photographs, diagrams, and other documents.

Based on the testimony and evidence presented, I find that the Plaintiff's injuries and damages were proximately caused by the accident and the conduct of the Defendant. In considering all the evidence and the demeanor and credibility of the witnesses, I award the Plaintiff actual damages in the amount of Sixty-five Thousand Eighty-eight and 84/100 Dollars (\$65,088.84).¹ I further find that the conduct of the Defendant in disregarding the stop sign was reckless and grossly negligent, and as a result, I award the Plaintiff punitive damages in the amount of Ten Thousand and 00/100 Dollars (\$10,000.00).

JUDGMENT

Judgment shall be entered in favor of the Plaintiff against the Defendant in the amount of Seventy-five Thousand Eighty-eight and 84/100 Dollars (\$75,088.84).

IT IS SO ORDERED.

Florence, South Carolina
September 23, 2015



Richard L. Hinson
Special Referee

¹ The Plaintiff's actual damages are computed as follows: causally related medical bills and wages (\$5,088.84); pain and suffering during and immediately after the accident (\$5,000); pain and suffering for the summer following the accident (\$25,000); loss of enjoyment of life related to the inability to participate in college athletics (\$25,000); and continued intermittent pain since the summer after the accident (\$5,000).

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF DILLON
Thomas J. Grossett, Jr.,

Plaintiff,

vs.

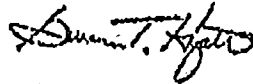
Nicolette S. Blue,

Defendant.

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IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT
2015 AUG 31 11:09
CLERK OF COURT No.: 2015-CP-17-313
DILLON COUNTY

APPIDAVIT OF DEFAULT

CERTIFIED
TRUE COPY



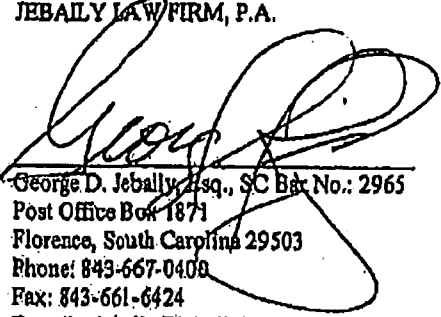
PERSONALLY APPEARED before me George D. Jobally, who, being duly sworn deposes
and says:

1. I am a practicing attorney with the Jobally Law Firm, P.A. of Florence, South Carolina.
2. I am the attorney of record for the Plaintiff, and on his behalf I brought an action against the above-captioned Defendant. The Complaint was dated June 1, 2015 and was served on the Defendant, Nicolette S. Blue on June 12, 2015 by certified mail. Please refer to the attached Proof of Service.
3. More than thirty (30) days have elapsed since service of the said Summons and Complaint and there has been no appearances made by anyone on behalf of the Defendant. In addition, the Defendant has failed to file an Answer, Notice of Appearance, Motion or other pleadings in this matter and is now, and has been, in default.
4. Your affiant saith nothing further.

10/5/2015 9:11:40 AM

JEBAILY LAW FIRM, P.A.

BY:


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SWORN to before me this 20th
day of August, 2015

Christina Stewart
Notary Public for South Carolina
My Commission Expires: February 4, 2018

STATE OF SOUTH CAROLINA
DILLON COUNTY

COURT OF COMMON PLEAS
NO. 2015-CP-17-00313

THOMAS J. GROSSETTI, JR., :
 : :
 Plaintiff, : :
 : :
 vs. : :
 : :
NICOLETTE S. BLUE, : :
 : :
 Defendant. : :

MOTION TO SET ASIDE DEFAULT
BEFORE JUDGE RICHARD HINSON, SPECIAL REFEREE

DATE TAKEN: Monday, January 11, 2016
TIME BEGAN: 10:15 a.m.
TIME ENDED: 11:01 a.m.
LOCATION: Richard Hinson, LLC
 105 Chase Street
 Florence, South Carolina
REPORTED BY: Laura Chamblee, RPR
 EveryWord, Inc.
 P.O. Box 1459
 Columbia, South Carolina 29202
 803-212-0012

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APPEARANCES:

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E X H I B I T S

EXH. NO.	DESCRIPTION	MARKED
11		
12 No. 1	Defendant's Memorandum in Support	41
13	of Motion to Set Aside Default	

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PROCEEDINGS:
- - -

THE COURT: Let's go on the record. This is Richard Hinson. I am serving as Special Referee in this matter, pursuant to an order of default and reference signed by the Circuit Court Judge in the Fourth Judicial Circuit back on August 27, 2015, appointing me Special Referee for the purpose of conducting a hearing on damages. Just procedurally, so we'll know how we got here, that was referred to me and we scheduled a damages hearing in this default matter Grossetti vs. Blue. Thomas J. Grossetti, Jr. vs. Nicolette S. Blue, 15-CP-17-313. We scheduled that hearing, and it took place on September 22, 2015 with plaintiff's counsel and his witnesses and evidence. I issued an order and judgment on September 23, 2015.

It appears that the defendant through counsel filed a motion to set aside default on October 8, 2015, and I received notice of that through correspondence from the attorneys a little over two months later on December 18, 2015. And we scheduled this hearing today on

1 January 11, 2016 for the purpose of hearing the
2 defendant's motion to set aside default. And
3 that is what we are here for today.

4 Plaintiff is represented by Mr. George
5 Jebaily and the defendant is represented by
6 Mr. Brett Bayne. And I have been provided with
7 a Memorandum in Support and some other
8 documents. And unless we have anything else we
9 need to put on the record, I'm going to turn it
10 over to Mr. Bayne and entertain his motion.

11 MR. BAYNE: I don't have anything else to
12 put on the record. Okay.

13 THE COURT: I'll hear your arguments.

14 ARGUMENT BY THE DEFENDANT

15 MR. BAYNE: Certainly. This matter arises
16 out of an automobile accident in May of 2013
17 that Mr. Grossetti was involved in, an accident
18 in which Ms. Blue is alleged to have been liable
19 for that accident. Ms. Blue is an insured of
20 Omni Indemnity Company.

21 And so after the accident occurred,
22 Mr. Grossetti's attorney contacted Omni to begin
23 discussing the merits of the claim and then
24 potential settlement, liability, that type of
25 information, as you would do in any type of

1 automobile accident case.

2 I'll go sort of through the course of
3 what occurred within the Circuit Court and then
4 jump back to what was going on behind the
5 scenes.

6 On June 1, 2015 a lawsuit was filed by
7 Mr. Grossetti against Ms. Blue. That lawsuit
8 was served on the defendant. As far as I can
9 tell, service was proper. She did not file an
10 answer. She did not forward that lawsuit to
11 Omni Indemnity Company. She was determined to
12 be in default as of, I'll verify the -- I think
13 there was an affidavit of default that was
14 filled out and filed on August 20, 2015. It was
15 referred to the Special Referee who then
16 conducted, as you set out, a hearing on
17 September 22. And an order was issued on
18 September 23 awarding \$75,088.84 in damages
19 based on the default.

20 So we received notice. Mr. Jebaily
21 sent a copy of all of that on October 2 based on
22 the letter -- the date on his letter. It was
23 received by Omni on October 5, 2015. And the
24 motion to set aside the default was filed on
25 October 8, 2015. So that's where we are now.

1 It was obviously then forwarded to your
2 attention and we're here today to discuss
3 whether or not that default should be set aside.

4 So jumping back to sort of what
5 occurred behind the scenes with Omni and Mr.
6 Grossetti. Between January of 2015, so five
7 months roughly before the lawsuit was filed, and
8 then up until September of 2015, so three months
9 after the suit was filed, there were eight phone
10 calls made by Omni Indemnity Company by the
11 adjuster, Kim Cofresi, and one of her associates
12 Lasheena High to Mr. Grossetti's attorney.
13 Those were set out -- The dates of each of those
14 calls were set out in Ms. Cofresi's affidavit.

