IN 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. 2012-CP-40-07125

David Pendarvis — Respondent,

v.

Wilson Miranda and Glendy M. Aguilar — Appellants.

FINAL BRIEF OF APPELLANT

Kelley Shull Cannon
Albert R. Pierce, Jr.
HOWSER, NEWMAN & BESLEY, L.L.C.
1508 Washington Street
P.O. Box 12009
Columbia, SC 29211
(803) 758-6000
Attorneys for Appellants

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Attorneys for Appellants

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STATEMENT OF THE CASE

On October 22, 2012, Plaintiff/Respondent David Pendarvis ("Pendarvis") filed a Summons and Complaint for a negligence action arising out of a motor vehicle collision that allegedly occurred on April 20, 2012, in Richland County against Defendants/Appellants Wilson Orozco ("Orozco")[1] and Meyvis Miranda ("Miranda").[2] Defendants did not file an Answer, and an Order of Default was filed on January 14, 2013. On February 20, 2013, a Damages Hearing was held and Judgment was entered against Orozco in the amount of $20,000.00.

Orozco and Miranda filed a Motion to Set Aside Entry of Default on March 18, 2013.[3] After a hearing before the Honorable Alison Renee Lee on June 18, 2013, this motion was denied by an order filed on August 8, 2013. Orozco and Miranda now appeal the Circuit Court's order denying their Motion to Set Aside the Judgment entered February 20, 2013. The Notice of Appeal was served upon Plaintiff on September 9, 2013.

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[1] Defendant Orozco was incorrectly named on the Summons and Complaint as "Wilson Miranda." (R. p. 33).

[2] Defendant Orozco was incorrectly named on the Summons and Complaint as "Glendy M. Aguilar." (R. p. 35).

[3] Although Defendants' motion was characterized as one to set aside an entry of default, Defendants specifically moved to set aside the judgment pursuant to Rule 60(b), SCRCP within their motion. (R. p. 31). Moreover, at the hearing, Defendants argued the judgment should be set aside pursuant to Rule 60(b). (R. p. 17, lines 10-21). The Circuit Court treated the motion as one for Relief from Judgment pursuant to Rule 60, SCRP. (R. p. 2). For purposes of this brief, Defendants will hereinafter refer to this Motion as "Defendants' Motion to Set Aside the Judgment."

ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING DEFENDANTS' MOTION TO SET ASIDE DEFAULT JUDGMENT

The standard of review on appeal of an Order denying a Motion for Relief from Judgment pursuant to Rule 60(b), SCRCP, is whether the Trial Court abused its discretion in denying the motion. *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006). "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.* at 551, 633 S.E.2d 503 (citing *Tri–County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

According to Rule 60(b)(1), "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect . . .." The following factors are relevant to a Trial Court's determination as to whether to set aside a judgment under Rule 60(b): "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 parties." *McClurg v. Deaton*, 380 S.C. 563, 573-74, 671 S.E.2d 87, 93 (Ct. App. 2008) *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011).

After analyzing the above factors, the Circuit Court denied Defendants' Motion to Set Aside the Judgment. The Circuit Court held that Defendants' reasons for failing to file an Answer were insufficient to establish mistake, inadvertence, surprise, or excusable neglect. (*See* R. pp. 2-3). The Circuit Court also determined that Defendants did not assert a meritorious defense and that the Plaintiff would be "unduly prejudiced by further expense and delay," if the judgment was set aside. (R. pp. 3-4). We contend the Circuit

Court abused its discretion in denying Defendants' Motion to Set Aside the Judgment by reaching factual conclusions not supported by the evidence presented and by failing to consider all of Defendants' arguments in reaching conclusions of law.

a. THE CIRCUIT COURT ERRED IN HOLDING THAT DEFENDANTS FAILED TO ESTABLISH MISTAKE, INADVERTANCE, SURPRISE, OR EXCUSABLE NEGLECT

At the hearing on Defendants' Motion to Set Aside the Judgment, Defendants proffered several reasons for their failure to respond to the Complaint. Defendants argued that, under the circumstances, Plaintiff's counsel's failure to provide notice to Miranda's automobile insurer, United Automobile Insurance Company ("United Auto"), entitled it and Defendants to an Order Setting Aside the Judgment. However, the Trial Court failed to address this argument in the Order. It is reversible error for the Trial Court to have determined that Defendants could not show their failure to act promptly in responding to the Complaint was due to mistake, inadvertence, surprise, or excusable neglect, without addressing Defendants' argument concerning a lack of notice.

