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-26-0659
Appellate Case Tracking No. 2012-212373

Jane "RM" 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.

MOTION TO STAY AND CONSOLIDATE

The Court has advised that this case will be heard on May 9, 2013. Pursuant to Rule 240 (motions generally) and Rule 263 (time), SCACR, the respondent requests that this appeal be held in abeyance until counsel has perfected the appeal in another case, and that the two cases be consolidated for decision. The related case is *Jane "AP" Doe v. Omar Jaraki et al.*, and bears Appellate Case Tracking No. 2012-212812.

These are companion cases. Both were initiated in January 2010, and both involve allegations of sexual assault against Appellant Dr. Omar Jaraki. In both cases, the defendants were held in default. In both appeals, the defendants are making similar

arguments as to why they believe the circuit court erred in refusing to relieve them from default. The appellants' briefs for each case are attached to this motion as **Exhibit A**. The respondents' briefs are attached as **Exhibit B**.

Though these cases are very similar, they have proceeded through the briefing process on different schedules; while the *RM Doe* case is fully-briefed and ready for argument, the initial briefing in the *AP Doe* case only recently concluded and the deadline for serving the record is April 19, 2013.

Because the cases present identical issues, the Respondent respectfully submits that hearing them together would conserve the court's and the parties' resources.

Respectfully submitted,

April 1, 2013

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Exhibit A

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Appeal from Horry County
Benjamin H. Culbertson, Judge

Case No. 2012-212373

Jane RM Doe, Respondent

v.

Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology and Arrhythmias Consultant, Institute of Electrophysiology, P.C.

Of whom Omar Jaraki and Halla Jaraki are the Appellants

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

III. DID THE TRIAL COURT COMMIT ERROR AND ABUSE ITS DISCRETION WHEN IT RULED THAT THE LETTER APPELLANTS SENT SEEKING ADDITIONAL INFORMATION ABOUT THE IDENTITY OF THE RESPONDENT DID NOT CONSTITUTE AN ANSWER OR "OTHERWISE DEFEND" PURSUANT TO S.C.R.C.P. 7 & 55?

IV. DID THE TRIAL COURT COMMIT ERROR AND ABUSE ITS DISCRETION WHEN IT RULED THAT THE APPELLANTS HAD FAILED TO ESTABLISH GOOD CAUSE TO BE RELEIVED FROM DEFAULT JUDGMENT PURSUANT TO S.C.R.C.P. 60?

STATEMENT OF THE CASE

Respondent initiated this action on January 27, 2010, with the filing of a summons and complaint alleging causes of action for assault; battery; intentional infliction of emotional distress; negligent infliction of emotional distress; invasion of privacy; breach of contract; breach of fiduciary duty; unfair trade practices; negligent supervision; and spoliation of evidence. **R. 7**. The summons and complaint were served on Appellant Omar Jaraki, M.D. on February 26, 2010; and they were served on Appellant Halla Jaraki on March 5, 2010. On April 30, 2010, respondent filed an affidavit of default along with her notice of motion and motion for default judgment. **R. 152**. The Clerk of Court for Horry County filed an entry of default therewith. On November 3, 2010, a damages hearing was held before the Honorable Benjamin H. Culbertson, Judge, and a judgment was entered in the amount of $100,000.00 in actual damages and $100,000.00 in punitive damages. **R. 116.** On November 22, 2010, a motion to be relieved from default judgment was filed by the Appellants and on November 30, 2010, an amended motion for relief from default judgment was filed. **R. 17.** A hearing on the amended motion for relief from default judgment was held before Judge Culbertson on May 21, 2012. On even date therewith Judge Culbertson denied the Appellants' motion and awarded damages in the amounts above stated.

Notice of Intent to Appeal was timely filed and this appeal follows.

ARGUMENT I

The trial Court committed error and abused its discretion when it ruled that the letter Appellant's sent seeking additional information about the identity of the plaintiff did not constitute an answer pursuant to S.C.R.C.P. 7 or otherwise defend pursuant to S.C.R.C.P. 55. (Issue 1)

This is in the nature of a medical malpractice action. From January 2007 through February, 2008, Respondent came to Dr. Jaraki's medical office on a weekly basis, **R. 55, lines 1-6**, for treatments related to heart problems. Early in that process, while placing EKG leads on Respondent's chest, Respondent claims that Appellant, Omar Jaraki, "cupped" her breast and felt her nipple inappropriately. **R. 36**. She didn't report this however until the following Spring, 2008, when she learned another patient had made a claim against the Appellant. **R. 101, lines 19 – 23**. Respondent filed suit for multiple causes of action. Before Respondent's counsel filed an affidavit of default and default judgment had been entered, Appellants filed and mailed a letter to Respondent's counsel within 30 days asking for identifying information about the plaintiff. **R. 157-159**. Appellants argued that the letter constituted an answer and "otherwise defended" the action, and alternatively, that good cause existed for granting relief from default. The Court denied Appellants' relief. **R. 121, line 3 – R. 124, line 20**.

STANDARD OF REVIEW

A trial court's ruling on a motion for default judgment is reviewed under an abuse of discretion standard. *Logan v. Civil Serv. Comm'n of City of Memphis*, No. W2007-00324-COA-R3-CV, 2008 WL 715226, at *10 (Tenn. Ct. App. Mar. 18, 2008).

Background

Plaintiff initiated this matter with the filing of a summons and complaint alleging several causes of action against the Appellants, all of which stemmed from an alleged improper touching of Respondent's breast by defendant, Omar Jaraki, during a medical examination.[1] Respondent testified that Dr. Jaraki "cupped" her breasts and played with

[1] Defendant Omar Jaraki is a cardiologist and practiced medicine in Horry County under the siness names *Cardiology & Arrhythmia Consultants*; *Cardiology and Arrhythmias Consultant*;

her nipples while attempting to place test leads on her chest for an EKG. **R. 36.** Respondent testified that she thought the proper way to lift the breast was to use either the side of the hand or the back side of the hand while lifting. She learned this later after a nurse from a different office lifted her breast with the side of her hand in order to place the EKG leads on her body. **R. 76, lines 4-9** . She stated that Dr. Jaraki would "cup" her breast to lift it in order to place the leads for the EKG underneath. **R. 76, line 17** id. The basic difference is that with Dr. Jaraki she had no cloths on her top, while the nurse felt underneath her top garment. Id. Respondent's counsel described how Respondent demonstrated for the Court the lifting of her breast for the EKG lead placement. **R. 79, lines 18-20**.

The evidence shows that Omar Jaraki, M.D., was served with the law suit on February 26, 2010. The service affidavit on file with the Court shows that his wife, Appellant, Halla Jaraki, was served on March 5, 2010. The Appellants are originally from Syria. **R. 121, lines 15-16.** Because of that fact, they did not understand Respondent's use of the initials "RM" and the name, "Jane RM Doe." Upon being served with the complaint, they did not understand the identity of the plaintiff, **R. 19** (Dr. Jaraki Affidavit paragraph 4), so they sought additional information about the plaintiff's identity. Appellants wrote a letter to plaintiff's counsel on March 24, 2010, which was within the 30 day period of time following Dr. Jaraki's receipt of the summons and complaint. A copy of the letter was filed with the clerk of court on April 1, 2010. **R. 157** (Id. paragraph

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and the *Institute of Electrophysiology, P.C.*. Defendant Halla Jaraki is the wife of Omar Jaraki and has worked in her husband's medical practice as a member of his support staff.

6). Plaintiff's counsel has stated, however, that he did not receive the letter.[2]

Defendants' affidavits show that they were confused by the captioning of the case which included a plaintiff by the name of "Jane RM Doe." Defendants knew that they had never treated any patient by such a name so they wrote a letter asking for additional information concerning the identity of the plaintiff. Moreover, defendant, Omar Jaraki had been sued before and that plaintiff had used a proper name, thus, he was not familiar with the "John Doe" designation in the litigation setting. **R. 19** (Affidavit of Dr. Jaraki at paragraph 3). Dr. Jaraki's letter stated

> I have to have the following to identify your plaintiff correctly if he or she existed in our records. I do not find anybody by name Jane RM Doe. I need the following and every item of the following: Name; Address; Date of Birth; Social security number; a copy of the driver license To positively identify your plaintiff due to the sensitive nature of medical records. Until I receive all the above information about this matter I cannot answer any further question.

R. 157. (Letter dated March 24, 2010).[3] A second identical letter was clocked in the clerk's office the same date and bore both Appellants' signatures. **R. 26.** Halla Jaraki stated in her affidavit that she mailed the letter to Respondent's counsel. **R. 23**.

On April 30, 2010, Respondent filed her Affidavit of default and her Notice of Motion and Motion for Default Judgment, and an entry of default was filed by the Clerk

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[2] A review of the Court file in the office of the clerk of court shows that the letter was not placed in the file even though it was clearly clocked with the clerk's office on April 1, 2010. There is no evidence at this point to explain why the letter was not in the Court's file at the time plaintiff filed its affidavit of default.

