STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	CIVIL ACTION NO. 2017-CP-27-00115
	)	
Richard L. Winslow and Charmayne Winslow,	)	
	)	**ORDER DENYING DEFENDANT MATTHEW W. HUDSON'S MOTION TO VACATE DEFAULT JUDGMENT**
Plaintiffs,	)	
	)	
v.	)	
	)	
Matthew W. Hudson, Waste Pro USA, Inc., and Waste Pro of South Carolina, Inc.,	)	
	)	
Defendants.	)	

Currently before the undersigned is Defendant Matthew W. Hudson's Motion to Vacate Default Judgment pursuant to Rule 60(b), SCRCP. The Motion is before me, sitting as Special Referee, pursuant to the August 30, 2017 Order of Reference signed by the Honorable Carmen T. Mullen. I heard the Motion on September 6, 2018. Present at the hearing were Patrick W. Carr, attorney for Plaintiffs; David Cobb, attorney for Defendant Hudson; and Benjamin Davis, attorney for Defendants Waste Pro USA, Inc., and Waste Pro of South Carolina, Inc. ("Waste Pro Defendants"). Having reviewed the pleadings, memoranda and exhibits, and hearing argument of counsel, I deny the Motion for the reasons set forth below.

FACTS

This case arises out of a motor vehicle accident that occurred on November 4, 2015. (Cmplt. p. 4). A garbage truck, owned by the Waste Pro Defendants and driven by Hudson while employed by the Waste Pro Defendants, collided with Plaintiffs' vehicle driven by Mr. Winslow. (Cmplt. p. 5). Mr. Winslow suffered injuries to his head, neck, back, shoulder, and knees, and underwent numerous surgeries. (Cmplt. p. 6).

Hudson is a resident of Georgia and, therefore, Plaintiffs served him pursuant to S.C. Code Ann. § 15-9-350 via the South Carolina Department of Motor Vehicles ("SCDMV"). (Aff. of Service). On April 6, 2017, the SCDMV sent the Summons and Complaint to Hudson via certified mail at the address listed on the accident report, and it was returned unclaimed and unable to forward. (Aff. of SCDMV). The SCDMV sent Plaintiffs' counsel a letter dated May 11, 2017, notifying him of the unclaimed return of the Summons and Complaint, and stating the SCDMV also sent the Summons and Complaint via open mail, pursuant to S.C. Code Ann. § 15-9-380. The SCDMV enclosed an affidavit of service and the unsigned return receipt. Plaintiff filed the same on June 26, 2017. The address provided to the SCDMV that it used for the certified and open mail was the address Hudson provided on the accident report. Plaintiffs did not serve the Waste Pro Defendants.

On August 10, 2017, Plaintiffs filed an Affidavit of Default as to Hudson. (Aff.). On August 30, 2017, the Honorable Carmen T. Mullen filed an Order of Default as to Hudson and referred the case to me "to preside over a hearing on Plaintiff's damages, to take testimony, make findings of fact and conclusions of law, and to enter a final judgment." (Order). Plaintiffs provided Hudson with notice of the damages hearing, which was held on October 12, 2017. An Order of Judgment was entered for Richard Winslow in the amount of $1,957,444.66 and for Charmayne Winslow for $3,000.00. (Order of Judgment). On January 19, 2018, Hudson filed a motion to vacate the judgment pursuant to Rules 60(b)(1) and (b)(3), SCRCP. (Mot. to Vacate).

APPLICABLE LAW AND DISCUSSION

"Whether to grant or deny a motion under SCRCP 60(b) is within the sound discretion of the judge." *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992).

I. <u>Excusable Neglect under Rule 60(b)(1), SCRCP</u>

Under Rule 60(b)(1), SCRCP, "the court may relieve a party . . . from a final judgment" for "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1), SCRCP. Hudson argues the fact that he did not receive notice of the lawsuit constitutes excusable neglect. The law of South Carolina says otherwise. It is undisputed that Hudson was at the time of the accident, and remains, a nonresident motorist. As such, he was deemed to have appointed the SCDMV "to be his true and lawful attorney upon whom may be served all summons or other lawful process in any action or proceeding against him growing out of any accident or collision in which such nonresident may be involved by reason of the operation by him . . . of a motor vehicle on" the roads of South Carolina. S.C. Code Ann. § 15-9-350. Service is made by sending the summons and complaint to the SCDMV, which then sends it "by certified mail . . . to the defendant." S.C. Code Ann. § 15-9-370. "If the defendant in any such cause shall fail or refuse to accept and receipt for certified mail containing the notice of service and copy of the process and it shall be returned", the SCDMV must then send it "by open mail." S.C. Code Ann. § 15-9-380. The filing of an affidavit of such mailing "shall have the same force and legal effect as if such process has been personally served upon such defendant." *Id.* Plaintiffs and the SCDMV complied with these statutory requirements.

