IN THE SUPREME COURT OF THE STATE OF DELAWARE

DIANE SCHRADER-VanNEWKIRK,	§	
	§	
Plaintiff Below,	§	No. 423, 2011
Appellant,	§	
	§	
v.	§	Court Below—Superior Court
	§	of the State of Delaware, in and
SHARON C. DAUBE,	§	for Kent County
	§	C.A. No. 08C-02-089
Defendant Below,	§	
Appellee.	§	

Submitted: April 13, 2012
Decided: May 30, 2012

Before **BERGER**, **JACOBS**, and **RIDGELY**, Justices.

O R D E R

This 30th day of May 2012, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The plaintiff-appellant, Diane Schrader-VanNewkirk, filed this appeal from the Superior Court's order, dated July 13, 2011, denying her motion to reopen the judgment dismissing her personal injury complaint. The judgment of dismissal was entered because plaintiff failed to respond to the Superior Court's directive to confirm in writing her intent to attend the trial scheduled for February 14, 2011. Under these unique circumstances, we find that the ultimate sanction of dismissal was not reasonable. Thus, we conclude that the Superior Court's denial of

plaintiff's motion to reopen was an abuse of discretion. Accordingly, we reverse and remand.

(2) The record reflects that plaintiff filed her complaint in February 2008, seeking damages for personal injuries that she and her daughter suffered as a result of an automobile accident in Dover, Delaware. At the time she filed her complaint, plaintiff and her daughter were residents of Virginia. Defendant, Sharon Daube, filed an answer. Thereafter, the case went to arbitration. The arbitrator found in plaintiff's favor and awarded damages of $18,000 to her and $1,000 to her daughter. Defendant demanded a trial de novo, and a trial date was set for May 2009, but was rescheduled for August 2009 at defendant's request. In June 2009, defendant requested another continuance due to plaintiff's inability to attend her scheduled independent medical examination (IME). Plaintiff had since moved to California and was having financial difficulties affording travel to Delaware. Thereafter, a new trial date was set for January 25, 2010. In December 2009, the parties filed a pretrial stipulation indicating that defendant would not contest the issue of liability, only the issue of plaintiff's damages. Defendant reached a settlement with plaintiff's daughter and made an offer of judgment to plaintiff prior to trial, which was later withdrawn.

(3) On January 25, 2010, plaintiff failed to appear at the scheduled trial. Upon returning to his office in Wilmington, plaintiff's counsel contacted the

Superior Court indicating that plaintiff had left him voicemail messages prior to the start of trial indicating that she had had a medical emergency while in the airport and had been unable to board her airplane. On February 17, 2010, defendant filed a motion to dismiss based on plaintiff's failure to appear at trial, which the Superior Court denied. In May 2010, defendant scheduled a follow-up deposition for plaintiff but refused to agree to allow plaintiff to participate via videophone or Skype. When plaintiff indicated that she could not appear for the deposition because she could not afford the airfare, defendant filed a second motion to dismiss for plaintiff's failure to comply with discovery. Following oral argument, the Superior Court denied the motion to dismiss and set a new trial date for February 14, 2011.

(4) Thereafter, defendant's counsel requested an office conference to discuss his client's concern over the "leniency" the trial court had afforded to the plaintiff. Following the status conference, the trial judge orally indicated that plaintiff's failure to appear on February 14, 2011, the rescheduled trial date, would result in dismissal of her complaint. Thereafter, the Superior Court held the pretrial conference on January 11, 2011. Plaintiff's counsel indicated that he had had no recent communication with his client and expressed concern regarding plaintiff's attendance at the upcoming trial. Following that conference, the Superior Court directed the plaintiff, through her counsel, to write to the trial court

by February 1, 2011 confirming her intent to appear for trial on February 14 or else her case would be dismissed. This Superior Court directive is reflected on the docket in the entry of a "Judicial Action Form" on January 11, 2011 setting forth the trial court's oral order. Unfortunately, the Superior Court record does *not* reflect the entry of a written order directing plaintiff to respond or risk dismissal, nor does it appear that the Superior Court Prothonotary provided written notice to plaintiff of the trial court's oral directive that she respond in writing by February 1. On February 2, plaintiff's counsel filed a letter indicating that he had not heard from his client. On February 3, 2011, the Superior Court dismissed plaintiff's complaint prior to the scheduled trial date.

(5) On February 15, 2011, plaintiff filed a *pro se* motion seeking to reopen the Superior Court's judgment of dismissal. Plaintiff asserted that she was unaware of the Superior Court's directive that she provide a written response by February 1 confirming her intent to appear on February 14. Plaintiff contended that she had purchased a plane ticket and had been prepared to appear on February 14, the scheduled trial date. The Superior Court held argument on the motion to reopen on July 8, 2011and denied the motion on July 13, 2011.

(6) A motion to open a default judgment pursuant to Rule 60(b) is addressed to the sound discretion of the trial court.[1] In reviewing whether the trial

[1] *Tsipouras v. Tsipouras*, 677 A.2d 493, 495 (Del. 1996).

court abused its discretion, this Court will consider: (i) whether the conduct resulting in the entry of the default judgment was the result of excusable neglect; (ii) whether the outcome of the action *may* be different if the judgment is reopened; and (iii) whether the nonmoving party will suffer substantial prejudice if the judgment is reopened.[2]

(7) Upon review of the record, we conclude that the Superior Court abused its discretion in denying plaintiff's motion to reopen the default judgment. Had plaintiff failed to appear for trial for the second time on February 14, 2011, dismissal of her complaint clearly would have been warranted. That is not the case, however. Her complaint was dismissed prior to the trial date because she failed to indicate her intent to appear. The Superior Court record does not reflect that the court provided plaintiff herself with notice of its directive. The Superior Court relegated that responsibility to plaintiff's counsel, who previously had informed the court of his inability to contact plaintiff. Under the unique circumstances of this case in which the attorney-client relationship appeared to be at an impasse, the Superior Court should have given notice directly to the plaintiff of its intent to dismiss her case if she failed to respond to its oral directive. We cannot conclude on this record that plaintiff's failure to respond to her attorney is equivalent to a willful failure to respond to the Superior Court.

[2] *Id.* at 495-96.

(8) Moreover, it is clear that the outcome of this case very likely will be different if plaintiff has her day in court. Delaware has a strong public policy that favors permitting a litigant a right to a day in court.[3] Delaware courts should apply Rule 60(b) with a "liberal construction"[4] because of the public policy favoring a trial on the merits as opposed to a judgment based on a default. Finally, because the default judgment was simply a dismissal of plaintiff's complaint, we find no substantial prejudice to the defendant, who admitted liability and was excused from having to even attend the trial, if the judgment is reopened and the Superior Court hears the plaintiff's claim for damages.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is REVERSED. The matter is hereby REMANDED to the Superior Court for further proceedings consistent with this order. Jurisdiction is not retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[3] *Dishmon v. Fucci*, 32 A.3d 338, 346 (Del. 2011).
[4] *Beckett v. Beebe Med. Ctr.*, 897 A.2d 753, 758 (Del. 2006) (*quoting Old Guard Insur. Co. v. Jimmy's Grille, Inc.*, 2004 WL 2154286 (Del. Sept. 21, 2004)).