[3] See 42 U.S.C. § 1320d-1320d-9; and The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules

of Court. On August 16, 2010, **R. 151 – 152**; the clerk's office mailed an Order Disposition of Motion clocked August 12, 2010 to Respondent's counsel.

On September 20, 2010 a letter was mailed from Dr. Jaraki to Respondent's counsel again asking for information about Jane RM Doe, denying that he could find information about this person. **R.158.** A letter was also sent from Halla Jaraki asking for information about patient Jane RM Doe and further denying that she could find such a patient in the office records. On September 29, 2010 a Notice was mailed to Halla Jaraki regarding the motion and default judgment. **R. 161**. On October 28, 2010 a letter from Respondent's counsel to the Appellants was mailed stating that the two letters from September 20, 2010 were never received by his office. **R. 160**. Additionally counsel provided a patient number for the plaintiff regarding her identity. The mailing also included notice of the damages hearing to be held on November 2, 2010. **Id.**

On October 29, 2010 a letter was mailed and filed by Halla Jaraki stating, "A response to the above legal action was submitted to the court and your office on April 1, 2010..." Judgment was entered on November 3, 2010 in the amount of $100,000.00 actual damages and $100,000.00 punitive damages. The following day, on November 4, 2010, after having hired counsel, the Appellants filed formal answers. **R. 123, lines 8-10**. On November 22, 2010, Appellants filed their Motion to be relieved from default judgment. An amended motion was filed on November 30, 2010.[4] **R. 16.** A hearing was held on May 21, 2012 on the amended motion for relief from default judgment. Appellants argued that the letter was "an answer, a responsive pleading that was filed basically denying the allegations in the complaint...." **R. 124, lines 10 – 12**. Additionally,

[4] The initial motion for relief cited grounds enumerated in "Rule 60(b)." The amended motion cited "Rule 60(b)(1) including mistake, inadvertence, surprise, or excusable neglect."

Appellants argued that the timeliness of the motion and Dr. Jaraki's denial of the allegations warranted relief from default judgment pursuant to Rule 60. Id., **R. 124, lines 17 - 20**. Judge Culbertson heard the motion and denied the same from the bench, indicating at that time that a form 4 order would be forth coming. That order was filed May 29, 2012. **R. 1.** We submit that the Court committed error in both respects.

Discussion

S.C.R.C.P. 7 governs pleadings. This rule states in part

> [t]here 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).

When the summons and complaint were served on the defendants, they responded in writing with a letter requesting additional identifying information about the plaintiff. **R.** 157. This was not unreasonable given the privacy concerns of medical patients and responsibilities had by treating physicians. We submit that Appellants' writing must be treated as an answer.

As for treating the Appellants as being in default, S.C.R. C.P. 55 states in part

> (a) 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. We submit that the written letter from the Appellants to the Respondent's counsel and filed with the Court constitutes an answer as contemplated by Rule 7 and it was an attempt to "otherwise defend" the action.

The phrase `otherwise defend' is not defined ... but is generally considered to 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. ... "A default by a defendant consequently arises only when the defendant has failed to contest the allegations raised in the complaint," making default judgment proper against the defendant when "liability has been admitted or `confessed' by the omission of statements refuting the plaintiffs claims." *Equable Ascent Fin, LLC v. Christian*, 196 Ohio App.3d 34, 962 N.E.2d 322 (2011); and see cases collected and cited therein: *Heritage Realtors v. Kahmann* (Apr. 26, 1993), 12th Dist. No. CA92-09-082, 1993 WL 128116 (deciding that by contesting the case through a motion for change of venue, the defendant had "otherwise defend[ed]" so as to avoid default judgment); *Murphy v. Alhajj* (June 3, 1999), 8th Dist. No. 74198, 1999 WL 359197 (determining that the defendant's motion to consolidate three small-claims cases and transfer them to the general division of the civil docket, to which the defendant attached an affidavit from his attorney explaining why the plaintiff was not entitled to the money he sought, coupled with the defendant's presence at the first hearing in the small-claims court, "indicated that the complaint was contested," the defendant otherwise defended, and default judgment was not proper); *Stradiot Specialty, Inc. v. Am. Calendar Co., Inc.*, 11th Dist. No. 2004-L-162, 2007-Ohio-3364, 2007 WL 1881309 (stating that a defendant's "motion to dismiss and a motion to transfer the matter to a foreign jurisdiction" as well as the defendant's attempt "to file an untimely answer" and "motion for summary judgment" meant that the defendant had otherwise defended against the plaintiffs claims and "could not be held in default").

Appellants' letter denies that they had treated any such patient as "Jane RM Doe" and thus necessarily denies the whole of the allegations made against them in the Respondent's complaint. **R. 157.** Thus it is unreasonable to conclude that they were not contesting the validity of the complaint's allegations. The trial Court's ruling constitutes an abuse of discretion we respectfully submit.

Thus it was error for Respondent's counsel to file an affidavit of default and it was error for the clerk of court to enter a default against the Appellants.

ARGUMENT II

The trial Court committed error and abused its discretion when it ruled that the appellants failed to establish good cause to be relieved from default judgment pursuant to S.C.R.C.P. 60. Issue II.

STANDARD OF REVIEW

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id.* "An abuse of discretion occurs when 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." *Id.* at 607, 681 S.E.2d at 888. *White Oak Manor, Inc. v. Lexington Ins. Co.*, 394 S.C. 375, 715 S.E.2d 383 (Ct.App. 2011)

Discussion

Traditionally, the law governing relief from default judgment has been "...liberally construed to see that justice is promoted and to strive for disposition of cases

on their merits. The element of discretion given to the trial judge makes it clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default. 10 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, § 2685. *Ricks v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535 (Ct.App. 1987). Compare "We favor trial of issues on merit over securing judgment by slight technicalities." *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 339 S.E.2d 524 (Ct.App. 1986)

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. Rule 60(b), SCRCP. 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 reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party. *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App. 2001). "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App. 1991). Rodriguez v. Gutierrez 391 S.C. 323, 705 S.E.2d 94 (Ct.App. 2011)

In Appellants' case, the promptness element is satisfied because Appellants were communicating with the Respondent within the 30 day window within which to respond. Moreover, they immediately sought relief from the default judgment within days of being notified about it. Appellants acted promptly. However, there are reasons for failure to file a formal response without using caution. There was confusion caused by the use of the plaintiff's initials and the fact that Appellant is a medical provider who is subject to the

privacy constraints of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules.[5]

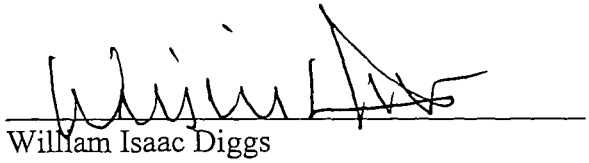
But for the Respondent's use of plaintiff's initials, the Appellants would have had no confusion about the matter. The appellants deny fully the Respondents allegations. **R. 27** (Proposed Answer). Thus, there is a meritorious defense. Lastly, there is no prejudice to the Respondent. No position would have changed by the time a trial could be had on the merits.

CONCLUSION

For the foregoing reasons the Appellants' request for relief from default should be granted. The trial court's ruling should properly be reversed and the case remanded and the defendants be permitted to file their proposed responsive pleadings.

Respectfully submitted,

LAW OFFICES OF WILLIAM ISAAC DIGGS



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ATTORNEYS FOR THE APPELLANTS

This 14 day of December, 2012
Myrtle Beach, South Carolina

[5] HIPAA permits release of records "in response to a subpoena, discovery request, or other lawful process." 45 C.F.R. § 164.512(e)(1)(ii). Mezu v. Morgan State University, 11-2396 (4th Cir. 9-14-2012)

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Of whom Omar Jaraki and Halla Jaraki are the Appellants

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

The trial Court committed error and abused its discretion when it ruled that the letter Appellant's sent seeking additional information about the identity of the plaintiff did not constitute an answer pursuant to S.C.R.C.P. 7 or otherwise defend pursuant to S.C.R.C.P. 55, or constitute "good cause" and ultimately excusable neglect under Rule 60. (Questions I and II).

Appellants would respectfully submit that the respondent has misperceived the nature of the argument being made in this appeal. Appellants assert that aspects of Rules 7, 55, and the concept of "good cause" should properly go into the decision making process of whether *excusable neglect* has been shown pursuant to S.C.R.C.P. 60. We argue that the foregoing concepts should be taken into consideration when making a determination of excusable neglect. **R. 123, lines 12-15.**

Synopsis of Reply

Default judgment is the end of a continuous timeline from the service of the complaint. The judgment includes the failure to timely answer or to otherwise defend the action. It includes the notation of default by the clerk of court. And it ends with the entry of default judgment by the Court. The default judgment, therefore, is not divorced from the notions of "an answer" as contemplated by Rule 7, or "good cause" and "default" as those concepts are contemplated by Rule 55. The phrase "good cause" as used in Appellants' question number "II" is used as a stepping stone to the Rule 60 analysis of excusable neglect. Thus, we argue that the correspondence presented by Appellants in response to the service of the complaint, and the initials "RM" as used by the Respondent in the case caption, gave rise to the presence of "good cause" as contemplated by Rule 55

due to confusion. Had the Appellants had the opportunity to argue *good cause* at the initial default stage prior to the entry of the default judgment, they could likely have persuaded the court to grant relief. No facts changed with the entry of default judgment. The letters were still part of the case; and the initials "RM" were still in the case caption. Appellants argue that these facts cannot be divorced from the timeline of events which gave rise to the entry of the default judgment as opposed to the entry of default.

