IN THE COURT OF APPEALS OF MISSISSIPPI
NO. 2009-TS-02037

ARVIND KUMAR, INDIVIDUALLY AND D/B/A
HOLIDAY INN OF COLUMBUS, BHAVNA KUMAR
TONY SAVAGE AND TRACEY SAVAGE — DEFENDANTS-APPELLANTS

V.

SHANNA LOPER — PLAINTIFF-APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF LOWNDES COUNTY. MISSISSIPPI

BRIEF OF THE APPELLEE

ORAL ARGUMENT NOT REQUESTED.

P. Nelson Smith, Jr.
Mississippi State Bar No [redacted]

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Shanna Loper

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V.

SHANNA LOPER — APPELLEE-PLAINTIFF

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of the Supreme Court and/or Court of Appeals may evaluate possible disqualification or recusal.

1. Shanna Loper, Appellee;
2. Hicks & Smith, PLLC, Attorneys for Appellee;
3. Holiday Inn of Columbus, Appellant;
4. Arvind Kumar, Appellant;
5. Tony Savage, Appellant;
6. Tracey Savage, Appellant;
7. John W. Crowell, Attorney for Appellant;
8. Judge Lee J. Howard, III, 16th District Circuit Court Judge.

This the 1st day of September, 2010.

P. NELSON SMITH, JR, MSB [redacted]

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STATEMENT OF THE ISSUES

Whether or not the Defendants have the right to set aside a default judgment after the default judgment has been taken and after an evidentiary hearing on damages has been held, when the defendants failed to make any make any appearance after suit is filed.

STATEMENT OF THE CASE

Plaintiff's complaint for intentional inflection of emotional distress was filed December 9, 2008. Process was had upon all the Defendants that were active participants in the intentional infliction of emotional distress claims. Bhavna Kumar has transferred her interest in Holiday Inn to Arvind Kumar per their divorce. The initial counsel for the Defendants, Ed Pleasants, never entered an appearance in Court and never made any other effort in court to defend the Defendants. No written answer was ever filed with the Court by then attorney Ed Pleasants or by the Defendants themselves. After the required time under the Mississippi Rules of Civil Procedure, an application of default was sought and obtained. Default judgment was entered by the Court against the Defendants and an order setting a hearing for damages was also entered. The Court subsequently conducted an evidentiary hearing on damages, where neither Ed Pleasants nor any of the Defendants appeared. On June 11, 2009, the Honorable Lowndes Circuit Judge, Lee Howard issued its Order awarding damages. On August 11, 2009, nine (9) months after the intentional infliction of emotional distress complaint was filed, Defendants purportedly entered an answer. The Defendants filed an amended motion to set aside the default on August 13, 2009. A hearing was conducted on the Defendants' motions on October 28, 2009. Judge Lee Howard filed his order hereby denying the request to vacate. A subsequent motion for reconsideration was denied by the court on November 23, 2009. Almost exhausting the thirty (30) days within which to file an appeal, the Defendants field a Notice of Appeal on December 22, 2009. They filed the Notice of Appeal without any appeal bond. Subsequently, an examination of a judgment debtor was held in this matter and the Defendant

Arvind Kumar has produced some documents in response to the Examination of Judgment Debtor Subpoena.

