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-26-5146

Jane "AP" 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.

INITIAL BRIEF OF RESPONDENT

John S. Nichols
SC Bar No. 4210
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

O. Fayrell Furr, Jr.
SC Bar No. 2246
FURR & HENSHAW
1900 Oak Street
Myrtle Beach, SC 29577
Office: (843) 626-7621

Attorneys for Respondent

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COUNTER-STATEMENT OF THE CASE

On January 15, 2010, Jane AP Doe ("Doe") filed a Notice of Intent to File Suit in a professional negligence action against Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology and Arrythmias Consultant, Institute of Electrophysiology, P.C. (collectively "Defendants"). Doe attached a copy of the answers to the standard interrogatories under Rule 33(b), SCRCP.

On May 3, 2010, Doe sent Defendants a letter advising them of the pre-suit mediation. (Tr. 3/7/11, p. 9, ll 11-21). In the letter, Doe identified her true name. (Tr. 3/7/11, p. 9, ll. 14-21).

On May 14, 2010, Judge John L. Breeden signed an order terminating the Pre-Litigation Mediation. The order noted that the Defendants "were not present...." (Order of May 14, 2010; Tr. 3/7/11, p. 10, l. 23 - p. 11, l. 7).

Doe filed a complaint against Defendants on June 11, 2010. 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 and for weight loss. 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. (Complaint).

On June 28, 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. (Proofs of Service). On June 29, 2010, Deputy Graham served Halla Jaraki, MD. (Proof of Service).

On July 9, 2010, Halla Jaraki and Omar Jaraki separately wrote letters addressed to Doe's lawyer. 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." (Letters of Omar and Halla Jaraki of 7/9/10). Both letters were apparently filed with the clerk of court.

On July 20, 2010, Doe's counsel sent Defendants a letter advising them that Doe had discovered the letters dated July 9, 2010, in the Clerk's file, and advising them once again what her true identity was. (Tr. 3/7/11, p. 11, ll. 8-25).

On October 10, 2010, Doe filed a motion for entry of default and for default judgment, asserting that although the answers were due on July 28, 2010, there had not been an appearance or Answer filed by the Defendants. (Plaintiff's Notice of Motion and Motion for Default Judgment).

On November 22, 2010, the Jarakis moved through counsel to be relieved from the entry of default. On November 30, 2010 (125 days after the answer was due and 51 days after Doe's motion for entry of default), all defendants jointly filed an answer to the complaint through counsel. On December 1, 2010, the Jarakis filed an amended motion for relief from the entry of default. Omar Jaraki attached an affidavit and a copy of his letter dated July 9, 2010, which he asserted served as his formal response to the complaint. Halla Jaraki also attached an affidavit as well as her letter of July 9, 2010. The basis for the motion was "the grounds enumerated in S.C.R.C.P. 55, including good cause." (Motion to be Relieved and attachments).

On March 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 July 2010. Doe pointed out that her counsel found the letters during a search of the Court file and sent a response identifying the name of the patient (i.e., Doe's true name) on July 20, 2010, yet they still failed to answer. (Memorandum in Opposition with Attachments; Tr. 3/7/11, p. 8, l. 21 - p. 9, l. 10).

The circuit court held a hearing on March 7, 2011, on both a motion for entry of default and the motion to be relieved. (Tr. 3/7/11, p. 5, ll. 8-16). Following argument, the court granted the motion to enter default and denied the motion to be relieved from default. (Tr. 3/7/11, p. 13, l. 23 - p. 14, l. 15). The court ruled the letter was not responsive (Tr. 3/7/11, p. 14, ll. 2-3). The court added:

> [T]his Court has the inherent authority to enforce the provisions of 15-79-125 which requires the pre-suit mediation and due to Dr. Jaraki's failure to attend the pre-suit mediation one way we can enforce it is by prohibiting responsive pleadings because he didn't comply with the statute in that regard. So, I want to make sure that both of those are in there, number one, that his letter does not constitute an answer, and then number two, that I find based upon the exhibits he knew the identity of the Plaintiff, and he willfully failed to attend the pre-suit mediation and because the Court has the inherent authority to enforce that statute I'm going to enforce it by not allowing responsive pleadings in this action.

