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-40-7125

David Pendarvis, Respondent,

v.

Wilson Miranda and Glendy M. Aguilar, Appellants.

BRIEF OF RESPONDENT

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February 28, 2014

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STATEMENT OF THE CASE

On October 22, 2012, the Respondent, David Pendarvis, filed a negligence lawsuit in Richland County against Appellants Wilson Miranda and Glendy M. Aguilar for injuries he sustained when he was rear-ended by the Appellant Wilson Miranda on or about April 20, 2012. On November 1, 2012, service was made by a deputy with the Richland County Sheriff's Department on Appellant Miranda by leaving a copy with Brenda Miranda, a member of Appellant Miranda's residence who was over the age of eighteen (18). Appellant did not answer the complaint within thirty (30) days or anytime thereafter.

Respondent moved for an order of default against Appellant Wilson Miranda which was granted by the Honorable L. Casey Manning on January 11, 2013. A damages hearing was held before the Honorable Robert E. Hood on February 20, 2013. Appellant was notified of the damages hearing in a letter dated February 1, 2013. According to the

lower court's order of damages of February 20, 2013, Respondent testified that he was injured when he was struck from the rear by the vehicle being driven by Appellant Miranda; that he continued to have pain from his injuries; and, that he incurred medical costs because of his injuries. The Honorable Robert E. Hood, in his February 20 order did give judgment to the Respondent against Appellant Miranda in the amount of twenty thousand dollars ($20,000.00).

On March 13, 2013, Appellant's counsel did send to the clerk of court Appellant's Notice of Motion and Motion to Set Aside Entry of Default seeking relief under Rule 55(c) and Rule 60(b) of the *South Carolina Rules of Civil Procedure (SCRCP)*. The Honorable Alison Renee Lee heard Appellant's Motion for Relief on June 18, 2013. In an order dated August 5, 2013 and filed August 8, 2013, Judge Lee addressed Appellant's Motion as a Motion for Relief of Judgment under Rule 60, *SCRCP* and denied the motion. Appellant did not file a Motion to Reconsider Judge Lee's order of August 5. On September 9, 2013 Appellants did send for filing their Notice of Appeal.

FACTS

On or about April 20, 2012, David Pendarvis, Respondent, was injured in a motor vehicle accident when the vehicle he was driving was struck from the rear by a vehicle being driven by Appellant Wilson Miranda. (R. pp. 5-6) As a result of the motor vehicle accident, Respondent received treatment at Spring Valley Family Practice and Midland Physical Medicine. (R. pp. 5-6)

Mr. Pendarvis filed a claim against Appellant's insurance company, United Automobile Insurance Company ("UAIC"). Respondent's counsel made a demand and

UAIC's response was a denial of the claim. (R. p. 18, ll. 18-25) Subsequently, Respondent filed suit. (R. p. 19, ll. 2-4) The Summons and Complaint were served on Appellant Miranda on November 15, 2012. (R. p. 37; R. p. 18, ll. 4-5).

Appellant Miranda did not answer and Respondent moved for an Order of Default which was granted. (R. p. 8) Counsel for Respondent initiated no further communications with UAIC after suit was filed. (R. p. 19, ll. 2-7)

One of Appellants' contentions is that the Appellants should be relieved of the default and damages order because Appellants speak limited English. (R. p. 19, ll. 10-12) However, the lower court found that "statements made by [Appellants] in their affidavits show [Appellants] understood the serious nature of the legal matter and thereafter **contacted their insurance company about the motor vehicle accident with the [Respondent]**." (R. p. 3, ll. 13-15)

STANDARD OF REVIEW

"[M]otions for relief under Rule 60(b) are addressed to the discretion of the court and appellate review is limited to determining whether the trial court abused its discretion." *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 124, 441 S.E.2d 835, 840 (Ct. App. 1994) "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. *Lanier v. Lanier*, 364 S.C. 211, 612 S.E.2d 456, 458 (Ct. App. 2005) (citing *Perry v. Heirs at Law of Gadsden,* 357 S.C. 42, 590 S.E.2d 502 (Ct.App.2003)). "The decision to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court." *Id.* (citing *Bowman v. Bowman,* 357 S.C. 146, 151, 591 S.E.2d 654, 656 (Ct.App.2004))