Appellants have argued that all of the foregoing elements are present in this case and they combine together to satisfy the requirements of Rule 60 and its "excusable neglect" element. Just as Appellants argued concepts from Rules 7 and 55 in Question I, they have argued *good cause* in Question II as being part of, and combining to meet, the requisite showing of excusable neglect required by Rule 60.

We are aware that *good cause* is the standard which must be met when seeking relief from default under Rule 55. Likewise, we are aware that a showing of *excusable neglect* is one of the requirements for obtaining relief from default judgment under Rule 60. See Brief of Appellants at pages 13 – 14, citing *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App. 1991); and *Rodriguez v. Gutierrez*, 391 S.C. 323, 705 S.E.2d 94 (Ct.App. 2011).

Discussion

Appellants Omar and Halla Jaraki were served on February 26, 2010, and March 5, 2010, respectively. Dr. Jaraki sent his letter to plaintiff's counsel on March 24, 2010, which was within the thirty (30) day window required for a timely response[1]. Thirty days thereafter, plaintiff's counsel filed the notice of motion and motion for default judgment and an entry of default was entered on April 30th, 2010, by the Clerk of Court. **R. 132.**

[1] These letters were filed with the Clerk's office on April 1, 2010.

Regarding respondent's argument that the issue is not preserved, See Brief of Respondent at page 6, Appellants would respectfully suggest that the argument presented in the Appellants' brief has again been misperceived. This is a *Rule 60* motion case addressing the concept of "excusable neglect." However, our analysis of this issue encompasses the preceding steps in the process which led to the point of the entry of the actual judgment. It incorporates considerations of Rules 7, 55, and the concept of "good cause" and how those rules could or should impact or reflect upon the decision making process relative to the concept of "excusable neglect." We are not addressing procedural rules with respect to their own application, but we are attempting to build an example of excusable neglect by combining what transpired in this case prior to the entry of the default judgment.

A default judgment had been entered in this case *before* the motion for relief had been filed. Rule 52 in its purest form addresses factual findings and conclusions of law based thereon. It establishes a framework whereupon a party may challenge a trial court's omission of issues(s) argued at trial but left unaddressed by the final judgment.[2] However, subsection (e) of Rule 52 eliminates the need for specific findings of fact and conclusions of law in a Rule 12 motion setting. S.C.R.C.P. 52(e) states, "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or

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[2] Rule 52 states in its pertinent part, "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58.... Sub section "b" addresses "Amendment." The rule states, " Upon motion of a party ***made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly, and the motion may be made with a timely motion for a new trial.*** Emphasis added.

any other motion except as provided in Rule 41(b)."

Appellants' case is in the nature of a Rule 12 issue because in their letter to plaintiff's counsel before the default was ever entered by the Clerk of Court, they were asking for a more definite statement, to wit: the name of the plaintiff and other pertinent identifying information. To raise the issue at that time under Rule 52, however, Appellants were required to make their motion within 10 days of the entry of the judgment. They missed that deadline which would have run on May 10, 2012, and therefore the applicability of Rule 52, and such a motion, becomes irrelevant to the matter at hand in terms of preservation of the issue for appellate review. Respondent cites no authority for its interpretation of this aspect of Rule 52. The case of *McMaster v. Columbia Bd. Of Zoning Appeals,* 395 S.C. 499, 719 S.E.2d 660 (2011) at note 3, cited by Respondent, certainly doesn't address Rule 52. It was a Rule 59 case pure and simple which merely confirmed the procedural necessity of making a motion to point out that the trial court didn't address a specific defense in its final order that might have been pled in the case (equal protection and privacy challenges to the Ordinance in that instance) for appellate review to be had of that issue. 395 S.C. 499, 508.

Appellants are asserting here that considerations presented by Rules 7, 55, and "good cause" for relief under Rule 55, may and should in this case, affect a trial court's consideration of whether "excusable neglect" has been shown by Appellants under Rule 60. Perhaps not in their own right do the letters sent by Appellants to Respondent's counsel constitute a formal answer, but it is reasonable to assert that the letters do properly belong in a chain of events which are designed to "otherwise defend" the allegations made in this case by plaintiff "RM." We argue that the letters should be part

of the determination of whether "excusable neglect" has been shown by the Appellants in this case and the trial Court was wrong to hold otherwise.

That brings us to Respondent's argument that Appellants did not preserve the issue for review because they didn't file a motion pursuant to Rule 59. We submit that Rule 59 may have application with respect to a reconsideration of the order denying relief from default judgment under Rule 60 only. Cf *McClurg v. Deaton,* 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2009)[3] To the extent Respondent's argument can be construed contrary to this conclusion, we submit respectfully, counsel for respondent is in error.

Thus Appellants present an S.C.R.C.P. 60 case. When Appellants filed their motion for relief, it was based on S.C.R.C.P. 60(b). The motion read in pertinent part, "Said motion is based on the grounds enumerated in S.C.R.C.P. 60(b)(1) including mistake, inadvertence, surprise, or excusable neglect." At the motion hearing, counsel for Appellants argued,

> [the letter] was a – an answer, a responsive pleading that was filed basically denying the allegations in the complaint and the complaint goes back really and complains of inappropriate touching . . . . That was denied by Dr. Jaraki and we would submit that it would squarely fall, that the facts of this case within the scope of Rule 60 and warrant relief from the default judgment in this case….

R. 124, lines 10 - 18.

Appellants were arguing that the letters they filed were a responsive pleading,

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[3] In McClurg v. Deaton, supra, Deaton moved to set aside the default judgment pursuant to Rules 60(b)(1) and 60(b)(3) of the South Carolina Rules of Civil Procedure. New Prime filed a motion to intervene and likewise moved to set aside the judgment pursuant to Rules 60(b)(1) and 60(b)(3). The trial court granted New Prime's motion to intervene, but denied both New Prime's and Deaton's motions to set aside the default judgment. Both New Prime and Deaton made motions for reconsideration pursuant to Rule 59(e), SCRCP, which the trial judge denied with the exception of deleting some language from the order not at issue in the appeal. 380 S.C. at 569.

and that they were otherwise defending the action, that they were seeking a more definite statement, that they constituted good cause - - all at the same time. Appellants were asserting that this series of events constituted more than *good cause* under Rule 55, and thus, simultaneously under the facts of this case, constituted excusable neglect under Rule 60.

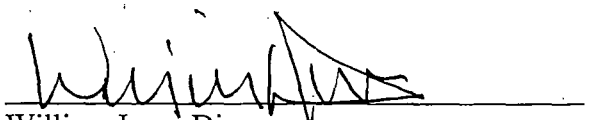
Appellants did not neglect this action. They affirmatively sought to determine the identity of the plaintiff and upon hiring counsel, filed answers which directly denied the accusations contained in the complaint. **R. 27**. This case, and the nature of the allegations contained in the complaint, demand to be tried on the merits of the matter.

CONCLUSION

For the foregoing reasons the Appellants' request for relief from default judgment should be granted. The trial court's ruling failing to find excusable neglect should properly be reversed and the case remanded and Appellants be permitted to file their proposed responsive pleadings.

Respectfully submitted,

LAW OFFICES OF WILLIAM ISAAC DIGGS



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ATTORNEYS FOR THE APPELLANTS

This 14 day of December, 2012
Myrtle Beach, South Carolina

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 Arrhythmias Consultant, Institute of Electrophysiology, P.C.,

Defendants

Of Whom

Omar Jaraki and Halla Jaraki, are

Appellants

INITIAL BRIEF OF APPELLANT

William Isaac Diggs
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ATTORNEY FOR APPELLANTS OMAR JARAKI AND HALLA JARAKI

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II. May defendants' failure to follow the pre-suit mediation process set out at, inter alia, S.C. Code Ann. §15-79-125, constitute a basis for the Trial Court to prohibit the filing of a responsive pleading or otherwise allowing the defendant to defend against the action in a subsequent law suit?

STATEMENT OF THE CASE

On January 15, 2010, in case 2010-CP-26-395, Plaintiff filed a Notice of Intent to File Suit pursuant to S.C. Code Ann. §15-79-125. The complaint named *Jane AP Doe* as the plaintiff. Counsel did not use the party's real name. On May 14, 2010, an "Order Terminating Pre-litigation Mediation" from mediator John Breeden issued. On June 11, 2010, the civil action *Jane AP Doe v. Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology & Arrhythmias Consultant and Institute of Electrophysiology, PC,* was filed and given case number 2010-CP-26-5146. On October 12, 2010, an affidavit of default was filed by plaintiff's counsel. On November 22, 2010, a motion for relief from default was filed by defendants. On March 7, 2011, a hearing was held on defendant's motion for relief. On March 10, 2011, a form-Order/Disposition of Motions-was filed denying defendants' motion and granting plaintiff's motion for default. A written order denying the motion for relief was entered May 20, 2011. On June 2, 2011, Appellants filed a timely Motion to Reconsider. A Form 4 Order denying Appellants' motion to reconsider was entered August 17, 2011 and an Appeal was taken. Following an objection by Respondent this Court dismissed the appeal on December 8, 2011, as interlocutory.