(Tr. 3/7/11, p. 14, ll. 3-15). The court entered a written order on May 20, 2011, reflecting these rulings. (Order of May 16, 2011 entered on May 20, 2011).

On June 3, 2011, the Defendants moved the court to reconsider its order. (Motion to Reconsider). Plaintiff filed a memorandum in opposition to the motion for reconsideration. (Memorandum in Opposition to Motion to Reconsider). On August 17, 2011, the Court entered a Form 4 order denying Defendants' motion for reconsideration.

Defendants appealed the orders denying the motion to set aside default. Doe moved to dismiss the appeal because the order was not appealable until final judgment. On December 8, 2011, the Court of Appeals entered an order granting the motion to dismiss the appeal.

On April 9, 2012, the circuit court held a hearing on the damages portion of the case. (Tr. 4/9/12). Following testimony the trial court ordered judgment for the plaintiff for $179,090.00. (Tr. 4/9/12, p. 43, ll. 16-17; Form 4 order entered April 10, 2012).

On April 20, 2012, Defendants filed a Motion for Clarification of the Order of Damages. (Motion of 4/20/12). The circuit court entered an order on July 26, 2012, clarifying that the award was for actual damages Doe sustained. (Order of 7/26/12).

On August 24, 2012, the Jarakis jointly filed and served a timely notice of appeal from the following orders: (1) the May 16, 2011 order entered May 20, 2011; (2) the Form 4 order entered August 16, 2011; (3) the Form 4 order granting judgment; and (4) the order on Clarification of the Judgment.

ARGUMENT

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

Appellants contend that the letters they purportedly sent to Doe's counsel requesting additional information about Doe's identity (A) was the functional equivalent of an answer, (B) amounted to a denial based upon lack of knowledge under Rule 8(b), SCRCP, or (C) amounted to efforts to "otherwise defend" under Rule 55, SCRCP. (App. Br. pp. 14-19). This Court should not be persuaded by these arguments.

A. THE LETTERS DID NOT CONSTITUTE AN "ANSWER"

Appellants contend that each of the letters they purportedly filed and sent to Doe's counsel were a sufficient writing to constitute an answer. This Court should reject this argument.

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 circuit court ruled that the letters the Jarakis sent to Doe's counsel "were not responsive pleadings and therefore the Defendants are in default." (Order of May 16, 2011, p. 3). This Court should affirm the finding that the letters do not constitute an "answer."

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, SCRCP, 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 has stated:

> 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). Appellants' letters do not fairly meet the substance of the averments in the Complaint. In form, the letters do not satisfy the SCRCP in any respect.

Even if the Court overlooks the 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 circuit court in this case properly refused to consider the Jarakis' letters to be denials. *Hill* is not meaningfully distinguishable.

The Note to Rule 7 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 State 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 Doe's 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) (in an unpublished order the Court of

Appeals of Ohio held 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*, 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 in this

Country 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 pre-suit filing and subsequent letters identifying Doe. (Discussed in Part III, below). Appellants' protestations that they did not know Doe's identity are hollow.

Furthermore, Dr. Omar Jaraki is no stranger to the litigation process. *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.*, 55 S.W.3d 799 (Ark. Ct. App. 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 a verifiable fact 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 AP 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).

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

B. THE LETTERS DID NOT SATISFY RULE 8, SCRCP

Appellants contend the letters satisfied the general denial requirements of Rule 8(b), SCRCP, which provides: "If [the defendant] is without knowledge or information sufficient to form a believe as to the truth of an averment, he shall so state and **this has**

the effect of a denial." (App. Br. p. 15) (emphasis by Appellants). The Court should not find this argument persuasive.