15 There are calls on January 27, 2015;
16 February 24, 2015; June 10, 2015; and another
17 one on June 10, 2015; June 24, 2015; July 29,
18 2015, August 20, 2015; September 22, 2015. In a
19 majority of those phone calls there was actual
20 conversation that occurred with either
21 Mr. Jebaily or with a lady named Christina who
22 is an employee in Mr. Jebaily's office. If
23 you'll notice in the affidavits it sets out what
24 the nature of those conversations were.

25 On January 27 Ms. Cofresi called

1 Mr. Jebaily's office, spoke to Christina and was
2 informed that if Omni did not offer the policy
3 limits he would file a suit within two weeks.

4 On February 24, Omni called to check
5 on the status as to whether that suit had been
6 filed. Again, spoke to Christina, who was
7 informed that they were in the process of filing
8 this suit unless we paid policy limits. During
9 that call Christina informed Ms. Cofresi that
10 she would forward a copy of the summons and
11 complaint when the suit was filed. No copy was
12 ever received by Omni pursuant to that
13 conversation.

14 On June 10, which is nine days after
15 the suit was filed, Ms. Lasheena High called
16 plaintiff's attorney. She spoke to Mr. Jebaily
17 who told her that a suit had been filed.
18 Ms. High asked Mr. Jebaily to forward a copy of
19 the summons and complaint. He agreed to do so.
20 No copy was ever received.

21 Again on June 10, Ms. High initiated
22 another conversation where she left a voicemail
23 for Christina asking for the summons and
24 complaint.

25 On June 24, the summons and complaint

1 had still not been received. Plaintiff's
2 counsel was called, provided a fax number for
3 the summons and complaint. It was not sent.

4 On July 29, having still not received
5 the summons and complaint, a voicemail was left
6 for Christina asking for a copy of the summons
7 and complaint.

8 On August 20, again having not yet
9 received the summons and complaint, Ms. Cofresi
10 spoke with Christina in Mr. Jebaily's office and
11 she informed Ms. Cofresi that she would need to
12 speak with Mr. Jebaily and call us back. She
13 never made a call back.

14 Then on September 22, a voicemail was
15 left asking for the summons and complaint again.

16 Now there's two important dates that
17 I'll get to in there, and that is aside from
18 obviously the numerous phone calls made after
19 the suit was filed asking for the status and
20 asking for a copy of the summons and complaint.
21 There was a phone call made on August 20, 2015
22 asking for a copy of the summons and complaint
23 and informing that we could be called back and
24 provided a copy. That is the same date that the
25 affidavit of default was filled out and filed

1 representing that Omni had not made an
2 appearance in order to defend this case, which
3 is true, but reflects information that -- in
4 other words, Omni is sitting here trying to
5 obtain the summons and complaint, trying to
6 appear and defend this matter, and is being
7 denied at that juncture.

8 THE COURT: Which date was that?

9 MR. BAYNE: That's August 20, 2015. And I
10 included as Exhibit C to the memo is the
11 affidavit of default. And all that says is
12 defendant has failed to file an answer, notice
13 of appearance, motion, or other pleadings in
14 this matter and is now and has been in default.
15 And again, that is correct but it reflects -- If
16 you look at the second page, it's signed
17 August 20, 2015. So up until that point and
18 including on that day, Omni has contacted
19 plaintiff attempting to obtain the summons and
20 complaint, attempting to defend the case,
21 attempting to appear, and has been stonewalled,
22 for lack of a better word, up to that point.

23 Now the second date is the
24 September 22 date. And in the memorandum I
25 realized I made a typo. I indicated that the

1 default judgment hearing was on September 23.
2 It was actually on September 22, which is not an
3 issue necessarily. But on September 22, we
4 called again asking for information about the
5 summons and complaint. That's the same date the
6 default damages hearing was held by you in this
7 office. And again, indicating that the
8 defendant did not appear for the hearing, which
9 is true, but again reflects -- or fails to
10 reflect the fact that up until that point there
11 had been eight phone calls made to plaintiff
12 attempting to become involved in this case and
13 obtain a copy of the summons and complaint.

14 So what does all that kind of wrap up
15 to? There's a four-pronged test for determining
16 whether to set aside a default judgment. It's
17 the promptness of the relief sought, the reasons
18 for the failure to act promptly, the existence
19 of a defense, and prejudice to the other
20 parties. And there's a long line of cases that
21 set that out.

22 The first prong, the timeliness of the
23 relief sought: This motion was filed three days
24 after notice was given that a default judgment
25 had been entered. So the promptness of the

1 relief isn't an issue. So there's really three
2 prongs that need to be reviewed and discussed.

3 THE COURT: Let me stop you there and make
4 sure we're on the same page. I know your motion
5 said relief from default, but technically we
6 would be going under rule 60(b)?

7 MR. BAYNE: 60(b).

8 THE COURT: Because a judgment has been
9 entered.

10 MR. BAYNE: Correct.

11 THE COURT: And if I'm reading your motion
12 right, the only part of 60(b) the only part that
13 you're moving under would be (b)(1).

14 MR. BAYNE: Mistake, inadvertence, or
15 excusable neglect.

16 THE COURT: Right.

17 MR. BAYNE: Yes.

18 THE COURT: Go ahead.

19 MR. BAYNE: And I believe when I filed the
20 motion on the 8th I either did not have the
21 judgment or was informed that it was only a
22 default. And so we filed it and then obtained
23 the actual amount of judgment if I remember
24 correctly.

25 THE COURT: Okay.

1 MR. BAYNE: So that's why it reflects that.
2 But 60(b)(1), mistake, excuse, inadvertence,
3 excusable neglect, is what we're moving under.
4 So the question becomes --

5 Let me jump to prejudice of the
6 parties, the existence of meritorious defense.
7 And then the second prong is really the main
8 issue for this hearing. Because of the
9 existence of a defense Omni has, and Omni on
10 behalf of the defendant has contested damages
11 throughout this course of negotiations. And
12 damages are a portion that can be contested as
13 far as defense in a case.

14 So there's existence of a meritorious
15 defense. We don't have to show that we would be
16 meritorious, just that it's possible that we
17 would pursue that at a hearing.

18 As far as the fourth prong, which is
19 prejudice, is concerned, the request for relief
20 was timely filed. The case has not yet -- It
21 was filed in June of 2015. We're now in January
22 of 2016. We're still several months away from
23 it appearing on any mediation or trial roster.
24 A good majority of the medical records and
25 discovery has been provided in this case. I

1 believe the only "discovery" that would be left
2 to do would likely be confirming we have all
3 medical records and then taking the deposition
4 of the plaintiff and the defendant. There's no
5 reason why this case wouldn't be ready even in
6 that short period of time to jump on a trial
7 roster or mediate by the predetermined mediation
8 deadline, let alone reaching a resolution to
9 that.

10 So the question becomes: Was there
11 any type of mistake or excusable neglect that
12 exists. And there's two cases that I refer to
13 in the memorandum. There's Edwards v. Ferguson
14 and there a case called McClurg v. Deaton. In
15 Edwards v. Ferguson, that's a case where the
16 defendant was in default. There was a default
17 judgment. In that case the plaintiff's counsel
18 actually contacted State Farm by telephone and
19 told him that a summons and notice and complaint
20 had been served on the defendant. That was
21 never provided to the insurance company. The
22 trial judge in that case found that State Farm
23 was informed, that there had been service.
24 However, the court set aside the default
25 judgment because State Farm was not given a copy

1 of the lawsuit. Supreme Court stated that State
2 Farm stands in the shoes of the defendant so far
3 as liability is concerned, in spite of the fact
4 the company was completely unaware and in spite
5 of the fact that the defendant has obviously
6 failed to cooperate to the prejudice of the
7 company.

8 So what they determined was -- and in
9 that case, if you do look at it and pull it up,
10 there was communication that was occurring
11 between the insurance company and the
12 plaintiff's attorney before, during, and after
13 the filing of the lawsuit. And yet no copy was
14 provided to the insurance company. And what
15 they determined was that there was an
16 expectation that a copy would be provided to the
17 insurance company if you're engaged in the
18 process of negotiation and discussion about the
19 case.

