THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Horry County
Benjamin H. Culbertson, Judge

Case No. 2012-212373

Jane RM Doe, Respondent

v.

Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology and Arrhythmias Consultant, Institute of Electrophysiology, P.C.

Of whom Omar Jaraki and Halla Jaraki are the Appellants

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Respondent initiated this action on January 27, 2010, with the filing of a summons and complaint alleging causes of action for assault; battery; intentional infliction of emotional distress; negligent infliction of emotional distress; invasion of privacy; breach of contract; breach of fiduciary duty; unfair trade practices; negligent supervision; and spoliation of evidence. **R. 7**. The summons and complaint were served on Appellant Omar Jaraki, M.D. on February 26, 2010; and they were served on Appellant Halla Jaraki on March 5, 2010. On April 30, 2010, respondent filed an affidavit of default along with her notice of motion and motion for default judgment. **R. 152**. The Clerk of Court for Horry County filed an entry of default therewith. On November 3, 2010, a damages hearing was held before the Honorable Benjamin H. Culbertson, Judge, and a judgment was entered in the amount of $100,000.00 in actual damages and $100,000.00 in punitive damages. **R. 116.** On November 22, 2010, a motion to be relieved from default judgment was filed by the Appellants and on November 30, 2010, an amended motion for relief from default judgment was filed. **R. 17.** A hearing on the amended motion for relief from default judgment was held before Judge Culbertson on May 21, 2012. On even date therewith Judge Culbertson denied the Appellants' motion and awarded damages in the amounts above stated.

Notice of Intent to Appeal was timely filed and this appeal follows.

ARGUMENT I

The trial Court committed error and abused its discretion when it ruled that the letter Appellant's sent seeking additional information about the identity of the plaintiff did not constitute an answer pursuant to S.C.R.C.P. 7 or otherwise defend pursuant to S.C.R.C.P. 55. (Issue 1)

This is in the nature of a medical malpractice action. From January 2007 through February, 2008, Respondent came to Dr. Jaraki's medical office on a weekly basis, **R. 55, lines 1-6**, for treatments related to heart problems. Early in that process, while placing EKG leads on Respondent's chest, Respondent claims that Appellant, Omar Jaraki, "cupped" her breast and felt her nipple inappropriately. **R. 36**. She didn't report this however until the following Spring, 2008, when she learned another patient had made a claim against the Appellant. **R. 101, lines 19 – 23**. Respondent filed suit for multiple causes of action. Before Respondent's counsel filed an affidavit of default and default judgment had been entered, Appellants filed and mailed a letter to Respondent's counsel within 30 days asking for identifying information about the plaintiff. **R. 157-159**. Appellants argued that the letter constituted an answer and "otherwise defended" the action, and alternatively, that good cause existed for granting relief from default. The Court denied Appellants' relief. **R. 121, line 3 – R. 124, line 20**.

STANDARD OF REVIEW

A trial court's ruling on a motion for default judgment is reviewed under an abuse of discretion standard. *Logan v. Civil Serv. Comm'n of City of Memphis*, No. W2007-00324-COA-R3-CV, 2008 WL 715226, at *10 (Tenn. Ct. App. Mar. 18, 2008).

Background

Plaintiff initiated this matter with the filing of a summons and complaint alleging several causes of action against the Appellants, all of which stemmed from an alleged improper touching of Respondent's breast by defendant, Omar Jaraki, during a medical examination.[1] Respondent testified that Dr. Jaraki "cupped" her breasts and played with

[1] Defendant Omar Jaraki is a cardiologist and practiced medicine in Horry County under the siness names *Cardiology & Arrhythmia Consultants*; *Cardiology and Arrhythmias Consultant*;

her nipples while attempting to place test leads on her chest for an EKG. **R. 36**. Respondent testified that she thought the proper way to lift the breast was to use either the side of the hand or the back side of the hand while lifting. She learned this later after a nurse from a different office lifted her breast with the side of her hand in order to place the EKG leads on her body. **R. 76, lines 4-9** . She stated that Dr. Jaraki would "cup" her breast to lift it in order to place the leads for the EKG underneath. **R. 76, line 17** id. The basic difference is that with Dr. Jaraki she had no cloths on her top, while the nurse felt underneath her top garment. Id. Respondent's counsel described how Respondent demonstrated for the Court the lifting of her breast for the EKG lead placement. **R. 79, lines 18-20**.

