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| THE STATE OF SOUTH CAROLINA<br><br>COUNTY OF DARLINGTON | )<br>)<br>) | IN THE COURT OF COMMON PLEAS<br>FOR THE 4TH JUDICIAL CIRCUIT |
| Samantha Joanne Carwile, individually and as the Personal Representative of the Estate of Marlayna Joan Carwile,<br><br>Plaintiff,<br><br>v.<br><br>Chris Anderson and Danielle Anderson,<br><br>Defendants. | | C/A No. 2020-CP-16-00299<br><br>**ORDER ON DEFENDANTS' JUNE 2, 2023 MOTIONS** |



**HEARING DATE:** September 15, 2023

**SPECIAL REFEREE:** Patrick J. McLaughlin

**PLAINTIFFS' ATTORNEYS:** Ryan C. Andrews
David B. Yarborough, Jr.
Reynolds. H. Blakenship

**DEFENDANT'S ATTORNEY:** James B. Hood

**COURT REPORTER:** Margaret F. Barnett

This matter came before the undersigned on the Defendants' two motions filed June 2, 2023. One motion sought relief of altering, amending and/or reconsidering the May 23, 2023 *Order Denying Motion for Entry of Default* ("Order-D") pursuant to Rule 59(e) SCRCP ("Motion-D"). The other motion sought relief of amending, altering and/or in the alternative a new trial of the May 23, 2023 *Order of Default Judgment* ("Order-J") pursuant to Rules 52(b) and 59(a) and (e) SCRCP ("Motion-J"). A hearing was held on September 15, 2023.

Having considered the motions, responses, replies and the arguments of the parties, and after a thorough review of the record and relevant case law, the Court DENIES motion-D and GRANTS IN PART and DENIES IN PART motion-J.

## FACTUAL/PROCEDURAL BACKGROUND

This is a negligence action arising out of an automobile-pedestrian collision that occurred on December 6, 2017, in Darlington County. The collision resulted in the death of Marlayna Carwile, the three-year-old daughter of Plaintiff Samantha Carwile and Justin Baxter.

Plaintiff filed this action on March 17, 2020, and Defendants Chris Anderson and Danielle Anderson were both personally served on April 6, 2020. After Defendants failed to timely serve a responsive pleading, the Court entered Defendants' default on June 15, 2020 ("first default").

On August 3, 2020, Defendant Danielle Anderson filed an Affidavit ("Exhibit 26") attesting that she had contacted Allstate Insurance Company ("Allstate"), her insurer for the date of loss, immediately after being served, and that Allstate had erroneously informed her to contact her current insurance carrier to defend her in the lawsuit. Defendant Danielle Anderson's affidavit also provided that she had retained Attorney Thurmond Brooker as her counsel due to Allstate's mistaken advice and failure to defend her which had caused the first default.

By Order dated May 26, 2021, the first default was set aside, and on June 11, 2021, the Defendants filed an Answer to the underlying action. Defendants subsequently failed to respond to discovery requests. Plaintiff filed a motion to compel, and the Court granted that motion; issuing an Order to compel. Defendants failed to comply with the Order to Compel. Plaintiff filed a motion for sanctions and the Court issued an Order granting sanctions; striking Defendants' Answer pursuant to Rule 37(b)(2)(C) and (d), SCRCP. *See* Order entered November 17, 2022 ("Sanctions Order"). In the Sanctions Order, the Court ruled that Defendants would be re-entered into default "upon application by the Plaintiff." Id.

After Plaintiff filed the application, the Court entered Defendants into default. *See* Order for Entry of Default entered November 29, 2022 ("second default").

By Order dated February 10, 2023, the case was referred to the undersigned as Special Referee pursuant to Rule 53, SCRCP; providing that the Special Referee "shall have and retain jurisdiction over any motions . . . related to the entry of default. . ." *See* Order of Reference to Special Referee entered February 10, 2023 ("Order of Reference").

On March 7, 2023, Plaintiff filed a motion for default judgment pursuant to Rule 55(b)(2), SCRCP. A hearing for the motion was scheduled for April 13, 2023. Defendants, through new counsel, Attorney Andrew MacLeod, filed a motion for relief from entry of default on April 12, 2023.

At the hearing on April 13, 2023, after considering the Order of Reference and noting that Ms. Carwile and Mr. Baxter were in attendance from out of State, the Court informed the parties of its intention to hear their testimony for the damages hearing and then, the Court would entertain Defendants' motion to set aside default. Both parties consented to proceeding in that fashion.

The Plaintiff called Suzanne Carwile and Justin Baxter as witnesses and presented testimony from both, as the parents and statutory beneficiaries of Marlayna Carwile. During that testimony, the Plaintiff offered exhibits in support of the testimony, to include the August 3, 2020 *de bene esse* deposition transcript of Vanessa Lobo, LLC, an expert in the field of trauma counseling; and twenty-four (24) photographs. There was no objection to any of the testimony or exhibits.

The Defense had the opportunity to cross-examine both parents, only asking Ms. Carwile approximately six (6) questions.

After receiving the testimony of the parents, there was break, after which the hearing resumed, and the Defense was recognized on their motion to set aside entry of default. There was

no objection to proceeding with the motion and no issue was raised regarding the power/authority of the Special Referee to hear and rule upon Defendants' motion.

In arguing the motion to set aside the second default, Defendants' counsel informed the Court that he was recently retained by Allstate, and indicated that Allstate had first learned about the underlying matter on March 30, 2023, when Allstate received a subpoena from Plaintiff's counsel. Defendants' counsel suggested that Defendants' previous counsel's actions resulted in the second entry of default against the Defendants. Defendants argued that these reasons constituted good cause to grant Defendants' motion for relief from entry of default and that the factors cited in Wham v. Shearson Lehman Bros., 298 S.C. 462 (Ct. App.) weighed in their favor.

The Court informed the parties at the conclusion of the hearing that given the sworn affidavit of Defendant Danielle Anderson that had been previously submitted to and relied upon by the Court in the setting aside the first entry of default in this matter, the Court denied the motion to set aside the second default.

The Court asked the Plaintiff for a proposed order that addressed the consequence of the inconsistent position argued by the Defense (i.e., judicial estoppel) and finding that the appropriate remedy to default arising from a Rule 37 sanction would have been a Rule 59(e) motion for reconsideration; and, if unsuccessful, an appeal. The Court also asked the Plaintiff for a proposed order on damages.