A damages hearing was held on April 9, 2012, before the Honorable Benjamin H. Culbertson, Judge. At that hearing Judge Culbertson awarded Respondent damages in the amount of $179,090.00. A Form 4 Order affirming the award was entered on April 10, 2012. Appellants filed a motion for clarification on or about April 19, 2012, seeking a determination of whether the damages were actual, or punitive, or a combination thereof. On July 26, 2012, Judge Culbertson signed an order of July 26, 2012, stating that the

damages awarded were "actual" damages.

ARGUMENT I

I. The letters filed by the defendants with the Clerk of Court were answers, or at minimum, constituted steps which Appellants took to "otherwise defend" this action and were therefore legally sufficient to avoid default under S.C.R.C.P. 55. (Question I)

In this argument, Appellants assert that letters they sent to plaintiff's counsel within the thirty (30) day period following the date of service of the complaint, seeking additional information about the identity of the plaintiff, were legally sufficient to constitute a responsive pleading. Moreover, the letters indicated that the Appellants had undertaken efforts to "otherwise defend" the action in order to avoid default under S.C.R.C.P. 55. Lastly, when the identity of the plaintiff had been properly disclosed, the Appellants needed assurances that they had the requisite permission to discuss Respondent's medical records with their own counsel.

Background

A. The Notice of Intent to File Suit: Case 2010-CP-26-395

This is a medical malpractice case filed by Respondent. Initially, on January 15, 2010, Plaintiff filed a Notice of Intent to File suit pursuant to S.C. Code Ann. §15-79-125. **R. ___**. The filing was given case number **2010-CP-26-395**. Additionally Plaintiff filed answers to rule 33(b) standard interrogatories.[1] Counsel did not use the plaintiff's real name, but rather he used the name *Jane AP Doe.* This "pre suit" filing case number, **395**, was different from the case number given the law suit which was subsequently filed

[1] When naming his first potential witness in the interrogatory responses, plaintiff's counsel wrote: "Jane AP Doe. Plaintiff in this action. Her expected testimony is in accordance with the facts known and damages sustained." Thus, this "disclosure" provided nothing by way of information regarding plaintiff's identity.

on June 11, 2010. The actual law suit was given case number 2010-CP-26-**5146**. On March 24, 2010, in case 2010-CP-26-395, plaintiff's counsel sent a letter sent to the Appellants giving them notice of mediation pursuant to S.C. Code Ann. §15-79-125. **R. ___**. The date which had been set for mediation was April 27, 2010. This correspondence predated Appellants' learning of the identity of the plaintiff. Appellant, Halla Jaraki, stated that on April 1, 2010, in case 2010-26-395, she filed a letter she had sent to plaintiff's counsel asking for information in order to identify the plaintiff correctly.[2] **R. ___**. Mrs. Jaraki told Respondent's counsel that she did not have a patient by the name of *Jane AP Doe* in their data base. In her letter, Appellant requested the name; address; date of birth; social security number; and a copy of the patient's driver's license. Further, in case 2010-26-395, Dr. Omar Jaraki testified by affidavit that he had sent a letter dated March 24, 2010, to plaintiff's counsel asking for the same information requested in the letter sent by Mrs. Jaraki. **R. ___** . Appellants did not attend the mediation on April 27, 2010, as they had not yet learned even the identity of the plaintiff by that date.

After the scheduled date for mediation had passed, on May 3, 2010, Respondent finally sent a letter to Appellants providing the actual name of the plaintiff: *Amanda Peele.* **R. ___.** This was in response to Appellants' letters asking for the name of the plaintiff. This letter referenced case *2010-26-CP-395*. On May 14, 2010, an "Order Terminating Pre-litigation Mediation," was signed by mediator John Breeden. R.___. Respondent did not offer to mediate the case again after disclosing the identity of the plaintiff.

B. The Law Suit: Case 2010-CP-26-5146

[2] Though filed on April 1, 2010, the letter was actually dated March 31, 2010. R. ___ .

On June 11, 2010, civil action *Jane AP Doe v. Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology & Arrhythmias Consultant and Institute of Electrophysiology, PC,* was filed. This filing was given case number *2010-CP-26-5146.* This action was served on Dr. Jaraki on June 28, 2010; **R.** ___ , and it was served on Mrs. Jaraki the next day on June 29, 2010. **R.** ___ . On July 9, 2010, eleven (11) days after service, a letter from Dr. Jaraki to plaintiff's counsel was filed with the Court (and sent to plaintiff's counsel according to Dr. Jaraki) requesting identification of *Jane AP Doe.* The letter stated that the name; address; date of birth; social security number and a copy of the driver's license were all needed in order to respond to the complaint. **R.** ___ .

It is important to note that this letter was made in reference to action *2010-CP-26-**5146**, **not 395.***[3] Mrs. Jaraki testified by affidavit that she sent a letter seeking the same information to Respondent's counsel. **R.** ___ . It too was filed with the Court. She stated this information was needed in order to identify the patient; it was also necessary due to the sensitive nature of medical records themselves. **Id.** On July 20, 2010, a letter was sent from plaintiff's counsel denying that he received the letters sent by the Jarakis to him in this case. **R.** ___. [4] Contesting this claim by counsel, both Dr. and Mrs. Jaraki filed affidavits stating that they had mailed the letters to plaintiff's counsel.[5] **R.** ___ .

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[3] Respondent has argued that plaintiff's name had been provided to the Appellants by this (July 9th, 2010) date. However, again, Appellants point out that that identification was with respect to civil action **395**. The Appellants did not assume nor did they know that the identity of the complainant in action 395 was one in the same as the plaintiff in civil action 5146. Regardless, Appellants' letter of September 20, 2010, indicates that they were aware of plaintiff's identity and knew they needed her permission to discuss her medical records with defense counsel. **R** ___ .

[4] The July 20, 2010, letter that Respondent's counsel sent to the Appellants was apparently intended to provide the information sought regarding the plaintiff's identification. However, the letter actually confirms that Amanda Peele was the plaintiff in case ***395*** **only.** It fails to state

In his July 20th letter, Respondent's counsel identifies the proper name and identify of the plaintiff in case 5146. However, counsel goes on to state the following:

> For clarification purposes, my client's date of birth is 8/2/66 and your medical record number for her according to your records is 0000362. Any additional information requested on my client will need to be made ***through formal discovery requests. If you have retained legal counsel*** to represent you in this matter, please let me know their name or have them contact me directly.

Emphasis added. It is reasonable to assume that counsel's use of the terms "formal discovery requests" and retained "legal counsel" reminded the reader of the formal nature of the proceedings against Appellants. It also brought to fore applicable rules of discovery and thus, requisite disclosure of confidential medical records of former patients.

On September 20, 2010, Appellant Halla Jaraki sent al letter to plaintiff's counsel *asking for notarized permission from Amanda Peele to discuss her medical record with her "counselors" and any agency or person necessary.* R. ___. The same request was sent from Dr. Jaraki to counsel regarding the confidentiality issue relating to Respondent's medical records. Respondent ignored the requested notarized permission allowing the Appellants to discuss Amanda Peele's medical records with third parties. Rather than responding to that request, plaintiff's counsel filed an affidavit of default on October 12, 2010. **R. ___.** We submit the affidavit erroneously ignored both the communications Appellants had had with Respondent's counsel, and the privacy concerns expressed by Appellants with respect to Amanda Peele's medical records. Also,

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affirmatively, and could have done a better job in confirming, that Amanda Peele was also the plaintiff in case 5146 as well.

[5] The affidavits were made a part of the record before the Court at the hearing had on Appellant's motion for relief from default which was held on March 7, 2011.

the affidavit was factually incorrect.[6] Appellants' letter relating to the identity of the plaintiff was a reasonable and necessary step to take while simultaneously indicating their intent to "otherwise defend" against the allegations contained in respondent's complaint.

C. The Hearing on Relief from Default

On November 22, 2010, a motion for relief from default was filed by Appellants. A hearing was held on March 7, 2011, on defendant's motion. During the hearing, Respondent's counsel told the trial Court that,

> We filed a notice of intent to file suit against the defendants...over a year ago. ***We heard back from the Defendant.*** He did not know who the Plaintiff, who the Plaintiff was by the name, by the caption." . . . And we sent him a letter on March 24, 2010, telling him who the parties were identifying Ms. Peel.

