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. 2017-CP-26-8184

Jane Doe, ... Appellant,

v.

Crazy Horse Saloon & Restaurant, Inc., d/b/a Thee New Dollhouse and
Dog Leg Right, LLC, ... Respondents.

FINAL REPLY BRIEF OF APPELLANT

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I. The trial court abused its discretion in vacating the default order because there was no factual support to justify a finding of "good cause" much less "excusable neglect."

Respondents appear to be confused. The parties agree the standard of review on the default issue is abuse of discretion. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606–07, 681 S.E.2d 885, 888 (2009) *citing Harbor Island Owners' Ass'n v. Preferred Island Props.*, Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The trial court's decision should not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Id.* at 607 *citing Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162–63, 375 S.E.2d 321, 322–23 (Ct. App. 1988). However, where, as here, the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, ***is without evidentiary support***, this Court will reverse the lower court. *Id. citing In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)(emphasis added).

A. The trial court had no evidence from which it could conclude Respondents should be let out of default because Respondents filed no affidavits with their motion and offered no evidence at the hearing.

Rather than address their own failure to provide *any* evidentiary support for their motion, Respondents spend significant time trying to distinguish between the standard for decision for a Rule 55(c) Motion and Rule 60(b) motion. However, the reality is that they themselves moved to vacate the default judgment *only* under Rule 60(b), (R. pp. 48 – 49), and they failed to support their motion with *any* competent evidence.

Respondents filed no affidavits with their motion and offered no evidence at the hearing. All the trial court had to rely on was the unverified, written motion of Respondents' trial counsel which claimed his clients had turned the properly served Complaint over to their insurance carrier

which failed to answer and subsequently denied coverage. The trial court had no evidence those assertions were true nor did the Respondents provide any actual timeline of what happened other than counsel's statement at the hearing that his clients were informed of the denial of coverage after their time to answer had run. The trial court took counsel's written and oral statement as evidence, (R. p. 101, lines 10 – 15) despite Appellant's counsel pointing out there was no actual evidence offered to support Respondents' assertions. (R. p. 97, lines 7 –8).

"Every trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual view ...." *Harper v. Bolton*, 239 S.C. 541, 562, 124 S.E.2d 54, 64 (1962) (J. Bussey in dissent). *See also e.g.*, *Sessions v. Withers*, 327 S.C. 409, 414 (Ct. App. 1997) (explaining statements of fact appearing only in argument of counsel are not considered evidence); *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695 (Ct. App. 1993) (noting the argument of counsel is not evidence and, standing alone, provides no support for a finding of fact); *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991) (arguments of counsel are not evidence); *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986) (a court cannot consider facts appearing only in argument of counsel.) *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.").

Respondents attempt to excuse their glaring lack of evidentiary support by claiming counsel's Rule 11, SCRCP, duty not to tell untruths to the Court substitutes for the requirement of actual evidence. If this were the case, there would be no need for any affidavits or evidentiary support at any trial or hearing as counsel could merely certify what she or he was telling the Court was true.

Respondents' failure to support their motion for relief from default with anything beyond the arguments of counsel is fatal to their case and, on this basis alone, this Court should find the trial court abused its discretion by granting their motion without any evidentiary basis.

B. Even if Respondents' counsel's statements could be considered evidence, his explanation of what happened in this case falls far short of meeting either the good cause or the excusable neglect standard.

The trial court concluded that because the insurance carrier waited until they let Respondents go into default to deny coverage, Respondents had shown "good cause" and were relieved of the obligation to answer timely. (R. p. 101, lines 9 –20). Again, Appellant points out that Respondents themselves filed their motion only under Rule 60(b), SCRCP and never asked the trial court to apply the Rule 55(c) standard.

However, even if Respondents had moved for relief under the standard their brief now asserts, and assuming *arguendo* that there were some competent evidence in the record to support their claims, Respondents still fall far short of having made a showing of either good cause or excusable neglect.

Respondents sought relief from the default judgment pursuant to Rule 60(b), SCRCP. Rule 60 allows the circuit court to relieve a party from a judgment for "mistake, inadvertence, surprise, or excusable neglect...." Rule 60(b)(1), SCRCP. "In determining whether a default judgment should be set aside under Rule 60(b)(1), '[t]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of [a] meritorious defense, and the prejudice to the other parties are relevant.'" *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993); *Hill v. Dotts*, 547 S.E.2d 894, 345 S.C. 304 (Ct. App. 2001).

Similarly, the Rule 55(c) "good cause" standard requires Respondents to:

> provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a 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. *Wham v. Shearson LehmanBros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989). The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct. App. 1995).

Sundown, 383 S.C. at 607-8 (S.C. 2009). Again, here, Respondents have offered exactly zero evidentiary support for their claims. Moreover, Respondents failed to provide any sort of satisfactory explanation for their failure to answer timely other than their claim they thought their insurance carrier was handling the case for them.