On May 23, 2023, the Court issued the two Orders. The Court will refer to the Order denying the Defendants' motion to set aside entry of default as "Order-D" and the Order of Default Judgment as "Order-J." Defendants filed the current motions on June 2, 2023. Plaintiff filed responses and the Defendants filed replies to those responses.

A hearing was held on September 15, 2023, wherein the Court heard arguments from the parties and the Defense submitted sixteen (16) exhibits and also provided to the Court, at the Court's request, a copy of the PowerPoint presentation used during argument. This Order follows.

## LAW/ANALYSIS

### I. Defendants' Motion to Alter or Amend and/or Reconsider *Order* denying motion for relief from entry of default pursuant to Rule 59(e) SCRCP (Motion-D and Order-D).

Based on the findings and discussion below, Defendants' motion to alter or amend and/or reconsider its Order Denying Motion for Entry of Default pursuant to Rule 59(e) SCRCP is DENIED.

#### a. Special Referee's authority to hear the case.

Defendants argue that the undersigned Special Referee did not have authority and/or jurisdiction to rule upon the Rule 55 motion to set aside default entered after the Circuit Court, Hon. Paul M. Burch, struck the Defendants' answer as a Rule 37 sanction via the Sanctions Order.

Judge Burch specifically found that "the Defendants answer be stricken from the record pursuant to South Carolina Rules of Civil Procedure 37(b)(2)(C) and 37(d)," and that "upon application by the Plaintiff, default be entered into against Defendants for Defendants' failure to answer, defend, or otherwise plead." Sanctions Order, November 17, 2022, p.2.

The 2nd Default Order was issued by the Darlington County Clerk of Court, entering default against the Defendants on November 29, 2022.[1]

[1] Once Defendants' answer was stricken via the Sanctions Order, they were in default as "entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party." Stark Truss Co. v. Superior Contr. Corp., 360 S.C. 503, 509 (Ct. App. 2004). *See also*, Judge Burch's finding that "upon application by the Plaintiff, default be entered…" Sanctions Order, November 17, 2022, p.2.

On February 10, 2023, the Darlington County Clerk of Court issued the Order of Reference, which noted that neither Defendant had filed any motion to reconsider the 2nd Default Order. The Order of Reference found the Special Referee:

> …shall have the full power and authority of this Court, and he shall rule on any motion for default judgment; hold a damages hearing and take all testimony and other evidence; and enter and enforce final judgment. He shall have and retain jurisdiction over any motions related to the appointment of him as special referee; any motions related to the entry of default, including but not limited to motions pursuant to Rule 55, SCRCP; any motions related to the entry of default judgment, including but not limited to motions pursuant to Rules 59 and 60, SCRCP; and any motions to intervene pursuant to Rule 24, SCRCP. [the Special Referee] will also have and retain jurisdiction over any supplemental proceedings in connection with the matter. All Orders of the Special Referee shall be filed with the Clerk of Court for Darlington County.

Order of Reference, p.1.

None of the above orders were appealed prior to the filing of the May 23, 2023 Orders.[2]

Defendants argue that the Special Referee did not have the power to hear the case, pursuant Limehouse v. Hulsey, 404 S.C. 93 (2013). That argument, ably presented by defense counsel, is that the Clerk of Court did not have the power to refer/appoint the Special Referee; and that therefore, the Special Referee could not hear the matter.

The Order of Reference specifically notes the matter "comes before the Court on Plaintiff's motion for referral to a special referee pursuant to Rule 53, SCRCP." Order of Reference, p.1.

Pursuant to Rule 53(b) SCRCP, "in an action where the parties consent, **in a default case**…some or all of causes of action in a case may be referred to a master or special referee by order of a circuit judge **or the clerk of court.**" Rule 53(b) SCRCP, emphasis added.

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[2] The Defendants filed a *Notice of Intent to Appeal* on June 22, 2023 with the South Carolina Court of Appeals; noticing their intention to appeal both May 23, 2023 Orders; the February 10, 2023 Order of Reference; the November 29, 2022 Order of Entry of Default; and November 17, 2022 Sanctions Order. That appeal has been stayed pending the resolution of these motions.

Defendants argue that Rule 53(b) does not provide the Clerk of Court with the authority to refer/appoint the Special Referee because Rule 53(b) "conflicts" with S.C. Code §14-11-60, Appointment of special referee, which reads:

> In case of a vacancy in the office of the master-in-equity[3] or in case of the disqualification or disability of the master-in-equity from interest or any other reason for which cause can be shown the presiding circuit court judge, upon agreement of the parties, may appoint a special referee in any case who as to the case has all the powers or a master-in-equity. The special referee must be compensated by the parties involved in the action.

S.C. Code §14-11-60.

Defendants argue that the absence of any reference to a clerk of court's authority to refer a case to a special referee in S.C. Code §14-11-60 creates a "conflict" between that statute and Rule 53; and that "any conflict between a statute and court rule must be resolved in favor of the statute," citing to S.C. Const. Art. V, §4 (2016) and Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 570 (2010).

Defendants go on to argue that given this "conflict" between Rule 53(b) and S.C. Code §14-11-60 concerning the ability of the Clerk of Court to have referred/appointed the Special Referee, the Special Referee has no power to hear this case.

In Roche v. Young Bros., the South Carolina Supreme Court reversed the Court of Appeals reversal of a default judgment based this same argument. Roche v. Young Bros., 332 S.C. 75 (1998) ("Roche IV"). In Roche, Defendant Young Brothers was originally found in default for failing to answer, default was entered, a damages hearing held, and damages awarded. Young Brothers filed a Rule 60 motion to set aside default judgment, which was denied by the trial court.

[3] Darlington County does not have a Master-in-Equity. *See*: https://www.sccourts.org/mastersCourt/mastersMap.cfm

In July 1992, Young Brothers appealed the judgment to the Court of Appeals, which reversed the default judgment; finding service of process had not been effected. Roche v. Young Bros., Inc. of Florence, 313 S.C. 356 (Ct. App. 1993) ("Roche I").

The South Carolina Supreme Court subsequently reversed the Court of Appeals and reinstated the entry of default; but, vacated the default judgment and awarded Young Brothers a new damages hearing. Roche v. Young Bros., Inc. of Florence, 318 S.C. 207 (1995) ("Roche II").