STATEMENT OF FACTS

Ms. Loper was a former employee of Mr. Kumar. He was doing business as the Holiday Inn of Columbus. A copy of the lease between Arvin Kumar and Holiday Inn is attached in the record excerpts of the Appellee. *(RE 0105-0140)* This document was identified by Mr. Kumar in his examination of judgment debtor. It shows that the Holiday Inn franchise is between Arvind Kumar and Holiday Inn. Mit-Sar is simply an attempt for him to escape personal liability, although the franchise lease is with him individually. While Ms. Loper was in the employ of the Holiday Inn as a cocktail waitress, Ms. Loper was exposed to repeated intentional infliction of emotional distress of the repeated aberrant behavior of Tony Savage and Mr. Kumar. All these instances were reported to a supervisor, Tracey Savage, who refused to address the issue, she being the mother of Tony Savage. Ms. Loper brought these issues to the attention of Mr. Kumar who also refused to remedy the situation. Ms. Loper was subjected to slurs, demeaning language and requests for sexual favors. All these activities extremely humiliated the Plaintiff. In the Plaintiff's complaint, though she factually outlined the aberrant behavior of Defendants, the only relief she sought was the state law claim of intentional infliction of emotional distress. Plaintiff alleged "Defendants' conduct invoked such outrage and revulsion and was done intentionally, or even if done unintentionally, the results were reasonably foreseeable, such as to constitute intentional infliction of emotional distress. *(RE 0141-0151)* No federal cause of action was sought, but the instances of sexual harassment, done intentionally, certainly give rise to the state law tort of intentional infliction of emotional distress.

Demand letters were sent, not only to Intercontinental Hotels Group (IHG), who licenses the Holiday Inn brand, but also to Mr. Kumar. The attempt was made to resolve the

situation before any suit was filed. Both IHG and the individual defendants chose not to resolve the intentional infliction of emotional claims of Ms. Loper prior to filing any suit. On August 18, 2008, Ed Pleasants, on behalf of the individual Defendants, sent a letter rejecting Plaintiff counsel's attempts to resolve these claims, *prior* to any litigation being filed. *(RE 0084-0085)* On August 25, 2008, a response was made from counsel for the Plaintiff. *(RE 0088-0099)* On August 29, 2008, an email was sent from counsel of the Plaintiff to Ed Pleasants concerning the Holiday Inn claim. *(RE 0088-0099)* Ed Pleasants subsequently called counsel for the Plaintiff and sent an email on August 29, 2008. *(RE 0088-0099)* Another email was sent from counsel of the Plaintiff to Mr. Pleasants of October 23, 2008, having heard nothing from Mr. Pleasants from the end of August to the date of that email. *(RE 0088-0099)* On November 13, 2008, another email was sent to counsel for the Defendants. *(RE 0088-0099)* No response was made by counsel for the Defendants and therefore the Complaint was subsequently filed and served upon the parties. A week after serving the Defendants, Ed Pleasants called and said he had a "$5,000,000.00 (Five Million Dollars) check", for counsel for the Plaintiff in the Loper Case. *(RE 0088-0099; 0022-0083).* He immediately said that statement was made in jest but stated emphatically that he was not representing any Defendant in this case. He mentioned that he might send it to another attorney, Taylor Smith. However, no attorney for the Defendants ever made any appearance subsequent to the Complaint being filed and served upon the Defendants. In fact, from mid-December 2008 until mid-February 2009 (when default was obtained), no Defendant and no attorney made any appearance in any manner on behalf of the Defendants. At no time after suit was filed, after process was properly made and after Mr. Pleasants stated he was not representing the Defendants, did any Defendant or any counsel for the Defendants make any appearance, until after Default Judgment and after damages were awarded in this matter. At the subsequent hearings, after the Default Judgment was made and after damages

were awarded, Defendants attempted to unilaterally have a "trial" in this matter, by some of the Defendants "testifying" that the allegations of the Complaint were false. It is important to note that even at the subsequent hearings, Arvind Kumar, the owner of the Holiday Inn Columbus, never appeared.

Most importantly, Pleasants told Plaintiff's counsel that he would not be representing the Defendants in any manner whatsoever. At that point it was incumbent upon the Defendants to obtain new counsel or to make an appearance or defend pro se. Neither occurred for more than three (3) months after service of process. In fact, no appearance was ever made until after damages were awarded in this matter. The undisputed fact is that as soon as these Defendants were served with process, their attorney contacted the Plaintiff's counsel and stated that he was not representing them. The Defendants at that point took no steps to obtain any attorney nor did they make any effort to make any personal appearance pro se. What the Defendants are attempting to do now is try this case through the Court of Appeals when they did not make any appearance or effort to defend once they were served with the Complaint. All they do now is point the finger at Ms. Loper and say she must be of bad character because of her past. However, had they looked at the Court record they would have seen the Certificate of Rehabilitation which makes this information inadmissible. Further, it was not admitted nor considered by the trial court. It was only marked for identification purposes only.

