THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-0659
Appellate Case Tracking No. 2012-212373

Jane "RM" Doe, ... Respondent,

v.

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

of whom
Omar Jaraki and Halla Jaraki are ..... Appellants.

BRIEF OF RESPONDENT

John S. Nichols, SC Bar # 004210
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

O. Fayrell Furr, Jr., SC Bar # 002246
FURR & HENSHAW
1900 Oak Street
Myrtle Beach, SC 29577
Office: (843) 626-7621

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Miscellaneous

COUNTER-STATEMENT OF THE ISSUES ON APPEAL

I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO SET ASIDE APPELLANTS' MOTION TO BE RELIEVED FROM DEFAULT JUDGMENT?

II. DID THE APPELLANTS DEMONSTRATE SUFFICIENT GROUNDS TO WARRANT RELIEF FROM DEFAULT JUDGMENT?

III. SHOULD THIS COURT AFFIRM ON THE GROUND THAT APPELLANTS HAVE NOT DEMONSTRATED THE EXISTENCE OF A MERITORIOUS DEFENSE TO RESPONDENT'S CLAIMS?

COUNTER-STATEMENT OF THE CASE

On January 27, 2010, Jane RM Doe ("Doe") filed a complaint against Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology and Arrythmias Consultant, Institute of Electrophysiology, P.C. (collectively "Defendants"). The Complaint stated a number of causes of action arising from inappropriate sexual assaults by Dr. Jaraki during his examination of Doe for potential cardiovascular problems. Several claims also asserted Dr. Jaraki filed false claims against Doe's insurance company, and furthermore falsified Doe's medical records following her report of his assaults to authorities.

On February 26, 2010, Deputy Sheriff Christopher Graham served the summons and complaint upon Omar Jaraki, M.D., Cardiology & Arrhythmia Consultants, Cardiology & Arrhythmia Consultants, and Institute of Electrophysiology, P.C. (R.pp.146-149). On March 5, 2010, Deputy Graham served Halla Jaraki, MD. (R.p.150).

On April 27, 2010, Doe filed a motion for entry of default and for default judgment, asserting that although the answers were due on April 7, 2010 (all defendants except for Halla Jaraki) and April 27, 2010 (Halla Jaraki), there had not been an appearance or Answer filed by the Defendants. (R.p.132; p.152). On April 30, 2010, the Clerk filed an Entry of Default. (R.p.151).

On September 20, 2010, Halla Jaraki and Omar Jaraki separately wrote letters to Doe's lawyer that were identical. The letters did not respond directly to the allegations in the complaint but, rather, requested specific identifying information regarding Doe. Each letter ended with "Until I receive all the above information about this matter I cannot

answer any further question." (R.p.158-159). Both letters were apparently also filed with the clerk of court.

On October 27, 2010, Halla Jaraki sent Doe's counsel a letter asserting that Halla Jaraki had sent a response to the court on April 1, 2010 and had also sent it to Doe's counsel. The purported "response" was a letter signed by both Omar Jaraki and Halla Jaraki requesting the identity of Doe before answering "any further questions." (R.p.26). On November 4, 2010, both Omar Jaraki and Halla Jaraki wrote separately that they denied the allegations by Doe.

On November 10, 2010, all defendants jointly filed an answer to the complaint through counsel. On November 22, 2010, the Jarakis moved through counsel to be relieved from the default judgment. On November 30, 2010, the Jarakis filed an amended motion for relief from the default judgment. Omar Jaraki attached an affidavit and a copy of a letter dated March 24, 2010, which he asserted served as his formal response to the complaint. Halla Jaraki also attached an affidavit as well as the letter of March 24, 2010, signed by both Omar and Halla Jaraki. The basis for the motion was "the grounds enumerated in S.C.R.C.P. 60(b)(1), including mistake, inadvertence, surprise, or excusable neglect." (R.p.17).

On May 2, 2011, Doe filed a memorandum in opposition to the Jarakis' motion. Doe contended her counsel never received the letters the Jarakis asserted they sent to counsel in March 2010. Doe also asserted the Jarakis did not even assert or prove the existence of a meritorious defense to the claims. (R.p.154).