In April 1995, Roche filed an *ex parte* motion with the circuit court requesting that the damages hearing be referred to Attorney Eugene A. Fallon, Jr., as special referee. The circuit court granted the motion without Young Brothers ever receiving notice of the motion. Young Brothers later made a motion to the circuit court to have the reference withdrawn and that motion was denied.

A damages hearing was subsequently held before Special Referee Fallon; where Young Brothers appeared and was represented by counsel. The Special Referee subsequently awarded damages via written order and Young Brothers appealed that order to the Court of Appeals.

The Court of Appeals reversed the circuit court; finding Young Brothers' consent was necessary. Roche v. Young Bros., Inc. of Florence, 326 S.C. 488 (Ct. App. 1997) ("Roche III").

Roche then appealed to the South Carolina Supreme Court. Roche v. Young Bros., 332 S.C. 75 (1998) ("Roche IV"). The Roche IV court specifically noted:

> **The problem in this case lies in reconciling the language in section 14-11-60 and Rule 53(a) and with that in Rule 53(b).** Rule 53(a) seem to require, without exception, the agreement of the parties prior to the appointment of a special referee. Rule 53(b), on the other hand, suggests that consent is not required in a default situation.

Roche IV at 81, emphasis added.

Citing to previous cases relating to statutory interpretation generally and of Rule 53(b), Rule 55(b)(1) SCRCP, and S.C. Code §14-11-85 specifically, the Roche IV Court, ultimately, reversed the Court of Appeals; finding that Young Brothers was in default and, thus, their "consent was not required prior to the circuit court appointing special referee Fallon." Roche IV, at 82-83.

In accord with Roche IV, I FIND that there is no conflict between the language of Rule 53(b) SCRCP and S.C. Code §14-11-60 affecting the power of the Special Referee to hear this matter. By statute, §14-11-60, the legislature authorized the Court to appoint special referees. By rule, 53(b), the South Carolina Supreme Court has decided, for the efficient administration of the courts, certain cases (consent, default, foreclosures), may be referred to a special referee by order of circuit judge "or the clerk of court." Rule 53(b) SCRCP.

The two provisions do not conflict. Section 14-11-60 grants the courts certain authority and, by rule, the Supreme Court has directed how that authority may be exercised.

This finding is consistent with the powers and authority vested in the judiciary via Art. V, §4 of the South Carolina Constitution, which specifically provides:

> The Supreme Court **shall make rules governing the administration of all the courts of the State**. Subject to the statutory law, **the Supreme Court shall make rules governing the** practice and **procedure in all such courts**.

Art. V, §4, S.C. Constitution, emphasis added.

At the time of the Order of Reference, the Defendants were clearly in default; having been in default since the Sanctions Order issued by Judge Burch striking their answer. At that point, because consent of the Defendants was no longer required pursuant to Rule 53(b), the referral of the matter to a special referee by the Clerk of Court was a ministerial act, appropriately exercised by the Darlington County Clerk of Court via the Order of Reference.

I FURTHER FIND that any challenge to the authority of the Special Referee to hear this matter has been waived.

At the start of the April 13, 2023 hearing, the Court specifically noted on the record:

> First off, Mr. MacLeod, I – I realize that you just recently made an appearance in this case and I saw where you have filed a – a motion to set aside default that I believe got filed yesterday. Looking at the order of reference that was signed by the judge – well, **it was signed by the clerk**, I guess – this case has been given to me to – to hold a damages hearing **and also address any motions related to the entry of default**. So – well, I know we've had these folks come in from out of town, so what I tend to do today is go ahead and take this damages hearing, let them do their testimony.
>
> **I will leave it up to the – to counsel if y'all want to argue the – the motion to set aside today**. I'm glad to sit here and listen to it.

*Transcript of April 13, 2023 hearing*, p.5, l.2-19, emphasis added.

Thus, at the commencement of the hearing, the parties were aware that the Order of Reference: (1) was issued by the Clerk of Court, and (2) authorized the Special Referee to address any motions related to the entry of default.

After a break following the testimony in the damages hearing, the hearing was reconvened on the record and Defense counsel was recognized "for a motion to set aside the entry of default that was filed yesterday." *Transcript of April 13, 2023 hearing*, p.63, l.17-23.

A hearing was then held on the Defendants' motion to set aside the entry of default. The parties made no objection to the Special Referee's authority to hear the matter.

Defendants argue no objection was required, because the arguments that they raise now involve the "power of the court to hear the case" under Limehouse v. Hulsey, 404 S.C. 93 (2013) and that the issue is not waivable.

At the September 15, 2023 hearing on their motion, Defendants argued:

> THE COURT: So in response the defense's argument about the power of the court, the plaintiff was arguing that would be waivable.

What's the defense's position on whether or not that's waivable?

MR. HOOD: Well, I think I'd go right back to Hulsey and go look at that case. What happened there was the issue was raised, and that was a primary argument against it. That's where the argument came over whether this was subject matter jurisdiction or personal jurisdiction. And, really, the distinction there was, you know, personal jurisdiction was waivable, subject matter jurisdiction is not; and that's where Few in his dissent went it, well, there's this third type of jurisdiction, which is the power of the court; and that's what we're dealing with here, is not waivable, and, therefore, it hasn't been waived.

I think when you go back and you read the Hulsey case, it's instructive for that very point, whether issues to – jurisdictional issues based on the power of the court can be raised now or not, and the answer in Hulsey was that, yes, they could.

*Transcript of September 15, 2023 hearing*, p.40, l.17 – p.41, l.14.

And:

THE COURT: The two orders that wound up with this case being before me, so the order from Judge Burch striking the answer and the order of reference, are those immediately appealable orders that have to be appealed; and if they aren't, does that waive it?

MR. HOOD: Got it. So we address that in our briefing, and thanks for asking that question. I think Link disposes of that issue, **which says that they can be immediately appealed but they don't have to be**.

*Transcript of September 15, 2023 hearing*, p.47, l.10-20, emphasis added.