Appellant filed suit in December of 2017, properly served all Respondents and waited for months for a response. Respondents purport to have notified their insurance carrier but took no other steps to defend their rights. (R. p. 92, line 14 – p. 93, line 4). Ninety-four (94) days elapsed between service of the Complaint and Respondents' Motion to Vacate the Default Order. In fact, they waited nearly a month after the Default Order to apply for relief from default. Such a delay can hardly be described as timely.

Respondents proof of a "meritorious defense" consisted entirely of the trial court asking Respondents' counsel if there was a meritorious defense and him saying, "Yes, sir. … It involves cameras. And I've been dealing with this matter for a while, so there is a meritorious defense in this …." (R. p. 93, line 22 – p. 94, line 2). In Respondents' brief, they attempt to bolster their claim of a meritorious defense by asserting their general denials in their belatedly served Answer constituted a meritorious defense. In so arguing, they cite *Savage v. Cannon*, 204 S.C. 473, 480 (S.C. 1944), which is an antiquated case whose ruling has been explicitly superseded by statute as

discussed in *Hillman v. Hillman*, 347 S.C. 253, 257 n. 4 (S.C. Ct. App. 2001) ("*Savage* arose under § 495 (1942) which was later repealed and replaced by Rule 60, SCRCP.") Even if *Savage* were still good law, it would not help Respondents' cause because, in that case, there was actual sworn testimony offered and the proffered answer had been verified under oath by the defendants as true. No such sworn testimony exists in this case and, again, Respondents cannot merely rely on the bald assertions of counsel to support their claims.

On the issue of prejudice, Appellant's counsel argued prejudice from not only the delay caused by Respondents' failure to answer timely or move timely to be let out of default, but he took issue with the quality of the limited discovery responses Respondents are so proud they belatedly sent. Respondents' counsel asserted at the hearing, "I went ahead and answered all of his discovery, all of his requests to admit that he had submitted, which were over 50." (R. p. 100, lines 18 – 20). In response, Appellant's counsel explained, "And he has not answered discovery other than the requests to admit, which was, I deny it." (R. p. 101, lines 7 – 8). Merely denying requests to admit can hardly be described as answering discovery and certainly cannot be described as "immediately furnishing discovery" as asserted by Respondents at page 11 of their brief. Respondents' argument also completed glides over the reality that its argument on the merits at summary judgment turned on the fact that Appellant had been unable to obtain the expected video evidence. That evidence was allegedly put outside of Respondents' control and lost by a third-party vendor and that fact was only disclosed to Appellant a year after their motion to be let out of default. (See R. pp. 83 – 89; R. p. 116). Had Respondents actually responded timely and furnished complete discovery responses, Appellant would have had a far easier time tracking down additional evidence to help prove her case.

Respondents' argument further strains credulity by asserting that none of the cases holding that an insurance company's failure to answer timely is attributable to the insureds apply because, in this case, their insurer failed to retain counsel and later denied coverage. (Respondents' Brief at pg. 12). Nothing whatsoever in the case law draws such a distinction. In *Sundown*, 383 S.C. at 609, 681 S.E.2d at 889, the Supreme Court affirmed a trial court's refusal to set aside a default judgment when an insurance company was notified of a claim and failed to answer on behalf of its insured. There, the Court confirmed that "the law is clear that an attorney ***or*** insurance company's misconduct is imputable to the client." *Id. citing Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994) (observing that an attorney's negligence in failing to answer is imputable to the defendant) and *Roberts v. Peterson*, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987) (recognizing that negligence of an attorney or insurance company is imputable to a defaulting litigant) (emphasis added). All of those cases refer to lack of diligence of either the attorney or the insurance company being attributable to the defendant. Regardless of whether the insurance company failed to act or whether the attorney hired by the insurance company failed to act, either or both failures are directly attributable to the defaulting defendant.

Similarly, Respondents' reliance on the fact that their insurer belatedly refused to provide coverage is also unavailing. In *Hill v. Dotts*, 345 S.C. 304, 311, 547 S.E.2d 894, 898 (Ct. App. 2001), the party failing to answer timely claimed his belief that he was uninsured was a sufficient reason to set aside the default judgment. This Court explicitly rejected that argument finding, "his insured status was not relevant to the allegations set forth in the complaint. Therefore, a mistake concerning the existence of insurance coverage for the accident was not germane to his failure to answer."

Again, even if the Court were to consider Respondents' unsupported allegations that the insurance carrier failed to answer the complaint in this case, it is well established in South Carolina even if the insurance company is at fault for not answering the complaint, that does not meet the even the less restrictive "good cause" standard that would allow a trial court to set aside a default:

> We hold that even assuming that the insurance company was at fault for not answering the complaint, Appellants failed to show good cause. Negligence of an insurance company is imputed to a defaulting litigant and cannot constitute good cause to relieve Appellants from the entry of default.

Richardson v. P.V., Inc., 383 S.C. 610, 618–19, 682 S.E.2d 263, 267 (2009).