To begin with, the circuit court did not specifically address an argument that the letters satisfied Rule 8(b), and Appellants did not seek a specific ruling on this point. *See, e.g., SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990) (noting that although an issue was raised in defendant's answer to the complaint, "it was never ruled on by the trial judge or raised in an appropriate post-trial motion. Therefore, this issue is not properly before this Court."). This argument is not properly before this Court.

Secondly, Appellants' argument on this point is conclusory, appearing in four sentences in one paragraph of the brief. (App. Br. pp. 15-16). There is no citation of authority to support Appellants' contention that the letter "equates with a general denial according to Rule 8." (App. Br. p. 16). Insofar as the Court concludes the argument is preserved, the Court should deem this argument abandoned. *See, e.g., Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 252 n. 3, 734 S.E.2d 161, 164 n. 3 (2012) (an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory).

Third, the letters do not satisfy Rule 8(b). The defendant is required by the rules of civil procedure to respond by responsive pleading in the manner set forth above. Rule 7(a), SCRCP. The references in Rule 8 are to the requirements of pleading, as evidenced by the Rule's provision that "when a **pleader** intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder." Rule 8(b) (emphasis added). *Cf. RoTec Services, Inc. v.*

Encompass Services, Inc., 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004) (discussing the requirements of Rule 8(b), SCRCP, in terms of a pleading); *Hill v. Dotts*, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001) (discussing the form of responsive pleading under Rule 8(b), and holding a letter from defendant did not satisfy the pleading requirement of Rule 8). The alleged "averments" in the letter do not fairly meet the allegations in the complaint, nor do they even deny anything.

Fourth, even if the argument was preserved or the argument was not conclusory and thus abandoned, whether to set aside the default was within the circuit court's sound discretion. *Hill v. Dotts*. Appellants have not presented a persuasive argument that the circuit court's ruling amounted to an abuse of that discretion. An abuse of discretion occurs when the court's rulings "either lack evidentiary support or are controlled by an error of law." *Graves v. CAS Medical Systems, Inc.*, 735 S.E.2d 650, 655 (S.C. 2012).

In this case, the circuit court did not believe the Appellants' protestations that they did not know who Doe was in time to answer prior to the date Doe filed the motion for entry of default. Thus, the circuit court's ruling does not lack evidentiary support.

Appellants contend, however, that the ruling is controlled by an error of law, that is, the circuit court's failure to construe Appellants' July 2010 letters to be responsive pleadings sufficient to avoid default. Both the plain language of the applicable rules of civil procedure and the construction given those rules by our appellate courts, however, support the circuit court's decision. There is no error of law.

Accordingly, this Court should reject Appellants' contention that the letters satisfied Rule 8(b), SCRCP.

C. THE LETTERS DID NOT SATISFY RULE 55, SCRCP

Appellants contend an additional reason to reverse the circuit court's ruling is that the letters meet the "otherwise defend" language set forth in Rule 55, SCRCP. This argument should not be persuasive.

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).

This issue is likewise not preserved for appeal. The circuit court did not specifically address an argument that the letters satisfied Rule 55(a), and Appellants did not seek a specific ruling on this point. *See, e.g., SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990) (noting that although an issue was raised in defendant's answer to the complaint, "it was never ruled on by the trial judge or raised in an appropriate post-trial motion. Therefore, this issue is not properly before this Court."). Accordingly, this argument is not properly before this Court.

Although Appellants moved for the circuit court to reconsider its ruling, Appellants did not request that the court 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).

Even if this procedural bar did not exist, the conclusion would still be that the Court affirm. Appellants contend their letters constitute an attack that would prevent default without presently pleading to the merits of the complaint. (App. Br. p. 16-17). This argument 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 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." *Bass v. Hoagland*, 172 F.2d 205, 210 (5th Cir.1949). *See also Olsen v. International Supply Co.*, 17 Alaska 643, 22 F.R.D. 221 (D.C. Alaska 1958) (same, following *Bass*); 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).

