

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2012-CP-40-01901

Desiree D. Beatty, ... Respondent,

v.

Pyong Han Cho, ... Appellant.

BRIEF OF APPELLANT

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June 7, 2013

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ISSUES ON APPEAL

- I) WHETHER THE DEFAULT JUDGMENT AGAINST APPELLANT SHOULD BE SET ASIDE DUE TO MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLIGENCE.
- II) WHETHER THE DEFAULT JUDGMENT AGAINST APPELLANT SHOULD BE SET ASIDE DUE TO FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT OF AN ADVERSE PARTY.
- III) WHETHER APPELLANT HAS DEMONSTRATED A MERITORIOUS DEFENSE IN THIS CASE.

STATEMENT OF THE CASE

1. Procedural History

This case arises from a motor vehicle accident that occurred on August 6, 2011. Respondent Desiree D. Beatty filed her Complaint on March 12, 2012, alleging she was injured as a result of the accident and asserting a cause of action for negligence against Appellant Pyong Han Cho. Appellant's wife, Diana Cho, was served by personal service on April 14th, 2012. However, the suit papers were never forwarded to Appellant's liability insurer, GEICO. While negotiations were ongoing between Respondent's counsel and GEICO, Respondent obtained an Entry of Default and a Default Judgment without GEICO's knowledge. This Order was filed June 15, 2012. Following a damages hearing on August 9, 2012, an Order was entered on August 10, 2012, awarding Respondent \$20,000 in damages.

Appellant filed a Motion for Relief from the Judgment on September 2, 2012, asking for relief pursuant to Rules 60(b)(1) and 60(b)(4), SCRCR, on the basis of Appellant's mistake, inadvertence, and excusable neglect. Following a hearing on November 6, 2012, an Order was filed November 19, 2012, denying the Motion for Relief from Judgment. A Notice of Appeal was thereafter filed on November 30, 2012, with this Court.

2. Facts

Appellant's wife, Diana Cho, speaks and reads limited English and did not understand what the suit papers were about when she was served. (R.p.21.) She had notified Appellant's insurance carrier, GEICO, of the accident and thought the matter had been resolved, considering it was a very minor impact. (R.pp.20, 21.) The Chos did not

receive any notice of the entry of default, the hearing on Respondent's motion for a default judgment, or the default judgment. (R.p.21.) The Chos moved from Richland to Lexington County after the accident. (R.pp.21, 22.)

Jennifer Delong is the adjuster who handled the claim for GEICO. (R.p.24.) She received notice of the accident, but no one at GEICO ever received notice of the lawsuit. (R.p.24.) Delong investigated the claim and attempted to settle the claim. (R.p.24.) From January 24, 2012 until August 28, 2012, Delong made numerous attempts to contact Respondent's counsel. (R.pp.25, 26.) At no time was she ever told that the case was in suit. (R.p.26.)

Specifically, on January 24, 2012, Delong called Respondent's counsel to make a settlement offer. (R.p.25.) Delong left a message with a paralegal at Respondent's counsel's office. (R.p.25.) She also sent a settlement offer to Respondent's counsel in writing on the same date. (R.p.25.) On January 31, 2012, Delong spoke with Respondent's counsel by telephone. (R.p.25.) Respondent's counsel advised that his client had not yet responded to GEICO's settlement offer. (R.p.25.) On February 22, 2012, Delong attempted to contact Respondent's counsel but the telephone line was busy. (R.p.25.) Delong was not notified that suit was filed on March 12, 2012. (R.p.25.) On March 20, 2012, Delong called Respondent's counsel and left a voice mail requesting him to call her back regarding GEICO's settlement offer. (R.p.25.)

Although Delong was not notified at the time, she subsequently learned that Diana Cho was served by personal service on April 14, 2012. (R.p.25.) GEICO did not receive a copy of the pleadings from either the insured or Respondent's counsel. (R.p.25.) On April 19, 2012, Delong spoke with Respondent's counsel. (R.p.25.) He

advised he could not discuss the case at that time but that he would pull the file and call back. (R.p.25.) Delong was not advised that suit had already been filed or that Diana Cho had been served. (R.p.25.)

On May 18, 2012, Delong left a voice mail message with Respondent's counsel requesting him to call back regarding GEICO's settlement offer. (R.p.25.) On June 14, 2012, Delong attempted to call Respondent's counsel but was unable to reach him. (R.p.25.) Delong wrote Respondent's counsel regarding GEICO's settlement offer on the same date. (R.p.25.) Delong was not aware of the Order of Default dated June 14, 2012, nor was she provided notice that the lawsuit was in default. (R.p.25.)

On June 28, 2012, Delong again attempted to reach Respondent's counsel by telephone but the line was busy. (R.p.26.) On July 29, 2012, Delong phoned Respondent's counsel and left a message with his secretary requesting him to call her back. (R.p.26.) Delong did not receive notice of the damages hearing scheduled for August 9, 2012. (R.p.26.) On August 20, 2012, Delong attempted to call Respondent's counsel but could not reach him because the line was busy. (R.p.26.) On August 22, 2012, Delong wrote to Respondent's counsel reinstating GEICO's settlement offer, still unaware that the case was in suit. (R.p.26.)