The court held a hearing on May 21, 2012, on the motion and ruled the Jarakis

failed to establish "excusable neglect" for not answering the complaint. (R.p.128, ll. 4-6; p.129, ll. 2-7). That same date the court entered a Form 4 order denying the motion to be relieved from default judgment. (R.p.1).

On June 28, 2012, the Jarakis jointly filed and served a timely notice of appeal from the May 21, 2012 order.

ARGUMENTS

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial court. *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Id.*

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SET ASIDE APPELLANTS' MOTION TO BE RELIEVED FROM DEFAULT JUDGMENT

Appellants contend the trial court erred and abused its discretion in ruling that the letters they purportedly sent requesting additional information about Doe's identity did not constitute an answer pursuant to Rule 7, SCRCP, or amounted to efforts to "otherwise defend" under Rule 55, SCRCP. This Court should not be persuaded by these arguments.

A. THE LETTERS DID NOT SATISFY RULE 7, SCRCP

Rule 7, SCRCP, provides:

> **(a) Pleadings**. There 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).

The Jarakis contend that each of the letters they purportedly filed and sent to Doe's counsel were a sufficient writing to constitute an answer for purposes of Rule 7. (App. Br. p. 10). This Court should reject this argument.

At the outset this issue is not preserved for appeal. The only ruling the trial court made in support of the denial of the motion was "I'm going to find that doesn't rise to excusable neglect." (R.p.128, ll. 4-5; see also p.129, ll. 2-7). The Jarakis did not move pursuant to Rule 52, SCRCP, or Rule 59, SCRCP, for the court to address their argument that the letters met the requirements of the Rules of Civil Procedure to constitute an "answer." *See, e.g., McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504 n. 3, 719 S.E.2d 660, 662 n. 3 (2011) (trial judge's general ruling insufficient to preserve a specific issue for appellate review; where a trial judge does not explicitly rule on an argument raised and no Rule 59(e), SCRCP, motion was filed, an appellate court may not address the issue).

Assuming the Court finds the issue properly preserved, the Court should still affirm. First, the letters are not in the proper form required by the South Carolina Rules of Civil Procedure. Rule 8(b), SCRCP, requires facts asserted in defenses to specifically meet each averment in a complaint. Any affirmative defenses must be separately set forth as well. Rule 8(c), SCRCP. Rule 10 provides that every pleading be captioned and that all averments of fact in a defense made in separate numbered paragraphs. Rules 10(a), (b), SCRCP. As this Court stated recently:

> Fundamentally, an answer is "[t]he response of a defendant to the plaintiff's complaint, denying in part or in whole the allegations made by the plaintiff." *Black's Law Dictionary* 91 (6th ed. 1991). In form, an answer "shall state in short and plain terms the facts constituting his defenses to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies." Rule 8(b), SCRCP. Furthermore, each denial "shall fairly meet the substance of the averments denied." *Id.* Where the defendant "is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state

> and this has the effect of a denial." *Id.* As with all pleadings, an answer "shall be so construed as to do substantial justice to all parties." Rule 8(f), SCRCP.

Hill v. Dotts, 345 S.C. 304, 308, 547 S.E.2d 894, 896 (Ct. App. 2001). The Jarakis' letters do not fairly meet the substance of the averments in the complaint. In form, the letters do not satisfy the SCRCP.

Next, even if the Court overlooks the utter lack of compliance with the rules governing form, the substance of the letters fails to constitute an answer. In *Hill*, this Court found that a letter sent by the *pro se* defendant did not "mention or deny any of the fourteen specific allegations of negligence and recklessness set forth in Hill's complaint." *Id.* The Court held the trial court properly refused to consider the letter a denial, either specific or general, to the complaint. Likewise, the trial court in this case properly refused to consider the Jarakis' letters to be denials.

The Note to Rule 7(a) indicates the adoption of Rule 7(a) did not mark a relevant change in State practice:

> **Note:**
>
> This Rule 7(a) is identical to the Federal Rule, and the provisions of Code §§ 15-13-10, 15-13-210, 15-13-310 and 15-13-610. There is no change to State practice, except the references to third-party pleadings.

