THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-3456

David Barnhill, Appellant,

v.

Lesa Michelle Gaffney and Jimmy Emmanuel Dessaure, III, Defendants,

Of Whom Jimmy Emmanuel Dessaure, III is Respondent.

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. IS AN ORDER SETTING ASIDE A DEFAULT JUDGMENT, WHICH IS INTERLOCUTORY IN NATURE, IMMEDIATELY APPEALABLE?

II. IN THE EVENT THAT THIS APPEAL IS NOT DISMISSED, DID THE CIRCUIT COURT ABUSE ITS DISCRETION IN SETTING ASIDE THE DEFAULT JUDGMENT WHERE THERE WAS A GOOD FAITH MISTAKE OF FACT?

STATEMENT OF CASE

Appellant filed this lawsuit on May 26, 2011, against Lesa Michelle Gaffney ("Gaffney") and Respondent alleging negligence against both Defendants and seeking damages for injuries sustained as a result of an automobile accident on October 17, 2010. (R. pp. 12-13) Gaffney was served personally with the Summons and Complaint on June 2, 2011. (R. p. 39) Respondent was served with the pleadings by certified mail on June 16, 2011. (R. pp. 37-38)

M. Rita Metts, Esquire filed an Answer on behalf of both Defendants, Gaffney and Respondent, on June 27, 2011. (R. p. 14; p. 27, lines 19-22; p. 31, lines 21-25; p. 32, lines 1-3) On October 25, 2011, Metts filed an Amended Answer on behalf of Defendant Gaffney only. (R. p. 15; Tr. p. 27, line 22 – p. 28, line 1 and lines 21-22)

On September 19, 2011, Appellant's counsel signed an Affidavit of Default against Respondent. (R. p. 3) The circuit court then issued an Order of Default as to Respondent on February 9, 2012. (R. p. 2) A damages hearing was scheduled for June 6, 2012, after which the circuit court granted judgment of Fifteen Thousand and 00/100ths ($15,000.00) Dollars against Respondent. (R. pp. 10-11)

On June 21, 2012, upon learning of the default judgment, Respondent, through his attorney, filed a Motion to be Relieved of Default. (R. pp. 16-17) He then filed on June

22, 2012, an Amended Motion to be Relieved of Default clarifying that the motion was being made by Respondent and not Gaffney. (R. pp. 18-19) The Motion was heard on August 14, 2012. (R. pp. 24-34) The circuit court later issued an order on September 10, 2012, vacating the default judgment against Respondent. (R. pp. 6-8)

Appellant served a Motion to Reconsider on September 24, 2012, requesting the circuit court to modify its order and hold Respondent in default. The circuit court issued an Order on October 12, 2012, denying Appellant's Motion to Reconsider. (R. p. 9)

Appellant served a Notice of Appeal on November 2, 2012.

STATEMENT OF THE FACTS

Appellant's claim for personal injuries arises out of a motor vehicle accident on October 17, 2010, when he was riding as a passenger in a vehicle driven by Respondent. (Tr. p. 12-13) At the time of the accident, Respondent had nearly completed backing into a private driveway from Colony Drive when Gaffney, while driving under the influence, struck the left front side of Respondent's vehicle. (R. pp. 35-36; pp. 20-21 at ¶¶ 2-7) The investigating officer found that Gaffney was at fault for the accident and arrested her for driving under the influence. (R. pp. 35-36; p. 21 at ¶ 7)

Respondent hired attorney J. Todd Rutherford, Esquire, to represent him with regard to the personal injuries he sustained in the accident. (R. p. 21 at ¶ 8; p. 22; p. 28, lines 6-18) By the time that the default judgment was entered, Respondent was under the impression that any lawsuit involving the accident had been resolved and concluded. (R. p. 21)

ARGUMENT

Appellant raises two issues on appeal: (1) whether the circuit court's decision to set aside the default judgment is immediately appealable; and (2) whether the circuit court abused its discretion in setting aside the default judgment based on good faith mistake of fact.

I. THIS APPEAL SHOULD BE DIMISSED BECAUSE AN ORDER SETTING ASIDE A DEFAULT JUDGMENT IS INTERLOCUTORY IN NATURE AND NOT IMMEDIATELY APPEALABLE.

The right to appeal an order issued before or during trial is controlled by S.C. Code Ann. § 14-3-330. *Pocisk v. Sea Coast Construction of Beaufort*, 380 S.C. 584; 671 S.E.2d 98 (Ct.App. 2008). Appellant contends that section 2 of the statute applies to permit him to immediately appeal the circuit court's decision to set aside the default judgment. S.C. Code Ann. § 14-3-330(2) provides:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
>
> . . .
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> . . . .