In Link v. School Dist. of Pickens County, 302 S.C. 1 (1990), the Supreme Court considered a case in which a summary judgment order did not dispose of all the causes of action. As the Link court noted, "summary judgment was granted against Link on his breach of contract claim, and he did not immediately appeal this ruling." The Plaintiff in Link had brought four (4)

causes of action and, after summary judgment was granted to one, the case proceeded against the remaining causes of action. Link at 2-3.

In this case, the Sanctions Order resolved **all** the causes of action by striking the answer. The only remaining issue at that point was the amount of damages. As such, it should have been appealed.

Even assuming the Order striking the answer did not have to be immediately appealed, Link does not support the Defendants' arguments. As Link noted "for reasons of public policy, **some rulings controlled by §14-3-330(2) must be immediately appealed, or the right to review will be lost**. See, e.g., Creed v. Stokes, 285 S.C. 542, 332 S.E.2d (1985) (attempt to appeal, after final judgment, **an order affecting the mode of trial**.)." Link at 6, fn.5, emphasis added.

In Creed, the South Carolina Supreme Court specifically found that an "order of reference":

> …was not interlocutory, **and should have been appealed immediately because it affected the mode of trial, a substantial right**. S.C. Code §14-3-300(2); Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978). **The order became the law of the case once appellant failed to timely appeal**.

Creed at 543, emphasis added.

"An unappealed order becomes the law of the case." McCall v. State Farm Ins. Mut. Auto Ins. Co., 359 S.C. 372, 377 (Ct. App. 2004), citing to Toler's Cove Homeowner's Ass'n v. Trident Const. Co., Inc., 355 S.C. 605, 610 (2003). "An unappealed ruling, right or wrong, is the law of the case." Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 398 (Ct. App. 2004). An unappealed order becomes the law of the case and the circuit court is "wholly without power or jurisdiction to revoke, vacate, overrule or reverse the same." C. I. T. Corp. v. Corley, 196 S.C. 339, 343 (1941).

An order affecting a substantial right, "**must be immediately appealed or any later objection in a subsequent appeal will be waived.**" Hagood v. Sommerville, 362 S.C. 191, 199 (2005), emphasis added.

Such logic prevents a party from submitting an issue to a special referee, waiting to see whether the special referee's ruling is favorable; and, if not, then challenging the authority of the special referee to make that ruling.

The Defendants in this case did not immediately appeal the Sanctions Order striking the answer, which pursuant to Link, should have been immediately appealed. Moreover, the Defendants did not immediately appeal the Order of Reference, which Link, Creed and Hagood all hold must be immediately appealed or any later objection in a subsequent appeal will be waived.

I FIND that the Order of Reference is the law of the case; including all authority conveyed to the Special Referee within that Order. The Defendants waived any right to challenge the Order of Reference by not filing an appeal within thirty (30) days of that order.

**b. Rule 59 versus Rule 55**

I FIND that the correct rule to pursue relief via motion (as opposed to an immediate appeal as discussed above) from the Sanctions Order striking the answer as a Rule 37 sanction, was a Rule 59(e) SCRCP motion to reconsider, which was required to be filed within ten (10) days. No such Rule 59(e) motion was timely filed by the Defendants. *See* Order-D, p.3-5; Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193 (Ct. App. 1999); and QZO, Inc. v. Moyer, 358 S.C. 246, 252 (Ct. App. 2004).

Assuming arguendo Defendants' Rule 55 motion was an appropriate mechanism under the rules by which to seek relief from the Rule 37 sanction striking the Defendants' answer, the Defendants have "failed to set forth satisfactory explanation for the default." *See* Order-D, p.3-5;

Regions Bank v. Owens, 402 S.C. 642, 649 (Ct. App. 2013); and the "judicial estoppel and abandonment" discussion below.

**c. Judicial Estoppel and Abandonment**

In finding that the Defendants had failed to set forth a satisfactory explanation for their second default during the April 13, 2023 hearing, the undersigned relied, in part, on the doctrine of judicial estoppel. Specifically, the Defendants now argue that their insurer, Allstate, only received notice of the claim in March 2023; when they previously submitted a sworn affidavit to the Court from Defendant Danielle Anderson indicating they notified Allstate about this matter in April of 2020. Order-D, p.4.

The undersigned found that the doctrine of judicial estoppel prevented the Defendants from maintaining such inconsistent positions and that it would be "fundamentally unfair to allow a party to take one position to argue itself out of default, then change that position in attempt to escape default a second time." Order-D, p.5.

Defendants argue the Court "overlooked or misapprehended the arguments presented by the Defendants regarding notice(s) to Allstate and improperly applied the doctrine of judicial estoppel in denying the Rule 55 motion," arguing that the positions were not actually inconsistent and did not support judicial estoppel. Motion-D, p.2.

In the June 23, 2020 Affidavit, Defendant Danielle Anderson gave sworn testimony that she was served with the lawsuit "around April 10th 2020" and that she "immediately contacted Allstate to file a claim with them since they were the insurance provider that I had coverage with at the time of the incident…" Defendant Anderson further testified that her privately hired attorney "informed me of how Allstate had not properly handled the situation…" Exhibit 26.

The Defendants offered no evidence to the undersigned in support of their Rule 55 motion. At the April 13, 2023 hearing, Defendants counsel argued to the undersigned that Allstate first learned of the case in March 2023:

> MR. MACLEOD: Briefly, I was hired to defend the – the defense by the insurance carrier, Allstate. They first tell me they found out about this case **March 30th, 2023 when they received a subpoena from the plaintiffs**. And they are in that position **because way back in 2020 when the case was filed and served, they tell me they were not given notice of that lawsuit**.
>
> There has been some story, and it's reflected in the affidavits that are already filed in this case, that the defendants spoke to at least two homeowner's insurance companies. **They said they spoke to Allstate, which I don't have any record of.** And they did have Allstate homeowners insurance at the time of this incident.

*Transcript of April 13, 2023 hearing,* p.64, l.3-19, emphasis added.

The long-standing rule in South Carolina is that a client is bound by the actions and statements of their attorney. *See* Shelton v. Bressant, 312 S.C. 183, 184 (1993) ("Acts of attorney are directly attributable to and binding upon a client.") and Smith v. Pearson, 210 S.C. 425, 530 (1947) (finding appellants bound by statement made by counsel at the outset of hearing).

It is clear from the Court's May 26, 2021 Order setting aside default on the first occassion, that Defendant Danielle Anderson's affidavit, and the representations made in that affidavit, were relied upon by the Court in finding good cause set aside default the first time.