20 McClurg v. Deaton was a later case
21 that came in 2009, and they relied a lot on the
22 reasoning from Edwards. In McClurg the
23 plaintiff's counsel informed Zurich that he was
24 going to file a lawsuit. While negotiations and
25 communications were ongoing, he filed the

1 lawsuit without notifying Zurich or providing
2 Zurich a copy. Defendants defaulted, judgment
3 was entered. The Court of Appeal set aside the
4 default stating, It is undisputed that Zurich
5 entered into settlement negotiations with
6 plaintiff's attorney based on counsel's conduct
7 and actions; it was reasonable for Zurich and
8 New Prime to believe that at the very least
9 counsel would provide Zurich a copy of any
10 pleadings when the matter had been filed. The
11 Court went on to say the facts show Zurich was
12 taken by surprise when counsel failed to inform
13 Zurich or New Prime of its action, thereby
14 meeting the surprise or excusable neglect
15 requirement under rule 60(b)(1).

16 Now in that case there were some other
17 allegations if you read the full body of it
18 about some misconduct by plaintiff's counsel.
19 Obviously, that's not being alleged here, but
20 when you read it, there were some other -- In
21 candor, there were other issues occurring behind
22 the scene with plaintiff's counsel in that case.
23 But nevertheless, that case sets out in clear
24 language that failing to provide a copy of the
25 lawsuit following negotiations and notice of

1 potential filing constitutes excusable neglect
2 and surprise.

3 So that sets up sort of the basis for
4 our 60(b)(1) prong that there was mistake or
5 excusable neglect. And that is again reflected,
6 going back to the affidavit, that there were
7 eight telephone calls with plaintiff's counsel
8 between January and September and that six of
9 those calls occurred after the complaint was
10 filed seeking information about the claim, to
11 discuss settlement options, to obtain a copy of
12 the summons and complaint. And five of those
13 eight calls either occurred with plaintiff's
14 attorney or plaintiff's attorney's assistant.

15 So that's in a nutshell the basis of
16 the 60(b) motion, is that had Omni been provided
17 with a copy of the suit as required by the
18 Edwards case and the McClurg case, a defense
19 would have been provided, an answer would have
20 been provided, an appearance would have been
21 made, and this matter would not have gotten to
22 the default stage. And that -- That is shown by
23 the fact that they were actively involved in
24 trying to obtain copies of the summons and
25 complaint. They were told they would be

1 provided with a copy of the summons and
2 complaint on numerous occasions. They provided
3 contact information, fax numbers, emails, et
4 cetera, to receive copies of the complaint. And
5 they were never forwarded.

6 And I think again that August 20 and
7 September 22 dates are important just for
8 purposes of determining prejudice and
9 determining mistake. Is that --

10 On August 20 we called again to check.
11 And that's the date the affidavit is filed. On
12 September 22 we called to check to try to find
13 out what's going on, and then a hearing was held
14 on that same day to set aside -- or to get the
15 default judgment.

16 So that's our basis for moving to set
17 aside. Omni, based on the Edwards case, has the
18 ability to come in since they stand in the shoes
19 of the defendant for liability purposes to
20 contest it on that basis. And we'd ask
21 respectfully that you set aside the default
22 judgment and the default and allow Ms. Blue to
23 file an answer -- allow Omni to file an answer
24 on behalf of Ms. Blue to contest the liability
25 damages in this case.

1 THE COURT: Thank you, Mr. Bayne.
2 Mr. Jebaily.

3 MR. BAYNE: I apologize, one more thing.
4 The order that I provided, I think I set it out
5 in the beginning, is an order from Judge Gee in
6 Lexington County that sets out a very similar
7 set of factual circumstances. That was a
8 default, not a default judgment, but she applied
9 the rule 60(b) standards to it in making her
10 decision. And that was a situation where there
11 was ongoing communication with plaintiff's
12 counsel before, during, and after it was filed.
13 And she determined that on that basis that
14 constituted excusable neglect. And while that's
15 not binding here, we would argue that it is
16 persuasive given it is a recent order of the
17 Circuit Court. And that will conclude my
18 presentation.

19 THE COURT: Give me just a minute to loo
20 over that. Have you got a copy of the Edwards
21 case?

22 MR. BAYNE: I'll see if I have one with me.
23 If not, I can provide you one.

24 THE COURT: That's fine.

25 MR. BAYNE: I will get you one today.

1 THE COURT: That's okay. I can get it.
2 It's cited in the other case.

3 MR. BAYNE: I believe it's from 1959 if I
4 remember correctly.

5 THE COURT: 1967 I believe. It's cited in
6 the McClurg case.

7 MR. BAYNE: McClurg relied pretty heavily
8 on it.

9 THE COURT: And that's spelled M-C- capital
10 C-L-U-R-G, McClurg.

11 MR. BAYNE: I have it as M-C capital
12 L-U-R-G is how I have it. It is two Cs. In
13 McClurg actually they ended up denying the
14 motion. But when you read it, it's because
15 Zurich presented that there would be no defense
16 to any of the information, so it didn't meet the
17 third prong of setting aside a default judgment.
18 But they did determine that the second prong,
19 that there was a failure to act promptly, was
20 met.

21 THE COURT: Okay.

22 MR. BAYNE: So when you get through the 30
23 pages of McClurg, they end up denying it at the
24 end of the day but on the basis that they didn't
25 present a meritorious defense.

1 THE COURT: Okay. Thank you. Mr. Jebaily.

2 ARGUMENT BY THE PLAINTIFF

3 MR. JEBAILY: Certainly the facts are clear
4 that the defendant was timely served; that the
5 time passed and no -- the defendant did not file
6 an answer. So from -- on its very merits, the
7 facts are clear about that the defendant was in
8 default.

9 What is happening here is Omni is
10 shifting the burden in trying to say that it is
11 the plaintiff's burden to provide all this
12 information to the insurance company. There is
13 no contractual relationship between the
14 plaintiff and the defendant's carrier. This is
15 not a first party situation where you have
16 uninsured or underinsured coverage involved and
17 now you have a contractual relationship between
18 the plaintiff and the carrier. In fact, the
19 carrier continuously asserts that there is no
20 contractual relationship. The contractual
21 relationship exists between the carrier and the
22 defendant.

23 What is -- What is missing from the
24 affidavit? What's missing from the affidavit is
25 what efforts, how frequently, what is the

1 documentation of the efforts on behalf of the
2 carrier to communicate and to find out
3 information from their defendant. There's
4 nothing in there. It's void as to that.

5 What efforts did the carrier make to
6 go online and check? It's easy to check and see
7 if suit's filed. You go online, you pull up.
8 You can do it on a weekly basis. You can --
9 It's not hard to see if suit is filed. What
10 efforts was made to go and check? Had the
11 carrier made the efforts to simply go and see if
12 suit has been filed after being put on notice,
13 they would know.

14 It's not our duty. We are under no
15 obligation. It's not our responsibility to
16 inform the carrier. And there's no case out
17 there that says -- And the Zurich case is not
18 the case that says that there is an affirmative
19 duty to notify. There's no case that says the
20 plaintiff is under an affirmative duty to notify
21 the carrier. And the policy of insurance
22 remains in effect and you have --

23 This is under the Financial
24 Responsibility Act. Coverage is required to be
25 there. And the plaintiff did what the plaintiff

1 was required to do. And no amount of contact
2 from an adjuster to my paralegal or to my legal
3 assistant can shift the burden and say that
4 somehow it becomes our responsibility and the
5 plaintiff's responsibility to do that.

6 Had the same effort, any reasonable
7 portion of all these contacts, every
8 communication, had that been checking to see --
9 They know what county the suit is going to be
10 filed in. It's easily obtained information. In
11 this day and time, all they have to do is go
12 online and see. Apparently there was no effort
13 made. Instead, they're shifting the burden, and
14 they can't do that.