Emphasis added. **R. 3, line 21 – R. 4, line 3**. Thus, at this hearing, counsel miss-spoke. While stating that he had indeed, "heard back from the Defendant" (a position he later ***denied*** by stating he had not received Appellant's letters, see **R. 11, lines 12 – 14)** counsel seemed to say that he had provided identity information prior to the mediation conference date, but not the date of the mediation itself. **R. 4, lines 6 – 8.**[7] This of course is incorrect and a reversal of what occurred. Notice of the date was provided, but not the identity of plaintiff. The trial Judge clearly relied on this erroneous identification timeline, see e.g. **R. 6, lines 14 – 24**, (where Judge Culbertson states, "And he notified him back in March as to whom the Plaintiff was and they required the mediation)."

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[6] Paragraph "3" of the affidavit states in part, "no Answer, Motion or Notice of Appearance has been made therein; and that said Defendants are now in default." The Appellants had "otherwise defended" the action pursuant to S.C.R.C.P. 55 we submit.

[7] Counsel stated, "On May 3, 2010, we sent him a letter advising him that Judge Breeden was going to hold the pre-suit mediation. **R. 4, lines 6 – 8.** The pre-suit mediation was set for April 27, 2010.

Furthermore, Respondent's counsel confused Appellant's counsel as well.[8] Appellants continued to argue that their letters constituted a general denial, **R. 7, lines 4 -5**; and that the Appellants' affidavits established a question of fact in the face of counsel's denial, as to whether the letters were mailed to, or received by, Respondent's counsel. **R. 7, lines 21 – 22.**

Respondent's counsel told the Court that, "we searched the court files every week to see what's going on in these kind of cases and he filed a letter with the clerk's office on July 9th saying he did not know who the client was again." **R. 4, lines 21 – 24.** Thus, Appellants' letters filed with the Court on July 9, 2010, coupled with this statement by Respondent's counsel and his own written response thereto, support the fact that Appellants' letters *were known to, and had been read by, counsel* for Respondent before he filed the affidavit of default.

On March 10, 2011, a Form 4 order was filed denying defendants' motion and granting plaintiff's motion for default. A written order denying the motion for relief was entered May 20, 2011. In the Court's opinion, it is stated,

> The letters filed by the Defendants with the Clerk of Court were not responsive pleadings and therefore the Defendants are in default. Furthermore, this court has inherent authority to enforce the Provision of S.C. Code Ann § 15-79-125 . . . and the Court hereby enforces the requirements of S.C. Code Ann. § 15-79-125 by prohibiting the filing of responsive pleadings.

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[8]Appellants' counsel stated, "I can't speak to that. That generally would be a correct statement, Your Honor. . . ." [Y]ou've got a general denial that was filed with the clerk's office on July the 9th. **R. 6, line 25 – R. 7, line 5.** Subsequently, Appellants' counsel walked back on the "correct statement" acquiescence and he did say he "...was not willing to concede all this knowledge, etcetera, that Mr. Furr imputes to the Jarakis." **R. 8, lines 8 – 9.**

R. ___ . Thus, the trial Court never analyzed this case as to whether "good cause" existed or not with regard to setting aside the entry of default pursuant to S.C.R.C.P 55. The Court stopped its analysis when it found that the letters did not constitute a responsive pleading. Moreover, the Court erroneously diverted the process by interjecting S.C. Code Ann. § 15-79-125, the pre-filing statute dealing with Notice of Intent to File Suit.

Appellants' Motion to Reconsider

On June 2, 2011, Appellants filed a timely Motion to Reconsider. The motion was based on the following grounds:

> (1) The letters filed by the defendants with the Clerk of Court were legally sufficient to avoid default;
>
> (2) Defendants failure to follow the pre-suit mediation process set out at, inter alia, 15-79-125 may not constitute a basis for the Court to prohibit the filing of a responsive pleading; and
>
> (3) notice of the identity of the plaintiff and a willing failure to attend the pre-suit mediation may not constitute a basis for holding the defendants in default under the facts of this case because the Court has (a) interjected a weighing of credibility of the affiants in their respective affidavits in the final order (b) without permitting them to testify in person before the Court at the hearing on relief from default or (c) allowing counsel or the defendants to be heard on the issue of credibility and (d) without notice to the defendants that the Court was going to do so in this instance.

A form 4 order denying Appellants' motion to reconsider was entered August 17, 2011. We submit that the Court erred when it denied Appellants' motion for relief from default and when it denied Appellants' motion to reconsider. The letters were sufficient to constitute a general denial under S.C.R.C.P. 55, and certainly expressed Appellants' intent to "otherwise defend" against the action. Furthermore, the issue of patient

confidentiality exists in this case. For example, may the Appellants discuss plaintiff's medical records with defense counsel? Lastly, Appellants submit that S.C. Code Ann. § 15-79-125 should not have entered into the Court's equation, because it interfered with the Court's analysis of whether good cause had been shown in support of setting aside the default pursuant to Rule 55.

STANDARD OF REVIEW

In *Sundown v. Intedge Industries*, 383 S.C. 601, 607-608, 681 S.E.2d 885 (2009), the Court discussed the standard of review for the setting aside of default under S.C.R.C.P. 55 and 60.

> "Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. This standard requires a party seeking relief from an entry of default under Rule 55(c) 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 Lehman Bros., 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). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App. 1994).

"Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP. The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the "good cause" standard established in Rule 55(c). *Ricks v. Weinrauch*, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct.App. 1987). 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." Rule 60(b), SCRCP. The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default.

We submit that Appellants' letters of July 9, 2010, sufficiently traversed the allegations in the complaint so as to constitute responsive pleadings and a general denial. Even if the letters failed to do so, the Appellants have "otherwise defended" against the action. Moreover, because of federal law privacy concerns, Appellants have shown good cause for their failure to file a timely answer because Respondent (1) did not timely disclose the identity of the Respondent and (2) she never supplied satisfactory assurance that plaintiff had consented to waive privacy interests in favor of Appellants' right to discuss litigation claims with counsel.

Discussion

Defendant Omar Jaraki was a licensed physician and cardiologist practicing medicine in Horry County, South Carolina.[9] Defendant Halla Jaraki is Dr. Jaraki's wife and she assisted him in his medical practice in Conway, South Carolina, in a support staff role. Plaintiff is a past patient of Dr. Jaraki and has filed this action which includes numerous causes of action based on the same conduct which alleges that he improperly sexually penetrated her with his fingers during an office visit.

Prior to the mediation date, Plaintiff had failed to tell the Jarakis that *Jane AP Doe* was not the real name of the plaintiff in this action, and thus not the real name of Dr. Jaraki's patient. Counsel neglected to tell the defendants that the caption contained a *pseudonym or anagram*. The letter of correspondence filed by Dr. Jaraki on July 9, 2010, and which he mailed to plaintiff's counsel according to defendant's affidavit, contains a denial. The letter states referring to his patients' records, in part, "I do not find anybody by name *Jane AP Doe*." We submit this statement by Dr. Jaraki constitutes a denial under S.C.R.C.P. 8, and constitutes an effort to "otherwise defend" against this action as contemplated by S.C.R.C.P. 55. Both Dr. Jaraki and his wife, Halla, are from Syria. They reasonably did not understand plaintiff's use of a pseudonym or anagram such as *Jane AP Doe* to conceal the identity of the plaintiff.

S.C.R.C.P. 8 states in part, "If he [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.***"[10] Emphasis Added. Both letters sent by the Jarakis, that

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[9] Defendant's license to practice medicine has been temporarily suspended pending resolution of allegations which have been made against him of a nature such as those made in this litigation.

[10] Rule 8(b) is entitled "Defenses; Form of Denials." It reads as follows:

of Dr. Jaraki and that of his wife, state that they cannot find such a patient as "Jane AP Doe" in their records. Clearly, we submit, each defendant is stating that he and she lack sufficient knowledge to respond, and this equates with a general denial according to Rule 8. We respectfully submit, it was error for counsel to file the affidavit of default we respectfully submit, and it was error for the trial Judge to hold that Appellants' letters did not constitute a responsive pleading.

Further reason to reverse the lower court's order is that the letters sent by Appellants seeking identity information shows a clear intent to "otherwise defend" against the action as set forth in S.C.R.C.P. 55. This rule states in its pertinent part

> 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. Thus, it is not enough to simply not file an answer. There must be no effort to "otherwise defend" against the action

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A party 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. If he 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. Denials shall fairly meet the substance of the averments denied. 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. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

"The phrase *otherwise defend* is not defined ... but is generally considered to 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. ... "A default by a defendant consequently arises only when the defendant has failed to contest the allegations raised in the complaint," making default judgment proper against the defendant when "liability has been admitted or `confessed' by the omission of statements refuting the plaintiffs claims." *Equable Ascent Fin, LLC v. Christian*, 196 Ohio App.3d 34, 36, 962 N.E.2d 322 (2011); and see cases collected and cited therein: *Heritage Realtors v. Kahmann* (Apr. 26, 1993), 12th Dist. No. CA92-09-082, 1993 WL 128116 (deciding that by contesting the case through a motion for change of venue, the defendant had "otherwise defend[ed]" so as to avoid default judgment); *Murphy v. Alhajj* (June 3, 1999), 8th Dist. No. 74198, 1999 WL 359197 (determining that the defendant's motion to consolidate three small-claims cases and transfer them to the general division of the civil docket, to which the defendant attached an affidavit from his attorney explaining why the plaintiff was not entitled to the money he sought, coupled with the defendant's presence at the first hearing in the small-claims court, "indicated that the complaint was contested," the defendant otherwise defended, and default judgment was not proper); *Stradiot Specialty, Inc. v. Am. Calendar Co., Inc.*, 11th Dist. No. 2004-L-162, 2007-Ohio-3364, 2007 WL 1881309 (stating that a defendant's "motion to dismiss and a motion to transfer the matter to a foreign jurisdiction" as well as the defendant's attempt "to file an untimely answer" and "motion for summary judgment" meant that the defendant had otherwise defended against the plaintiffs claims and "could not be held in default").

