IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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

VERSUS — CAUSE NO. 2009-TS-02037

SHANNA LOPER — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF LOWNDES COUNTY, MISSISSIPPI

BRIEF OF THE APPELLANTS

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Arvind Kumar	Appellant
Holiday Inn of Columbus	Appellant
Bhavna Kumar	Appellant
Tony Savage	Appellant
Tracey Savage	Appellant
Shanna Loper	Appellee
John W. Crowell	Attorney of Record for Appellants
P. Nelson Smith	Attorney of Record for Appellee
Hon. Lee J. Howard	Trial Court Judge

Respectfully submitted, this the 1st day of July, 2010.

JOHN W. CROWELL

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STATEMENT OF THE CASE

A. Introduction and Procedural History

Loper's Complaint for sexual harassment was filed on December 9, 2008, and process was issued and served upon Arvind Kumar on December 12, 2008, Tony Savage on December 9, 2008 and upon Tracy Savage on December 12, 2008. Although Bhavna Kumar was named as a defendant, there was no process upon her and she has not appeared. Although there is a reference to the Holiday Inn in the style of the case, the Holiday Inn is not a separate entity and was never made a party to this litigation. After process, Defendants' counsel wrote Loper's counsel and told him of the Defendants' intention to defend. Although no written answer was ever filed with the court, Loper's counsel was never told there would be no defense. With no notice to Defendants or their counsel, Loper filed an application for default which was granted by the clerk. An Interlocutory Judgment was entered by the Court against the Appellants on February 24, 2009, with an order setting a hearing for damages. On April 21, 2009, the Court conducted an evidentiary hearing regarding damages, and on June 11, 2009, issued its Order Awarding Damages. On June 17, 2009, the Appellants filed their motion to vacate the default and they filed an answer on August 11, 2009. An Amended Motion to Set Aside was filed August 13, 2009. The Court conducted a hearing on the motions on August 17, 2009, and on October 28, 2009 entered an order denying the Appellants request to vacate the judgment. On November 2, 2009, the Appellants filed a motion for reconsideration, which was denied by the Court on November 23, 2009.

On December 22, 2009, Appellants filed their notice of Appeal, followed by you the appeal bond and the designation of record on December 29, 2009. The record in this case was docketed on January 5, 2010.

B. Statement of Facts

On March 24, 2008, Loper became employed by Mit-Sar, LLC, the entity which was operating the Holiday Inn franchise in Columbus, Mississippi (T 19, 45, RE 29)[1]. Mit-Sar was never identified or named as a defendant in this case. Loper worked as a cocktail waitress in a bar and lounge on the Holiday Inn premises (T 6). Tony Savage, 22 years of age, with a first grade education (T 43). was a co-employee. Loper's immediate supervisor was Tony's mother, Tracy Savage (T 19). Arvind Kumar was the manager of Mit-Sar who had no direct involvement in the operation of the bar (RE 29).

Loper's duties included taking drink orders from customers (T 20). Her employment was terminated on July 25, 2008, after working only 4 months, not because anyone harassed her, but because she forged a customer's credit ticket (T 20-21, 42). She was paid a base rate of $2.10 per hour and retained the actual tips that were allocated to her.

In her Complaint and in her testimony before the Court, Loper claimed earnings of $4,000 per month (T 6), but she offered no copies of her tax returns for 2008 or other documentation of that claim (T 6). She claimed earnings of $2,500 per month (T 11) related to a cleaning service, but offered no documentation related to that claim.

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[1] References in the brief are to the Record (R_) bates numbered pages in the Record Excerpts (RE__) and the Transcript (T ___) or the Exhibits (Ex __).

Loper was fired from her job because of customer complaints that she forged a bar bill and had offered sex for money to a separate customer (T 23).

Contrary to her allegations, Loper never complained to Tony Savage (T 48-50), to Tracy Savage (T 25) or to Arvind Kumar (RE 29) about the alleged misconduct of Tony Savage. There was no written report of any misconduct submitted to Mit-Sar (RE 29) In contrast, there was testimony that Loper was the party initiating the physical contact (T 25-26, 47-48)

At the damages hearing, Loper produced a microcassette tape, and a transcript, that allegedly depicted a conversation that she had on one occasion with Tony Savage and another co-worker. There was no attempt at the hearing to authenticate the tape or provide a proper foundation for its introduction into evidence (T 7-8). At the hearing, she asked the Court to award her damages of $700,000 based upon her allegations and the skimpy proof and testimony that had been provided. There is no evidence that Loper filed any type of complaint with the Equal Employment Opportunity Commission, or that any right to sue letter was generated.