Even under prior practice an answer was required to "contain a denial of each material allegation of the complaint controverted by the defendant and a statement of any new matter constituting a defense." *DM Co., Inc. v. Nycoil Co.*, 273 S.C. 496, 257 S.E.2d 499 (1979) (holding judgment by default precluded under S.C. Code Ann. § 15-13-310 where oral response to pleadings, which did not comply with strictures of circuit court rules, at a

rule to show cause hearing was sufficient to comply with substantive requirement of the rules given plaintiff had actual notice of both the existence and contents of defendant's response to plaintiff's Complaint; defendant's testimony under oath controverted each material allegation of the complaint and made a statement of new matter constituting an affirmative defense). Here, even if the letters could be construed to be responsive, there is nothing in them to controvert any allegations of the complaint or raise any matter constituting an affirmative defense. They do not, in substance, amount to answers to the complaint.

Courts in other jurisdiction have consistently held that a letter that does not meet the form or substance of a responsive pleading does not constitute an "answer" so as to avert an entry of default. *Compare Spratt v. Brant Frederickson*, Op. No. 38579 (Ohio Ct. App. filed April 26, 1979) (1979 WL 210050) (holding letter by defendant filed with clerk of court and second letter sent to plaintiff's counsel asserting denial of responsibility for plaintiff's damages did not constitute an "answer" under Ohio Rules of Civil Procedure because (a) letter did not meet form requirements of Rule 10; (b) the letter did not constitute a "general denial" under Rule 8(B); (c) there was no proof of service required by Rule 5(D) with *Bosworth v. Cooney*, 156 Ga.App. 274, 277, 274 S.E.2d 604, 606 (Ga. Ct. App. 1980), *cert. denied* 2/3/81 (holding defendant's "motion to dismiss and produce a deed," memorandum in support of the motion, and affidavits did not constitute an "answer" within the meaning of Georgia Civil Practice Act; Code permits a complaint, an answer, a third-party complaint and answer, a reply to a counterclaim, and an answer to a cross-claim, and "these documents and these documents alone constitute the

pleadings"; court noted there was no language in the documents that could reasonably be construed as a general denial of the averments of the complaint not any specific denial of the principal allegations of the separate paragraphs of the complaint except as to jurisdiction) and *Everest Reinsurance Co. v. Kerr*, 253 S.W.3d 100 (Mo. Ct. App. 2008) (finding letter sufficient to constitute answer where it referenced proper case number, reflected the "subject" to be "Answer to Petition," stated it was in response to the summons, was signed by defendant, was file-stamped with the clerk within thirty days of service, and stated petition contained many false statements and accusations" and that defendant's "plea....in this matter is NOT GUILTY"; further, defendant provided specific denials to majority of allegations at default hearing and asked for permission to amend answer if letter deemed insufficient).

The letters in this case fall far short of the mark from letters that courts have accepted as responsive pleadings. The letters do not supply any denial of liability, nor do they fairly meet the averments in the complaint. The specific allegations of the complaint were the subject of a report to the medical board in the Spring of 2008, as noted in the Jarakis' brief. (App. Br. p. 6). The Jarakis' protestations that they did not know who Doe was are hollow.

Furthermore, Dr. Omar Jaraki is no stranger to the litigation process. (R.p.127, ll. 6-14). *See In re: Omar JARAKI, Debtor*, Case No. 04–09182–W (U.S. Bnkrcy Ct., D.S.C. 2006) (2006 WL 2612198) (permitting bankruptcy trustee to settle litigation Dr. Jaraki brought in Horry County entitled "Omar Jaraki, M.D. vs. Len Villacres and Medtronic, Inc.," Case No. 04–CP–27–3103, over Dr. Jaraki's objection); *Jaraki v. Quinlan*, Case