According to Appellant, the circuit court's decision to set aside the default judgment "determined the action, its mode of trial and prevented a judgment from which a direct appeal could be taken." (Initial Brief of Appellant, p. 6) Further, Appellant alleges that the decision interfered with his substantial right to choose his defendant and

cited to the recent case of *Neeltec Enterprises, Inc. v. Long*, 397 S.C. 563; 725 S.E.2d 926 (2012).

In *Neeltec Enterprises*, the lower court found that defendant was not the proper defendant for the claims presented. As a result, the lower court ordered that two corporate defendants be substituted for the individual defendant. The South Carolina Supreme Court in *Neeltec Enterprises* held that this interlocutory order from the lower court substituting defendants affected the substantial right of the plaintiff to choose her defendant within the meaning of S.C. Code Ann. § 14-3-330(2)(a).

Neeltec Enterprises is easily distinguishable from the present case. Contrary to Appellant's arguments, the order to set aside the default judgment does not determine the action, its mode of trial, or affect the right of the Appellant to choose his defendant. It simply requires Appellant to prove his case against Respondent in order to obtain a judgment. "Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order." *Pocisk* at 588; 671 S.E.2d at 101, citing *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470; 402 S.E.2d 482, 483 (1991).

Unlike *Neeltec Enterprises*, the lawsuit against Respondent is not discontinued. *See Neeltec Enterprises* at 566;725 S.E.2d at 928 ("this order effectively discontinues petitioner's right against Long, thus bringing the order under *2(a)*"). Instead, Appellant may continue his lawsuit against Respondent and attempt to prove his case before a jury.

The general rule is that an order setting aside a default judgment is interlocutory in nature and therefore not immediately appealable. *Dibble v. Schade*, 308 S.C. 88; 417 S.E.2d 104 (Ct.App. 1992); *Pioneer Associates, Inc. v. Ticor Title Ins. Co.*, 300 S.C. 346; 387 S.E.2d 711 (Ct.App. 1989). Such an order is not final and there has yet to be a trial.

Contrary to Appellant's position, there is no substantial right under S.C. Code Ann. § 14-3-330 to avoid a trial on disputed issues. *Pocisk* at 589; 671 S.E.2d at 101.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN SETTING ASIDE THE DEFAULT JUDGMENT BASED ON GOOD FAITH MISTAKE OF FACT.

The decision of whether to set aside a default judgment lies solely within the sound discretion of the trial judge. *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601; 681 S.E.2d 885 (2009); *Thompson v. Hammond*, 299 S.C. 116; 382 S.E.2d 90 (1989); *Rodriguez v. Gutierrez*, 391 S.C. 323; 705 S.E.2d 94 (Ct.App. 2011); *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160; 375 S.E.2d 321 (Ct.App. 1988). The trial judge's decision will not be overturned on appeal absent a clear showing of an abuse of that discretion. *Sundown* at 606; 681 S.E.2d at 888; *Thompson; Rodriguez*; *Mitchell Supply Co.* An abuse of discretion occurs where (1) the trial judge was controlled by some error of law or (2) when the order, based upon factual conclusions, is without evidentiary support. *Sundown* at 606-607; 681 S.E.2d at 888; *Thompson; Rodriguez; Mitchell Supply Co*.

Appellant contends that the circuit court abused its discretion in setting aside the default judgment because (1) Respondent's actions did not amount to excusable neglect and (2) Appellant will suffer great prejudice. First, the circuit court did not set aside the default judgment on grounds of excusable neglect. Instead, the default was set aside because of good faith mistake of fact. Second, there has been no discovery or other tasks completed in this case that would subject Appellant to any prejudice.

Pursuant to Rule 60(b)(1), SCRCP, a court may relieve a party from a judgment for mistake, inadvertence, surprise or excusable neglect. *Williams v. Watkins*, 384 S.C. 319;

681 S.E.2d 914 (Ct.App. 2009). This rule is an appropriate remedy where there is a good faith mistake of fact and there has been no attempt to thwart the judicial system. *Williams v. Watkins*, 384 S.C. 319; 681 S.E.2d 914 (Ct.App. 2009); *Microtronics, Inc. v. S.C. Dept. of Revenue*, 345 S.C. 506; 548 S.E.2d 223 (Ct.App. 2001); *Hillman v. Pinion*, 347 S.C. 253; 554 S.E.2d 427 (Ct.App. 2001). Relevant factors in determining whether a default judgment should be set aside are (1) the promptness with which relief is sought, (2) the existence of a meritorious defense; and (3) the prejudice to the other parties. *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct.App. 2008); *Hill v. Dotts*, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001).