The evidence shows that Omar Jaraki, M.D., was served with the law suit on February 26, 2010. The service affidavit on file with the Court shows that his wife, Appellant, Halla Jaraki, was served on March 5, 2010. The Appellants are originally from Syria. **R. 121, lines 15-16**. Because of that fact, they did not understand Respondent's use of the initials "RM" and the name, "Jane RM Doe." Upon being served with the complaint, they did not understand the identity of the plaintiff, **R. 19** (Dr. Jaraki Affidavit paragraph 4), so they sought additional information about the plaintiff's identity. Appellants wrote a letter to plaintiff's counsel on March 24, 2010, which was within the 30 day period of time following Dr. Jaraki's receipt of the summons and complaint. A copy of the letter was filed with the clerk of court on April 1, 2010. **R. 157** (Id. paragraph

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and the *Institute of Electrophysiology, P.C.*. Defendant Halla Jaraki is the wife of Omar Jaraki and has worked in her husband's medical practice as a member of his support staff.

6). Plaintiff's counsel has stated, however, that he did not receive the letter.[2]

Defendants' affidavits show that they were confused by the captioning of the case which included a plaintiff by the name of "Jane RM Doe." Defendants knew that they had never treated any patient by such a name so they wrote a letter asking for additional information concerning the identity of the plaintiff. Moreover, defendant, Omar Jaraki had been sued before and that plaintiff had used a proper name, thus, he was not familiar with the "John Doe" designation in the litigation setting. **R. 19** (Affidavit of Dr. Jaraki at paragraph 3). Dr. Jaraki's letter stated

> I have to have the following to identify your plaintiff correctly if he or she existed in our records. I do not find anybody by name Jane RM Doe. I need the following and every item of the following: Name; Address; Date of Birth; Social security number; a copy of the driver license To positively identify your plaintiff due to the sensitive nature of medical records. Until I receive all the above information about this matter I cannot answer any further question.

R. 157. (Letter dated March 24, 2010).[3] A second identical letter was clocked in the clerk's office the same date and bore both Appellants' signatures. **R. 26.** Halla Jaraki stated in her affidavit that she mailed the letter to Respondent's counsel. **R. 23**.

On April 30, 2010, Respondent filed her Affidavit of default and her Notice of Motion and Motion for Default Judgment, and an entry of default was filed by the Clerk

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[2] A review of the Court file in the office of the clerk of court shows that the letter was not placed in the file even though it was clearly clocked with the clerk's office on April 1, 2010. There is no evidence at this point to explain why the letter was not in the Court's file at the time plaintiff filed its affidavit of default.

[3] See 42 U.S.C. § 1320d-1320d-9; and The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules

of Court. On August 16, 2010, **R. 151 – 152**; the clerk's office mailed an Order Disposition of Motion clocked August 12, 2010 to Respondent's counsel.

On September 20, 2010 a letter was mailed from Dr. Jaraki to Respondent's counsel again asking for information about Jane RM Doe, denying that he could find information about this person. **R.158.** A letter was also sent from Halla Jaraki asking for information about patient Jane RM Doe and further denying that she could find such a patient in the office records. On September 29, 2010 a Notice was mailed to Halla Jaraki regarding the motion and default judgment. **R. 161**. On October 28, 2010 a letter from Respondent's counsel to the Appellants was mailed stating that the two letters from September 20, 2010 were never received by his office. **R. 160**. Additionally counsel provided a patient number for the plaintiff regarding her identity. The mailing also included notice of the damages hearing to be held on November 2, 2010. **Id**.