On December 9, 2008, with no further notice to these Defendants, Loper filed her Complaint. She offered no explanation to the Court for why no process was made on Ms. Kumar or Ms. Kumar's involvement in the alleged misconduct.

As soon as a demand was made upon the Defendants, Loper's counsel was contacted by Ed Pleasants on behalf of Appellants who told him that the claims were denied and would be strenuously resisted (RE 57-58). Leaving no doubt that the Defendants disputed the claims, Pleasants wrote to Loper's counsel and said:

> Mr. Kumar, Traci Savage, and Tony Savage all categorically and emphatically deny every single claim made by Ms. Shanna Loper in that August 6, 2008 letter. Ms. Loper was fired from the Holiday Inn solely because of her repeated inappropriate conduct as a waitress, which included, among other things, stealing money from customers. My clients wholly and conclusively reject your offer to resolve any claims by Shanna Loper to avoid litigation. If Ms. Loper does, in fact, initiate any litigation based off false accusations, then my clients will immediately pursue malicious prosecution action against her.

Although Pleasants later said he would not continue to represent the Defendants (T 60), neither he nor the Defendants ever expressed any intent to concede Loper's claims (T 60-63), and there is no evidence that Pleasants ever communicated that position to the Defendants.

Tracy Savage assumed responsibility for communicating with Pleasants (T 28-30) and checked with him on a regular basis (T 36) as to whether the defense was being protected. In return, she received verbal assurances from Pleasants (T 30-31), and was provided with a copy of an answer (T 30-31, RE 59-61) which Pleasants told her he had filed with the Court (T 31-32). The record confirmed that no such answer was filed.

At some point, according to Loper's counsel, Pleasants advised that he would not be representing the Defendants in the case, and that another Columbus attorney would be retained to defend them (R 60). There is no evidence that any other attorney was not ever contacted by Pleasants. More importantly, Pleasants never told Smith that no defense would be offered or that the Defendants had abandoned the defense. (T 60-63).

On February 10, 2009, without writing any type of confirming correspondence to Pleasants or providing notice to Pleasants or the Defendants, or the potential replacement attorney, Taylor Smith, Loper filed her application for default (RE 12).

As the result of inquiry by counsel for Kumar in an unrelated matter, Loper's Complaint was discovered and a motion to vacate the default judgment was filed, along with supporting affidavits and materials (RE 16-18, 23-38).

The lower court found that no one had "entered an appearance" on behalf of the Defendants, and as a result, it was unnecessary for Loper's counsel to give further notice to Ed Pleasants, any other attorney, or to the Defendants. Although Defendants specifically asked the Court to consider the three part test espoused by Mississippi state and federal courts, the Court declined to do so.

The undisputed fact is that as soon as these Defendants were served with process, they took the steps necessary to retain an attorney (T 28), they maintained contact with the attorney for assurance that he was resisting the claim (T 30), and they were given an answer which he told them had been filed with the Court (T 30-31, RE 59-61).

There was no evidence, other than Loper's testimony, of any earnings that she had received at the Holiday Inn or elsewhere for the year of the alleged misconduct or at any prior time. The Lower Court found there was evidence of only "minor physical contact from Tony Savage (RE 6). Even the description of the incident depicted by the tape would not support an award of $100,000 in this case.

Although Loper claimed she resigned her employment as a result of harassment (T 10), the testimony of Tracey Savage, substantiated by documentary evidence (R 55-56), is that she was terminated because she forged a customer's credit card charges and because a separate customer complained because she had failed to perform the sexual favors she had promised (T 20-21, 23).

It is undisputed that the lower court failed to apply the three part test applicable in these cases. There was ample explanation for the Defendants' failure to file an answer, there was ample evidence of a meritorious defense on the part of the Defendants, conceded by Plaintiff's counsel (T 60-63), and no proof whatsoever offered by the Plaintiff relative to the prejudice that would result in a vacation of a default.

As a result, the Court's ruling denying the relief requested by the Defendants, as well as the interlocutory and final judgments entered against them, should be reversed and vacated, granting the Defendants the opportunity to fully contest this claim.

Admittedly, there was no new appearance by the Defendants, but Pleasants never told Smith that the Defendants had abandoned their defense. The letter from Pleasants to Smith detailing the Defendants' position (RE 57-58) was never withdrawn, and that letter and the advice to Smith that new counsel was being retained collectively evidenced a "...clear intent to defend the suit."

SUMMARY OF THE ARGUMENT

When the Defendants were served, they immediately hired an attorney who told Plaintiff's counsel that the claim would be contested and he gave Defendants a copy of an Answer he said had been filed. Defendants unquestionably expressed their intent to defend and no one ever told Loper or her attorney that the defense had been abandoned. That contest is an appearance that, under Rule 55(b), requires notice to the Defendants, or It is not necessary for an attorney to manifest the intent to defend. Pleasants did manifest the intent to defend, by telling Smith that all claims were denied, (RE 57-58), and

although he later told Smith he would not be handling the defense, Pleasants never said that Defendants wouldn't contest the claim.