15 The affidavit doesn't mention any
16 effort, zero effort, on the part of Omni to
17 communicate with their insured or to find out
18 information from -- very easily accessible
19 online. Two minutes is all it takes to pull it
20 up and to see. They made no effort. Their
21 affidavit says nothing about it. Instead the
22 affidavit shifts the burden. And that's not --
23 In this day and time, that's not -- that doesn't
24 constitute excusable neglect because it shifts
25 the burden to the plaintiff and it's not our

1 responsibility.

2 THE COURT: Anything in response to that?
3 I've got a few questions after that.

4 DEFENDANT'S RESPONSE

5 MR. BAYNE: Just briefly. I think that as
6 far as the contact with the defendant, and
7 obviously that's not set out in the affidavit at
8 all and I don't have any information one way or
9 the other, but when you read the Edwards case,
10 if I remember correctly in that, there was some
11 discussion that State Farm not only knew that a
12 suit had been filed and served, but failed to
13 contact their insured at all. And it was still
14 in that case set aside as excusable neglect
15 because they were informed -- they were not
16 provided with a copy of the lawsuit.

17 I don't know that it needs to go as
18 far as shifting the burden one way or the other,
19 but I do believe that Edwards and McClurg both
20 set out a factual scenario wherein you -- if you
21 engage in communication with the insurance
22 company and you're discussing, having contact
23 with them, whoever initiates that, that
24 communication, after the date suit is filed,
25 there becomes a reasonable expectation they'll

1 be provided with a copy, especially when they
2 ask for one.

3 As far as the online check goes, I
4 agree. You can go online and check but we have
5 40 counties to check. And it requires a
6 presumption that there's not a, I guess,
7 misspelling or other error within the clerk's
8 office that it would be found, and it requires
9 you to check on a daily or weekly basis in over
10 40 counties. And I don't think there's a burden
11 to do that either on the insurance company, but
12 I certainly think when you contact plaintiff and
13 you request on eight different occasions a copy
14 of the suit, that there becomes an obligation
15 under case law to provide a copy of that suit so
16 that they can appear and defend. And that was
17 not done in this case.

18 MR. JEBAILY: There's an order from Judge
19 Clifton Newman which again is not binding but it
20 does address somewhat this issue. I had not
21 received the memo from Brett on this until this
22 morning, so I've not had a chance to provide a
23 responsive --

24 MR. BAYNE: My assistant said she sent it
25 on Friday and she did not. I gave it to Richard

1 too this morning. I apologize.

2 MR. JEBAILY: Right. This is my first time
3 seeing this.

4 THE COURT: Let's talk about what is
5 binding. I've read -- I actually prepared for
6 this hearing by pulling up some of these cases
7 that you've already talked about. And I believe
8 that at least we agree on what the law is; we
9 agree on which rule we're going under; we agree
10 on the four-part test.

11 Mr. Bayne, let me just tell you what's
12 on my mind and see what your responses are to
13 this. First of all, this McClurg case, I
14 remember when it came out some eight years ago.
15 And I think you will agree with me that what was
16 done in that case by plaintiff's counsel, in
17 fact, I think the Court even said it, possibly
18 bordered on an ethical violation and was really,
19 really bad.

20 MR. BAYNE: Correct. And if I remember
21 correctly, the discussion about that related to
22 after the suit was filed, he contacted them and
23 basically represented that it had not been filed
24 and tried to negotiate a settlement while it was
25 proceeding to default. And that did not happen

1 here. I don't --

2 THE COURT: In fact, he filed two lawsuits,
3 giving the impression that he was giving notice
4 of one, while the other one was going into
5 default.

6 MR. BAYNE: Correct.

7 THE COURT: And kind of played fast and
8 loose.

9 MR. BAYNE: Correct. There's a web of
10 procedural issues in that McClurg case. I
11 readily admit that.

12 THE COURT: And in spite of that, in spite
13 of that, I think the issue that they focused on,
14 and it was a two-to-one decision I think, that
15 they focused on was a meritorious defense; that
16 in spite of all of that bad -- what they
17 perceived -- even the majority perceived as bad
18 conduct, that they focused on meritorious
19 defense in that case. But going back to the
20 conduct, one thing Mr. Jebaily and I noticed in
21 the affidavit said, y'all are not alleging
22 anything even remotely close to what counsel did
23 in that case in McClurg --

24 MR. BAYNE: No.

25 THE COURT: -- in this case. But one thing

1 that does concern me is that paragraph 10 where
2 the adjuster says, I spoke with Mr. Jebaily and
3 he informed me suit had been filed. And that
4 was before there had been a default, correct?

5 MR. BAYNE: Correct, that was nine days
6 after it had been filed. There was no --

7 THE COURT: There's no misrepresentation
8 then?

9 MR. BAYNE: No, no. We don't allege any
10 malfeasance or misconduct at all. There is
11 none.

12 THE COURT: So your main gripe is that he
13 did not send you a copy of the suit papers,
14 correct?

15 MR. BAYNE: Correct, pursuant to Edwards
16 and then McClurg relied on it.

17 THE COURT: Okay. Let me just challenge
18 you. I know we're in 2016 now and some of these
19 cases were filed long before technology had
20 developed to where it is now, or even before
21 technology. Does she give any reason why she
22 did not hire counsel once she knew that suit had
23 been filed; or why she did not, knowing that the
24 accident and the parties lived in Dillon County,
25 did not look it up to see what had been filed

1 and take action? Does she give any indication
2 in her affidavit as to why she didn't do that?

3 MR. BAYNE: No.

4 THE COURT: Do you have any an explanation
5 for that?

6 MR. BAYNE: I do not. I've been given no
7 explanation as to why they did not either go to
8 Dillon County online to look it up, or hire
9 counsel immediately on June 10 when they were
10 told it was filed. The only explanation I have
11 for that is that they weren't told they had been
12 served. It's six of one at that point. I do
13 agree with you that once it's been filed, they
14 were informed of that, it should have certainly
15 probably raised a red flag. But again, I would
16 point out they provided a fax number, asked for
17 a copy of it so they could forward it to counsel
18 and that was not provided to them.

19 THE COURT: Let me ask you one other thing
20 and this goes to, I think, what's the heart of
21 the matter on most of these cases, is the
22 meritorious defense issue. I don't have Edwards
23 in front of me, but McClurg cites and actually
24 goes into detail. And Edwards it sounds like
25 was not nearly as bad of facts as McClurg.

1 Of course, it was a long time ago, but
2 they have a footnote here where they said in
3 Edwards that there were issues about plaintiff
4 being intoxicated, who was -- that there was an
5 issue about who was driving the car, that there
6 were issues of contributory negligence, and
7 issues such as that.

8 Is there any -- Are y'all
9 contending -- and I don't see anything in any of
10 these affidavits and I'm assuming you were
11 unable to get an affidavit from the defendant.
12 Is there anything on liability that y'all are
13 contending that is a meritorious defense on
14 issue of liability?

15 MR. BAYNE: No. Liability we would not be
16 contesting if the matter were set aside. The
17 contest would be to the extent and measure of
18 damages and necessity of medical care that
19 was --

20 THE COURT: Let me ask you about that. I
21 notice the McClurg majority sort of danced
22 around with that a little bit, and then did not
23 address it, claimed it wasn't preserved. But
24 then even said if it was preserved, they didn't
25 know if they would hear it. I know the dissent

1 said that the issue of damages is something in a
2 meritorious defense.

3 But just for my own curiosity and I
4 guess for the purposes of this motion and from
5 defending cases for 25 years, I'm assuming every
6 single case there could be an issue on damages.
7 Where does it become a meritorious defense on
8 the issue of damages, and what burden does a
9 defendant have to meet? Because you could try
10 this case in front of ten different referees or
11 ten different juries and get a different
12 result --

13 MR. BAYNE: Sure.

14 THE COURT: -- depending on what it is, and
15 everyone has a different opinion of value,
16 particularly in unliquidated damages like this.
17 What is y'all's position on what a meritorious
18 defense is on damages and how is it proven in
19 this motion?

20 MR. BAYNE: I don't think --

21 THE COURT: Or how is it presented in this
22 motion? I know you don't have to prove it, but
23 to show that it is meritorious, where is it?