On August 28, 2012, Delong received notice of the default judgment against GEICO's insured. (R.p.26.) On the same day, the undersigned was assigned the case by GEICO and the Motion for Relief from Judgment was filed on September 6, 2012. This was the first notice GEICO received of this lawsuit. (R.p.26.) After learning of the default judgment, Delong called Diana Cho, the named insured under GEICO's policy. (R.p.26.) Delong was told that Cho had mailed a copy of the pleadings to GEICO.

(R.p.26.) GEICO never received any communication of any kind regarding the lawsuit or the default proceedings. (R.p.26.)

STANDARD OF REVIEW

A Rule 60(b) motion is addressed to the sound discretion of the trial judge and can be reversed on appeal upon a finding of abuse of discretion. Paul Davis Sys., Inc. v. Deepwater of Hilton Head, LLC, 362 S.C. 220, 225, 607 S.E.2d 358, 360 (Ct. App. 2004). In determining whether an abuse of discretion occurred, the case must be considered in the light of its underlying circumstances. Brown v. Weathers, 251 S.C. 67, 160 S.E.2d 133 (1968). On review of an order granting or denying a motion to set aside judgment for excusable neglect, an abuse of discretion arises when the circuit court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support. RRR, Inc. v. Toggas, 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008), *aff'd* 381 S.C. 490, 674 S.E.2d 170 (2009). Judicial discretion in granting or refusing relief from a default should be exercised “in the same liberal spirit in which [Section 15-27-130] was designed - in furtherance of justice and in order that cases may be tried and disposed of upon their merits.” Lowe's of Georgia, Inc. v. Costantino, 288 S.C. 106, 109, 341 S.E.2d 382, 383 (Ct. App. 1986) (citing Gaskins v. California Ins. Co., 195 S.C. 376, 379-80, 11 S.E.2d 436 (1940)). This is consistent with South Carolina's policy favoring the disposition of issues on their merits rather than on technicalities. Micronics, Inc. v. S. Carolina Dep't of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001).

ARGUMENT

I. THE DEFAULT JUDGMENT AGAINST APPELLANT SHOULD BE SET ASIDE DUE TO MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLIGENCE.

Rule 60(b), SCRCP, provides five enumerated grounds for relief from a final judgment. Momani v. Van Surdam, 296 S.C. 409, 410, 373 S.E.2d 691, 692 (Ct. App. 1988). Among these grounds are mistake, inadvertence, surprise, or excusable neglect; and fraud, misrepresentation, or other misconduct of an adverse party; and a showing that the judgment is void. Rule 60(b)(1), (3) and (4). To obtain relief from a default judgment, the movant must show a meritorious defense. Tri-County Ice & Fuel Co., Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

The reason the default judgment should be set aside in this case is apparent from a Supreme Court of South Carolina decision addressing similar circumstances. Edwards v. Ferguson, 254 S.C. 278, 175 S.E.2d 224 (1970). In Edwards, the insured driver was an alcoholic and he failed to notify his liability carrier, State Farm, about the accident. Id. at 280, 175 S.E.2d at 225. The driver was served through personal service on his father, who was illiterate. Id. at 281, 175 S.E.2d at 225. The driver's father failed to forward the suit papers to State Farm. Id. They were later found in a drawer in the driver's house. Id. As a result, a default judgment was entered against the driver. Id. at 281-82, 254 S.E.2d at 225. The trial court denied the driver's motion to set aside the judgment based on mistake, inadvertence, surprise, or excusable neglect. Edwards, 254 S.C. at 282, 275 S.E.2d at 225. The Supreme Court reversed, finding that the trial court abused its discretion. Id. at 283, 175 S.E.2d at 226.

Appellants' motion for relief from the default judgment should be granted under Edwards. As in Edwards, the person upon whom service was obtained understood little English. (R.p.21.) She did not understand what the suit papers were for and she thought she was simply being harassed by the Respondent personally. (R.p.21.) Notice of the suit was never provided to GEICO. (R.p.24.) Therefore, this Court should grant Appellant's motion pursuant to Rule 60(b)(1), SCRCP and Edwards.

II. THE DEFAULT JUDGMENT AGAINST APPELLANT SHOULD BE SET ASIDE DUE TO FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT OF AN ADVERSE PARTY.

Rule 60(b)(3) also provides for default judgments to be set aside due to fraud, misrepresentation, or other misconduct of an adverse party. Appellants' motion should be granted on this basis because Respondent's counsel continued to negotiate with GEICO without telling GEICO that the case was already in suit and that its insured was in default.