On October 29, 2010 a letter was mailed and filed by Halla Jaraki stating, "A response to the above legal action was submitted to the court and your office on April 1, 2010..." Judgment was entered on November 3, 2010 in the amount of $100,000.00 actual damages and $100,000.00 punitive damages. The following day, on November 4, 2010, after having hired counsel, the Appellants filed formal answers. **R. 123, lines 8-10**. On November 22, 2010, Appellants filed their Motion to be relieved from default judgment. An amended motion was filed on November 30, 2010.[4] **R. 16.** A hearing was held on May 21, 2012 on the amended motion for relief from default judgment. Appellants argued that the letter was "an answer, a responsive pleading that was filed basically denying the allegations in the complaint...." **R. 124, lines 10 – 12**. Additionally,

[4] The initial motion for relief cited grounds enumerated in "Rule 60(b)." The amended motion cited "Rule 60(b)(1) including mistake, inadvertence, surprise, or excusable neglect."

Appellants argued that the timeliness of the motion and Dr. Jaraki's denial of the allegations warranted relief from default judgment pursuant to Rule 60. Id., **R. 124, lines 17 - 20**. Judge Culbertson heard the motion and denied the same from the bench, indicating at that time that a form 4 order would be forth coming. That order was filed May 29, 2012. **R. 1.** We submit that the Court committed error in both respects.

Discussion

S.C.R.C.P. 7 governs pleadings. This rule states in part

> [t]here shall be a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14, and there shall be a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer; and there may be a reply to affirmative defenses as provided in Rule 8(c).

When the summons and complaint were served on the defendants, they responded in writing with a letter requesting additional identifying information about the plaintiff. **R.** 157. This was not unreasonable given the privacy concerns of medical patients and responsibilities had by treating physicians. We submit that Appellants' writing must be treated as an answer.

As for treating the Appellants as being in default, S.C.R. C.P. 55 states in part

> (a) When a party against whom a judgment for affirmative relief is sought has failed to plead ***or otherwise defend*** as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book).

Emphasis added. We submit that the written letter from the Appellants to the Respondent's counsel and filed with the Court constitutes an answer as contemplated by Rule 7 and it was an attempt to "otherwise defend" the action.

The phrase `otherwise defend' is not defined ... but is generally considered to refer "to attacks on the service, or motions to dismiss, or for better particulars, and the like, which may prevent default without presently pleading to the merits. ... "A default by a defendant consequently arises only when the defendant has failed to contest the allegations raised in the complaint," making default judgment proper against the defendant when "liability has been admitted or `confessed' by the omission of statements refuting the plaintiffs claims." *Equable Ascent Fin, LLC v. Christian*, 196 Ohio App.3d 34, 962 N.E.2d 322 (2011); and see cases collected and cited therein: *Heritage Realtors v. Kahmann* (Apr. 26, 1993), 12th Dist. No. CA92-09-082, 1993 WL 128116 (deciding that by contesting the case through a motion for change of venue, the defendant had "otherwise defend[ed]" so as to avoid default judgment); *Murphy v. Alhajj* (June 3, 1999), 8th Dist. No. 74198, 1999 WL 359197 (determining that the defendant's motion to consolidate three small-claims cases and transfer them to the general division of the civil docket, to which the defendant attached an affidavit from his attorney explaining why the plaintiff was not entitled to the money he sought, coupled with the defendant's presence at the first hearing in the small-claims court, "indicated that the complaint was contested," the defendant otherwise defended, and default judgment was not proper); *Stradiot Specialty, Inc. v. Am. Calendar Co., Inc.*, 11th Dist. No. 2004-L-162, 2007-Ohio-3364, 2007 WL 1881309 (stating that a defendant's "motion to dismiss and a motion to transfer the matter to a foreign jurisdiction" as well as the defendant's attempt "to file an untimely answer" and "motion for summary judgment" meant that the defendant had otherwise defended against the plaintiffs claims and "could not be held in default").