24 MR. BAYNE: Sure, it's presented very
25 briefly and not with any specificity, but simply

1 that we plan to challenge both the extent of the
2 physical injury and the necessity of some of the
3 medical bills that were incurred.

4 I agree with you that the valuation,
5 you know, a hundred juries are going to come up
6 with a hundred different numbers. A hundred
7 special referees would come up with a hundred
8 different numbers when all that's presented. So
9 it's not so much a challenge to the actual
10 dollar value of the judgment that came. It's a
11 challenge to the underlying evidence that was
12 presented that reached the -- that allowed you
13 to reach the conclusion that you reached.

14 And the plaintiff has the burden in
15 every case, even when liability is fully
16 conceded, to establish the full measure of
17 damages and the full measure of the necessity of
18 the medical bills and present that to the jury
19 to make that determination. So even if we take
20 it back to June 1, receive a copy of it, file an
21 answer, concede liability, and go to damages,
22 there still could be a jury verdict returned of
23 zero dollars.

24 THE COURT: Has there been any evidence
25 presented by affidavit or otherwise by the

1 insurance company as to why they believe -- not
2 just believe, but why they believe they will be
3 able to prove or present to a finder of fact
4 that the damages were not what they were
5 supposed to be and that they have a meritorious
6 defense other than just generally we think it's
7 too much money, or we think that some of the
8 bills are unnecessary? Is there any evidence,
9 direct evidence, as to what would be presented
10 at trial on those issues?

11 MR. BAYNE: No, other than the sort of
12 nebulous we plan to contest the damages and
13 the -- we plan to contest the injury and the
14 extent of the medical bills and the damages.
15 There's not a specific, you know, we believe the
16 third chiropractor was--and just giving a
17 hypothetical--we believe the second or third
18 chiropractor was unnecessary kind of thing. We
19 don't have any specific allegation in the
20 memorandum or in the affidavit that sets out the
21 specific medical bills or injuries we plan to
22 contest. Just simply that that would be the
23 defense that we would put forward--a concession
24 of liability and then a defense to damages.

25 THE COURT: Okay. Just for the record,

1 I've got the McClurg case I'm going to look at.
2 I'm going to look at the Edwards case. I've got
3 Rule 60. I'll look over these Circuit Court
4 orders. I know they're not binding. They may
5 have given some guidance just to indicate what you
6 have presented as far as -- well, as far as
7 support of your motion. You have your
8 Memorandum that I'm going to review which is a
9 six-page memorandum. Attached to that, for the
10 record, is Exhibit A which is an affidavit of
11 Kim Cofresi?

12 MR. BAYNE: Cofresi.

13 THE COURT: C-O-F-R-E-S-I. Which appears
14 to be a four-page affidavit. And then attached
15 to that is Exhibit B which appears to be my
16 order and judgment. And Exhibit C, which was
17 the affidavit of default from Mr. Jebaily. Is
18 that correct? That's all? That is the -- Those
19 are the documents that you put into evidence in
20 addition to, I think, that order --

21 MR. BAYNE: Correct.

22 THE COURT: -- from the circuit Court. And
23 I think Mr. Jebaily has done -- has presented an
24 order as well. Any other evidence that you wish
25 to present?

1 MR. BAYNE: None at this time.

2 THE COURT: Mr. Jebaily?

3 PLAINTIFF'S RESPONSE

4 MR. JEBAILY: By their own admission in
5 their affidavit, they were on -- they received
6 communication and actual notice from me and from
7 my office that suit had been filed. They were
8 aware of it. They knew about it. And they
9 chose to do nothing about it. That is when a
10 carrier is on actual notice.

11 I mean it's almost like a premises
12 liability case in a sense, you know, when you
13 have actual notice. I mean you can say, well,
14 the defendant was served. That's constructive
15 notice in a sense. By here they had actual
16 notice, and they chose to do nothing about it.

17 Now after the fact, they want to
18 complain about it. They didn't go get online,
19 easily done, and just get a copy of the
20 complaint themselves. They didn't contact
21 Mr. Bayne, who is very capable, and I'm sure he
22 wishes they had. And we'll put on that the
23 record, right?

24 MR. BAYNE: I do wish they had.

25 MR. JEBAILY: Putting a phone call to him

1 and saying listen, you know, suit was filed in
2 this case, how about tracking it down, whatever,
3 you know, we want you to defend it.

4 Instead of making the calls to me and
5 to my office, there's a whole lot else they
6 could have done and I would way should have
7 done. It is their responsibility, and they
8 cannot shift the burden to say after they had
9 actual notice, after they were fully aware,
10 there was no --

11 And I have to just take one-half a
12 second and say that if there is any inference
13 that's being made that somehow there was
14 misleading activity occurring on the part of my
15 office to them, I take great umbrage if there's
16 any inference. And I would hope that --

17 MR. BAYNE: There is no inference of that.
18 I tried to -- I apologize for interrupting you.
19 I tried to set that out in the memo when I
20 discussed McClurg that there was no -- The facts
21 set out there that that attorney did is not
22 being alleged here. There is clearly no
23 malfeasance, misconduct, or anything like that,
24 or misleading. There's nothing on your part
25 that I would -- I'm not trying to imply that.

1 If I did, I apologize.

2 MR. JEBAILY: I just want to make that
3 clear because certainly we did not provide a
4 copy of the summons and complaint. Did not do
5 that. Told them the complaint -- suit had been
6 filed, but I didn't send a copy of it. And I'm
7 not alleging and at no point in time did I
8 allege that we did send a copy of it. We have
9 been very up-front in what we did do and what we
10 didn't do.

11 We did file suit. We did let them
12 know we filed suit. We did not send a copy of
13 the summons and complaint. Those are, I think,
14 facts that are not in dispute. And at no time
15 was there any misrepresentations made to Omni,
16 anything other than what the facts actually are.
17 Are we in agreement?

18 MR. BAYNE: Correct, there was no
19 misrepresentation made by your office that it
20 had -- it had not been served yet or anything
21 like that. Nothing like that was done. I agree
22 100 percent.

23 MR. JEBAILY: All right. Thank you for
24 that because that's very, very important to me
25 personally as well as to my client. Given that,

1 then, I think we're back to they were on notice,
2 they were aware, and they just dropped the ball.
3 You can't hold the plaintiff responsible when
4 the carrier is aware and they drop the ball, you
5 know.

6 This would be no different than the
7 defendant sending suit papers to the adjuster
8 and the adjuster just sits on it. The adjuster
9 had the information, the information was in
10 Omni's hands, and they did not choose to take
11 action or hire a lawyer. It's their mistake.
12 It's their -- They dropped the ball.

13 And when the adjuster and when the
14 carrier drops the ball, they have to deal with
15 the consequences. And there's no excusable
16 neglect; it's not surprise. It's none of that.
17 There's no surprise here. They were told that
18 suit was filed. There's no surprise. There's
19 no excusable neglect when they were told that
20 information and they chose not to act on it.
21 That's not excusable. That's just -- You know,
22 they dropped the ball and they've got to deal
23 with it.

24 THE COURT: Anything in response,
25 Mr. Bayne?

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DEFENDANT'S RESPONSE

MR. BAYNE: The only thing is I would disagree that it's analogous to the employee at the store receiving a complaint and sending it along and nobody doing anything because here the insurance company was actively trying to obtain a copy of the summons and complaint. Obviously they didn't take every possible route that anyone could come up with they could do, but they did actively engage and try to -- try to obtain it, try to appear, and try to defend this case, and were unable to do so. So we just ask that it be set aside so we can proceed to file an answer in this matter.

THE COURT: Okay. The affidavit and other exhibits that you gave us today, have they been filed with the Dillon County Clerk of Court?

MR. BAYNE: They were sent for filing. They were sent on Friday. I don't know --

THE COURT: So the court reporter doesn't need to have a copy of those. Those are already in the record.

MR. BAYNE: They will be but she can have mine if she wants.