M.R.C.P. Rule 55 specifically contemplates the possibility that a party may appear in the action without the necessity of hiring an attorney to do so. The rule provides, in part, as follows:

> (b) Judgment. In all cases, the party entitled to a judgment by default shall apply to the court therefor. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application of judgment at least three days prior to the hearing of such application...(emphasis added).

Rule 55 also shows that the court may set aside a default in accordance with Rule 60(b). (...if a judgment by default has been entered, [the court] may likewise set it aside in accordance with Rule 60(b)).

The comment to Rule 55 is telling, as follows:

> The mere appearance by a defending party will not keep him from being in default for failure to plead or otherwise defend, but if he appears and indicates the desire the contest the action, the court can exercise its discretion and refuse to enter a default. This approach is in line with a general policy that whenever there is doubt whether a default should be entered, the court ought to allow the case to be tried on the merits...although an appearance by a defending party does not immunize him from being in default for failure to plead or otherwise defend, it does entitle him to at least three days written notice of the application to the court for the entry of a Judgment based on his default. (emphasis added).

Under Mississippi Rules of Civil Procedure 60(b), in determining whether a Default Judgment should be set aside, our Courts are directed to consider three factors: (1) whether the Defendant has good cause for his default; (2) whether the Defendant has

a colorable defense to the merits of the claim; and (3) the nature and extent of prejudice which may be suffered by the Plaintiff if the default is set aside. *Allstate Ins. Co. v. Green*, 794 So.2d 170 (Miss.2001); *Stanford v. Parker*, 822 So.2d 886 (Miss. 2002).

Appellants acted prudently when served and they hired a lawyer to defend the claims. Ed Pleasants vehemently disputed Loper's claims and Tracy Savage continued to maintain contact with Pleasants and received assurances that the Defendants were protected and was provided a copy of an answer that he said had been filed with the Court (RE 59-61).

This is not an instance where the Defendants ignored the Court's rules. Defendants' failure to file an Answer was, at most, a mistaken reliance on the representation of their attorney and not occasioned by disregard of the service of process or indifference. And this is not a case where the Defendants were claims personnel, and simply forgot about or failed to seek representation. The Defendants, having received what was purportedly a copy of an answer filed with the court, are not guilty of disregarding Plaintiff's Complaint. Instead, these Defendants were victims of malpractice, or worse, by the counsel upon which they were relying.

Ample good cause exists that should prevent a judgment for being taken against them.

Even assuming that "good cause" has not been shown, a default judgment is still not warranted. The three prong test of Rule 60(b) is a balancing test which does not require that all three factors be met for a judgment to be set aside.

The Mississippi Supreme Court has said that the presence of a meritorious defense on the merits is a ground for awarding relief even where good cause is not shown:

> If any one of three (3) factors in the balancing tests out weighs the other in importance, this is the one. Indeed, we have encouraged our trial courts to vacate default judgments whether Defendant has shown that he has a meritorious defense on the merits.

Clark v. City of Pascagoula, 507 So.2d 70, 77 (Miss. 1987); *Bryant, Inc. v. Walters*, 493 So.2d 933, 937 (Miss. 1986); *Bailey v. Georgia Cotton Goods Co.*, 543 So.2d 180, 182 (Miss. 1989); *Shannon v. Henson*, 499 So.2d 758, 768 (Miss. 1986) (colorable defense mitigates against enforcement of default.) See also *Allstate Ins. Co. v. Green*, 794 So.2d 174 (Miss. 2001) (holding it to be a reversible error for a trial court not to set aside default judgment when a defendant had a colorable defense on the merits of the underlying claim).

Defendants asked the Court to do is weigh the equities and vacate the default judgment. Loper, who did not testify at the hearing, misled the Court when she alleged in her complaint, and then testified at the initial hearing, that she was forced to "...resign her employment..." As the proof clearly established, Loper did not resign. She was fired because of her dishonesty and inappropriate conduct. She does not deserve a windfall based upon her misrepresentation to the Court.

On the other hand, the proof is undisputed that the Defendants were all represented by counsel, that they relied upon him, that he denied the Plaintiff's claims by

letter and by conduct, and the Defendants were furnished with a copy of an answer he reportedly filed.