A showing of good cause contemplates a lesser standard than the, "... more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or `other misconduct of an adverse party," than setting aside a default Judgment pursuant to S.C.R.C.P. 60(b). *ITC Commercial Funding, LLC v. Crerar,* 393 S.C. 487, 713 S.E.2d 335 (Ct.App. 2011). While Appellants need not have shown an actual meritorious defense under rule 55 (see ITC Commercial Funding, LLC supra, at 393 S.C. at 494, "...although the Appellant may have had good cause to set aside the entry of default under Rule 55, SCRCP, [without showing a meritorious defense] she did not meet the standards established by Rule 60(b), SCRCP, to set aside the judgment,") the Appellants did proffer a meritorious defense. In the Answer filed with their motion for relief from default, Appellants filed an absolute denial of committing any tortuous acts against this Respondent. **R. ___.** Furthermore, federal law constrained Appellants' ability to act to a large degree, [11] and buffers Appellants' argument that good cause exists in this case so as to not hold them in default in this instance.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) pre-empts state law regarding any privacy or confidentiality rules relating to plaintiff's medical records. See *Holman v. Rasak*, 486 Mich. 429, 785 N.W.2d 98 (2010). Respondent did not provide an expert affidavit alleging a specific breach of standard of care by Dr. Jaraki. Rather she relied on S.C. Code § 15-36-100(C)(2) [12] and its "no

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[11] See 45 C.F.R. § 164.512, "Uses and disclosures for which an authorization or opportunity to agree or object is not required."

[12] This subsection reads as follows: "The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies

special learning is needed to evaluate the conduct of the defendant" language. Thus Respondent's medical records had not played a role in this case prior to service of the complaint itself and respondent's counsel's letter discussing discovery issues. It was then that Appellants realized that privacy concerns with respect to plaintiff's medical records presented an issue front and center.

For the foregoing reasons, the trial court should be reversed on this issue and this case remanded for resolution on the merits. Therefore, even if the letters proffered by Appellants were deficient as a matter of law as constituting an answer to the law suit, we submit that good cause has been shown for setting aside the entry of default.[13] The Appellants were in ongoing contact with Respondent's counsel and never "sat on their hands" to the prejudice of any party. Moreover, satisfactory assurance had not been provided by plaintiff respecting a waiver of privacy with respect to the medical records generated during the provision of medical services to the plaintiff.

ARGUMENT II

II Defendants failure to follow the pre-suit mediation process set out at, inter alia, S.C. Code Ann. § 15-79-125 may not constitute a basis for the Court to prohibit the filing of a responsive pleading. (Question II)

In the order denying defendants' motion for relief from default, this Court stated at page 3 of the Order,

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within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

[13] In this action, Respondent had filed a motion for entry of default because such had not been noted in the clerk's records. The Court simultaneously ruled that Respondent's motion would be granted, default entered, and Appellant's motion for relief therefrom would be denied.

> Furthermore, this Court has inherent authority to enforce the Provision of S.C. Code Ann. § 15-79-125, which requires Pre-Suit Mediation and the Defendants' failure to attend the Mediation deprived them of one more opportunity to discover the identity of the Plaintiff, and the Court hereby enforces the requirements of S.C. Code Ann 15-79-125 by prohibiting the filing of responsive pleadings.

Order at page 3, last paragraph. Appellants asked the trial Court to reconsider this holding. The Court sanctioned Appellants for allegedly failing to follow the prelitigation process by striking defendants' right to file a responsive pleading in this matter, thereby placing defendants in default. We respectfully 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. This is especially so when the identity of the plaintiff was not known by the date of the scheduled mediation hearing.

When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly. *See Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996). Therefore, the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case. *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 399 S.E.2d 439 (Ct.App. 1990). Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). *Griffin Grading v. Tire Service Equipment*, 334 S.C. 193, 198-99, 511 S.E.2d 716 (Ct.App. 1999). In the instant case, plaintiff's counsel wrote a letter advising defendants of the

scheduled mediation. There was no court order in effect at that time. Moreover, we submit that no bad faith, willful disobedience or gross indifference to a party's rights has been shown in this instance. Sub-section "F" of the statute reads

> (F) Participation in the pre-litigation mediation pursuant to this section does not alter or eliminate any obligation of the parties to participate in alternative dispute resolution ***after the civil action is initiated***. However, there is no requirement for participation in more than one alternative dispute resolution forum following the filing of a summons and complaint to initiate a civil action in the matter.

Emphasis added. Because Appellants were unaware of the plaintiff's identity as of April 27, 2010, the date of the scheduled mediation, we submit that no sanction should have been imposed upon them. However, the proper sanction to be imposed in this instance we submit, if any, would be to allow the plaintiff to file her lawsuit and then ***compel use*** of the latter alternative dispute resolution forum contemplated by S.C. Code Ann. § 15-79-125, we respectfully submit.

By doing what the Court did at the trial level, and by-passing the "good cause analysis," the Court's action was tantamount to striking the Appellants' answer and holding them in default. This was error we respectfully submit. Appellants assert that the pre-litigation process was intended to reduce frivolous law suits. It was not intended to eliminate the right of a party to defend against liability. The lower Court's sanction, respectfully, was in opposition to the purpose of the legislation, and with all due respect, the result was too harsh in this instance. We respectfully ask this Court to reverse the lower Court's Order and allow the litigation to be resolved on the merits.

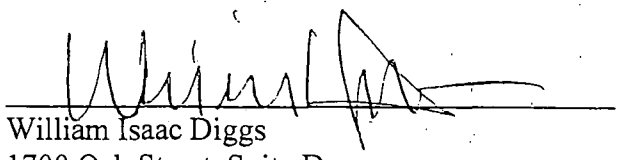
CONCLUSION

For the foregoing reasons, the Appellants would respectfully request this Court to reverse the Order denying Appellants relief from default under S.C.R.C.P. 55 and to

remand the case for resolution on the merits by trial by jury.

Respectfully submitted,

LAW OFFICES OF WILLIAM ISAAC DIGGS



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ATTORNEYS FOR APPELLANTS

This 24th day of September, 2012
Myrtle Beach, South Carolina

CERTIFICATE OF COUNSEL

This is to certify that the Final Brief of Appellant complies with the requirements Rule 211(b), SCACR. Additionally, counsel certifies that the Final Brief of Appellant is in compliance with the Supreme Court's August 13, 2007 order regarding personal data identifiers and sensitive information.

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ATTORNEY FOR THE APPELLANT

This _____ day of September, 2012
Myrtle Beach, South Carolina

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 Arrhythmias Consultant, Institute of Electrophysiology, P.C.,

Defendants

Of Whom

Omar Jaraki and Halla Jaraki, are

Appellants

INITIAL REPLY BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANTS OMAR JARAKI AND HALLA JARAKI

APPELLANTS' RESPONSE TO RESPONDENTS ARGUMENT I

(1) The letters filed by the defendants with the Clerk of Court were legally sufficient to avoid default.

Respondent argues that the letters did not constitute an answer, that Appellants did not make a "Rule 8" argument below and it wasn't specifically ruled on by the Court, and that the letters filed by Appellants did not satisfy Rule 55. *Brief of Respondent* at pages 6-18. Appellants submit the respondent's argument is without merit and the lower Court should be reversed.

Plaintiff failed to timely tell the Jaraki's that *Jane AP Doe* was not the real name of the plaintiff in this action, and thus not the real name of Dr. Jaraki's patient. Counsel neglected to tell the defendants that the caption contained a *pseudonym or anagram.* The correspondence filed by Dr. Jaraki on July 9, 2010, and which he mailed to plaintiff's counsel according to defendant's affidavit, contains a denial. The letter states referring to his patients' records, in part, "I do not find anybody by name *Jane AP Doe.*" Respondent's allegations were horrendous, she claimed that Appellant Omar Jaraki placed his finger inside of her. **R.** ___ . She asserted such was done for other than medical reasons. Id. Appellants' counsel argued below,[1]

> . . . certainly knowing who the Plaintiff is doesn't alleviate or doesn't undermine one's right to generally deny the allegations with respect to a complaint, frames the issues sufficiently, I would submit, under our rules to avoid being held in default under Rule 55. So, ... that's the issue that Your Honor has to decide today whether the letter on July the 9th constitutes sufficiently an answer to avoid being

[1] This argument is in response to the trial Court's erroneous statement that the Appellant had been informed of the plaintiff's identity "back in March" Tr. 6, lines 19-20. However, as of the mediation date, Appellants had not been informed of the identity of the plaintiff. **R.** ___ .

placed in t default in the action, and I would submit that it does. . . .