"Rule 60(b)(1), SCRCP, which provides relief to a party from final judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect. To obtain relief from a default judgment, the movant must also show a meritorious defense." *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.,* 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990) (citing *Mitchell Supply Co. v. Gaffney,* 297 S.C. 160, 375 S.E.2d 321 (Ct. App. 1988)). "A motion for relief pursuant to Rule 60(b)(1) is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Id.*

ARGUMENTS

I. BECAUSE APPELLANTS DID NOT FILE A RULE 59(E) MOTION TO RECONSIDER THE LOWER COURT'S ORDER DENYING APPELLANTS' MOTION TO SET ASIDE DEFAULT JUDGMENT, APPELLANTS DID NOT PROPERLY PRESERVE THE ISSUES OF LACK OF NOTICE AND ESTABLISHING A MERITORIOUS DEFENSE AS TO LIABILITY FOR APPELLATE REVIEW.

The Appellants, in their brief, argued that the lower court failed to address in its order denying Appellants' Motion to Set Aside Default Judgment Appellants' argument that Respondent's counsel had failed to provide notice to Appellants' automobile insurer. (Appellants' Brief p. 4) Further arguing that "it is reversible error for the trial court to have determined that [Appellants] could not show their failure to act promptly in responding to the Complaint was due to mistake, inadvertence, surprise or excusable

neglect, without addressing Defendant's argument concerning lack of notice." (Appellants' Brief p. 4)

Additionally, Appellants argued that "[t]he trial court failed to consider [Appellant Wilson Miranda] Orozco's evidence that he had a meritorious defense as both to liability and as to damages." (Appellants' Brief p. 8) Arguing that the lower court's order "focuses solely on whether [Appellants] could challenge the validity of service of process based on the misstatement of their names in the Summons and Complaint." (Appellants' Brief p. 8).

"A party *must* file [a 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. " *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 24602 S.E.2d.772, 780 (2004). "[T]he appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are preserved for appellate review only when they are raised and to and ruled on by the lower court." *Id.* Because Appellants did not make a Motion to Reconsider under Rule 59(e), *SCRCP*, the issues asserted by Appellants concerning lack of notice of the lawsuit to Appellants' insurance company and establishing a meritorious defense are not properly preserved for appellate review.

II. BECAUSE APPELLANTS CONTACTED THEIR INSURANCE COMPANY AFTER APPELLANT MIRANDA WAS SERVED AND BECAUSE CURRENT NEGOTIATIONS WERE NOT ONGOING BETWEEN RESPONDENT'S COUNSEL AND APPELLANTS' INSURANCE COMPANY, THE ORDER OF THE LOWER COURT DENYING APPELLANTS ORDER TO BE RELIEVED FROM DEFAULT JUDGMENT SHOULD BE AFFIRMED.

Appellants moved for relief under Rule 60(b) of the South Carolina Rules of Civil Procedure. Rule 60(b) states, in part, that "[o]n 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." "Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), *SCRCP*. *Rodriguez v. Gutierrez*, 391 S.C. 323, 331, 705 S.E.2d 94, 99 (Ct. App. 2011) (citing *Sundown Operating Co. v. Intedge Industries, Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009)). "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 reason for failing to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. " *Id.*

The Court of Appeals in *Rodriguez* laid out the standard of review for relief from a Rule 60(b) order:

> The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court. The circuit court's decision will not be disturbed absent a clear showing of an abuse of that discretion. An abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support.

Id. 391 S.C. at 329 (citing *Thompson v. Hammond*, 299 S.C. 116, 199, 382 S.E.2d 900, 902-903 (1989); *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 162-163, 375 S.E.2d 321, 322-323 (Ct. App. 1988); *Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 402, 368 S.E.2d 687, 689 (Ct. App. 1988))

Unlike Rule 55, "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." *Id.* "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief. *Id.* (citing *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991))

Appellants argue that the default judgment against Appellants should be set aside "due to mistake, inadvertence, surprise or excusable neglect." (Appellants' Brief p. 4) Appellants' argument is mainly based on the case of *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970). In *Edwards*, the insured driver never informed his insurance company of the motor vehicle accident he had had nor did he forward the summons and complaint on to the insurance company. *Id.* 254 S.C. at 280. Service was made on the insured driver through personal service on the insured's father who was illiterate. *Id.* The plaintiff in that matter was a passenger in the insured's vehicle which was in a one car crash where it was in dispute as to who was driving the vehicle. *Id.* The insured never forwarded process on to his insurance company. *Id.*