In *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970), the South Carolina Supreme Court held an automobile insurer was entitled to set aside judgment where the Plaintiff's counsel and the insurer engaged in communications regarding a potential settlement of the Plaintiff's claim, but then when settlement discussions failed, Plaintiff's counsel filed a lawsuit against the insured without serving the Summons and Complaint, or providing a copy thereof, to the insurer. It was only after the matter was in default that Plaintiff's counsel provided the insurer with the pleadings and informed the insurer of the default. *Id.* at 281-82, 175 S.E.2d at 225. A damages hearing was subsequently held and a judgment was entered against the insured. *Id.* at 283, 175 S.E.2d at 225. Emphasizing

that a motion to set aside judgment "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits[,]" *Id.* at 282-83, 175 S.E.2d at 226 (citing *Gaskins v. California Ins. Co.*, 195 S.C. 376, 11 S.E.2d 439 (1940)), the *Edward's* Court held, "[a] review of **the entire record in this case** convinces us that the Trial Court abused his discretion in failing to vacate judgment, [and that] [t]he justice of the case required that the judgment be set aside with leave to the defendant to answer." *Id.* (emphasis added).

Similarly, in *McClurg v. Deaton*, 380 S.C. 563, 572-73, 671 S.E.2d 87, 92-93 (Ct. App. 2008) *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011), this Court held that an insurance company established surprise or excusable neglect within the meaning of Rule 60(b)(1), SCRCP, where the Plaintiff's counsel engaged in ongoing negotiations with the insurance company, but failed to notify the insurance company that he had served a summons and complaint upon the defendant. According to this Court, in light of the insurance company's prior communications with the Plaintiff's counsel, the insurer had a **reasonable expectation** that it would at least be provided a copy of the pleadings. *Id.* at 573, 671 S.E.2d at 92 (emphasis added).

Other courts have similarly held a motion to set aside judgment is appropriate where the plaintiff's counsel fails to give notice to the insurer that a lawsuit has been filed against its insured where there has been a prior course of dealings between counsel and the insurer. *Id.* at 582-83, 671 S.E.2d at 97-8 (discussing *McGee v. Reynolds,* 618 N.E.2d 40 (Ind. Ct. App. 1993) and *Boles v. Weidner*, 449 N.E.2d 288 (Ind. 1983)).

In the present case, Plaintiff's counsel communicated with United Auto prior to filing suit in an attempt to settle Plaintiff's claim. (R. p. 18, lines 20-23; *see* R. p. 38).

After considering Plaintiff's medicals and the surrounding circumstances of the motor vehicle accident, United Auto refused Plaintiff's settlement demand. (R. p. 18, lines 23-24, R. p. 38). Plaintiff's counsel subsequently served a Summons and Complaint upon the Defendants without notifying United Auto of the lawsuit or providing the insurer with a courtesy copy of the pleadings. Plaintiff's counsel failed to give notice of the lawsuit to United Auto despite the fact that Plaintiff's counsel knew that United Auto had a duty to defend the Defendants and that any judgment would be satisfied by United Auto. Plaintiff's counsel acknowledged at the hearing that for all intents and purposes he was suing United Auto: "I don't talk to this insurance company. I sue them; I sue them constantly. I sent them the medical. He (adjuster) wrote me a letter back saying he wasn't going to pay me a penny. I sued him." (R. p. 25, lines 2-5). In light of the prior course of dealing between Plaintiff's counsel and United Auto, United Auto reasonably expected that it would be given notice of any lawsuit filed against Defendants.