In sum, Respondents have offered zero facts or evident that would establish the timeliness of their motion, that they had a meritorious defense, or that the delay had not prejudiced Appellant. Respondents' only excuse is that they believed their carrier "was handling it" but they took no steps to confirm their interests were being represented. Their unjustified assumption that some third party was acting on their behalf does not and should not qualify as excusable neglect or good cause to set aside a default judgment. Because Respondents have established no entitlement to relief, this Court should reverse the trial court's order vacating the default judgment.

II. The trial court should not have granted Respondents' Motion for Summary Judgement where there were materials questions of fact still to be resolved and discovery was incomplete at the time of the hearing.

At the time of the summary judgment hearing in April of 2019, discovery was still underway. Though Appellant had served discovery at the commencement of the case in December of 2017, and had asked for records of the subscribers to the live feed of the locker room sold by Respondents, Respondents did not tell Appellant until March 13, 2019 that those records were held by a third-party. (This was a few weeks after Respondents filed their generic motion for summary judgment with no supporting evidence or argument.) At the motion hearing, without any prior

memorandum being filed or notice to Appellant, Respondents suddenly argued that they could not be blamed for the destruction or loss of evidence done by a third party. Respondent was never able to subpoena a representative of the third party nor was she permitted to pursue her potential claims for spoliation of evidence or investigate the relationship between Respondents and the third-party. Despite the protestation of Appellant's counsel at the hearing and in his motion to alter or amend, Respondents inexplicably claim this issue has not been preserved for review. Their preservation claim ignores the clear evidence in the record of this issue being brought squarely before the trial court. (R. p. 113, line 18 – p. 114, line 3; p. 116, line 16 – 23; R. pp. 88 – 89).

The heart of Appellant's case rests on her allegation that Respondents individually, and by and through their agents, employees, servants, and/or independent contractors, surreptitiously videotaped her while undressing within the changing rooms at the club and disseminated the illegal and unauthorized video(s) on the World Wide Web for profit. (See R. pp. 22 – 26, ¶¶ 8 – 20, 24, 26 – 31, and 33 – 40). At summary judgment and here in this Court, Respondents rely almost exclusively on the fact that Appellant has not yet been able to confirm her belief that Respondents broadcast her image in various stages of undress. (Respondents' Brief at pg. 15). They ignore the fact that they themselves refused to provide in discovery the names of people who may have seen her live streamed and they delayed over a year after filing to ever allege the recordings and evidence demanded were in the control of a third party.

South Carolina law is abundantly clear that summary judgment is not appropriate where the non-moving party has not a full and fair opportunity to complete discovery. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69, 74 (1999). Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. "This means, among other things, that summary judgment must not be granted until the

opposing party has had a full and fair opportunity to complete discovery." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002) *citing Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Given the incomplete state of discovery and Respondents' intentional withholding of vital evidence, summary judgment was not appropriate and this Court should reverse the trial court's grant of summary judgment.

Moreover, Respondents' blithely claim the premature grant of summary judgment on a motion "not technically proper under the rules," (Respondent's Brief at pg. 21), did not prejudice Appellant. Again, Respondents ignore the fact that they themselves refused to provide in discovery the names of people who may have seen Appellant live streamed nude or in various stages of undress and they delayed over a year after filing to ever allege the evidence in the control of a third party. This delay deprived Appellant of the opportunity to investigate Respondents' self-serving assertions and to bring her case in the ordinary course of litigation.

As to the substance of Appellant's claims, the testimony of Appellant, which must be viewed in the light most favorable to her, establishes that she would regularly change clothes in the "entertainer dressing room," that she would put her make-up while changing in the "entertainers dressing room," that she would wait in line to be inspected by the house mother and have other entertainers help her put her outfit on while in the "entertainers dressing room," indicating that she would have been naked or partially naked while in the "entertainers" dressing room from where the live feed was streaming. Whether Appellant's testimony together with the evidence she is able to develop is sufficient to prove that it was more likely than not that images of her naked or partially undressed were transmitted to the public via the worldwide web without her consent is a question of fact that must be decided by a jury. The trial court should not have granted Respondents' motion for summary judgment.

CONCLUSION

In summation, what Respondents are really asking this Court to do is to affirm their belief that the laws and rules do not apply to them. First, Respondents urge the Court to ignore the long-standing body of case law that says defendants are not excused from having to answer timely if their insurance company fails them. Then they ask the Court to accept their attorneys' arguments as evidence despite the large body of case law stating arguments of counsel are not evidence. Then they ask the Court to ignore the requirement that a defendant tell the plaintiff ahead of time what the bases for a summary judgment motion will be and the requirement that discovery be completed prior to a grant of summary judgment. Then, finally, they demand the Court ignore the testimony of Appellant herself about the merits of her case and the other relevant testimony to find there is not a scintilla of proof as to their liability. This Court should hold Respondents to the same standards and rules it has applied to countless other defendants and should reverse the trial court's order vacating the default judgment; or, in the alternative reverse the trial court's order granting Respondents' motion for summary judgment.

Respectfully submitted:

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CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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