I FIND that allowing the Defendants to once again use Allstate, as the basis of good cause explanation for default would be fundamentally unfair and further prejudice the Plaintiffs in this matter; particularly where the Defendants are essentially challenging the validity of an affidavit which they previously offered to the Court and the Court accepted as a basis for setting aside default previously in this case. Accepting such an argument would allow the Defendants to adopt

a position of fact in conflict with one they previously took in the same litigation. Judicial estoppel prohibits the Court from accepting such argument.

Defendants now argue that the actions of their former counsel, Attorney Brooker, rise to the level of abandonment; and that the Court should distinguish between an attorney's simple negligence and what they describe as "willful abandonment."

There was no evidence presented by the Defendants prior to the September 15, 2023 hearing in support of their allegation of "willful abandonment," or even, for that matter, simple negligence by Mr. Brooker. Defendants' April 12, 2023 Rule 55 motion to set aside entry of default did not raise any claims of abandonment by counsel as the "good cause" to set aside default.

Defendants did not allege "abandonment" in this matter until their August 2, 2023 reply to the Plaintiff's memorandum in opposition to the pending motions to reconsider now before the Court. These Defendants argued, for the first time, that their attorney's conduct "transcended mere neglect and establishes willful abandonment" and should be good cause for setting aside Judge Burch's November 17, 2022 Order striking their answer. Reply-D, p.5.

At the September 15, 2023 hearing, the Defendants submitted, as Exhibit 12, a lawsuit filed August 25, 2023 in which the Defendants have joined Plaintiff Samantha Carwile, in suing Allstate, a local insurance broker/agent and his agency, as well as Attorney Brooker and his law firm on various causes of action alleging, essentially, professional negligence. Defendants also submitted, as Exhibit 13, an affidavit from an attorney offered in support of the allegations of professional negligence against Attorney Brooker; which was filed as an exhibit to that lawsuit.

It appears Attorney Brooker and his law firm have subsequently filed an Answer[4] denying the allegations; and, in turn, asserting a defense of negligence/contributory negligence against the

[4] *See* Answer filed September 23, 2023 in C/A No. 2023-CP-16-00616.

Defendants accusing the Defendants of "failing to keep in contact with the [Brooker and his law firm]; failing to cooperate with [Brooker and his law firm]; and failing to follow [Brooker and his law firm]'s advice."

I FIND that it would be unfair and unnecessarily prejudicial to the Plaintiff at this stage in this case to accept the Defendants' new allegations of abandonment as good cause to set aside default for a second time.

Based on the above, Defendants' Motion-D is DENIED.

## II. Defendants Motion to Amend pursuant to Rule 52(b) and Rule 59(e) SCRCP and/or in the alternative, Motion for New Trial, pursuant to Rule 59(a) SCRCP (Motion-J and Order-J).

To the extent the Defendants' instant Motion to Amend pursuant to Rule 52(b) and Rule 59(e), and in the alternative, For New Trial, pursuant to Rule 59(a), relies on arguments that the Order of Default Judgment (Order-J) awarding damages is affected by absence of authority of the Special Referee to hear this case, the Court reiterates the findings and discussion above. Other issues raised by the Defendants in the instant motion are addressed herein below.

Defendants' motion-J is GRANTED in part and DENIED in part.

### a. Propriety of the Court's Consideration of Certain Evidence

Damages recoverable in a wrongful death action are the damages sustained by the statutory beneficiaries resulting from the death of the decedent, including (1) pecuniary loss; (2) mental shock and suffering; (3) wounded feelings; (4) grief and sorrow; (5) loss of society and companionship. *See*, e.g., Lucht v. Youngblood, 266 S.C. 127, 137 (1976); Ballard v. Ballard, 314 S.C. 40, 41-42 (1994); and Welch v. Epstein, 342 S.C. 279, 304 (Ct. App. 2000).

The statutory beneficiaries in this case are the mother and father of Marlayna Carwile, Samantha Carwile and Justin Baxter. The Court's Order of Default Judgment, details with some

specificity, evidence that was presented through Ms. Carwile and Mr. Baxter's testimony at the April 13, 2023 damages hearing. *See* Order-J, "Findings of Fact" section.

Defendants argue that it was improper for the Court to consider evidence of the parents' lost wages and diminished earning capacity, evidence of the deterioration of the relationship between Ms. Carwile and Mr. Baxter, evidence of the parents' emotional trauma arising from witnessing the injuries to their daughter at the scene, and evidence concerning the emotional impact on and/or any need for future counseling of the minor brother who witnessed his sister's death.

I FIND that the consideration of this evidence by the Court was appropriate under the wrongful death statute and relevant case law. Specifically, this evidence is relevant to the mental shock and suffering, wounded feelings, grief and sorrow, loss of society and companionship that the statutory beneficiaries have suffered and continue to suffer from this tragedy.

At a bench trial on wrongful death claims, the Hon. David C. Norton of the Federal District Court applied South Carolina law and awarded $6 million, each, to the estates of a 13-year-old, a 14-year-old, and a 16-year-old.

Judge Norton found that South Carolina law provides that "parents are entitled to a presumption of nonpecuniary damages." Hurd v. United States, 134 F.Supp.2d 745, 774 (D.S.C. March 8, 2021) (citing Mock v. Atlantic Coast Line R.R. Co., 227 S.C. 245 (1995) and Self v. Goodrich, 300 S.C. 349 (Ct. App. 1989)). Judge Norton also cited The South Carolina Law of Torts; noting "It may often be assumed that grief and sorrow will be experienced at the loss of a loved one; however, the strength of such presumption is a function of the closeness of the relationship…" *See* F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 615 (2d ed. 1997).