No. VA933406 (Mass. Super. filed 6/30/94) (1994 WL 879877) (Dr. Jaraki sued a number of defendants, including "John Doe" defendants, for various causes of action); *Jaraki v. Cardiology Associates of Northeast Arkansas, P.A.*, 75 Ark. App. 198, 55 S.W.3d 799 (2001) (Dr. Jaraki was sued for purportedly violating a non-compete clause in his employment contract). He is intimately familiar with both the civil and criminal justice systems in South Carolina as well as other states. This Court should take judicial notice of the matters in which Dr. Jaraki has been a litigant which are of public record. Rule 201, SCRE. *Cf. Sloan v. Greenville County*, 380 S.C. 528, 670 S.E.2d 663 (Ct. App. 2009) (this Court took judicial notice of its own docket). It is not disputable that Horry County's Public Index lists several matters in which Dr. Jaraki is a litigant. See *Jaraki v. Medtronic, Inc.*, 2004-CP-26-03103 (currently under Rule 40(j),SCRCP, dismissal); *Willis v. Jaraki*, 2004-CP-26-04504 (uncontested default); *Jaraki v. White*, 2004-CP-26-00543 (dismissed by summary judgment); *Jaraki v. White*, 2004-CP-26-04462. See http://www.horrycounty.org/SCJDWEB/publicindex/PISearch.aspx?CourtType=G This Court may take notice of the existence of those matters. *See Hemingway v. Small*, 284 S.C. 42, 324 S.E.2d 335 (Ct. App. 1984) (original judicial notice of adjudicative findings at the appellate level should be limited to matters which are indisputable).

Even so, lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney. *Hill v. Dotts* (*citing Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App.1988)). Here, the Jarakis, who are both educated persons familiar with the judicial process, expect the Court to hold them to a lesser standard because they contend they did

not understand the pleadings. Dr. Jaraki was well aware of who "Jane RM Doe" is, having pled guilty in May 2010 to criminal charges arising from his assaults on several women, including Doe, (see http://www.carolinalive.com/news/story.aspx?id=462100) and further having responded to a complaint before the medical board Doe made in 2008.

Accordingly, this Court should reject the Jarakis' argument that the letters they claim they filed and mailed to Doe's counsel constitute an "answer" under Rule 7, SCRCP. The Court should affirm the trial court's denial of the Jarakis' motion to be relieved from default judgment.

B. THE LETTERS DID NOT SATISFY RULE 55, SCRCP

Rule 55, SCRCP, provides:

> **(a) Entry.** 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). The Jarakis submit that their letters "was an attempt to 'otherwise defend' the action" for purposes of Rule 55(a). This argument should not be persuasive.

This issue is likewise not preserved for appeal. As noted above, the only ruling the trial court made in support of the denial of the motion was "I'm going to find that doesn't rise to excusable neglect." (R.p.128, ll. 4-5; see also p.129, ll. 2-7). The Jarakis did not move pursuant to Rule 52, SCRCP, or Rule 59, SCRCP, for the court to address their argument that the letters met the requirements of the Rules of Civil Procedure to constitute a "pleading" or that they "otherwise defended" the complaint. *See, e.g.*,

McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 504 n. 3, 719 S.E.2d 660, 662 n. 3 (2011) (trial judge's general ruling insufficient to preserve a specific issue for appellate review; where a trial judge does not explicitly rule on an argument raised and no Rule 59(e), SCRCP, motion was filed, an appellate court may not address the issue).

Assuming the Court finds the issue properly preserved, the Court should still affirm. The Jarakis' contend their letters constitute an attack that would prevent default without presently pleading to the merits of the complaint. (App. Br. p. 11). They contend the letters deny "they had treated any such patient as 'Jane RM Doe' and thus necessarily denies the whole of the allegations made against them in Respondent's complaint." (App. Br. p. 12). These arguments should not be persuasive.

South Carolina's version of Rule 55(a) is drawn from Federal Rule 55. Rule 55, SCRCP, Notes. Some federal courts have explained that under the federal rules, the words "otherwise defend" under Rule 55 refers 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." *Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir.1949) ("The words 'otherwise defend' 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.");*Olsen v. International Supply Co.*, 17 Alaska 643, 22 F.R.D. 221 (D.C. Alaska 1958) (same, following *Bass*). *See also* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 2682 (1990) ("The words 'otherwise defend' refer to the interposition of various challenges to such matters as service, venue, and the sufficiency of the prior pleading, any of which might prevent a default if pursued in the absence of a responsive

pleading."). One state court has indicated the language envisions a pre-answer motion in lieu of an answer as permitted by Rule 12 (b). *See Harrison v. Mississippi Bar*, 637 So.2d 204 (Miss. 1994) (holding the words "otherwise defend" in Mississippi's version of Rule 55(a) envisions a motion under Rule 12(b)). *Accord Wickstrom v. Ebert*, 101 F.R.D. 26 (D.C. Wis. 1984) (motions challenging a complaint for failure to state a claim upon which relief can be granted fall squarely within the ambit of the phrase "otherwise defend"); *Smith v. C.I.R.*, 91 T.C. No. 66, 91 T.C. 1049 (1988) (phrase "otherwise defend" as used in Rule 55 refers to defenses and objections available to a defendant by motion prior to filing an answer). Thus, even under this view, a pre-answer motion pursuant to Rule 12, SCRCP, is required to fall within the ambit of the "otherwise defend" language of Rule 55(a).