In addition to Plaintiff's counsel's failure to notify United Auto about the Summons and Complaint served upon the Defendants, the language barrier Defendants faced due to their inability to speak English further inhibited their ability to respond to the Complaint. The Trial Court rejected the notion that the Defendants' inability to speak English and understand the significance of the Summons and Complaint served as a sufficient reason to support the setting aside of the judgment. (R. p. 3). This holding was based on the factual conclusion that "the statements made by Defendants in their Affidavits show that Defendants understood the serious nature of the legal matter and thereafter contacted their insurance company about the motor vehicle accident with the Plaintiff." (R. p. 3). However, both Orozco and Miranda stated in their Affidavits that

they did not understand what the Summons and Complaint constituted. (R. pp. 32, 34). Orozco only contacted the insurance company because he was able to decipher that the documents had "something to do with the accident." (R. p. 32). There is no indication in Orozco's Affidavit or Miranda's Affidavit that either Defendant understood the serious nature of the legal matter. Moreover, because Orozco and Miranda are not conversational in the English language, they ran into difficulty when attempting to communicate with the insurance company concerning the papers they had received. (R. pp. 32, 34).

Despite the fact that Defendants' inability to speak or understand the English language greatly hindered their ability to take appropriate action when they were served the Summons and Complaint, the Trial Court ultimately determined this was not excusable neglect. (R. p. 3). The Trial Court stated that a "lack of familiarity with legal proceedings is not an acceptable excuse and the court will hold a layman to the same standard as an attorney." (R. p. 3)(quoting *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010). However, in the present case, it was not simply a lack of familiarity with the Summons and Complaint that led to Defendants' failure to respond to the Complaint. Rather, it was their inability to speak the language in which the legal documents were written, and their subsequent difficulty in communicating their receipt of these documents with their insurance company. The fact that the Defendants were misidentified further confused the Defendants, making it that much more difficult to figure out the steps they needed to take to address the situation. The Trial Court erred by dismissing Defendants' argument that their inability to speak English prevented them from acting promptly. *See Cuevas v. Barraza*, 146 Idaho 511, 516, 198 P.3d 740, 745

(Ct. App. 2008) (holding that a language barrier should be considered in evaluating mistake or excusable neglect, and that the Defendant's delay in responding to the Complaint was due, in part, to his misunderstanding of the English language).

In light of the above, the Trial Court erred in holding that Defendants did not establish sufficient reasons for their failure to act promptly, due to both surprise and excusable neglect, in responding to the Complaint.

b. THE CIRCUIT COURT ERRED IN HOLDING THAT DEFENDANTS FAILED TO ESTABLISH A MERITORIOUS DEFENSE TO PLAINTIFF'S NEGLIGENCE ACTION

The Trial Court erred in holding that Defendants did not establish a meritorious defense. "To establish a meritorious defense, a party is not required to show an absolute defense[,]" *Mictronics, Inc. v. S. Carolina Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (citing *Thompson v. Hammond,* 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989)); nor must the party show that he would ultimately prevail at trial. *Id.* (*quoting Graham v. Town of Loris,* 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978). Rather, a meritorious defense is 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.'" *Id.* (*quoting Graham v. Town of Loris,* 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978)).

The Trial Court failed to consider Orozco's evidence that he had a meritorious defense as both to liability and as to damages. The Trial Court's order focuses solely on whether Defendants could challenge the validity of service of process based on the misstatement of their names in the Summons and Complaint. (R. pp. 3-4). However, this defense was not argued by the Defendants at the June 18, 2013 hearing. (*See* R. pp. 14-

30) At the hearing, Defendants argued that Orozco's Affidavit asserts allegations, which if true, would provide Orozco a defense as to liability and as to the amount of damages suffered by Plaintiff. (R. p. 20, line 17-p. 21, line 18).

The motor vehicle accident underlying this negligence action occurred when Orozco's vehicle rear-ended Plaintiff's vehicle at a stop sign at the crest of a hill. (R. p. 20, lines 17-23). Orozco's Affidavit indicates that as he was approaching the intersection where the accident occurred, it appeared that the cars in front of him were not stopping. (R. p. 32). Orozco rear-ended the car in front of him when the car stopped suddenly. (R. p. 32). These facts would reasonably support a defense as to Orozco's liability.