Appellants cite to several cases from other jurisdictions in support of their assertion that they meet the "otherwise defend" language. (App. Br. p. 17). In each case, however, the defendant filed a pre-answer motion raising some procedural point. *See Equable Ascent Fin., L.L.C. v. Christian*, 962 N.E.2d 322, 324 (Ohio Ct. App. 10 Dist. 2011) (defendant had filed a timely motion for more definite statement and subsequent motion for summary judgment to the amended complaint; Court stated "Although an answer to the complaint precludes a default judgment, "[a] case may also be placed at issue by a defendant, thus making a default judgment improper, by motions permitted by the Civil Rules to be made prior to or in lieu of an answer."); *Heritage Realtors v. Kahmann*, Op. No. CA92-09-082 (Ohio App. 12 Dist. 1993) (1993 WL 128116) (in an unpublished decision the Court of Appeals of Ohio noted defendant filed a pre-answer motion to transfer venue and then filed a responsive pleading within 14 days of withdrawing the motion, as permitted by the rules); *Murphy v. Alhajj*, Op. Nos. 74198, 74199, 74200 (Ohio App. 8 Dist. 1999) (1999 WL 359197) (in an unpublished opinion Court of Appeals of Ohio held appellant "otherwise defended" suit where: (a) appellant filed a motion to consolidate the three small claims cases and to transfer them to the general division of the civil docket; (b) the motion contained an affidavit by appellant's attorney wherein he stated that some of the monies to which appellee claimed he was

entitled were gifts and some of the amounts claimed due were previously paid to appellee by appellant; (c) a trial was previously conducted on appellee's first filed claim; and (d) the record reflected that appellant appeared, with counsel; Court held that although the trial court denied appellant's motion for leave to enter a general denial as being untimely filed, the record revealed that appellant's filings and appearance at the prior hearing indicated that the complaint was contested, Appellant sufficiently appeared to "otherwise defend," so the trial court abused its discretion when it entered a default judgment against her); *Stradiot Specialty, Inc. v. Am. Calendar Co., Inc.*, Op. No. 2004-L-162 (Ohio App. 11 Dist. 2007) (2007 WL 1881309) (in an unpublished order Court of Appeals of Ohio noted appellant (a) filed a motion to dismiss and a motion to transfer the matter to a foreign jurisdiction; (b) attempted to file an untimely answer, but the answer was stricken by the trial court; and (c) attempted to file a motion for summary judgment that was disallowed by the lower court; Court held that by virtue of the actions taken by appellant to "otherwise defend" against appellee's claims, appellant could not be held in default). Inasmuch as these unpublished opinions are properly cited, they offer no support to Appellants' arguments in this case.

Furthermore, 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, Appellants failed to plead under Rule 7, SCRCP, as discussed above. 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 because they did not answer, the other view of Rule 55(a) (failure to proceed post-answer) does not apply. Their letters do not constitute an attempt to "otherwise defend" as that phrase has been interpreted by courts around the country.

Appellants also 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. 18-19). The short answer to this is that the trial court did not rule upon this argument. *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). Even so, the evidence demonstrates Doe provided the very information Appellants sought in sufficient time for Appellants to answer the

complaint without default.

Further, rather than trying to be cagey, Appellants 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"); or (3) answered the complaint with a general denial and averments that fairly met the allegations. Appellants did none of these things. Instead, they simply played a game of cat and mouse, asserting they did not know any "Jane AP 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 AP Doe" was. Dr. Jaraki was criminally charged because of his behavior, and ultimately pled guilty in May 2010. See reports of plea at http://www.carolinalive.com/news/story.aspx?id=462100 and http://www.carolinalive.com/news/story.aspx?id=469263.