SUMMARY OF ARGUMENT

Defendants failed to enter an appearance of any nature after the Complaint was filed until after default judgment was taken and damages awarded. The only contact by counsel for the Defendants after suit was filed was to announce he was not representing the Defendants. Subsequently, Defendants never sought any other counsel or made any appearance pro se. Only

through chance did current defense counsel learn of the default, in conjunction with their representation of Arvind Kumar in his divorce.

The default judgment in the trial court is taken as an adjudication on the merits, as if a jury trial had occurred. Defendants cannot now set aside the default. The Rules of Civil Procedure provide for the process followed by the Plaintiff. She is entitled to her judgment. The Defendants failed to follow the Rules of Civil Procedure, at their peril. The trial court's judgment and award of damages should be upheld.

ARGUMENT AND AUTHORITIES

Whether or not the Defendants have the right to set aside a default judgment after the default judgment has been taken, after an evidentiary hearing on damages has been held, when the defendants failed to make any make any appearance in the case.

The Defendants' case, when it is all boiled down, is simply a complaining to the Court that they should have gotten a three (3) days notice before the default could be tried. The Circuit Court found Defendants' counsel called Plaintiff's attorney on December 9, 2008, whereby he informed Plaintiff's attorney that he was no longer representing the Defendants in this matter. *(RE 0100-0101)* Plaintiff's counsel heard nothing else from the Defendants or any other Defendants' counsel. *(RE 0088-0099)* Since Plaintiff's counsel was not contacted by the Defendants or other counsel after their communication, no one manifested a clear intent to defend the suit, so as to constitute an appearance, after the suit was filed. *(RE 0100-0101)* Since no one made any appearance on behalf of the Defendants, the Defendants were not entitled three (3) days notice. *(RE 0100-0101)* Judge Howard correctly found, based on the testimony presented to it at any hearing in this matter, no one has appeared in this action. The "mere possibility" of another attorney handling the Defendants' case is not enough to constitute an appearance. In fact, no attorney ever appeared on behalf of the Defendants in this action after Ed Pleasants communicated to Plaintiff's counsel that he was no

longer representing the Defendants. The fact that no Defendant otherwise appeared, once served with the Complaint, demonstrates the fact there was no clear intent to defend the suit. As stated in previous pleadings, what the Defendants really suggests is that Plaintiff's counsel should have run down the list of every attorney in Lowndes County to determine if they were representing the Defendants and a failure to do so should be a bar to a Default Judgment. That position simply cannot hold water in any Court. The Defendants' assertion that Ed Pleasants' letter months and months prior to any suit being filed, constitutes an appearance in an action yet to be filed, and thus requires three (3) days notice prior to default, is without basis in law or fact. The argument they make here is the same failed argument they have made all along. Judge Howard correctly found, citing *Dyna Steel Corporation v Aztec Industries*, 611 So.2d 977, (1992), that the focus of determining in whether the party made an appearance is whether the non-movant has manifested a clear intent to defend the suit. *(RE 0100-0101)* From December 9, 2008 until February 2009, and indeed even at the hearing on the damages, Plaintiff's counsel heard nothing from the Defendants or any defense counsel. *(RE 0001-0016)* No attorney for the Defendant has ever entered an appearance after suit was filed until after the Circuit Court entered its order awarding damages. Defendants now wish to argue the merits of the case as if no determination has already been made. Defendants fail to recognize the effect of a Default Judgment. After a Default Judgment, which here was taken on February 17, 2009, all the allegations of the Complaint are taken as true. *Rush v. North American Van Lines*, 608 So.2d 1205 (1992). As stated in that case, when a judgment by default is entered, it is taken as a complete and final adjudication of issues necessary to justify the relief awarded, and is given the same effect as a judgment rendered after a trial on the merits. Id. Once a default is established, the Defendants here have no further standing to contest the factual allegation of the Plaintiff's claims for relief. *Id.* (See also official comment to Rule 55 of the Mississippi Rule