THE COURT: That's fine. If she needs a

1 copy of those to fulfill the record, you can do
2 that and attach it as an Exhibit. It will
3 obviously be in the clerk's file. Anything else
4 we need to discuss? I think I've got everything
5 that I need. I will go read this. I will read
6 your memo. I'll read the affidavit again, read
7 over the cases. And I have a free afternoon
8 this afternoon, nothing is scheduled, no
9 mediations or anything. So I anticipate getting
10 you an order drafted today and hopefully can get
11 it out. Today is my birthday so...

12 MR. BAYNE: Happy birthday.

13 MR. JEBAILY: Well, this is a great way for
14 you to --

15 THE COURT: It's a great way. But
16 hopefully I can get that out before my children
17 celebrate my birthday tonight. I will email
18 y'all my results and -- or my order and I
19 will -- I'll also mail it to Ms. Hyatt in Dillon
20 so that she can file it. And then I will email
21 y'all also any invoice for the services today.
22 And then you will be taking care of the court
23 reporter I believe; is that correct?

24 MR. BAYNE: Yes, yes.

25 THE COURT: Okay. With that, I'm going to

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adjourn the hearing.

(Exhibit Number 1 was marked for
identification.)

(Proceedings concluded at 11:01 a.m.)

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA:

COUNTY OF DARLINGTON:

I, LAURA CHAMBLEE, Court Reporter,
certify that the foregoing is a true and correct
transcript of the proceedings taken down by me in the
case aforesaid. The exhibits attached hereto, if
any, are copies of documentary evidence only and the
physical evidence remains in the custody of the
Clerk. This certification is expressly withdrawn and
denied upon the disassembly or photocopying of the
foregoing transcript or any part thereof, including
exhibits, unless said disassembly or photocopying is
done by the official undersigned court reporter and
original seal and signature attached hereto.

Dated this 19th day of February, 2016.



LAURA CHAMBLEE, CCR, RPR
MY COMMISSION EXPIRES:
DECEMBER 22, 2018

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STATE OF SOUTH CAROLINA
COUNTY OF DILLON

IN THE COURT OF COMMON PLEAS

THOMAS J. GROSSETTI, JR.,
Plaintiff,

Civil Action No. 2015-CP-17-00313

v.

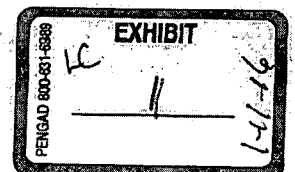
DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION TO SET
ASIDE DEFAULT

NICOLETTE S. BLUE,
Defendant.

This matter comes before this court on Defendant's Motion to Set Aside Default Judgment. The underlying motion was filed on or around October 8, 2015 immediately following receipt of the Order of Default from opposing counsel. This memorandum discusses in detail the mandatory set aside required by McLurg due to mistake, inadvertence, surprise, and/or excusable neglect.

In determining whether to set aside a default under Rules 55(c) and 60(b), our courts have noted 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 the other parties. Tobias v. Rice, 379 S.C. 357, 366, 665 S.E.2d 216, 221 (Ct.App.2008); Micronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App.2001); Hill v. Dotts, 345 S.C. 304, 309, 547 S.E.2d 894, 897 (Ct.App.2001); New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 378 (Ct.App.1993). Additionally, our courts have stated "We have held that Section 10--1213¹ should

¹ Revised to S.C. Code Ann. 15-27-130 of the 1976 Code. It provided "at any time within one year of notice thereof" the circuit court may relieve a party from a judgment "taken against him through his mistake, inadvertence or excusable neglect." It was repealed in 1985 and replaced in part by Rules 55 and 60.



be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits." Gaskins v. California Ins. Co., 195 S.C. 376, 11 S.E.2d 439 (1940). Further, the Fourth Circuit has set out that "no cognizable prejudice inheres in requiring a plaintiff to prove a defendant's liability, a burden every plaintiff assumes in every civil action filed..." Colleton Prep. v. Hoover, 616 F.3d 413, 419 (2010).

First, Defendant filed for the requested relief just three days after it was notified of the default judgment. Therefore, promptness of the requested for relief is not at issue.

Second, Defendant has set out the reasons for the failure to respond. Specifically, as set out in the prior sworn affidavit of Kim Cofresi, Omni Indemnity Company (Defendant's Insurance Company) contacted Plaintiff's counsel on eight (8) different occasions between January 2015 and September 2015. *See* Exhibit A. **This included six (6) calls after the Complaint was filed seeking information about the claim and discussing settlement options.** Five (5) of the eight (8) calls either occurred with Plaintiff's attorney, Plaintiff's attorney's assistant. On three (3) calls, a voicemail was left for Plaintiff's attorney (and never returned).

On February 24, 2015, Omni was informed by Plaintiff's counsel that a copy of the Summons and Complaint would be provided "when the suit was filed" (which was not done). On June 10, 2015, Omni spoke with Plaintiff's attorney who stated he would fax a copy of the Summons and Complaint (which was not done despite providing the fax number). On June 10, 24 and July 29 Omni requested a copy of the Summons and Complaint from Plaintiff's attorney (which was never provided). On August 10, Omni spoke with Christina in Plaintiff's attorney's office and requested a copy of the Summons and Complaint. Christina said she needed to speak with Plaintiff's attorney and "would call us back" (she never did). On September 22, Omni left another voicemail requesting a copy of the Summons and Complaint (it was never returned).

Then on October 5, 2015, Omni received a copy of the Summons, Complain, Order for Entry of Default, and Default Judgment.

Interestingly, the Default Judgment hearing was held on September 23, 2015—one day after Omni had called Plaintiff's attorney to check on the status of the Summons and Complaint. The Order states that "Defendant did not appear for the hearing" despite Plaintiff'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. See Exhibit B. Also of interest, the Affidavit of Default was signed on August 20, 2015 by George D. Jebaily who represented Defendant had not made an appearance. See Exhibit C. 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. 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.

Omni had a reasonable expectation notice of suit would be given based on the communications from Plaintiff's counsel. Edwards v. Ferguson, 254 S.C. 278, 175 S.E.2d 224, requires a set aside in this case². In Edwards, the plaintiff's counsel "...orally informed...State Farm on the phone...that summons, notice, and complaint had been served³ on the defendant..." The trial judge in Edwards even found as a matter of fact that State Farm was informed of the service by Plaintiff's counsel. Despite the clear notice to State Farm, the court set aside the

² Edwards also permits Omni to raise issues that affect Omni as Omni "stands in the shoes of the defendant so far as liability is concerned..."

³ In the present case, Plaintiff'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.

default judgment because State Farm was not given a copy of the law suit. In doing so, the Supreme Court of South Carolina stated "State Farm stands in the shoes of the defendant 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 defendant 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 plaintiff 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—Plaintiff's counsel informed Omni of the pending lawsuit and failed to provide a copy to Omni⁴. Therefore, Edwards clearly requires the default be set aside.

Further, McLurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2009) clearly sets out the reasons for Omni/Defendant's failure to act is justified as excusable neglect and mistake. McLurg was decided after Edwards and relies heavily on the reasoning in Edwards. In McLurg, the plaintiff's counsel informed Zurich in writing he was going to file a lawsuit. While negotiations and attempted communications were ongoing, he filed the lawsuit without notifying Zurich or providing Zurich a copy of the lawsuit. The defendants defaulted and a judgment was entered. The Court of Appeals set aside the default. Specifically, the Court stated "...it is undisputed Zurich...entered into settlement negotiations with [plaintiffs] attorney...based on counsel's conduct and actions, it was reasonable for Zurich and New Prime to believe that...at the very least, that counsel would provide Zurich a copy of any pleadings in the matter when filed." The court went on to say "...the facts show [Zurich] was taken by surprise when...counsel failed to inform Zurich or New Prime of this action, thereby meeting the surprise

⁴ Plaintiff'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.

or excusable neglect requirement under Rule 60(b)(1)⁵. McLurg sets out in clear language that failing to provide a copy of the lawsuit following negotiations and notice of potential filing constitutes excusable neglect and/or surprise⁶. Therefore, the reason for failure to act promptly is not at issue.