The Plaintiff will sustain no prejudice at all as a result of this Court setting aside the default judgment. Loper and her counsel have at all times been aware that Defendants denied any liability in this matter and Loper didn't even bother to attend or testify at the hearing on the Motion to Vacate (T 67). She offered no claim of prejudice, and has made her record through her testimony in the earlier evidentiary hearing.

To the contrary, not setting aside the entry of default would result in tremendous prejudice to the Defendants, and then should be afforded an opportunity to defend the merits of this case and should not be prevented from arguing their case due to an inadvertent mistake.

ARGUMENT

I. THE DEFAULT JUDGMENT AGAINST THE DEFENDANTS SHOULD BE SET ASIDE

Rule 60 (b) of the Mississippi Rules of Civil Procedure provides, in pertinent part, as follows:

> (b) Mistakes: Inadvertence; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a Final Judgment, Order, or proceeding for the following reasons:
>
> (1) Fraud; misrepresentation, or other misconduct of an adverse party;
>
> (2) Accident or mistake;...
>
> (6) Any other reason justifying relief from the judgment.

M.R.C.P. 60(b) (emphasis added)

Although "default judgments are not favored in the law, it does not follow that a party seeking relief from a default judgment is entitled to that relief as a matter of right," *Pointer v. Huffman*, 509 So.2d 870, 875 (Miss. 1987); *see also Guaranty National Insurance Co. v. Pittman*, 501 So.2d, 377 (Miss. 1987) (citations omitted). This Court has stated that "where there is a reasonable doubt as to whether or not a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on its merits," *McCain v. Dauzat*, 791 So.2d 839, 843 (Miss. 2001) quoting *Southwestern Surety Ins. Co. v. Treadway*, 113 Miss. 189, 74 So. 143, 143 (1917).

In determining whether a default judgment should be set aside, the Mississippi Supreme Court has repeatedly weighed the following factors in a three prong balancing under M.R.C.P. 60(b):

> (1) the nature and legitimacy of the Defendant's reasons for its Default, i.e. whether the Defendant has good cause for its Default;
>
> (2) whether the Defendant has a colorable defense to the merits of the claim; and
>
> (3) the nature and extent of prejudice which may be suffered by the Plaintiff if the Default is set aside.

Allstate Ins. Co. v. Green, 794 So.2d 170 (Miss. 2001); *Stanford v. Parker*, 822 So.2d 886 (Miss. 2002), *H & W Transfer & Cartage Service, Inc. v. Griffin*, 511 So.2d, 895, 898 (Miss. 1987).

The first factor to be addressed by this Court is the culpability of the Defendants' conduct with respect to the delay in filing their Answer. Rule 60(b) provides that a default judgment may be set aside for mistake, inadvertence or excusable neglect. Such is certainly the case here. Defendants were served on December 9 and 12, 2008. Defendants delivered the Complaint and Summons to their attorney, Ed Pleasants, and relied upon him to negotiate with Plaintiff's counsel in an effort to persuade Loper to dismiss her claims and defend the case, if necessary.

The second factor is whether the Defendants have a meritorious defense. The second prong of this balancing test asks whether the defendant has a colorable defense to the merits of the plaintiff's claim. *See e.g., Pittman*, 501 So.2d at 388. The Mississippi Supreme Court held that "[i]f any one of the three factors in the balancing test outweighs the other in importance, this is the one." *Bailey*, 543 So.2d at 182; *see also Stanford,* 822 So.2d at 888 (quoting *Allstate Ins. Co. v. Green,* 794 So.2d 170, 174 (Miss. 2001)) (stating that this Court has "encouraged trial courts to vacate a default judgment where 'the defendant has shown that he has a meritorious defense'"). In this case, Loper claims that she was injured, in part, due to the conduct of the Defendants.

Defendants have a strong defense against Plaintiffs' claims.

As to the final factor, the Fifth Circuit Court of Appeals has held that "mere delay does not alone constitute prejudice. Rather, the plaintiff must show that the delay will result in the loss of evidence, increased difficulties in discovery, or greater opportunities for fraud or collusion."' *Lacy v. Sitel Corp.*, 227 F.3d 290, 293 (5th Cir. 2000) (citing *Berthelsen v. Kane*, 907 F.2d 617, 621 (6th Cir. 1990). Here there is certainly no

prejudice to the Plaintiff because no Final Judgment has been entered, and the finding of damages was entered by the Court on June 11, only 6 days prior to the filing of the Defendants' initial motion to set aside the defaults. In order to avoid any potential prejudice to the Plaintiff, Defendants offered to enter a tight scheduling order and cooperate in any way to expedite a trial of this matter (RE 27).

(1) **Defendants' failure to Answer was, at most, the result of simple negligence and error, not an utter disregard for service of process or indifference.**

In all times, Defendants acted in good faith. Having recovered a copy of the Complaint, Defendants contacted their attorney (T 30-31) who specifically advised Plaintiff's counsel that Defendants intended to vigorously defend this matter.