Supreme Court precedent states that non-receipt of the summons and complaint does not invalidate service made pursuant to the nonresident motorist statutes. In *Cook v. Federal Ins. Co.*, 263 S.C. 575, 211 S.E.2d 881 (1975), the plaintiff's vehicle was hit by a vehicle owned but not driven by Mr. McDaniel. Mr. McDaniel came to the scene of the accident, which occurred in South Carolina, and provided the responding highway patrolman with a registration card and driver's license from North Carolina. *Id.* at 580, 211 S.E.2d at 882. Mr. McDaniel worked in North Carolina and maintained an office there but apparently spent his weekends in South

Carolina with his family. *Id.* at 580, 211 S.E.2d at 882-83. The plaintiff served Mr. McDaniel under the nonresident motorist statutes at the North Carolina address provided to the highway patrolman. *Id.* at 580-81, 211 S.E.2d at 883. The certified letter sent by the State Highway Commissioner came back unreturned, and the summons and complaint were then sent by open mail, pursuant to the service statutes. *Id.* at 581, 211 S.E.2d at 883. After the plaintiffs obtained a default judgment against Mr. McDaniel, their insurance carrier argued the service on McDaniel was improper. *Id.* The Supreme Court found service proper. It noted other jurisdictions hold "that Plaintiff is entitled to rely upon information furnished [to] the investigating officer" and "that McDaniel did 'fail or refuse to accept and receipt' for the certified letter" as contemplated by the statute. *Id.* at 583-84, 211 S.E.2d at 884. Specifically, the Court held "[o]ur statute does not require that one refuse to accept service." *Id.* at 584, 211 S.E.2d at 884.

The facts of this case are identical to *Cook*. Plaintiffs served Hudson under the nonresident motorist statute using the address provided to the investigating officer. Hudson's certified letter came back unclaimed and he was then served by open mail in accordance with the statute. Based on *Cook*, service pursuant to the nonresident motorist statutes is still valid despite the fact that Hudson did not receive a copy of the summons and complaint. Hudson does not argue Plaintiffs did not comply with the applicable service statutes. Hudson's argument that Plaintiffs or the SCDMV should have made further attempts to find another address for him is unpersuasive as I am unaware of any authority that contains such a requirement. That Hudson had five addresses in a two-year period shows the unworkability of such a requirement.

Therefore, I find Hudson fails to show excusable neglect and such failure alone warrants the denial of his Rule 60(b)(1) motion.[1]

II. Constitutionality of the Nonresident Motorist Service Statutes

Hudson argues the nonresident motorist service statutes are unconstitutional because they discriminate against citizens of other states and do not provide adequate notice. (Supp. Memo.). These arguments do not appear to actually challenge the constitutionality of a statute that appoints the SCDMV as the statutory agent for process for a nonresident motorist. Rather, the arguments suggest ways in which the statute may be amended to, in Hudson's view, make receipt of service of process more likely.[2] This is not a basis for finding the statutes unconstitutional and is more properly addressed to the legislature. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted).

[1] The cases cited by Hudson in support of his argument for excusable neglect are factually and legally distinguishable and do not address the controlling Supreme Court precedent in *Cook. Cox v. Sprung's Transp. & Movers, Ltd.*, 407 F. Supp. 2d 754 (D.S.C. 2006), addressed under the more lenient Rule 55(c) standard whether service on the SCDMV constituted service on a nonresident business. 407 F. Supp. 2d at 757. The District Court held service on the SCDMV was insufficient where it sent the summons and complaint by registered, not certified, mail and no return receipt was filed. This is not contrary to the holding in *Cook* that compliance with the statutes, despite non-receipt, constitutes valid service. In *Cousar v. M&R Carriers I, Inc.*, 2016 WL 3087008 (D.S.C. 2016), the District Court addressed the more lenient Rule 55(c) standard and analyzed only the four factors for granting relief without ruling on the validity of service. *Id.* at *4-6. As to service, the Court only noted that it is "unclear" who is responsible when the SCDMV uses an improper mailing address for a defendant.

[2] The use of an allegedly correct address still does not guarantee actual receipt by a defendant. For example, in this case, Plaintiffs sent service of a subsequent lawsuit to Hudson at the address he states is correct and it was returned as refused. (Aff. of Carr).

The United States Supreme Court ruled decades ago that a statute such as South Carolina's is constitutional. The nonresident motorist service statutes provide that, by using the roads of South Carolina, a nonresident motorist agrees to have the SCDMV serve as his statutory agent. The plaintiff is required to serve the summons and complaint to the SCDMV, which is required to provide notice to the defendant by sending the summons and complaint via certified mail and then open mail if the certified letter is unclaimed or refused. S.C. Code Ann. §§ 15-9-350 to -380.