Regarding Defendants' defense to damages, according to Orozco's Affidavit, the collision was only minor and occurred while Orozco was travelling at a very slow speed. (R. p. 32-33). Orozco's Affidavit indicates that the accident only resulted in minor scratches to Plaintiff's and Orozco's vehicles. (R. p. 33). In addition, the Plaintiff waited more than a month after the accident before seeking any treatment for the injuries alleged. (R. p. 21, lines 5-15). In light of this evidence, Defendants also had a defense to the amount of damages asserted by the Plaintiff. Although it is a question of first impression in South Carolina as to whether a defense to damages—as opposed to liability—is a sufficient meritorious defense for purposes of setting aside a judgment pursuant to Rule 60, other states have recognized that a defense to damages alone qualifies as a meritorious defense. *McClurg v. Deaton*, 395 S.C. 85, 97-8, 716 S.E.2d 887, 893-94 (2011) (Toal, C.J., dissenting) (noting that "whether a meritorious defense can relate to damages . . . is one of first impression in this state," and citing several jurisdictions that have held in the affirmative); *see also Gotcher v. Barnett*, 757 S.W.2d

398, 404 (Tex. App. 1988) (holding defendants established a meritorious defense sufficient to obtain a grant of a new trial where the defendants asserted allegations that, if true, would lessen the amount of Plaintiff's damages).

Despite the above factual allegations contained in the record, the Trial Court erred in ruling that Defendants did not establish a meritorious defense in failing to even consider either of these two arguments, both of which clearly constitute meritorious defenses, in denying Defendants' Motion to Set Aside the Judgment.

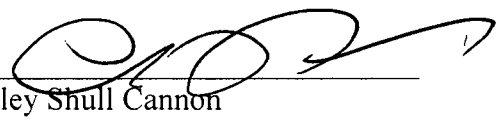
d. THE CIRCUIT COURT ERRED IN HOLDING PLAINTIFF WOULD BE UNDULY PREJUDICED IF DEFENDANTS' MOTION TO SET ASIDE DEFAULT JUDGMENT WAS GRANTED

According to the Order, "Plaintiff would be unduly prejudiced by further expense and delay" if the judgment were set aside. (R. p. 4). However, if the Judgment were set aside, Plaintiff would simply prosecute his case as any Plaintiff would in the normal fashion. Certainly, Plaintiff would have expected that, under normal circumstances, Defendants would Answer the Complaint. At that point, the parties engage in the typical discovery process, and Plaintiff could potentially try his case and have his day in court. Therefore, the only prejudice that would be served by affirming the circuit court's Order is to deny Defendants the opportunity to have their day in court. "[T]he law favors the resolution of disputes based upon all parties having their day in court." *McClurg v. Deaton*, 380 S.C. 563, 580, 671 S.E.2d 87, 96 (Ct. App. 2008) *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011) (Hearn, C.J., concurring in part and dissenting in part). Thus, Rule 60(b) should be liberally construed to ensure justice is promoted and that cases are disposed of on their merits. *See Edwards v. Ferguson* 254 S.C. 278, 283 (applying Section 10-1213, a predecessor to Rule 60).

CONCLUSION

In light of the foregoing, Defendants contend the Trial Court abused its discretion in denying their motion to set aside the February 20, 2013 judgment pursuant to Rule 60(b), SCRCP, and Defendants respectfully request this Court to grant Defendants relief from judgment so that they may file an Answer in this case.

Respectfully submitted,



Kelley Shull Cannon
Albert R. Pierce, Jr.
HOWSER, NEWMAN & BESLEY, L.L.C.
1508 Washington Street
P.O. Box 12009
Columbia, SC 29211
(803) 758-6000
Attorneys for Appellants

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CERTIFICATE OF COUNSEL

I hereby certify that the *Final Brief of Appellant* complies with Rule 211(b), SCACR.

Kelley Shull Cannon
Albert R. Pierce, Jr.
HOWSER, NEWMAN & BESLEY, L.L.C.
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P.O. Box 12009
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PROOF OF SERVICE

I hereby certify that I have served the *Final Brief of Appellant* on David Pendarvis by depositing a copy of it in the United States Mail, postage prepaid, on February 28, 2014, addressed to his attorneys of record, Barry B. George and Paige B. George, as follows:

Barry B. George
Paige B. George
Law Office of Barry B. George
1419 Bull Street
Columbia, SC 29201

Kelley Shull Cannon, Esquire
Albert R. Pierce, Jr., Esquire
HOWSER, NEWMAN & BESLEY, L.L.C.
1508 Washington Street
P.O. Box 12009
Columbia, SC 29211
(803) 758-6000
Attorneys for Appellants

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