Judge Norton addressed the damages for the loss of each child, recapping testimony about the child-parent relationships, details of how the children died, and the life expectancy of the children and their surviving parents. Hurd at 763-765. Judge Norton further explained the support in the record for the damages he ultimately awarded:

> The record reflects that the relationships these children shared with their families were exceptional. Daniel and Paul Cornett and Bobby Lee Hurd enjoyed spending time with their families and considered their parents and siblings their best friends. The testimony at trial revealed that being a family and sharing time together were the most important aspects of both the Hurds' and the Cornetts' lives. As a result of the closeness shared between these parents and their children, the impact of this tragedy is even more severe. Testimony at trial revealed that these parents have been overcome with grief. The pain they endure on a daily basis is overwhelming, and the damages they sustained are immeasurable. As stated by the South Carolina Court of Appeals in Scott v. Porter, "there is no mathematical formula which can easily establish the value of this kind of loss, and it is not this court's place to do so." 340 S.C. 158, 530 S.E.2d 389, 395 (S.C. Ct. App. 2000). However, in light of wrongful death verdicts in South Carolina involving minor children, the court finds the following damages are proper in this case.[5]

Hurd at 775.

In discussing the non-pecuniary damages suffered by the surviving parents, Judge Norton found "as evidenced by Ms. Cornett's testimony at trial, the overwhelming magnitude of Ms. Cornett's suffering, sorrow, pain, emptiness and grief is unbearable…the untimely deaths of her beloved children have essentially left her lifeless." Judge Norton awarded Ms. Cornett $6,000,000.00 for the loss of each child. Hurd at 776.

As to the Hurds' "loss of intangibles," Judge Norton found, "…the record reflects these parents have suffered the most tragic of all losses, the loss of a child…Both parents must endure their own separate loss and a combined loss as well." Judge Norton awarded $6,000,000.00 Dollars, "to be divided…$3,000,000.00 Dollars to each parent." Hurd at 776.

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[5] Judge Norton also cited to awards made in the cases of Steinke v. Player & Beach Bungee, Inc., 145 F.3d 1325 (4th Cir. 1998). Jimenez v. Chrysler Corp, 74 F.Supp.2d 548 (D.S.C. 1999).

As discussed below, much of the evidence the Defendants argue was inappropriately considered by this Court, is similar to evidence considered by the Hurd, Steinke, and Jimenez courts in awarding damages under South Carolina wrongful death law.

**i. Lost Wages & Diminished Earning Capacity**

Defendants argue it was improper for the undersigned to consider evidence of the parents' lost wages and diminished earning capacity, as they are not recoverable damages in a wrongful death action. Motion-J, p.3, ¶7

Examples of this evidence was the impact their daughter's death had on the parents' jobs:

> Ms. Carwile was "unable to return to work for approximately eleven months after her daughter's death." Order-J, p.5, ¶9.
>
> Mr. Baxter planned to continue his career at Robinson Nuclear Power Plant all the way through retirement. However, after his daughter's death he could not muster the focus or ability to perform the job. In fact, since his daughter's death, Mr. Baxter has had trouble maintaining any consistent employment and is currently employed making approximately one-third of the salary he was making prior to his daughter's death. Order-J, p.6, ¶12.

Consideration of this evidence in a wrongful death case was addressed during the September 15, 2023 hearing:

> THE COURT: One other question I had, and I want both sides to respond to this, is the idea about the elements of damages that were inappropriate to consider. If we have a case like this one where you have a child that dies, and we know that it's appropriate to consider emotional grief and sorrow, I'd like for both of you to respond to the idea that if you have, for example, you got a parent who is so – obviously the loss of a child is probably the worst thing that can happen to people, and people are going to recover and react to that differently. **If you have a parent who it impacts them so significantly that they lost their job, does that not speak to the emotional trauma or the grief and sorrow of the parent; that they are, for lack of a better way to say it, so wrecked that they can't go on in life, right, and they lose their job by it.**

> In a case where evidence is presented about that, not necessarily specific evidence about, I lost my job, I made X amount per year, this is how long I would live, that's this amount, we want you to award us this much in lost wages, but **would it not be appropriate for that to be considered as just a factor in weighing the grief and sorrow of the parent from the loss of the child**.
>
> I'll give you the chance first to respond to that, Jamie, and then let Ryan respond for the plaintiff.
>
> MR. HOOD: Sure. I think the answer to your question is that **how it impacted the parent would be admissible to show evidence to support their claim for the wounded feelings and the grief and sorrow. I think you can describe that**.

*Transcript of September 15, 2023 hearing*, p.43, l.17 – p.44, l.25, emphasis added.

The colloquy above shows the Defendants agree consideration of this evidence is appropriate when evaluating a parents non-pecuniary damages.

The evidence shows Mr. Baxter went from being a "highly" trained armed security officer at the Robinson Nuclear Power Plant, to now working as a security officer at a resort (which he described as "essentially, deliver keys to guests that are locked out of their rooms"). One of the first memories Mr. Baxter had from the night of his Marlayna's death, was calling his captain to come "take all my firearms from me because I didn't want to shoot myself." Mr. Baxter never returned to work at Robinson Nuclear Power Plant, testifying that it was approximately three (3) years before he was able to "get back out into the world and be a productive member of society," losing what he had intended to be his "career job" as a result of Marlayna's death. *Transcript of April 13, 2023 hearing*, p.44, l.11 – p.45; p.51, l.2 - p.53, l.25.

Ms. Carwile testified that she did not return to work until November of the next year (11 months), describing how her co-workers referred to Marlayna as "the little glass dolls that had

blond hair -- the precious moments baby. That's what everybody at work called her. But I couldn't hang out with them anymore." *Transcript of April 13, 2023 hearing*, p.36, l.20 – p.37, l.13.

Both Ms. Carwile and Mr. Baxter testified to having experienced and continuing to experience severe depression, anxiety, sleepless nights, panic attacks, loss of appetite and having been diagnosed with PTSD, severe anxiety and depression. Ms. Carwile suffers headaches, while Mr. Baxter suffers physical chest pains and numbness. Order-J, p.4-5, ¶¶8-11. Both testified to receiving counseling. Mr. Baxter testified "about once every three months, I either have to go sit in an emergency room parking lot or I have to call the paramedics to come to my house and just tell me that I'm not having a heart attack, I'm not drowning, I'm not dying, just to – it's – it's ongoing." *Transcript of April 13, 2023 hearing*, p.59, l.15-20.

Evidence showing how long Ms. Carwile and Mr. Baxter were out of work, and the employment difficulties they have had since, supports their claims of the intensity and duration of their mental shock and suffering, wounded feelings and grief and sorrow.

This is appropriate evidence for consideration in weighing the mental shock and suffering, wounded feelings and grief and sorrow of the parents. Specifically, it is credible and competent evidence that "revealed that these parents have been overcome with grief. The pain they endure on a daily basis is overwhelming, and the damages they sustained are immeasurable." Hurd at 775.