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

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

The Appellants have not contended either below or on appeal that they have a meritorious defense to Doe's complaint, nor did the trial court rule upon the issue of the existence of a meritorious defense. This Court should affirm on this alternative basis.

Rule 55(c), SCRCP, permits a party to move to set aside the entry of default. *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009). The "good cause" standard under Rule 55(c) requires a party seeking relief from an entry of default to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. *Id.* Once the party has put forth a satisfactory explanation for the default, the trial court must also consider:

(1) the timing of the motion for relief;

(2) whether the defendant has a meritorious defense; and

(3) the degree of prejudice to the plaintiff if relief is granted.

Id. (Emphasis added). *Accord, Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 719 S.E.2d 703 (Ct. App. 2011). The motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Sundown Operating Co.*

To establish a "meritorious defense," a movant need not show that he would prevail on the merits, but only that his defense is meritorious. *Thompson v. Hammon*, 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 trial. *Id.* 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. *Id.*

In this case, Appellants did not contend below that they had a meritorious defense to Doe's complaint. Furthermore, the circuit court did not rule on the issue of whether a meritorious defense existed, and Appellants did not make this issue part of their motion to reconsider the order. The issue is, therefore, not before this Court. *See McClurg v. Deaton*, 395 S.C. 85, 716 S.E.2d 887 (2011) (holding a party seeking to set aside a default must raise the issue of "meritorious defense" to the trial court, and the trial court must rule upon the issue, for the issue to be preserved for appeal).

A showing of a meritorious defense is a necessary step under Rule 55. Appellants failed to present this issue to the circuit court, the circuit court did not rule upon it, and it was not part of Appellants' motion for reconsideration. This issue is, therefore, not before this Court, and this failure undercuts Appellants' entire argument.

The Court should affirm on this alternative basis pursuant to Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). *See also, I'On, LLC v. Mount Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment."). *Accord, Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 719 S.E.2d 656 (2011) (affirming ruling where supported by record, and citing to Rule 220(c)); *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) (affirming

circuit court's ruling on alternative basis apparent in the record). *Cf.*, *Standard Sav. & Loan Ass'n v. Evans*, 255 S.C. 207, 178 S.E.2d 145 (1970) (affirming trial court's ruling on grounds "somewhat dissimilar" to those relied upon by the trial court).

III. THE CIRCUIT COURT DID NOT ERR AS A MATTER OF LAW IN PROHIBITING APPELLANTS FROM FILING RESPONSIVE PLEADINGS AS A MEANS OF ENFORCING THE PRE-SUIT MEDIATION PROCEDURE SET FORTH IN SECTION 15-79-125 OF THE SOUTH CAROLINA CODE

Appellants contend the circuit court erred as a matter of law in ruling the court had the inherent authority to enforce the provisions of the Pre-Suit mediation requirement of the South Carolina Code of laws by prohibiting the filing of responsive pleadings. (App. Br. pp. 19-21). Appellants submit "that failure to follow the mediation procedure contained within S.C. Code Ann. § 15-79-125 does not justify placing a defendant in default or striking a defendant's responsive pleading." (App. Br. p. 20). Appellants also contend the pres-suit process "was intended to reduce frivolous law suit," and not "to eliminate the right of a party to defend against liability." (App. Br. p. 21). This is tantamount to an argument that prohibiting the filing of responsive pleadings is not permitted by Section 15-79-125. The Court should reject these arguments.

Section 15-79-125 requires a plaintiff in a medical malpractice case to "contemporaneously file a Notice of Intent to File Suit" together with responses to standard interrogatories under the South Carolina Rules of Civil Procedure. S.C. Code Ann. § 15-79-125(A) (2012). "The Notice of Intent to File Suit must be served upon all named defendants in accordance with the service rules for a summons and complaint outlined in the South Carolina Rules of Civil Procedure." *Id.*

The statute provides further:

> (C) Within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit, the parties shall participate in a mediation conference unless an extension for no more than sixty days is granted by the court based upon a finding of good cause. Unless inconsistent with this section, the Circuit Court Alternative Dispute Resolution Rules in effect at the time of the mediation conference for all or any part of the State shall govern the mediation process, including compensation of the mediator and payment of the fees and expenses of the mediation conference. The parties otherwise are responsible for their own expenses related to mediation pursuant to this section.