The South Carolina Supreme Court has admonished the practice of filing suit and serving the insured without informing the insurer and while continuing to negotiate as if the case was not yet in suit. McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011). In McClurg, the Court of Appeals held that failure to send a courtesy copy to defendant's insurance carrier when settlement negotiations are ongoing is grounds to set aside a default judgment. Id. at 573, 671 S.E.2d at 92-93¹; see also Lowe's, 288 S.C. at 110, 341 S.E.2d at 384 (affirming the setting aside of default pursuant to Rule 60(b) when defendants received the summons

¹ The adverse outcome in McClurg was due to the court's finding that the defendants failed to raise a meritorious defense in their motion to set aside the default. McClurg, 395 S.C. at 86-87, 716 S.E.2d at 887-888. As set forth below, this aspect of the McClurg ruling does not apply here because Appellants raised a meritorious defense.

but believed settlement negotiations were ongoing and nothing more was required of them)².

The concurring opinion in McClurg stated that “counsel’s actions in continuing to uphold the appearance of settlement negotiations while simultaneously pursuing a default judgment without notice to Zurich . . . certainly warrants the grant of [the defendants’] Rule 60(b) motion.” Id. at 584, 671 S.E.2d at 98 (Hearn, C.J., concurring). Two Indiana cases were cited in support of the holding that failure to notify an insurance carrier that suit has been filed when settlement negotiations are ongoing is grounds for relief from a default judgment. McClurg, 380 S.C. at 583, 671 S.E.2d at 98 (citing McGee v. Reynolds, 618 N.E.2d 40 (Ind. Ct. App. 1993) and Boles v. Weidner, 449 N.E.2d 288 (Ind. 1983)). As noted, the McGee court described the plaintiff attorney’s behavior as bad faith and “smacking of chicanery and unfair advantage which could not be tolerated.” McClurg, 380 S.C. at 583, 671 S.E.2d at 98 (citations omitted). Furthermore, the dissenting opinion in the Supreme Court decision noted that the default judgment was obtained by “trickery and deception.” McClurg, 395 S.C. at 88, 716 S.E.2d at 889 (Toal, C.J., dissenting).

This authority establishes that Respondent’s conduct merits setting aside a default judgment. McClurg was decided under Rule 60(b), which is applicable in this case. Appellant requests that this Court reverse the trial court and grant the Motion for Relief from the Default Judgment because Respondent’s counsel failed to negotiate in good

² In holding the defendants’ neglect was excusable, this Court relied on two opinions finding relief from judgment appropriate when settlement negotiations appeared to be ongoing. Lowe’s, 288 S.C. at 110-11, 341 S.E.2d at 384 (citing Peters v. Dietrich, 27 P.2d 1015 (Or. 1934) (settlement negotiations pending and motion to vacate default judgment filed promptly) and De Mattie v. Henry, 189 P.2d 774 (Cal. App. 1948) (plaintiff’s attorney chose to enter into settlement negotiations with defendant’s insurance carrier and gave no notice of his intention to end negotiations)).

faith by sending a courtesy copy of the Complaint to GEICO and providing notice that Appellant was in default under McClurg.

III. APPELLANT HAS DEMONSTRATED A MERITORIOUS DEFENSE IN THIS CASE.

In McClurg, this Court held that a party seeking relief from a default judgment under Rule 60(b) must make a prima facie showing of a meritorious defense. McClurg, 395 S.C. at 86-87, 716 S.E.2d at 887-88. To establish a meritorious defense, a party is not required to show an absolute defense. Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989).

[A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It 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.

Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978).

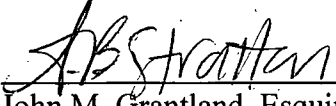
Appellant satisfied this requirement through the claim documents submitted by GEICO's adjuster, Jennifer Delong. (R.pp.28-39.) These claim documents demonstrate that any damage to the vehicles was almost undetectable from the photos. (R.pp.32-334.) When Respondent's bumper cover was pulled off, the bumper itself showed no damage at all. (R.p.34.) The cost of the repairs to the vehicle was less than \$500. (R.p.31.)

Respondent's judgment was for \$20,000, which is grossly disproportionate to the evidence from the vehicles. Moreover, both Pyong and Diana Cho testified by affidavit that they saw Respondent and spoke to her for an extended period of time after the accident and they saw no evidence that she was injured. (R.pp.20, 22.) Therefore, Appellants have demonstrated a meritorious defense. Appellant requests that this Court reverse the trial court and provide relief from the judgment to allow him to present his

case on the merits. Further, Respondent is not prejudiced when setting aside of the default judgment allows her the day in the court she is entitled to.

CONCLUSION

Based on the grounds enumerated in Rule 60(b) and explained herein, Appellant respectfully requests this Court reverse the trial court and provide relief from the default judgment.



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with
Rule 211(b).


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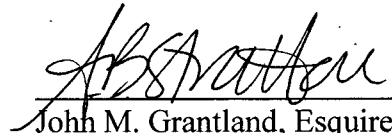
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PROOF OF SERVICE

I certify that I have served the Brief of Appellant by depositing a copy of it in the United States Mail, postage prepaid, on June 7, 2013, addressed to attorney of record, Barry B. George, Esquire, 1419 Bull Street, Columbia, South Carolina 29201.

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