I FIND the consideration given by the Court to lost wages/diminished earning capacity was appropriate consideration of evidence speaking to the intensity and duration of the mental shock and suffering, wounded feelings, grief and sorrow these parents suffered and continue to suffer.

**ii. Deterioration of the parents' relationship**

In Jimenez, a case cited by Judge Norton in Hurd, the District Court considered similar evidence and found that a $12.5 million jury verdict for the wrongful death of a six-year-old child

did not warrant a new trial as it "was not the result of passion, caprice, or prejudice on the party of the jury":

> Although there was no evidence of pecuniary loss in this case, the evidence at trial of the mental shock and suffering, wounded feelings, grief, sorrow and loss of society and companionship experienced by Sergio's parents as a result of his death was compelling. **Witnessing Sergio's death was extremely hard on his mother**, Ms. Barrientos. She became hysterical when she saw her son lying in the road, bleeding profusely from what was described as "a gaping hole in the side of his head." It was equally devastating for Mr. Jimenez, who arrived on the scene only after his family had already been taken to the hospital. It was later at the hospital that Mr. Jimenez finally found Sergio and was so overcome with grief that he denied his son's death and pleaded with him to wake up.
>
> The evidence demonstrated that before the collision, the Jimenez family was close and loving. Mr. Jimenez and Ms. Barrientos experienced great joy in domestic life and exhibited all the characteristics of a loving family, with family life centered on the children, in general, and on six-year-old Sergio, in particular. As Sergio's surviving sister Maria explained at trial, Sergio was his father's "heart" and because Ms. Barrientos could bear no more children, Sergio remained her "baby." **Testimony showed that after the accident Barrientos and Jimenez parted company because they could not be in each other's presence without being painfully reminded of their son**. Testimony further showed that Barrientos eventually felt compelled to leave South Carolina to escape the reminders of Sergio. Jimenez testified that his personality has changed drastically for the worse since he lost his only son, and now, he finds relief only in the dreams he has of Sergio.

Jimenez v. Chrysler Corp, 74 F.Supp.2d 548, 574-575 (D.S.C. 1999) (internal citations to the record omitted), emphasis added. [6]

Testimony in this case is similar:

> MS. CARWILE: At first, I felt like it made us closer because we were the only person that understood what we were going through. But then it changed and I was like I couldn't really talk about her because if one was in a decent mood and was able to talk about her without crying and the other one probably wasn't, we didn't want to put each other into that – into that mood and into that state. And it just became – it became hard because we couldn't – we couldn't really talk to each other anymore. We couldn't – the connection that we did have through our daughter wasn't there. And **it broke us**.

[6] The District Court did remit the verdict to $9 million in compensatory damages, after a finding that the award was unduly liberal, an issue discussed further below.

*Transcript of April 13, 2023 hearing*, p.33, l.1-14, emphasis added.

> MR. BAXTER: It – at the end, ultimately, **the word I would say is destroyed**. It just – whenever you have two people that both broken, you know, it's – when it's one is having a good day and one might be having a bad day and some days you want to talk and remember the good times and then the other person may not be able to – to handle it. And it just in the end led to us not being able to communicate and us not being able to get along. So we had to split up.

*Transcript of April 13, 2023 hearing*, p.56, l.5-15, emphasis added.

The above testimony is helpful in evaluating the grief and sorrow these two parents suffered and struggled through following the death of a child. As Judge Norton found in Hurd, "both parents must endure their own separate loss **and a combined loss as well**." Hurd at 776, emphasis added. Not only does the deterioration of Ms. Carwile and Mr. Baxter's relationship show the impact their grief and sorrow had on their relationship, it highlights that they no longer have the comfort of each other in managing their grief and sorrow; and they no longer enjoy the shared memories and recollections of their daughter.

I FIND evidence of the deterioration of Ms. Carwile and Mr. Baxter's relationship following the death of their daughter to be helpful in understanding the impact, intensity and duration of their mental shock and suffering, wounded feelings and grief and sorrow.

**iii. Evidence parents' emotional trauma from witnessing the injuries to their daughter**

The Court is at a loss for how it is possible to separate the grief and sorrow these parents suffer from witnessing the injuries to, and death of their daughter, from the "mental shock and suffering" they are entitled to as recoverable damages in a wrongful death action.

> MR. ANDREWS: And you were a nurse at this time?

MS. CARWILE: Right. I remember thinking, you know, if you – if you cut your head, it's a very vascular area and so she's probably bleeding a lot. But – so I followed him outside as I'm calling 911. And they are like, what's your emergency? I'm like, I don't really know yet. And then as soon as I opened the door and started walking outside, I seen my brother holding Marlayna across the street at the Andersons. And I just started sprinting. I didn't know – I didn't – at the time didn't know until I got to her and I seen her and she had – she had blood everywhere at her face. It was coming out of her ears. It was coming out of her eyes. And her eyes – I knew when I seen her she wasn't there anymore.

[omitted testimony]

I told Justin to feel for her pulse. **As a nurse, I knew the steps of what I needed to do, but I couldn't – I was just – I was just frozen. And he started C.P.R. I just couldn't – couldn't do it, not on my daughter**.

*Transcript of April 13, 2023 hearing*, p.25, l3 – p.26, l.3, emphasis added.

MR. BAXTER: I was at home doing the dishes, getting everything ready so Samantha could come cook dinner. And it was time for the kids to come home. And I looked out the door to go get them. And then soon as I looked out the door, I saw the worst thing that I had ever seen in my life.

MR. ANDREWS: What do you remember next?

MR. BAXTER: Panic and terror and I thought I been trained and prepared to deal with all these things, but there's no training that can prepare you for what I saw. And most of it was just a blur, but I just remember brief periods throughout that. I remember seeing – I noted that her shoes – she came out of her shoes. And I know that I remember the blood. I remember giving C.P.R. I was trained as a first responder. I felt I had felt a pulse, so I tired to give her C.P.R., and then I just remember getting the kids inside to get them away from that environment 'cause that's what they didn't need – the didn't need to see anymore of that.

And then **the last thing I really remember is just sitting in a yard with ants crawling all over me, biting me, not caring. Just crying**.