Tr. 7, lines 8- 16. We submit the statement by Dr. Jaraki constitutes an answer and a denial as argued by Appellants quoted above. Moreover, both Dr. Jaraki and his wife, Halla, are from Syria. They reasonably did not understand plaintiff's use of a pseudonym or anagram to conceal the identity of the plaintiff.

Respondent also argues there was no ruling by the Court on this issue and therefore it is not properly before the Court. *Brief of Respondent* at page 12. Appellants respectfully submit that when they argued that the letters were "sufficient to avoid default," it can reasonably understood that the Appellants were arguing that the letters were reasonably sufficient to avoid default ***under the applicable rules of civil procedure*** and that when the Court says "no" you are wrong in this instance, that the Court is specifically ruling on the fact that the letters do not comply with S.C.R.C.P. 7 and/or 8.

S.C.R.C.P. 8 states in part, "If he [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."[2] Both letters sent by the Jaraki's, that of Dr. Jaraki and

---

[2] Rule 8(b) is entitled "Defenses; Form of Denials." It reads as follows:

> A party 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. If he 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. Denials shall fairly meet the substance of the averments denied. 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. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

that of his wife, state that they cannot find such a patient as "Jane AP Doe" in their records. Clearly, we submit, each defendant is stating that he and she lack sufficient knowledge to respond, and this equates with a general denial according to Rule 8. It was error for counsel to file the affidavit of default we respectfully submit. We respectfully submit that the letters of July 9, 2010, stated in effect, that defendants lacked sufficient knowledge to answer the complaint and thus, a general denial was pled. **R. ___ .** Even if the letters are technically slightly deficient to constitute an answer, we submit "good cause" has been shown here because Appellants did not have knowledge about the identity of the plaintiff.

APPELLANT'S REPLY TO RESPONDENT'SARGUMENT II

The element of the existence of a meritorious defense to the Respondent's claims is preserved to enable this Court to conduct an appellate review of this case wherein Appellants seek relief from the entry of default. (Reply to Respondent's argument II).

Respondent has argued that the Appellants have not preserved the issue of a meritorious defense. See *Brief of Respondents* at page 20 – 22. However, respondent did not make this argument below when it filed its *Memorandum in Opposition to Motion to be Relieved from Default Judgment.* **R.___.** *In Re Dickey*, 395 S.C. 336, 355, 718 S.E.2d 739 (2011) ("As a threshold matter, we note that Respondent for the first time on appeal challenges the appointment of Robert Bogan as a Special Prosecutor[fn10] and the Panel's method of questioning witnesses during the hearing.[fn11] Accordingly, we find these arguments are not properly before this Court)." Appellants submit that it is the Respondent who has waived the right to pursue this argument at the appellate level. Even assuming that respondent may raise this argument for the first time on appeal, Appellants respectfully submit that respondent's argument is without merit.

Appellants do have a meritorious defense and they properly preserved the element of the existence of a meritorious defense in this case as part of the motion for relief from default filed by them below. As stated in the Brief of Appellant,

> 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 Lehman Bros., 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).

Brief of Appellant at p. 13. On October 12, 2010, an affidavit of default was filed by plaintiff's counsel and on November 22, 2010, a motion for relief from default was filed by the Appellants. That filing included, *inter alia*, an affidavit by Appellant, Omar Jaraki, M.D. and a proposed Answer by Appellants in the event the Court determined that good cause existed, or that the letters did not constitute an answer. In both the affidavit and the answer, Appellants asserted that they had not harmed the plaintiff in any way and denied the allegations contained in the complaint. Thus, a meritorious defense existed in this case.

Initially, in the affidavit that Dr. Jaraki filed in support of his motion for relief from default, he stated,

> 12. . . . [C]ontrary to Mr. Furr's statement, I did mail "Exhibit A" to him on July 9, 2010, and I filed a copy of the letter with the Court on that date. I believe that my letter should be treated as both an answer and notice of appearance. The letter generally denies that I treated "Jane AP Doe" and therefore denies the allegations made in the complaint.
>
> 13. Even now, ***knowing of the true identity of the plaintiff, I deny that I committed any inappropriate conduct and I deny all of the allegations contained within the complaint which allege misconduct*** or errors on my part, or on the part of any of the defendants.

R. ___ . Emphasis added.

Attached therewith was Appellants' proposed Answer. In their proposed responsive pleading Appellants denied every substantive allegation and denied causing any harm to

the plaintiff. **R.** ___ . This satisfies the meritorious defense element in setting aside a default under S.C.R.C.P. 55, we respectfully submit.

APPELLANT'S REPLY TO RESPONDENT'SARGUMENT III

The Court may not strike a responsive pleading in a medical malpractice lawsuit due to a defendant's failure to participate in pre-suit mediation before the malpractice action has been filed under the circumstances presented by this case. (Response to Respondent's Argument III).

In the Brief of Appellant, Appellants argued

> We respectfully 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. This is especially so when the identity of the plaintiff was not known by the date of the scheduled mediation hearing.

Brief of Appellant at page 20. It is important to note that as of the date the mediation was to be held, April 27, 2010, (1) the Appellants had not been told the real name of the plaintiff, and (2) no court order had been issued requiring the Appellants to attend the mediation. The routine practice in Appellants' judicial circuit (the Fifteenth Judicial Circuit) is to schedule an ADR Sanctions Roster Meeting and at that roster meeting, the Court will order a mediation if it has not been scheduled or held by the time of that meeting. See e.g. ADR Roster Meeting for April 22, 2013, in Horry County, South Carolina. [3]

Moreover, all of the cases cited by the Respondent involve circumstances where the alleged misconduct occurred *after* the litigation had commenced, not *before* it had

[3] See, e.g. http://publicindex.sccourts.org/horry/courtrosters/RosterDetails.aspx?CourtAgency=26002&RosterID=104&RosterCode=MO; or http://www.horrycounty.org/depts/legalserv/cocFiles/rosters.asp,

commenced. As argued in the Brief of Appellants, the Court should have tailored relief in a manner which was justifiable or more appropriate for the severity or lack thereof of the alleged mis-conduct. Rather than doing so, however, the Court ordered that Appellants were to be denied the right to defend against the allegations made against them by the respondent.

CONCLUSION

For the foregoing reasons, the arguments presented by the Respondent in this matter are without merit. Appellants would respectfully request this Court that it reverse the Order denying Appellants motion for relief from default under S.C.R.C.P. 55 and to remand the case for resolution on the merits by jury trial.

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS

This 20th day of March, 2013
Myrtle Beach, South Carolina

Exhibit B

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-26-0659
Appellate Case Tracking No. 2012-212373

Jane "RM" 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.

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE CASE

On January 27, 2010, Jane RM Doe ("Doe") filed a complaint against Omar Jaraki, Halla Jaraki, Cardiology & Arrhythmia Consultants, Cardiology and Arrythmias Consultant, Institute of Electrophysiology, P.C. (collectively "Defendants"). 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. 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.

On February 26, 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. (R.pp.146-149). On March 5, 2010, Deputy Graham served Halla Jaraki, MD. (R.p.150).

On April 27, 2010, Doe filed a motion for entry of default and for default judgment, asserting that although the answers were due on April 7, 2010 (all defendants except for Halla Jaraki) and April 27, 2010 (Halla Jaraki), there had not been an appearance or Answer filed by the Defendants. (R.p.132; p.152). On April 30, 2010, the Clerk filed an Entry of Default. (R.p.151).

On September 20, 2010, Halla Jaraki and Omar Jaraki separately wrote letters to Doe's lawyer that were identical. 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." (R.p.158-159). Both letters were apparently also filed with the clerk of court.

On October 27, 2010, Halla Jaraki sent Doe's counsel a letter asserting that Halla Jaraki had sent a response to the court on April 1, 2010 and had also sent it to Doe's counsel. The purported "response" was a letter signed by both Omar Jaraki and Halla Jaraki requesting the identity of Doe before answering "any further questions." (R.p.26). On November 4, 2010, both Omar Jaraki and Halla Jaraki wrote separately that they denied the allegations by Doe.

On November 10, 2010, all defendants jointly filed an answer to the complaint through counsel. On November 22, 2010, the Jarakis moved through counsel to be relieved from the default judgment. On November 30, 2010, the Jarakis filed an amended motion for relief from the default judgment. Omar Jaraki attached an affidavit and a copy of a letter dated March 24, 2010, which he asserted served as his formal response to the complaint. Halla Jaraki also attached an affidavit as well as the letter of March 24, 2010, signed by both Omar and Halla Jaraki. The basis for the motion was "the grounds enumerated in S.C.R.C.P. 60(b)(1), including mistake, inadvertence, surprise, or excusable neglect." (R.p.17).

On May 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 March 2010. Doe also asserted the Jarakis did not even assert or prove the existence of a meritorious defense to the claims. (R.p.154).