The court in *Edwards,* based on the totality of the circumstance and after finding that a meritorious defense existed, relieved the defendant of default, holding that the lower court had abused its discretion in upholding the default judgment. *Id. Edwards* can be differentiated from the facts at issue in this appeal. The motor vehicle accident that is the basis of Respondent's lawsuit involved two vehicles – one vehicle driven by Respondent and one by Appellant Wilson Miranda. (R. pp. 11-13) There is no evidence of any possible collusion as there was found to be in *Edwards*. Additionally, Appellants contacted their insurance company following service of the Summons and Complaint on Appellant Miranda. (R. p. 34, paragraph 5; R. p. 33, paragraph 5)

Appellants here claim they speak limited English. However, Judge Lee in her Order Denying Appellants' Motion to Set Aside Default Judgment stated that the "statements made by [Appellants] in their affidavits show [Appellants] understood the serious nature of the legal matter and thereafter contacted their insurance company about the motor vehicle accident with the [Respondent]." (R. p. 3) However, that argument is moot because according to the Appellants, they contacted their insurance company. (R. p. 34, paragraph 5; R. p. 33, paragraph 5)

Respondent believes this court should turn to the cases of *Cowan v. Allstate Ins. Co.*, 357 S.C. 625, 594 S.E.2d 275 (2004) and *Hill v. Dotts*, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001). In *Cowan*, counsel for the Plaintiff filed a lawsuit on the Defendant and served him properly. *Cowan*, 357 S.C. at 625. Plaintiff did not provide a copy of the Summons and Complaint to the Defendant's insurance company. *Id.* The court in Cowan found that the "cooperation clause" of § 38-77-142(B) between an insured and his insurance cannot be extended to an innocent third party. *Id.* There is no duty for a third party to notify an insurance company that a suit has been filed. *Id.* (*See also Shores v. Weaver*, 315 S.C. 347, 351, 433 S.E.2d 913, 914-915 (Ct. App. 1993) which states "that a liability insurance policy required by statute before one can register a motor vehicle may not be defeated or voided after a loss by the insured's failure to forward to the insurer the pleadings in an action brought against the insured by a third party victim of the insured's negligence.")

The Court in *Hill* found that :

> [A] party has a duty to monitor the progress of his case. 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. It is always a matter of regret that a party should not have his day in court. However, ...**[where] the appellant was duly served with the summons and complaint, [i]t was his duty to answer the complaint.... [Therefore,] [h]e must suffer the consequence of his failure to answer**. Accordingly, [a party's] failure to understand the legal process is not excusable neglect under Rule 60(b).

Id. 345S.C. at 310 (citations omitted, emphasis added)

Additionally, Appellants argue that there were ongoing negotiations between Appellants insurance company and Respondents' counsel; and, therefore, Respondent had a duty to provide a copy of the Summons and Complaint to Appellants' insurance company. (Appellants' Brief p. 5-6) Appellants' argument is based on *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). The court in *McClurg,* relying in part on *Edwards*, stated that "an insurer may, **under the proper circumstances**, be entitled to an order setting aside a default judgment where the insurer is involved in **ongoing negotiations** with a claimant but is not informed that the defendant has been served with a summons and complaint." *Id.* 380 S.C. at 571.

In *McClurg*, counsel for the Plaintiff filed suit in October and then continued to initiate calls to the insurance company from November of that year until June of the following year. *Id.* 380 S.C. at 568. The court there held that the conduct of counsel constituted an appearance of ongoing negotiations; and, therefore, should have been provided a copy of suit papers. *Id.* In the present case, prior to Respondent filing suit, all communications with the insurance company had ceased.

During the hearing on Appellants' Motion to Set Aside Default Judgment, counsel for both Appellant and Respondent provided Judge Lee with a letter from Appellants'

insurance company to Respondent's counsel dated October 11, 2012. (R. p. 18, ll. 23-5; R. p. 23, ll. 1-10) That letter rejected Respondent's demand and stated that the insurance company was "**closing [their] file**." (R. p. 38 - UAIC's letter dated October 11, 2012). Appellants point out in the hearing on Appellant's Motion to Set Aside Default Judgment and in their own brief that the insurance company had refused Respondent's settlement demand.