"[A] state's power to regulate the use of its highways extends to their use by non-residents as well as by residents." *Wuchter v. Pizzutti*, 276 U.S. 13, 18 (1928). "We have also recognized it to be a valid exercise of power by a state, because of its right to regulate the use of its highways by non-residents, to declare, without exacting a license, that the use of the highway by the non-resident may by statute be treated as the equivalent of the appointment by him of a state official as agent on whom process in such a case may be served." *Id.* at 18. Such statutory provisions are constitutional if they "impose either on the plaintiff himself or upon the official receiving service or some other, the duty of communication by mail or otherwise with the defendant." *Id.* at 20. Stated another way, the statutes must require the plaintiff or statutory officer "to advise [the defendant], by some written communication, so as to make it reasonably probable that he will receive actual notice." *Id.* at 19; *see also Washington ex rel. Bond & Goodwin & Tucker, Inc. v. Superior Court of Washington*, 289 U.S. 361, 365-66 (1933) (interpreting *Wuchter* as holding a state may render a nonresident "amenable to action there, only if the statute providing for substituted service incorporates reasonable provision for giving the defendant notice of the initiation of litigation").

South Carolina's statutes include provisions that make it reasonably probable the defendant will receive notice by requiring the SCDMV to send service by certified mail and open mail. The statutes are a proper exercise of the state's power to regulate its highways as it is remedial in nature and designed to protect injured persons who suffer harm caused by nonresident motorists while providing nonresidents with reasonable service of process. I find the statutes are constitutional and deny Hudson's motion on this basis.

III. Conduct of Party Under Rule 60(b)(3), SCRCP

Under Rule 60(b)(3), SCRCP, "the court may relieve a party . . . from a final judgment" for "fraud, misrepresentation, or other misconduct of an adverse party." Rule 60(b)(3), SCRCP. Hudson argues that he is entitled to relief under Rule 60(b)(3) because (1) Plaintiffs' counsel made a demand on his insurance carrier in March 2017 and then did not respond to calls from an agent over six months later in September and October 2017, and (2) Plaintiffs did not serve the Waste Pro Defendants. (Mot. pp. 6-7).

Hudson argues that participating in settlement discussions somehow creates an obligation to provide an insurance carrier with notice of a lawsuit. Nothing in the South Carolina Rules of Civil Procedure require a Plaintiff to provide a copy of the pleadings to the insurance carrier. Rule 4, SCRCP; *see also White Oak Manor, Inc. v. Lexington, Inc.*, 407 S.C. 1, 12, 753 S.E.2d 537, 543 (2014) ("[N]othing in the South Carolina Rules of Civil Procedure requires the service of a courtesy copy of the summons and complaint on opposing counsel."). Notice to the insurer is a matter between the insured and the insurer.[3]

[3] *See* Order of the Honorable Clifton Newman Denying Defendant's Motion for Relief from Entry of Judgment, p. 6 (2016-CP-38-01013) (April 25, 2017) ("There is no unilateral duty for one lawyer to notify an adverse insurance company or lawyer of the status of service of process upon a defendant absent a promise to do so. The rules governing service of process require service to be made upon the Defendant, not the insurer or attorney for the Defendant.")

Hudson cites to *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), to argue that not disclosing the existence of a lawsuit justifies setting aside a default judgment. I do not read *McClurg* to hold that and further find the facts in *McClurg* stand in sharp contrast to the facts of this case. In *McClurg*, the injured plaintiffs were involved in a car accident with Harrell Wayne Deaton, an employee of New Prime, Inc. *Id.* at 567, 671 S.E.2d at 89. New Prime was insured by Zurich North America under a commercial trucker's general liability policy. *Id.* In *McClurg*, counsel for the plaintiffs engaged in the following conduct:

- Sent "a letter of representation" to the insurer and "beginning a course of contact between Zurich and counsel regarding injuries, medical treatment, and settlement negotiations."
- Sent "a proposed settlement package"
- Sent a letter to Zurich "request[ing] settlement within the next week" and stating "'If I haven't heard from you by that time, I will file suit and serve the Defendant and send you a courtesy copy of the pleadings.'"
- Sent Zurich "a copy of a complaint [naming only New Prime and not Deaton as a defendant]. . . and indicating his intent to 'proceed with litigation' if the matter was not soon settled."
- "[A]greed to delay filing suit while Zurich reviewed the settlement demand."
- "[E]xchanged telephone messages in regard to settlement, but did not reach a final agreement on the matter."
- "[F]iled a summons and complaint . . . , naming only Deaton as a defendant."
- "[A]fter the summons and complaint were already filed by counsel . . . counsel continued the path of negotiation with Zurich, sending Zurich an additional medical report concerning the underlying cause of action."