These Defendants did not ignore the Court's rules. In *International Paper Co. v. Basila, 460 So.2d 1202 (Miss. 1984)*, the Supreme Court reversed the default judgment and set it aside holding that Defendant's failure to file an Answer was by mistake or accident and "was certainly not occasioned by simple disregard of the service of process or indifference." Id at 1204. These Defendants are not guilty of disregarding Plaintiff's Complaint. Ed Pleasants contacted Plaintiff's counsel after suit was filed but not yet served and advised Plaintiff's counsel of the intent to defend the suit. Likewise, this is not a case where the Defendants were trained and experienced claims personnel who forgot about or misplaced the complaint. In *American States Insurance Company v. Rogillio*, 10 S. 3d. 463 (Miss. 2009), the Supreme Court affirmed a lower court's refusal to vacate a default judgment, finding that the insurance company's misplacing the summons and complaint did not constitute excusable neglect.

These Defendants acted in utter good faith. If any mistake was made by them, it was in putting their reliance upon the representation of the attorney they hired to defend them. Ample good cause exist that would prohibit a default judgment for being taken against them.

(2) Appellants have a colorable defense on the merits of this claim.

Even assuming that "good cause" has not been shown, a default judgment is still not warranted. The 3 prong test of Rule 60(b) is a balancing test which does not require that all three factors be met for a judgment to be set aside.

The Mississippi Supreme Court has said that the presence of a meritorious defense on the merits is a ground for awarding relief even where good cause is not shown:

> If anyone of three (3) factors in the balancing tests out ways the other in importance, this is the one. Indeed, we have encouraged our trial courts to vacate default judgments whether Defendant has shown that he has a meritorious defense on the merits.

Clark v. City of Pascagoula, 507 So.2d 70, 77 (Miss. 1987); *Bryant, Inc. v. Walters*, 493 So.2d 933, 937 (Miss. 1986); *Bailey v. Georgia Cotton Goods Co.*, 543 So.2d 180, 182 (Miss. 1989)); *Shannon v. Henson*, 499 So.2d 758, 768 (Miss. 1986) (colorable defense mitigates against enforcement of default.) See also *Allstate*, 794 So.2d 174 (Miss. 2001) (holding it to be a reversible error for a trial court not to set aside default judgment when a defendant had a colorable defense on the merits of the underlying claim).

The second factor is whether the Defendants have a meritorious defense. The Mississippi Supreme Court has held that if any of the three factors outweighs the others in importance, meritorious defense is that factor. *Bailey v. Georgia Cotton Goods Co.*, 543 So. 2d 180, 182 (Miss. 1989).; *Stanford v. Parker*, 822 So. 2d 886, 888 (Miss. 2002). Our Supreme Court has encouraged trial courts to vacate a default judgment where the Defendant has shown that he has a meritorious defense. *Allstate Ins. Co. v. Green*, 794 So. 2d 170, 174 (Miss. 2001). Loper did not appear at the hearing on the motion to vacate, but previously testified that she resigned her employment because of the alleged sexual harassment. In fact, as the testimony and documentary evidence at this hearing clearly showed, she was terminated because of her own misconduct. We submit there is no chance that Plaintiff can prevail at trial. Given the misrepresentation by the Plaintiff in her earlier testimony, there can be no doubt that the Defendants have a meritorious defense to assert in this case. Counsel for Plaintiff conceded in argument that Defendants set forth a meritorious defense.

American States Ins. Co. v. Rogillio, 10 So.3d 463 (Miss. 2009) sets forth a good summary of the many cases that have considered this issue. It acknowledges the general rule that the second factor, whether the movant has a meritorious defense, is the most important. In argument, Plaintiff conceded that the hearing established that the Defendants had established a meritorious defense, and we think that is clear. An opportunity for the Defendants to present their defense, and avoid not only a default judgment for $100,000 but also the stigma of a claim of sexual harassment, is much more

important to the Defendants than the thin claim that Plaintiff would suffer from a short delay.

Loper provided very little support for her claim related to intentional infliction of emotional distress. Although if there is outrageous conduct, no injury is required for recovery for intentional infliction of emotional distress or mental anguish, *Leaf River Forest Products, Inc. v. Ferguson*, 662 So. 2d. 648, 658 (Miss. 1995), the thin and uncorroborated testimony of Plaintiff demonstrates the weakness of her case. For example, a transcript of a tape recording, taken surreptitiously by Loper, is offered to demonstrate the character of the alleged misconduct. A review of that transcript, R 16-20, contains no references to repetitive advances by Savage and no real protest by Loper of the comments. In fact, what the tape does reveal is that the conversations were three way, in which another employee, Adam, was talking with a fourth employee about potential sexual activity. In his order, the lower court takes note of the fact that he was unaware of when the Plaintiff began working, how long the harassing behavior lasted, and that he was aware of only one minor physical contact between Tony Savage and the Plaintiff (RE 6-7). There was no testimony from Loper concerning any type of medical treatment or expense.