Respondent argues that such statement ends negotiations and relieves Respondent of any duty to provide notice of a lawsuit to Appellant's insurance company. Respondent argues that Appellants' insurance company had no expectation that they would be provided notice of any Summons and Complaint in this matter. It is clear that Respondent did not intend and did not attempt to give the appearance that negotiations were ongoing. Therefore, *McClurg*, is not applicable to the facts at hand. Additionally, since Appellants did not preserve the issue of lack of notice for appellate review, this argument of Appellants is not properly before this court and should not be considered.

III. BECAUSE THE APPELLANTS HAVE FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUE OF THE EXISTENCE OF A MERITORIOUS DEFENSE AND BECAUSE APPELLANTS HAVE NOT ESTABLISHED A MERITORIOUS DEFENSE THE LOWER COURT'S ORDER DENYING APPELLANTS' MOTION TO SET ASIDE DEFAULT JUDGMENT SHOULD BE AFFIRMED.

As previously stated above, the Appellants have failed to preserve the issue of a meritorious defense as to liability or damages. Appellants argued the "[t]he trial court failed to consider [Appellant Wilson Miranda] Orozco's evidence that he had a

meritorious defense as both to liability and as to damages"; but, Appellants did not file a Motion to Reconsider the trial court's order under Rule 59(e). (Appellants Brief p. 8)

Under a Rule 60(b)(1) motion, for the moving party to recover, the moving party must also make a "prima facie showing of a meritorious defense." *McClurg v. Deaton*, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008). Appellants have not made one in this matter. According to Appellant Wilson Miranda's affidavit, Respondent's vehicle was moving at a slow rate of speed when the vehicle Appellant Miranda was driving struck Respondent's vehicle in the rear. The lower court in addressing the issue of a meritorious defense stated only that the "[Appellants] assert[ion] that the [Respondent]'s misstatement of the parties names establishe[d] a meritorious defense" carried no merit. (R. p. 3-4).

IV. BECAUSE THE RESPONDENT FOLLOWED THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AS TO SERVICE OF THE SUMMONS AND COMPLAINT AND THE PLAINTIFF WOULD BE PREJUDICED BY FURTHER EXPENSE AND DELAY THE LOWER COURT'S ORDER DENYING APPELLANTS' MOTION TO SET ASIDE DEFAULT JUDGMENT SHOULD BE AFFIRMED.

The Supreme Court in *Roche v. Young Bros. Inc. of Florence* stated:

> Rule 4, *SCRCP* serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action. We have never required exacting compliance with the rules to affect service of process. Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.

Roche v. Young Bros. Inc. of Florence, 318 S.C. 207, 209-210, 456 S.E.2d 897, 899 (1995). There has been no evidence provided by Appellants that service was not proper

in this matter. Respondent here has more than "sufficiently complied with rules" and Appellants were given proper notice of the proceedings.

"[The South Carolina Rules of Procedure] shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1, *SCRCP* Respondent's exacting compliance to these rules should guarantee him of such. To set aside the Default Judgment in this matter would cause Respondent to incur more costs and as the lower court stated "further expense and delay." (R. p. 4).

CONCLUSION

Service was proper in this matter and Appellant did not answer within the allotted time. Additionally, Appellants have not presented any facts or evidence that the lower court abused its discretion. Therefore, for the reasons stated, this Court should uphold the order of the lower court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that Respondent's Final Brief complies with Rule 211(b), SCACR.

March 3, 2014

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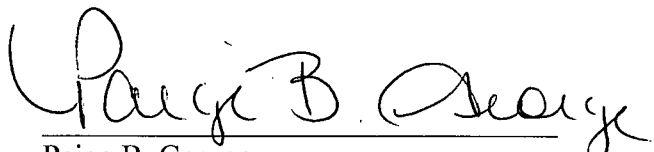
PROOF OF SERVICE

I certify that I have served Respondent's Final Brief on Wilson Miranda and Glendy M. Aguilar by depositing a copy of it in the United States Mail, postage prepaid, on March 3, 2014, addressed to their attorneys of record, Kelley S. Cannon and Albert R. Pierce, Post Office Box 12009, Columbia, South Carolina 29211.

March 3, 2014



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