The court held a hearing on May 21, 2012, on the motion and ruled the Jarakis

failed to establish "excusable neglect" for not answering the complaint. (R.p.128, ll. 4-6; p.129, ll. 2-7). That same date the court entered a Form 4 order denying the motion to be relieved from default judgment. (R.p.1).

On June 28, 2012, the Jarakis jointly filed and served a timely notice of appeal from the May 21, 2012 order.

ARGUMENTS

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial court. *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Id.*

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

Appellants contend the trial court erred and abused its discretion in ruling that the letters they purportedly sent requesting additional information about Doe's identity did not constitute an answer pursuant to Rule 7, SCRCP, or amounted to efforts to "otherwise defend" under Rule 55, SCRCP. This Court should not be persuaded by these arguments.

A. THE LETTERS DID NOT SATISFY RULE 7, SCRCP

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 Jarakis contend that each of the letters they purportedly filed and sent to Doe's counsel were a sufficient writing to constitute an answer for purposes of Rule 7. (App. Br. p. 10). This Court should reject this argument.

At the outset this issue is not preserved for appeal. The only ruling the trial court made in support of the denial of the motion was "I'm going to find that doesn't rise to excusable neglect." (R.p.128, ll. 4-5; see also p.129, ll. 2-7). The Jarakis did not move pursuant to Rule 52, SCRCP, or Rule 59, SCRCP, for the court to address their argument that the letters met the requirements of the Rules of Civil Procedure to constitute an "answer." *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).

Assuming the Court finds the issue properly preserved, the Court should still affirm. 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 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 stated recently:

> 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). The Jarakis' letters do not fairly meet the substance of the averments in the complaint. In form, the letters do not satisfy the SCRCP.

Next, even if the Court overlooks the utter 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 trial court in this case properly refused to consider the Jarakis' letters to be denials.

The Note to Rule 7(a) 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 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 the 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) (holding 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*, 156 Ga.App. 274, 277, 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 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 report to the medical board in the Spring of 2008, as noted in the Jarakis' brief. (App. Br. p. 6). The Jarakis' protestations that they did not know who Doe was are hollow.

Furthermore, Dr. Omar Jaraki is no stranger to the litigation process. (R.p.127, ll. 6-14). *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.*, 75 Ark. App. 198, 55 S.W.3d 799 (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 not disputable 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 RM 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) and further having responded to a complaint before the medical board Doe made in 2008.

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

B. THE LETTERS DID NOT SATISFY RULE 55, SCRCP

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). The Jarakis submit that their letters "was an attempt to 'otherwise defend' the action" for purposes of Rule 55(a). This argument should not be persuasive.

This issue is likewise not preserved for appeal. As noted above, the only ruling the trial court made in support of the denial of the motion was "I'm going to find that doesn't rise to excusable neglect." (R.p.128, ll. 4-5; see also p.129, ll. 2-7). The Jarakis did not move pursuant to Rule 52, SCRCP, or Rule 59, SCRCP, for the court to 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).

Assuming the Court finds the issue properly preserved, the Court should still affirm. The Jarakis' contend their letters constitute an attack that would prevent default without presently pleading to the merits of the complaint. (App. Br. p. 11). They contend the letters deny "they had treated any such patient as 'Jane RM Doe' and thus necessarily denies the whole of the allegations made against them in Respondent's complaint." (App. Br. p. 12). These arguments 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 refers 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) ("The words 'otherwise defend' 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.");*Olsen v. International Supply Co.*, 17 Alaska 643, 22 F.R.D. 221 (D.C. Alaska 1958) (same, following *Bass*). *See also* 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).

However, 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, the Jarakis failed to plead under Rule 7, SCRCP, as discussed in the previous section of this Brief. 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 their letters do not constitute an attempt to "otherwise defend" as that phrase has been interpreted.

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

II. THE APPELLANTS DID NOT DEMONSTRATE SUFFICIENT GROUNDS TO WARRANT RELIEF FROM DEFAULT JUDGMENT

The trial court made one ruling below: "I'm going to find that doesn't rise to excusable neglect." (R.p.128, ll. 4-5; see also p.129, ll. 2-7). On appeal, the Jarakis provide the following statement of the issue on appeal:

> Did the trial court commit error and abuse its discretion when it ruled that the appellants had failed to establish *good cause* to be relieved from default judgment pursuant to S.C.R.C.P. 60?

(App. Br. p. 4) (emphasis added). The Jarakis state the issue in that fashion further in the brief. (App. Br. p. 12). This is an incorrect statement of the law.

The standard for granting relief from an entry of default is "good cause" under Rule 55(c), SCRCP, while the standard is more rigorous for granting relief from a default judgment under Rule 60(b), SCRCP. *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*,

383 S.C. 601, 681 S.E.2d 885 (2009). Relief from default *judgment* under Rule 60(b), SCRCP, "requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or 'other misconduct of an adverse party.'" *Id.* (quoting Rule 60(b), SCRCP).

In this case, there is no challenge to the trial court's finding of a lack of "excusable neglect." Thus, it is the law of this case that the Jarakis failed to establish "excusable neglect" so as to warrant relief under Rule 60. *See State v. Fripp*, 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012) (appellant's failure to challenge the trial court's ruling in the appellate brief renders the unchallenged ruling the law of the case).

Even so, the Jarakis failed to present or argue any particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation or other misconduct by Doe. They also failed to establish they had some diminished capacity to justify relief under Rule 60. *See ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (Ct. App. 2011) (discussing *Sundown* and affirming the failure to set aside default judgment under Rule 60). Accordingly, the trial court's ruling is correct.

The Jarakis 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. 13-14). The short answer to this is that the Jarakis did not make this argument to the trial court, nor did the trial court rule upon it. *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).

Further, the Jarakis 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")[1]; or (3) answered the complaint with a general denial and averments that fairly met the allegations. The Jarakis did none of these things. Instead, they simply played a game of cat and mouse, asserting they did not know any "Jane RM 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 RM Doe" was. As they admit in their brief, Doe filed a report of Dr. Jaraki's behavior in the Spring of 2008. (App. Br. p. 6). Dr. Jaraki was also criminally charged because of his behavior, and ultimately pled guilty in May 2010. (see http://www.carolinalive.com/news/story.aspx?id=462100)

This Court should reject the Jarakis' argument that they established "good cause" to justify setting aside the default judgment, and should affirm the trial court's ruling.

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

The Court should affirm the trial court's ruling for the additional reason that the Jarakis have failed to establish the existence of a meritorious defense sufficient to justify

[1] The Jarakis' counsel admitted as much at the motion hearing. (R.p.124, ll. 1-4).

relief under Rule 60, SCRCP.

A meritorious defense is necessary in order for a judgment to be set aside under Rule 60(b), SCRCP. *McClurg v. Deaton*, 395 S.C. 85, 716 S.E.2d 887 (2011). A meritorious defense is more than merely a factor to consider under certain Rule 60(b) grounds for setting aside default judgments. *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (Ct. App. 2011). To establish a meritorious defense, the party does not have to show he would prevail on the merits; rather, a meritorious defense 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. *Williams v. Watkins*, 384 S.C. 319, 681 S.E.2d 914 (Ct. App. 2009). The party seeking to set aside the judgment has the burden of presenting evidence proving the facts essential to entitle him to relief. *McClurg v. Deaton*, at 575, 671 S.E.2d at 94. *Accord Rodriguez v. Gutierrez*, 391 S.C. 323, 705 S.E.2d 94 (Ct. App. 2011) (movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief).

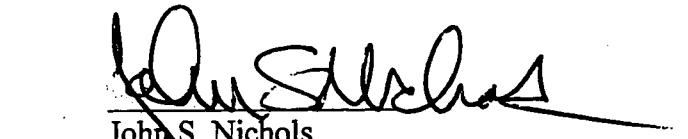
The Jarakis baldly state "The appellants deny fully the Respondents[']allegations. Thus, there is a meritorious defense." (App. Br. p. 14). This is their only argument on this point. The Jarakis did not offer evidence or otherwise prove facts essential to their claimed entitlement to relief, either below or on appeal. This alone is fatal to the relief they seek.

Accordingly, the Court should affirm the trial court's denial of the Jarakis' motion for relief pursuant to Rule 60.

CONCLUSION

For the reasons stated the Court should affirm the trial court's ruling.

Respectfully submitted,



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December 14, 2012

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

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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,

February 14, 2013

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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-26-0659

Jane "RM" 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.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellants with a copy of the *Motion to Stay and Consolidate* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

William Isaac Diggs, Esquire
Law Offices of William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 29577

Erin Bridges

April 1, 2013

Erin Bridges
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

BNTD

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ATTORNEYS AT LAW

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Allison Paige Sullivan
Ashley Trout Thompson

April 1, 2013

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Jane "RM" Doe v. Omar Jaraki
Case Tracking No.: 2012-212373

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a Motion to Stay and Consolidate in regards to this case. I have also enclosed a proof of service on counsel for the Appellant and a $25.00 check for filing this motion. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you need any additional information, please to not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: O. Fayrell Furr, Esquire
William Isaac Diggs, Esquire