The merits of Loper's claims are likewise diluted by her conduct on the job. The undisputed testimony was that she drank on the job in violation of company policy, gave customer's lap dances for money and flirted and rubbed on the customers (T 45-48). Tony Savage was not offended by her behavior, considering her behavior to be merely joking around (T-48).

In Plaintiff's argument at the hearing on the motion to vacate the summary judgment, Plaintiff's attorneys clearly acknowledged the merits of the Defendants' case.[2]

To support a claim for intentional infliction of emotional distress, plaintiff must show severe emotional distress. *Restatement (2d) of Torts*, Section 46 (1) (1965). One who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. *Lyons v. Zales Jewelry Company*, 246 Miss. 139, 150 So. 2d 154, 158 (1963). Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting satisfactory boundaries of liability, severity is an element of intentional infliction of emotional distress. *Restatement (2d) of Torts*, Section 46, Comments B and J.

Appellants have a colorable defense on the merits of the Plaintiff's claim.

(3) Setting aside the Default Judgment will not prejudice Loper.

Loper will sustain no prejudice as a result of this Court setting aside the default judgment against Defendants. Loper and her counsel have at all times been aware that Defendants denied that Loper was entitled to any relief.

Plaintiff cannot argue that having to prove his case against Appellants is prejudicial. The burden of proof in a case is not legally cognizable prejudice. See *Bailey*, *Supra* 543 So.2d at 183 (trouble of proving a claim "is not what is meant by cognizable prejudice under this throng of the balancing test"). Consequently, there is no prejudice in any form whatsoever to the Plaintiff in setting aside the default judgment.

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[2] "...then you get into prong number 2 about the defensive standing of the defendant, well, obviously from the testimony you got this morning, Your Honor, you do have that, ..." (T 70), and "...obviously, the defensible claim is in dispute, ...(T 71).

To the contrary, not setting aside the Entry of Default would result in substantial prejudice against Defendants, and they should be afforded an opportunity to defend the merits of this case and should not be prevented from arguing the case due to their reasonable reliance upon the misrepresentation of their attorney.

II. THE LOWER COURT ERRED IN FAILING TO APPLY THE THREE FACTOR TEST

In its order of October 27, 2009, the Court did not address the three prong factors articulated by our courts. On a motion to vacate a default under Rule 60(b), the court should consider (a) the nature and legitimacy of the Defendants' reason for default, (b) the merits of the Defendants asserted defense, and (c) the extent of prejudice to the Plaintiff. *H & W Transfer & Cartage Service, Inc. v. Griffin*, 501 So. 2d. 895, 898 (Miss. 1987).

The three part test "...boils down almost to a balancing of the equities – in whose favor do they preponderate...Furthermore, [w]here there is a reasonable doubt as to whether or not a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on the merits. *Guaranty Nat. Ins. Co. v. Pittman,* 501 So. 2d 377, 388 (Miss. 1987), *McCain v. Dauzat,* 791 So.2d 839, 843 (Miss. 2001).

Under Rule 60(b), a default judgment may be set aside for a mistake, inadvertence, or excusable neglect. Without repeating all of the facts, there is no doubt that the Defendants retained Ed Pleasants to represent them, and it is undisputed that Pleasants provided them not only with a copy of correspondence to Plaintiff's counsel

denying the claims, but also a copy of an answer which he represented he had filed with the court. Under these circumstances, there was no reason for the Defendants to take any further steps to confirm their defense of the Plaintiff's claim. Regardless of whether Defendants' failure is characterized as a mistake, inadvertence or excusable neglect, there is no evidence that they intended to ignore the existence of the claim or to fail to defend it in a vigorous fashion.

Finally, setting aside the judgment will result in no prejudice to the Plaintiff. The court's consideration of this motion was obviously of no consequence to her, since she didn't even attend the hearing on the motion to vacate. Mere delay does not alone constitute prejudice, and Plaintiff made no showing that delay would result in her loss of evidence, increased difficulties in discovery or greater opportunities for fraud or collusion. *Lacy v. Sitel Corporation*, 227 F.3d. 290, 293 (5th Cir. 2000). There is no risk of a loss of evidence because the Plaintiff has already established a record. Plaintiff has made no showing of prejudice. On the other hand, prejudice to the Defendants is great.