In this case, there was actually no default because an answer was timely filed on Respondent's behalf and never withdrawn. (R. p. 14; p. 28, lines 19-25; p. 33, lines 2-12) The filing of the answer on Respondent's behalf likely resulted from a mistake by Metts as to whom she had been hired to represent.[1] Appellant admitted at the motion hearing that "Ms. Metts through error answered for both defendants" but took the position that the filing of the Amended Answer resulted in a withdrawal of the previous answer. (R. p. 30, lines 7-11; p. 31, line 21- p. 32, line 4) However, the circuit court never relieved Metts as counsel for Respondent as required by Rule 11(b), SCRCP. Rule 11(b) provides:

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[1] Appellant takes the position for the first time in his Initial Brief that Metts was hired by Allstate Insurance Company to defend Gaffney in this action and that her use of "Defendants" and "Defendant" referred to Gaffney exclusively. (Initial Brief of Appellant, pp. 2 and 6) First, there is no evidence in the record that Metts was hired byAllstate to represent Gaffney. Second, this position is directly contrary to the position taken by Appellant at the motion hearing where his counsel admitted that Metts initially answered for both Defendants and asserted that by amending the answer, Metts withdrew the initial Answer on behalf of Respondent. (R. p. 30, lines 7-11; p. 31, line 21 – p. 32, line 4)

> An attorney may be changed by consent, or upon cause shown, and upon such terms as shall be just, upon application, by order of the Court, and not otherwise. Written notice of change of attorney must be served as provided by Rule 5.

Metts never sought the circuit court's permission to withdraw as counsel for Respondent after filing the initial Answer. Appellant's position that the Answer was withdrawn on behalf of Respondent when the Amended Answer was filed is thus untenable.

Furthermore, Respondent was under the belief that he was being represented by Todd Rutherford, Esquire, with regard to the accident. (R. p. 21; p. 28, lines 6-11) Based upon the fact that Gaffney was driving under the influence and hit Respondent when he was in a driveway, Respondent believed, in good faith, that Gaffney was at fault in causing the accident and that the matter was resolved during his representation by Rutherford. (R. pp. 20-21; p. 28, lines 6-11; p. 29, lines 1-13) While Appellant asserts in his Initial Brief that "Respondent made no attempt to contact either Mr. Rutherford or Appellant's counsel to determine what he should do with the process he received," there is no evidence in the record to support this statement. (Initial Brief of Appellant, p. 8) In fact, it is unknown what Respondent told Rutherford. (R. p. 32, lines 23-25)

A consideration of the relevant factors used in determining whether a default judgment should be set aside shows no abuse of discretion by the circuit court. First, a motion for relief was immediately filed once Respondent received notice of the default judgment. (R. pp. 16-17; p. 29, lines 6-9) Second, Respondent has established a meritorious defense in that there is evidence from which a jury could conclude that Gaffney was solely or primarily negligent in causing the automobile accident, especially in view of the fact that she was driving under the influence. (R. pp. 35-36; p. 27, lines

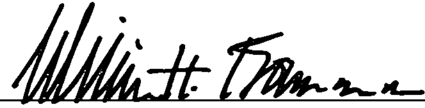
10-12) To establish a meritorious defense, it is not necessary for Respondent to show he would prevail on the merits but only that his defense is one worthy of a hearing or judicial inquiry. *Williams* at 326; 681 S.E.2d at 917-918; *Microtronics, Inc.*; *see also Thompson v. Hammond*, 299 S.C. 116; 382 S.E.2d 90 (1989). Third, Appellant will not suffer any prejudice if relief is granted to Respondent. No discovery has taken place. Appellant chose to settle his case with Gaffney without engaging in any discovery. (R. p. 27, lines 10-12; p. 29, lines 15-16] Thus, the only issue besides Appellant's damages is whether Respondent was negligent in causing the accident and if so, the degree of his negligence.

South Carolina has a policy favoring disposition of issues on their merits rather than on technicalities. *Williams; Mictronics, Inc.* Given the good faith mistake of fact with regard to representation, the immediate motion for relief, the existence of a meritorious defense, and the lack of prejudice to Appellant, the setting aside of the default judgment by the circuit court should be affirmed.

CONCLUSION

Because the order setting aside the default judgment is interlocutory in nature and not immediately appealable, Respondent requests that this appeal be dismissed. In the alternative, Respondent requests that the Court of Appeals affirm the Order of the Honorable Alison Renee Lee filed on September 7, 2012.

Respectfully submitted,



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May 31, 2013

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I hereby certify that The Final Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent in this case on Paige B. George, attorney for the Appellant, by depositing a copy of it in the United States Mail, postage prepaid, on May 31, 2013, addressed to her at 1419 Bull Street, Columbia, South Carolina 29201.

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