S.C. Code Ann. §§ 15-79-125 (C) (emphasis added). The pre-suit procedure statute thus *mandates* participation in the mediation conference under the Circuit Court ADR Rules unless inconsistent with the section or the court grants a party an extension up to 60 days upon a finding of good cause – no such extension was requested or obtained in this case.

Furthermore, the Circuit Court Alternative Dispute Resolution Rules (SCRADR) apply insofar as they are not inconsistent with the statute. In 2010, the Court-Annexed ADR Rules mandated physical attendance at the mediation settlement conference. Rule 6(b), SCRADR. The Rules also contained a duty of cooperation. Rule 6(d), SCRADR.

If a party failed to cooperate in ADR, the circuit court could impose sanctions, including "the striking of a pleading." Rule 10(a), SCRADR. The Rules of ADR in effect in 2010 also provided:

> **(b) Sanctions.** If any party or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCP.

Rule 10(b), SCRADR (emphasis added).

Under Rule 37(b)(2)(C), SCRCP, the trial court has the discretion to impose a sanction it deems just, including "an order striking out pleadings... or rendering judgment by default against the disobedient party...." *See also*, *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003) (imposition of sanctions under Rule 37(b) is generally entrusted to the sound discretion of the trial judge, which will not be disturbed absent a "clear abuse of discretion"). The party appealing from the order of sanction carries the burden of proving an abuse of discretion occurred. *Id. See also*, *McNair v. Fairfield County*, 379 S.C. 462, 665 S.E.2d 830 (Ct. App. 2008) (affirming trial court's discretion in striking answer as sanction under Rule 37(b)).

The Pre-Suit Procedure statute also provides, "The circuit court has jurisdiction to enforce the provisions of this section." S.C. Code Ann. § 15-79-125 (D). The circuit court stated it had "inherent" authority to enforce the provisions of the statute and Appellants do not challenge that ruling. However, the circuit court also had statutory authority to enforce Section 15-79-125.

Thus, Section 15-79-125(C) incorporates the existing ADR Rules, which incorporate the sanctions available under Rule 37(b), SCRCP, as a sanction for failing to participate in ADR. Rule 37(b) permits the sanction the circuit court imposed in this case, namely, preventing a responsive pleading. The authority for the court to impose that sanction is both inherent (by virtue of the unappealed ruling below) and through the statute. Accordingly, this Court should affirm the circuit court's ruling.[1]

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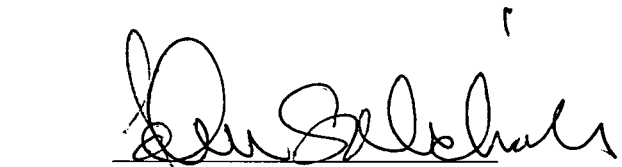
[1] The Court need not address this alternative basis if Appellants' letters did not constitute an answer or "pleading otherwise" so as to avoid default. *See Jennings v. Jennings*, 736 S.E.2d 242, 244 (S.C. 2012) ("[W]hatever doesn't make any difference, doesn't matter.").

CONCLUSION

For the reasons stated, the Court should affirm the circuit court's order denying Appellants' motion to set aside the entry of default.

Respectfully submitted,



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John S. Nichols
SC Bar No. 4210
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599

O. Fayrell Furr, Jr.
SC Bar No. 2246
FURR & HENSHAW
1900 Oak Street
Myrtle Beach, SC 29577
Office: (843) 626-7621

Attorneys for Respondent