Third, Defendant is required to show the existence of a meritorious defense. Plaintiff has asserted his damages include physical injury and medical bills. Defendant has contested the injury and medical bills from the outset of this case. Therefore, there is a potential meritorious defense to damages that has been presented to this court and will be presented at trial in this matter.

Fourth, and finally, the court must consider the prejudice to the other nonmoving parties. Specifically, prejudice to Plaintiff. Here there is no prejudice. First, the request for relief is timely filed. Second, there would be no need for a set aside had Plaintiff's counsel complied with the holdings in Edwards and McLurg. Third, the South Carolina Supreme Court and applicable Federal Courts have held that there is "a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits." See, for example, Tazco, Inc. v. Director, Office of Workers Compensation Program, U.S. Dep't of Labor, 895 F.2d 949, 950 (4th Cir.1990) ("The law disfavors default judgments as a general matter."); Consolidated Masonry & Fireproofing, Inc. v. Wagman Constr. Corp., 383 F.2d 249, 251 (4th Cir.1967) ("Generally a default should be set aside where the moving party acts with

⁵ The Court of Appeals also called into question actions of plaintiff'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 plaintiff'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 Plaintiff's attorney never informed Omni the suit had been filed.


⁶ As noted above and, Plaintiff'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.

reasonable promptness and alleges a meritorious defense.”). Additionally, in Colleton Prep. v. Hoover, 616 F.3d 413, 419 (2010), the Fourth Circuit found that “no cognizable prejudice inheres in requiring a plaintiff to prove a defendant’s liability, a burden every plaintiff assumes in every civil action filed.” Plaintiff cannot show there is any prejudice to setting aside the default. The Complaint in this matter was filed in June 2015. If the default is set aside, we would still not even be close to a trial roster or mediation deadline. Defendant is prepared to proceed immediately to discovery and a trial on the merits. Therefore, there is no delay that prejudices Plaintiff. And as set out above, there is no other prejudice to Plaintiff which exists.

Conclusion

For all the foregoing reasons, the default judgment entered by this court must be set aside Pursuant to McLurg, Edwards, and all other case law cited herein, and the South Carolina Rules of Civil Procedure, the default must be set aside for excusable neglect, inadvertence, and/or mistake and the matter should proceed equitably on the merits.

MCANGUS GOUDELOCK & COURIE, L.L.C.


Brett H. Bayne, Bar No.: 100018
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor (29201)
Columbia, South Carolina 29211-2519
(803) 779-2300

ATTORNEYS FOR OMNI INDEMNITY
COMPANY AND DEFENDANT, NICOLETTE S.
BLUE

January 8, 2016

EXHIBIT A

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS

THOMAS J. GROSSETTI, JR.,)
)
Plaintiff,)

Civil Action No. 2015-CP-17-00313

vs.)

AFFIDAVIT OF KIM COFRESI

NICOLETTE S. BLUE,)
)
Defendant.)

PERSONALLY APPEARED BEFORE ME, the undersigned, Kim Cofresi, who, after being duly sworn, deposes and states:

1. I am over the age of eighteen.
2. I am of sound mind to swear this affidavit.
3. I am employed by Omni Indemnity Company.
4. I was one of the employees in charge of handling the claim file for the above referenced case.

5. Omni received notice of this claim on or around May 21, 2013.

6. Following notice of the claim, Omni began adjusting the claim and began a course of settlement negotiations with Plaintiff and/or Plaintiff's attorney.

7. I called Plaintiff's counsel on January 27, 2015 to check on the status of our then current offer to settle. During this phone call I spoke with Christina (who represented herself as Mr. Jebaily's assistant) and Mr. Jebaily. I was informed that if we did not offer the policy limits he would file suit within two weeks.

8. I called Plaintiff's counsel on February 24, 2015 to check if suit had been filed

pursuant to the January 27 conversation. I spoke to Christina and was informed they were in the process of filing suit unless we paid policy limits. Christina informed me she would forward a copy of the Summons and Complaint when the suit was filed.

9. I monitored the case closely on an ongoing basis to determine if suit had been filed.

10. On June 10, 2015, Lasheena High (another adjuster in our office) again called Plaintiff's counsel. I spoke with Mr. Jebaily and he informed me suit had been filed. I asked him to forward me a copy of the Summons and Complaint and he agreed to do so. I provided him with our fax number to send the Summons and Complaint.

11. On June 10, 2015, Lasheena initiated another phone call wherein she left a voicemail for Christina asking that Christina forward the Summons and Complaint.

12. On June 24, 2015 we had not yet received the Summons and Complaint. I called Plaintiff's counsel again and provided the fax number for sending a copy of the Summons and Complaint.

13. On July 29, 2015 we had still not yet received the Summons and Complaint. I called Plaintiff's counsel and left a voicemail for Christina asking her to forward a copy of the Summons and Complaint.

14. On August 20, 2015, we had still not yet received the Summons and Complaint. I called Plaintiff's attorney and spoke with Christina. She informed me that she would speak to Mr. Jebaily and call me back. She never called back.

15. On September 22, 2015, I again left a voicemail for Christina with contact information for the Summons and Complaint.

16. On October 2, 2015, Plaintiff's counsel sent a copy of the Summons,

Complaint, Order for Entry of Default Judgment, and the Default Judgment. This was received by Omni on October 5, 2015.

17. Plaintiff's counsel refused to provide a copy of the Summons and Complaint so that it could be handled in an appropriate manner.

18. Plaintiff's counsel apparently filed a lawsuit on June 1, 2015.

19. Plaintiff's counsel never provided Omni with a copy of this lawsuit despite numerous conversations with Plaintiff's counsel.

20. During each of these phone calls, I spoke to employees in Plaintiff's counsel's office and/or Plaintiff's counsel directly or left messages for one or both.

21. During each of the phone calls with Christina or Mr. Jebaily, I was informed the Summons and Complaint would be provided.


22. Plaintiff's counsel never informed Omni the matter was in default despite numerous conversations with Plaintiff's counsel about the Summons and Complaint.

23. Plaintiff's counsel never informed Omni of any default damages hearing in this matter despite numerous conversations with Plaintiff's counsel about the Summons and Complaint.

24. In fact, I contacted Plaintiff's counsel on six different occasions immediately before and after the suit was apparently filed to obtain a copy of the Summons and Complaint—each and every one of these requests was willfully ignored by Plaintiff's counsel.

25. I believe Plaintiff's counsel failed to provide Omni with a copy of the Summons and Complaint to induce a default in this matter despite numerous attempts by Omni to obtain the Summons and Complaint prior to the matter entering default.

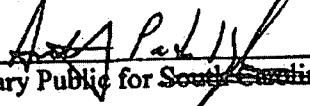
FURTHER, AFFLIANT SAYETH NAUGHT.



Kim Cofresi

SWORN TO AND SUBSCRIBED BEFORE ME

This 14th day of October, 2015.



Notary Public for ~~South Carolina~~ Georgia

My Commission Expires: 2/2/18



EXHIBIT B

STATE OF SOUTH CAROLINA)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 15-CP-17-313

Thomas J. Grossetti, Jr.,)

Plaintiff,)

vs.)

Nicolette S. Blue,)

Defendant.)

ORDER AND JUDGMENT

Pursuant to an Order of Entry of Default and Referral to a Special Referee filed on August 31, 2015, this matter was referred to me as Special Referee for the purpose of conducting a hearing to determine damages.

The damages hearing was conducted at my office located at 105 Chase Street in Florence, South Carolina, on September 22, 2015, beginning at 1:00 p.m. George D. Jebaily, Esquire, was present on behalf of the Plaintiff, Thomas J. Grossetti, Jr. The Plaintiff, his mother, and a court reporter were also present. The required notice of the hearing was given to the Defendant via both regular mail and certified mail return receipt and was made a part of the record. However, the Defendant did not appear for the hearing.