380 S.C. at 567-69, 671 S.E.2d at 89-90. The history of negotiations, representations made by counsel, and failure to notify Zurich of the complaint filing "raises serious concerns . . . and quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3)." *Id.* at 573, 671 S.E.2d at 92-93. Ultimately, the Court found New Prime failed to preserve the issue of

whether a meritorious defense existed and denied the motion to set aside the default judgment. *Id.* at 573-76, 671 S.E.2d at 93-94. On certiorari to the Supreme Court, it affirmed the Court of Appeals' decision not on any Rule 60(b)(3)basis, but on a finding that Deaton and New Prime failed to preserve the issue of whether they had a meritorious defense. 395 S.C. at 86-87, 716 S.E.2d at 887-88.

McClurg does not contain a holding that addresses the propriety of counsel's conduct and, regardless, the conduct alleged here is not comparable to what occurred in *McClurg*. Hudson states only that Plaintiffs' attorney made a demand and then did not respond to phone calls from the insurance carrier that occurred over six months after the demand. This does not constitute "fraud, misrepresentation, or other misconduct of an adverse party" and, to hold otherwise would effectively halt pre-suit settlement discussions.[4]

Finally, Hudson's argument relating to service to the Waste Pro Defendants is also unavailing. The order of judgment applies only to Hudson and has no effect on the Waste Pro Defendants. Hudson may not use an argument related to other defendants as the basis to set aside a default judgment applicable only to him.

For these numerous, independent reasons, I find Hudson fails to satisfy Rule 60(b)(3).

IV. Factors to Consider for Rule 60(b) Motion

Even if Hudson could show grounds for relief under Rules 60(b)(1) or (b)(3), I would still deny the motion for the separate and independent reason that he does not satisfy the factors for consideration in deciding a Rule 60(b) motion. "[I]n determining whether to set aside a default judgment under Rule 60(b), the trial judge should consider the following relevant factors: (1) the

[4] Hudson's citation to *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970), is misplaced because that case involved Rule 60(b)(1), not (b)(3), and, regardless, the Court did not make any ruling regarding the provision of notice.

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." *McClurg v. Deaton*, 380 S.C. 563, 573, 671 S.E.2d 87, 93 (Ct. App. 2008). "A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief." *Id.* at 575, 671 S.E.2d at 94.

Hudson asserts a meritorious defense as to (1) causation because he represents he was not on his cell phone at the time of the accident and Mr. Winslow left the scene without complaining of injury, (2) damages because his attorney states, in his experience, the judgment amount is excessive, and (3) improper venue.

As to improper venue, I am unable to locate any authority that improper venue is considered a meritorious defense. Venue is not a defense in the sense that it is evidence of whether a party would prevail at trial. Therefore, I do not find it a meritorious defense.

As to the amount of damages, I initially note that it is questionable whether an affidavit stating counsel's opinion constitutes evidence sufficient to show a meritorious defense. "Arguments of counsel are also not evidence." *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) (finding party failed to present evidence to entitle him to relief under Rule 60(b)). Regardless, I am unable to locate, and Hudson failed to provide, any South Carolina authority that the amount of damages is a meritorious defense. This defense also does not go to whether a party may prevail at trial but, rather, to the amount of damages awarded if he failed.

As to causation, I find the evidence presented does not constitute a meritorious defense. "A meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial." *Rouvet*, 388 S.C. at 312, 696 S.E.2d at 209 (internal quotation marks omitted). "Rather, a

meritorious defense need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." *Williams v. Watkins*, 384 S.C. 319, 326, 681 S.E.2d 914, 918 (Ct. App. 2009) (internal quotation marks omitted). Hudson does not challenge his fault in causing the accident. (Aff. of Hudson). He states only that he was not on his cell phone at the time of the accident and that he does not believe Mr. Winslow was injured because he drove away from the scene of the accident. *Id.* at ¶¶ 10-12. This does not present "a real controversy as to real facts arising from conflicting or doubtful evidence" that would affect a determination of causation of the accident. *Williams*, 384 S.C. at 326, 681 S.E.2d at 918. Mr. Winslow represented to me at the damages hearing that he went to the hospital within hours of the accident and Hudson's statement that Mr. Winslow left the accident scene does not create a controversy as to the causation of his injuries. I am aware that a meritorious defense need not be perfect but, applying this standard, I do not find the proffered defense meritorious.

For these reasons, the Motion to Vacate Default Judgment is **DENIED.**

AND IT IS SO ORDERED.

Dated: Oct. 5, 2018
Ridgeland, South Carolina

C. Stephen Bennett
Special Referee