Appellants' letter denies that they had treated any such patient as "Jane RM Doe" and thus necessarily denies the whole of the allegations made against them in the Respondent's complaint. **R. 157.** Thus it is unreasonable to conclude that they were not contesting the validity of the complaint's allegations. The trial Court's ruling constitutes an abuse of discretion we respectfully submit.

Thus it was error for Respondent's counsel to file an affidavit of default and it was error for the clerk of court to enter a default against the Appellants.

ARGUMENT II

The trial Court committed error and abused its discretion when it ruled that the appellants failed to establish good cause to be relieved from default judgment pursuant to S.C.R.C.P. 60. Issue II.

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id.* "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Id.* at 607, 681 S.E.2d at 888. *White Oak Manor, Inc. v. Lexington Ins. Co.,* 394 S.C. 375, 715 S.E.2d 383 (Ct.App. 2011)

Discussion

Traditionally, the law governing relief from default judgment has been "...liberally construed to see that justice is promoted and to strive for disposition of cases

on their merits. The element of discretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default. 10 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, § 2685. *Ricks v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535 (Ct.App. 1987). Compare "We favor trial of issues on merit over securing judgment by slight technicalities." *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 339 S.E.2d 524 (Ct.App. 1986)

Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or other misconduct of an adverse party. Rule 60(b), SCRCP. In determining whether to grant a motion under Rule 60(b), the circuit court should consider: (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 party. *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App. 2001). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App. 1991). Rodriguez v. Gutierrez 391 S.C. 323, 705 S.E.2d 94 (Ct.App. 2011)

In Appellants' case, the promptness element is satisfied because Appellants were communicating with the Respondent within the 30 day window within which to respond. Moreover, they immediately sought relief from the default judgment within days of being notified about it. Appellants acted promptly. However, there are reasons for failure to file a formal response without using caution. There was confusion caused by the use of the plaintiff's initials and the fact that Appellant is a medical provider who is subject to the

privacy constraints of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules.[5]

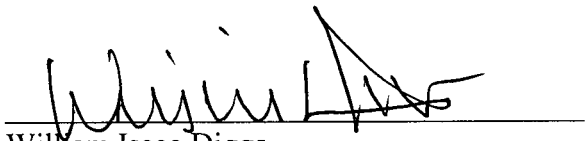
But for the Respondent's use of plaintiff's initials, the Appellants would have had no confusion about the matter. The appellants deny fully the Respondents allegations. **R. 27** (Proposed Answer). Thus, there is a meritorious defense. Lastly, there is no prejudice to the Respondent. No position would have changed by the time a trial could be had on the merits.

CONCLUSION

For the foregoing reasons the Appellants' request for relief from default should be granted. The trial court's ruling should properly be reversed and the case remanded and the defendants be permitted to file their proposed responsive pleadings.

Respectfully submitted,

LAW OFFICES OF WILLIAM ISAAC DIGGS



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This 14 day of December, 2012
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[5] HIPAA permits release of records "in response to a subpoena, discovery request, or other lawful process." 45 C.F.R. § 164.512(e)(1)(ii). Mezu v. Morgan State University, 11-2396 (4th Cir. 9-14-2012)

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Of whom Omar Jaraki and Halla Jaraki are the Appellants

CERTIFICATE OF COUNSEL

This is to certify that the Final Brief of Appellant complies with the requirements Rule 211(b), SCACR. Additionally, counsel certifies that the Final Brief of Appellant is in compliance with the Supreme Court's August 13, 2007 order regarding personal data identifiers and sensitive information.

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This 14 day of December, 2012
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CERTIFICATE OF SERVICE

This is to certify that I have this 20th day of December, 2012, deposited one copy of the Final Brief and Final Reply Brief of Appellants in the U.S. Postal Service with proper postage affixed thereto and addressed to opposing counsel as follows:

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