However, the majority of federal jurisdictions have held the words "or otherwise defend" refers to proceedings after a defendant has answered, and is viewed as the reverse of "failure to prosecute" on the plaintiff's side. *See, e.g., Au Bon Pain Corp. v. Artect Inc.*, 653 F.2d 61 (2d Cir.1981) (the court found that a defendant's nonappearance at a deposition, dismissal of counsel, vague and unresponsive answers to interrogatories, and failure to appear at trial were sufficient to support a finding that he had "failed to plead or otherwise defend" under Rule 55). *See also City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114 (2nd Cir. 2011) (noting the view espoused in *Bass v. Hoagland* has not "found favor in a majority of our sister circuits"). One of those "sister circuits" is the Fourth Circuit. *See Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126 (4th Cir. 1992) (in case arising out of South Carolina, Fourth Circuit affirmed finding of default under Rule

55 where defendants had filed responsive pleadings but failed to cooperate in discovery, refused to submit to depositions, and failed to participate in the defense of the suit).

Here, the Jarakis failed to plead under Rule 7, SCRCP, as discussed in the previous section of this Brief. They also did not "otherwise defend" within either interpretation of that language in Rule 55(a). They filed no pre-answer motion pursuant to Rule 12, and their letters do not constitute an attempt to "otherwise defend" as that phrase has been interpreted.

Accordingly, the Court should affirm the trial court's denial of the Jarakis' motion to set aside default judgment.

II. THE APPELLANTS DID NOT DEMONSTRATE SUFFICIENT GROUNDS TO WARRANT RELIEF FROM DEFAULT JUDGMENT

The trial court made one ruling below: "I'm going to find that doesn't rise to excusable neglect." (R.p.128, ll. 4-5; see also p.129, ll. 2-7). On appeal, the Jarakis provide the following statement of the issue on appeal:

> Did the trial court commit error and abuse its discretion when it ruled that the appellants had failed to establish *good cause* to be relieved from default judgment pursuant to S.C.R.C.P. 60?

(App. Br. p. 4) (emphasis added). The Jarakis state the issue in that fashion further in the brief. (App. Br. p. 12). This is an incorrect statement of the law.

The standard for granting relief from an entry of default is "good cause" under Rule 55(c), SCRCP, while the standard is more rigorous for granting relief from a default judgment under Rule 60(b), SCRCP. S*undown Operating Co., Inc. v. Intedge Indus., Inc.*,

383 S.C. 601, 681 S.E.2d 885 (2009). Relief from default *judgment* under Rule 60(b), SCRCP, "requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or 'other misconduct of an adverse party.'" *Id.* (quoting Rule 60(b), SCRCP).

In this case, there is no challenge to the trial court's finding of a lack of "excusable neglect." Thus, it is the law of this case that the Jarakis failed to establish "excusable neglect" so as to warrant relief under Rule 60. *See State v. Fripp*, 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012) (appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case).

Even so, the Jarakis failed to present or argue any particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation or other misconduct by Doe. They also failed to establish they had some diminished capacity to justify relief under Rule 60. *See ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (Ct. App. 2011) (discussing *Sundown* and affirming the failure to set aside default judgment under Rule 60). Accordingly, the trial court's ruling is correct.

The Jarakis contend that under the privacy constraints of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), they needed the additional information before filing a formal response to the complaint. (App. Br. pp. 13-14). The short answer to this is that the Jarakis did not make this argument to the trial court, nor did the trial court rule upon it. *E.g.*, *RFT Management Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 337 n. 7, 732 S.E.2d 166, 174 n. 7 (2012) (arguments not made at

the time of trial court's ruling are not properly reviewable on appeal).