As the Court said in *Dauzat* case, quoting *Guaranty Nat. Ins. Co. v Pittman,* 501 So 2d 377, 388 (Miss 1987), the 3 part test "...boils down almost to a balancing of the equities – in whose favor do they preponderate,...Furthermore, [w]here there is a reasonable doubt as to whether or not a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on the merits."

III. LOPER FAILED TO PROVIDE DEFENDANTS WITH NOTICE OF HER MOTION FOR A DEFAULT JUDGMENT AND THE JUDGMENT IS VOID AND SHOULD BE SET ASIDE

M.R.C.P. 55(b) provides:

> (b) Judgment. In all cases, the party entitled to a judgment by default shall apply to the court therefor. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application of judgment at least three days prior to the hearing of such application...(emphasis added).

Rule 55 also shows that the court may set aside a default in accordance with Rule 60(b). (...if a judgment by default has been entered, [the court] may likewise set it aside in accordance with Rule 60(b)).

The comments to Rule 55 also provide that:

> The mere appearance by a defending party will not keep him from being in default for failure to plead or otherwise defend, but if he appears and indicates the desire the contest the action, the court can exercise its discretion and refuse to enter a default. This approach is in line with a general policy that whenever there is doubt whether a default should be entered, the court ought to be tried on the merits...although an appearance by a defending party does not immunize him from being in default for failure to plead or otherwise defend, it does entitle him to at least three days written notice of the application to the court for the entry of a Judgment based on his default.

The comments disclose that the rule clearly contemplates an appearance in some form other than filing a formal pleading as follows:

> ...as a result, a party who has filed a responsive pleading or otherwise defended may still find himself in default for noncompliance of the rules at some later point in the action. ...Although an appearance by a defending party does not immunize him from being in default for failure to plead or otherwise defend, it does entitle him to at least three days written

notice of the application to the court for the entry of a judgment based on his default.

The comment to Rule 55(b) merits quoting at further length:

> The ability of the Court to exercise its discretion and refuse to enter a Default Judgment is made effective by the two (2) requirements in Rule 55(b) that an application must be presented to the Court for the entry of judgment and that notice of an application must be sent to the defaulting party if he has appeared. The latter requirement enables the defaulting party to show cause to the Court why a Default Judgment should not be entered or why the requested relief should not be granted. A party's failure to appear or be represented at any stage of the proceedings following an initial appearance does not effect this notice requirement. Service of the notice must be made three (3) days before the hearing on the application and must afford an opportunity to appear at the hearing. The purpose of this portion of Rule 55(b) is simple: It is intended to protect those parties who, although delaying in a formal sense by failing to file pleadings within the thirty day period, has otherwise indicated to the moving party a clear purpose to defend the suit. On the other hand when a defaulting party has failed to appear, thereby manifesting no intention to defend, it is not entitled to notice of the application for a Default Judgment under this rule.
>
> M.R.C.P. 55

Plaintiff's failure to give Defendant notice of its application for entry of default and motion for default judgment as required by Rule 55 means that Plaintiff's entry of default and default judgment are void as a matter of law and should be set aside pursuant to Rule 60(b)(4) as discussed above.

The federal rule, F.R.C.P. 55(b)(2), and the caselaw related to it, are virtually the same as our state court rules. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. *Baez v. S.S. Kresge Co.*, 518 F.2d 349, 350 (5th Cir. 1975).

There is no doubt that the known counsel for the Defendants, had "appeared" with respect to the action by Loper against the Defendants. Since no notice was given, the default judgment against the Defendants should be set aside.

The Court should determine whether or not the Defendants made an appearance in this action. This Court has held that "[t]raditionally, for an action to constitute an appearance, one had to file documents in or actually physically appear before a court." *Holmes v. Holmes*, 628 So.2d 1361, 1363 (Miss. 1993) (citations omitted). However, "those requirements have been relaxed considerably for Rule 55 purposes." *Holmes*, 628 So.2d at 1363 (citations omitted). "Once a party has made an indicia of defense or denial of the allegations of the complaint, such party is entitled to at least three days written notice of the application for default judgment." *Wheat v. Eakin*, 491 So.2d 523, 525 (Miss. 1986). This Court has noticed that "informal contacts between parties may constitute an appearance." *Holmes*, 628 So.2d at 1364 (citing various cases in which written documents that were exchanged between parties or filed with the court, or conversations initiated by Defendants' counsel, indicated an intent to defend the action and thus constituted an appearance).