of Civil Procedure.) The Defendants have no standing to contest the factual allegations of the Plaintiff's claim for relief. Defendants simply assert they contest the factual allegations of the Plaintiff's complaint. That is insufficient to be a colorable defense. As in the Rush case, the Defendants have filed nothing of evidentiary value. *Id.* Mr. Kumar has never even made a personal appearance or testified in this matter. One of the Defendants, Tony Savage, has never even met with Mr. Pleasants or anyone else to discuss the case and never paid any retainer or any sums to Mr. Pleasants. *(RE 0022-0083)* Mr. Savage never asked Mr. Pleasants to represent him in this matter. *(RE 0022-0083)* Ms. Savage never hired Mr. Pleasants to represent her for anything in this matter. *(RE 0022-0083)* She relied on Mr. Kumar's representation that "he (Mr. Kumar) would take care of everything". *(RE 0022-0083)* Ms. Savage never saw any bill from Mr. Pleasants nor ever received a written status report. *(RE 0022-0083)* Thus, at any hearing in this matter after the damages were awarded by Judge Howard, Mr. Kumar never appeared, Tracey Savage basically admitted Mr. Pleasants was not his attorney and Ms. Savage admitted that she did not retain or pay any sums to hire Mr. Pleasants. Yet current Counsel for the Defendants indicated to the Court that all Defendants were aware of the effect of the Complaint and the need to answer within thirty (30) days. They simply failed to answer within thirty (30) days, or even until six (6) months later.

There was no appearance by the Defendants or by anyone on behalf of the Defendants after the Complaint was filed, prior to default. The only contact by anyone after the complaint was filed and prior to default was the call from Ed Pleasants wherein he clearly, unequivocally, and undisputably stated he was not representing the Defendants. *(RE 0088-0099)* As Judge Howard pointed out, what further notice of a lawsuit did the Defendants require? *(RE 0022-0083).* They were well aware by their own testimony or by their current counsel's representations of the necessity in filing an answer. *(RE 0021-0082)* As in the *Rogillio* case, the Defendants here are arguing that

default was unintentional and they were in reliance on their attorney to take all necessary actions. *American State Insurance Company v. Rogillio*, 10 So.3d 463, (Miss. 2009). In *Rogillio*, the Court noted that the Defendants should have been more diligent in their actions of defending the suit. *Id.* The Court cited *H & W Transfer and Cartage Service, Inc. v. Griffin* 511 So.2d 895 (Miss. 1997), stating that although initially acting diligently in putting the complaint in the proper person's hands, the Defendants imprudently made no follow up inquiry and for all practical purposes let the matter drop until they found out that the default judgment had been taken. *Id. at 899.* The Rogillio Court further cited the *H. W. Transfer* case with approval, in stating that Defendants' "story" did not amount to good cause to set aside the default. *Id.* As in the *Rogillio* case, the Defendants' excuse herefor defaulting defies logic. *Id.* The Defendants did not claim that they did not receive the Complaint nor did they fail to recognize or understand the importance of the Complaint, they simply acted imprudently and took no further action to determine whether an answer had in fact been filed. *Id.* Here, as in *Rogillio*, the Defendants still would never have acted except that the current attorneys, by happenstance, in Arvind Kumar's divorce case, discovered this default. In the present case, not only had a default judgment been taken on liability but a hearing on a damages had been held and an order entered awarding damages. We were much further down the road than in *Rogillio* when current defense counsel accidentally discovered the default and entered their appearance.

Certainly the Plaintiff does not concede that the Defendants have established a meritorious defense. The Defendants would contest allegations of the Plaintiff, but they are a day late and a dollar short. The facts and allegations and the issues in the Complaint are taken as true. The Default Judgment is treated as the conclusive and final adjudication of the issue necessary to justify the relief awarded. It has the same effect as a trial on the merits. Tony Savage never denied the intentional infliction of emotional distress. He only testified at the hearing that he just didn't recall his

statements and actions. *(RE 0022-0083)* That is far from a "meritorious defense", especially when the allegations are now taken as true as if there had been a trial on the merits. In *Rogillio*, the Court found that the trial court did not abuse its discretion in not setting aside the default judgment. *Id.* Clearly, it logically follows that the Supreme Court believed the trial court had made the correct decision. If it believed otherwise, the Supreme Court would have found that the trial court had abused its discretion and would have reversed it.