Further, the Jarakis could have (1) moved to dismiss pursuant to Rule 12(b)(6), SCRCP; (2) moved for a more definite statement pursuant to Rule 12(e), SCRCP ("[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading")[1]; or (3) answered the complaint with a general denial and averments that fairly met the allegations. The Jarakis did none of these things. Instead, they simply played a game of cat and mouse, asserting they did not know any "Jane RM Doe" and that they required additional information before answering. As noted above, Dr. Jaraki himself had been a plaintiff in a case in which he sued "doe" defendants.

Appellants were not confused about who "Jane RM Doe" was. As they admit in their brief, Doe filed a report of Dr. Jaraki's behavior in the Spring of 2008. (App. Br. p. 6). Dr. Jaraki was also criminally charged because of his behavior, and ultimately pled guilty in May 2010. (see http://www.carolinalive.com/news/story.aspx?id=462100)

This Court should reject the Jarakis' argument that they established "good cause" to justify setting aside the default judgment, and should affirm the trial court's ruling.

III. THIS COURT SHOULD AFFIRM ON THE GROUND THAT APPELLANTS HAVE NOT DEMONSTRATED THE EXISTENCE OF A MERITORIOUS DEFENSE TO RESPONDENT'S CLAIMS

The Court should affirm the trial court's ruling for the additional reason that the Jarakis have failed to establish the existence of a meritorious defense sufficient to justify

[1] The Jarakis' counsel admitted as much at the motion hearing. (R.p.124, ll. 1-4).

relief under Rule 60, SCRCP.

A meritorious defense is necessary in order for a judgment to be set aside under Rule 60(b), SCRCP. *McClurg v. Deaton*, 395 S.C. 85, 716 S.E.2d 887 (2011). A meritorious defense is more than merely a factor to consider under certain Rule 60(b) grounds for setting aside default judgments. *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (Ct. App. 2011). To establish a meritorious defense, the party does not have to show he would prevail on the merits; 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, 681 S.E.2d 914 (Ct. App. 2009). The party seeking to set aside the judgment has the burden of presenting evidence proving the facts essential to entitle him to relief. *McClurg v. Deaton*, at 575, 671 S.E.2d at 94. *Accord Rodriguez v. Gutierrez*, 391 S.C. 323, 705 S.E.2d 94 (Ct. App. 2011) (movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief).

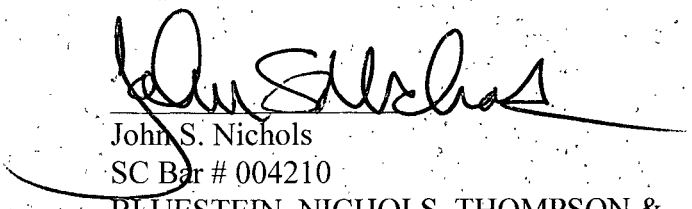
The Jarakis baldly state "The appellants deny fully the Respondents[']allegations. Thus, there is a meritorious defense." (App. Br. p. 14). This is their only argument on this point. The Jarakis did not offer evidence or otherwise prove facts essential to their claimed entitlement to relief, either below or on appeal. This alone is fatal to the relief they seek.

Accordingly, the Court should affirm the trial court's denial of the Jarakis' motion for relief pursuant to Rule 60.

CONCLUSION

For the reasons stated the Court should affirm the trial court's ruling.

Respectfully submitted,



John S. Nichols
SC Bar # 004210
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

O. Fayrell Furr, Jr.
SC Bar # 002246
FURR & HENSHAW
1900 Oak Street
Myrtle Beach, SC 29577
Office: (843) 626-7621

Attorneys for Respondent

December 14, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-0659

Jane "RM" Doe, ... Respondent,

v.

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

of whom
Omar Jaraki and Halla Jaraki are ..... Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellants with a copy of the *Final Brief of Respondent* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

William Isaac Diggs, Esquire
Law Offices of William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 29577

Erin Bridges

December 20, 2012

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010-CP-26-0659
Appellate Case Tracking No. 2012-212373

Jane "RM" Doe, ... Respondent,

v.

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

of whom
Omar Jaraki and Halla Jaraki are . . . . . Appellants.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

December 20, 2012

John S. Nichols
SC Bar # 004210
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

Attorneys for Respondent