In *Holmes*, this Court found that the defendant had made an appearance in the action because of the letters exchanged between counsel for the parties demonstrating that the defendant intended to defend the action *Holmes*, 628 So.2d at 1364. Accordingly, this Court reversed the trial court's order denying the defendant's motion to set aside the judgment of divorce because the defendant had appeared through her lawyer's

correspondence with opposing counsel and the plaintiff failed to provide notice pursuant to Rule 55(b). *Holmes,* 628 So.2d at 1362, 1365.

In *King v. Sigrest*, the defendant failed to file a timely answer and the plaintiff subsequently obtained an entry of default. 641 So.2d 1158, 1160 (Miss. 1994), However, after the entry of default, the defendant served the plaintiff with a motion to set aside default. This Court held that the trial court erred in denying the defendant's motion to vacate the default judgment because the defendant had appeared in the action by serving the plaintiff with her motion to set aside default and the plaintiff failed to provide notice pursuant to Rule 55(b). Id. at 1162.

The Defendants' failure to timely respond to Plaintiffs' Complaint was due to mistake and excusable neglect on the part of their attorney. The Defendants played no part in the delay in responding to the Complaint. As is set out in the Affidavit of Arvind Kumar, the Defendants immediately notified their attorney and forwarded the Complaint and Summons directly to him. These Defendants promptly addressed the lawsuit that had been filed against them and followed appropriate procedures for getting the claim to their attorney so that the claim could be defended (RE 29-38).

In its order of October 27, 2009, the Court notes the prevailing rule that under M.R.C.P. Rule 55, it is not necessary for a defendant to make a formal court appearance or actually appear before the court, but that the focus should be in determining whether the "...nonmovant has manifested to the movant a clear intent to defend the suit." *Dynasteel Corp. v. Aztec Industries, Inc.*, 611 So. 2d 977, 981 (1992). Noting that no

attorney filed an answer or appeared at any hearing on behalf, the Court held the Defendants had not manifested a "clear intent to defend the suit."

Respectfully, we do not believe that it is necessary for an attorney to manifest the intent to defend. Pleasants did manifest the intent to defend, by telling Smith that all claims were denied, RE 57-58, and although he later told Smith he would not be handling the defense, Pleasants never said that Defendants wouldn't do so.

M.R.C.P. Rule 55 specifically contemplates the possibility that a party may appear in the action without the necessity of hiring an attorney to do so.

Smith testified that on December 19, 2008, he was advised by Pleasants that Pleasants would no longer be representing the Defendants, but that Taylor Smith, another local attorney, would be handling the defense. There was nothing in the conversation, according to Smith, between Smith and Pleasants that indicated that the Defendants had abandoned their position or did not intend to contest the Plaintiff's claim. There was no effort by Smith to contact or consult with Taylor Smith or the Defendants in an effort to determine whether Taylor Smith was actually going to be involved in the case or that the Defendants did not intend to contest the claim.

Admittedly, there was no new appearance by the Defendants, but Pleasants never told Smith that the Defendants had abandoned their defense. The letter from Pleasants to Smith detailing the Defendants' position was never withdrawn, and that letter and the advice to Smith that new counsel was being retained collectively evidenced a "...clear intent to defend the suit."

CONCLUSION

The facts of this case warrant setting aside the default judgment against the Defendants in this cause. Defendants have at all times disputed and denied the Plaintiff's claims and her counsel was aware. The proof shows that Appellants had "appeared" and clearly indicated to Plaintiff's counsel that they intended to defend this matter. Most importantly, Defendants had a colorable defense against the merits of the Plaintiff's claim. Plaintiff has at all times been aware of Defendants' position in this matter and will not be prejudiced by allowing them to continue with that position. On the contrary, Defendants will be greatly prejudiced if the judgment is upheld.

Respectfully submitted,

ARVIND KUMAR, TONY SAVAGE AND TRACEY SAVAGE, Appellants

BY: _____
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CERTIFICATE OF SERVICE

I, the undersigned, John W. Crowell, attorney of record for the Appellants, do hereby certify that I have this day mailed, via United States first class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellants to the following:

P. Nelson Smith, Jr.
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Post Office Box 1111
Columbus, MS 39703

Hon. Lee J. Howard
Trial Court Judge
Post Office Box 1344
Starkville, MS 39760

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

JOHN W. CROWELL

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

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

VERSUS — **CAUSE NO. 2009-TS-02037**

SHANNA LOPER — **APPELLEE**

CERTIFICATE OF MAILING

I, Mary D. McDaniel, certify pursuant to Rule 25(a) of the Mississippi Rules of Appellate Procedure that on the 1st day of July, 2010, I mailed, via regular U.S. Mail, to the Mississippi Supreme Court Clerk the original and four (4) copies of the Brief of Appellants.

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

Mary D. McDaniel

AC\29,303-007\Brief of Appellantfin