DAMAGES

This matter arises out of an automobile accident that occurred on May 17, 2013, in Dillon County, when the Defendant disregarded a stop sign and caused her vehicle to violently collide with the Plaintiff's vehicle. The Plaintiff presented evidence in the form of sworn testimony from the Plaintiff and his mother (Angela Grossetti), as well as, exhibits consisting of medical bills, medical reports, photographs, diagrams, and other documents.


Based on the testimony and evidence presented, I find that the Plaintiff's injuries and damages were proximately caused by the accident and the conduct of the Defendant. In considering all the evidence and the demeanor and credibility of the witnesses, I award the Plaintiff actual damages in the amount of Sixty-five Thousand Eighty-eight and 84/100 Dollars (\$65,088.84).¹ I further find that the conduct of the Defendant in disregarding the stop sign was reckless and grossly negligent, and as a result, I award the Plaintiff punitive damages in the amount of Ten Thousand and 00/100 Dollars (\$10,000.00).

JUDGMENT

Judgment shall be entered in favor of the Plaintiff against the Defendant in the amount of Seventy-five Thousand Eighty-eight and 84/100 Dollars (\$75,088.84).

IT IS SO ORDERED.

Florence, South Carolina
September 23, 2015



Richard L. Hinson
Special Referee

¹ The Plaintiff's actual damages are computed as follows: causally related medical bills and wages (\$5,088.84); pain and suffering during and immediately after the accident (\$5,000); pain and suffering for the summer following the accident (\$25,000); loss of enjoyment of life related to the inability to participate in college athletics (\$25,000); and continued intermittent pain since the summer after the accident (\$5,000).

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF DILLON

Thomas J. Grossetti, Jr.,

Plaintiff,

vs.

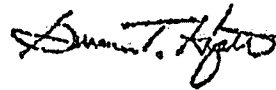
Nicolette S. Blue,

Defendant.

FILED
GWEN T. BYRNE
2015 AUG 05 11:09 AM
IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT
CLERK OF COURT No.: 2015-CP-17-313
DILLON COUNTY

AFFIDAVIT OF DEFAULT

ACERTIFIED
TRUE COPY



PERSONALLY APPEARED before me George D. Jebaily, who, being duly sworn deposes
DILLON COUNTY

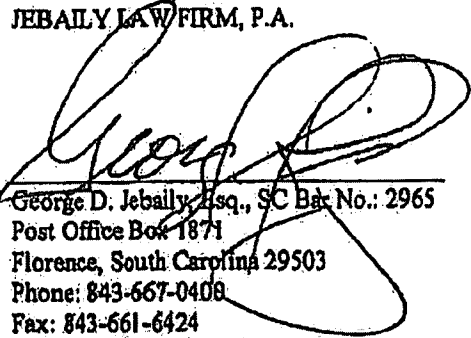
and says:

1. I am a practicing attorney with the Jebaily Law Firm, P.A. of Florence, South Carolina.
2. I am the attorney of record for the Plaintiff, and on his behalf I brought an action against the above-captioned Defendant. The Complaint was dated June 1, 2015 and was served on the Defendant, Nicolette S. Blue on June 12, 2015 by certified mail. Please refer to the attached Proof of Service.
3. More than thirty (30) days have elapsed since service of the said Summons and Complaint and there has been no appearances made by anyone on behalf of the Defendant. In addition, the Defendant has failed to file an Answer, Notice of Appearance, Motion or other pleadings in this matter and is now, and has been, in default.
4. Your affiant saith nothing further.

10/5/2015 9:11:40 AM

JEBAILY LAW FIRM, P.A.

BY:


George D. Jebaily, Esq., SC Bar No.: 2965
Post Office Box 1871
Florence, South Carolina 29503
Phone: 843-667-0408
Fax: 843-661-6424
E-mail: gjebaily@jebailylaw.com

SWORN to before me this 20th
day of August, 2015

Christina Stewart
Notary Public for South Carolina
My Commission Expires: February 4, 2018



Jebaily Law Firm, P.A.

P.O. Box 1871 · Florence, SC 29503-1871
(843) 667-0400 · (800) 868-0400 · Fax (843) 661-6424

Ronald J. Jebaily
George D. Jebaily

Rangeley C. Bailey
Suzanne H. Jebaily
Brian S. Yost

September 2, 2015

Nicolette S. Blue
2130 Nelson Dr.
Dillon, SC 29536

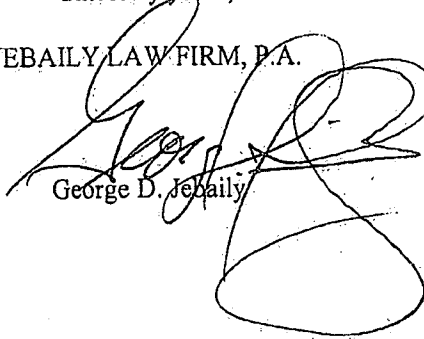
RE: Thomas J. Grossetti, Jr. vs. Nicolette S. Blue
Case No.: 2015-2015-CP-17-313
Matter No.: 13-5554-GDJ/cbs

Dear Ms. Blue:

Enclosed herewith please find copies of the August 27, 2015 Order of Entry of Default Judgment by the Clerk as to Defendant and for Referral to a Special Referee along with a Notice of Hearing which we are hereby serving upon you in this matter.

Sincerely yours,

JEBAILY LAW FIRM, P.A.


George D. Jebaily

GDJ/cbs
Enclosure

cc: Thomas J. Grossetti
Richard L. Hinson, Esquire

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)
)
Thomas J. Grossetti, Jr.,)
)
)
Plaintiff,)
)
vs.)
)
Nicolette S. Blue,)
)
)
Defendant.)

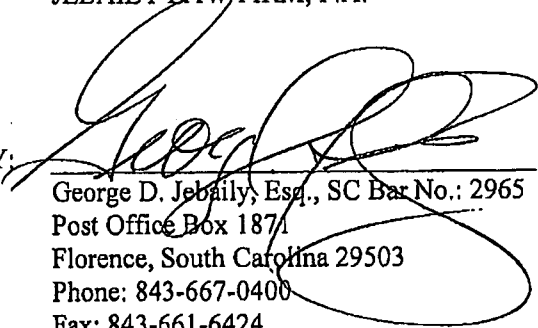
IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Case No.: 2015-CP-17-313

NOTICE OF HEARING

YOU WILL PLEASE TAKE NOTICE that a damages hearing in the above-captioned matter has been scheduled for **Tuesday, September 22, 2015, beginning at 1:00 p.m.** You are hereby notified to be present at this time at the office of Special Referee, Richard L. Hinson, Esquire, located at 105 Chase Street, Florence, South Carolina.

JEBAILY LAW FIRM, P.A.

BY: 
George D. Jebaily, Esq., SC Bar No.: 2965
Post Office Box 1871
Florence, South Carolina 29503
Phone: 843-667-0400
Fax: 843-661-6424
E-mail: gjebaily@jebailylaw.com

STATE OF SOUTH CAROLINA

COUNTY OF DILLON

Thomas J. Grossetti, Jr.,

Plaintiff,

vs.

Nicolette S. Blue,

Defendant.


IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

Case No.: 2015-CP-17-313

CERTIFICATE OF SERVICE

I, the undersigned employee of Jebaily Law Firm, P.A., hereby certify that I have served the Defendant with a Notice of Hearing via United States Postal Service (a) **Certified Mail - Return Receipt Requested - Restricted Delivery** and (b) **regular United States Mail** as follows:

Nicolette S. Blue
2130 Nelson Drive
Dillon, SC 29536



Christina B. Stewart
Paralegal for George D. Jebaily

Florence, South Carolina

September 2, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

SEP 12 2016

APPEAL FROM DILLON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Richard L. Hinson, Special Referee

Case No. 2016-000246

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that the Record on Appeal 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.

McANGUS GOUDELOCK & COURIE, L.L.C.



Brett H. Bayne
Post Office Box 12519, Capitol Station
Meridian, 1320 Main Street, 10th Floor (29201)
Columbia, South Carolina 29211-2519
(803) 779-2300

Attorneys for Appellant Nicolette S. Blue

July 1, 2016