Ms. Loper has testified in this matter. *(RE 0001-0016)* The Defendants were not present, as they have never defended this matter prior to the default and never defended this matter on the hearing on damages. Thus her testimony and the Judgment of the Court is taken as true and conclusive. It is factually undisputed that Mr. Pleasants only contact, once suit had been filed, was to inform Plaintiff's counsel that he was not representing the Defendants. That did not relieve the Defendants of the necessity of filing an answer or otherwise appearing in this matter after they were served with summonses and the complaint. Thus the trial court correctly noted that the Defendants had notice. *(RE 0022-0083).* The bottom line is, after service, the Defendants failed to answer and took no further action until the current Defense Counsel, representing Mr. Kumar in his divorce, noticed that a default had been taken against Mr. Kumar. Had that happenstance not occurred, there still would not be any appearance by Mr. Kumar!

CONCLUSION

The Default Judgment should not be set aside. At the hearing on this matter to set aside the default, the majority of the testimony offered by the two (2) Defendants that did show up in court was strictly hearsay. They talked about "unknown" customers who did not testify at the hearing. Judge Howard let them testify but recognized that it was hearsay and that hearsay is not any evidence that legitimately contests the judgment.

Defense counsel argued at the hearing that the allegations of the complaint were denied through Ed Pleasants. However, all such contact with Ed Pleasants, his correspondence and subsequent emails, were before any suit was filed. The only communication, after suit was filed and after summons was served, was that he was not representing the Defendants. Judge Howard correctly stated that the Defendants had done nothing to defend the lawsuit.

Once a party is served with a complaint, it is incumbent upon that party to make sure that a response is filed with thirty (30) days of service. It is not their attorney who has been served, it is not their attorney has been sued, it is that party. All three (3) Defendants, whether by testimony at the hearing or by affidavit (Kumar has never appeared in Court personally), indicated that they noticed on the summons they had thirty (30) days to respond. They also indicated they had not paid any sums towards the hiring of Mr. Pleasants. Some of the Defendants never even asked him to represent them in this case. Further, immediately after the process of the Defendants, Ed Pleasants informed Plaintiff's counsel that he was not these parties' attorney and he would not be representing them. Months passed, and the Defendants never entered any type of appearance, never checked with the Court to see if any appearance had been filed, never filed any motion, never filed any answer - they did nothing in this case. In fact, no Defendant did anything in this case until current Defendants' counsel happened, by chance, to find that a default judgment and awarding of damages had been entered. That happenstance occurred in conjunction with Mr. Crowell representing Arvind Kumar in Mr. Kumar's divorce. But for that happenstance chance, there still would be no response by these Defendants. The majority of the Court evidence offered by the Defendants at the hearing to set aside was hearsay or otherwise inadmissible. What the Defendants fail to grasp is that the judgment of default is conclusive on the merits, just as if there had been a trial. Defendants simply cannot meet any standard under the rules or the law in order to set aside not only the default

CERTIFICATE OF SERVICE

I, the undersigned attorney, P. Nelson Smith, Jr., counsel for the Appellee, do hereby certify that I have filed this ***Brief of Appellee*** with the Clerk of this Court, and have served a true and correct copy of this ***Brief of Appellee*** by United States first class mail, postage prepaid, to the following:

John W. Crowell
Nichols, Crowell, Cooper, Gillis and Amos
P. O. Box 1827
Columbus, MS 39703-1827

Honorable Lee J. Howard, IV
CIRCUIT COURT JUDGE, DISTRICT 16
P. O. Box 1344
Starkville, MS 39760-1344

SO CERTIFIED, this the 1st day of September, 2010.

P. NELSON SMITH, JR.