*Transcript of April 13, 2023 hearing*, p.49, l.6 – p.50, l.7, emphasis added.

Ms. Carwile explaining how she was mentally shocked to the point of being "frozen" and unable to do for her own daughter that which she had been trained as a nurse to do; and Mr. Baxter being so in shock that the last thing he remembers is just sitting in the yard, being eaten by ants and crying is evidence of the mental shock and suffering they both suffered.

Ms. Lobo explained that the grief a parent experiences when they lose a child is more complicated than the normal stages of grief (denial, bargaining, anger, depression, and then eventually acceptance). That grief is, itself, like a trauma response. Just the loss of a child is enough to trigger flashbacks: seeing the child, hearing the child, imagining the child will come back in. (DT p.11, l.15 - 25).

Ms. Lobo explained that the grief of a parent who witnesses their child's death is even more complicated. In a situation where the traumatic experience of the parent involves seeing the body, the blood and the gore, it is similar to PTSD. It further complicates treatment and healing because the parent needs to be able to talk about his/her experiences, but you must be thoughtful that they are going to experience flashbacks with the disturbing details they witnessed. Ms. Lobo described it "grief and loss but with severe trauma experience." (DT p.14, l.1 – p.15, l.2).

Surely the fact that this incident occurred right outside the home, and both Ms. Carwile and Mr. Baxter responded immediately, does not prohibit the Court from considering how those facts would have contributed to the intensity of the mental shock and suffering both parents experienced immediately and the severity of the grief and sorrow they struggled with and continue to struggle with today.

If that is the Defendants' position, it is at odds with case law. Ms. Cornett's "mental shock and suffering is severe due to her knowledge of the intense physical and mental anguish her

children suffered…" Hurd at 776. The District Court in Steinke analyzed the facts of the case "including [the child's] character, the violent circumstances surrounding his death, and the additional grief suffered by his parents as a result of having watched him die in such a terrible manner." Stienke v. Beach Bungee, Inc., 1998 U.S. App. LEXIS 9512, at *4 (4th Cir. 1998). "Witnessing Sergio's death was extremely hard on his mother, Ms. Barrientos. She became hysterical when she saw her son lying in the road, bleeding profusely…It was equally devastating for Mr. Jimenez, who…was so overcome with grief that he denied his son's death and pleaded with him to wake up." Jimenez at 575.

I FIND that the evidence considered by the Court about the parents being on the scene and witnessing the injuries to and death of their daughter was appropriate evidence as it speaks directly to the mental shock and suffering both parents suffered. Such evidence also speaks to the intensity and duration of the grief and sorrow they both suffered and struggled with following the death of their daughter.

**iv. Evidence of the impact of Marlayna's death on her minor brother**

Ms. Carwile described the relationship between her then seven-year-old son, Rylan, and his three-year-old little sister, Marlayna, and how important their relationship was to her:

MR. ANDREWS: How was she with – how would you describe the relationship between her and your son?

MS. CARWILE: Was – he was her best friend. She – that was her favorite person was my son. They – when he was in school, she was pretty – she was pretty calm for the most part, you know just watching movies and do crafts and – with my mom. And – but no, as soon as he got home, she was would wild out.

MR. ANDREWS: What do you mean, wild out?

MS. CARWILE: She didn't – it was like she had stored up all of this energy all day until he got home. And then it was just like she would just turn into this little tornado and the two of them would

> just go around the house, throw toys everywhere, jump around, bounce around, you know, after – he was seven at the time. He gets home from school having to sit all day, he is ready to expend some energy. But yeah, he would get home from school. She would just…
>
> MR. ANDREWS: How did it make you feel watching her and your son playing together?
>
> MS. CARWILE: It was the best thing. I grew up too quick and I wanted to make sure my kids didn't do that. And the two of them together, it was like they got to be kids and not worry about anything. **I was very proud of that.**

*Transcript of April 13, 2023 hearing*, p.17, l.24 – p.19, l.1, emphasis added.

Ms. Carwile later explained how the impact of Marlayna's death, which Rylan witnessed, stripped her of that pride:

> MR. ANDREWS: And how did it affect your son Rylan, Marlayna's passing?
>
> MS. CARWILE: **He had to do the very thing I didn't want for my kids. They grew up too quick**. He gets in trouble at school. He goes through these like explosive – he doesn't know how to handle his emotions. He got bad grades, was getting in trouble.
>
> MR. ANDREWS: And he actually – he actually witnessed the accident itself. Right?
>
> MR. CARWILE: Correct. **He seen the whole thing**.

*Transcript of April 13, 2023 hearing*, p.33, l.15 – 25, emphasis added.

Setting aside the reasonable inference that the ability of any parent to properly grieve the loss of child would be made exponentially more difficult by that parent's concern over their other child having witnessed their sibling's traumatic death, this evidence speaks directly to Ms. Carwile's own grief and sorrow. Marlayna's death resulted in Ms. Carwile's son losing the very childhood Ms. Carwile had been so proud she was providing them both – the childhood she had herself never had.

Ms. Lobo, who counseled both Ms. Carwile and Rylan, explained how Ms. Carwile's grief and sorrow manifested itself following Marlayna's death:

A: Well, I think ability to go back to working or even imagining herself going back to working. Ability to get out of the house and do normal duties, you know, like grocery shopping, driving. **Ability to parent her son, Rylan**. So kind of feeling, you know, detached, disconnected, unhappy but also **feeling guilty that her son had to have a different mom but not having anything else to give to him at the time**.

Q: And piggybacking off of what you were talking about with Rylan, did she make complaints of having difficulty with her son?

A: Yes.

Q: And did she complain – make complaints of that on numerous occasions in treating with you?

A: Yes.

Q: And do you have an opinion whether or not that has to do – do you have an opinion as to whether her challenges with her son were as a result of her daughter's death?

A: Yes, definitely. Because before that, they were, you know, connected, had a very positive relationship. She knew the different relationship she had with both, and it was very natural, you know, her description. And **after the passing, it was almost like she couldn't find necessarily the joyful connection with her son because she was feeling so much in despair**.

*August 3, 2020 Deposition of Vanessa Lobo* ("DT"), p.17, l.2 – p.18, l.4, emphasis added.

I FIND that the evidence considered by the Court about the impact Marlayna's death had on her minor brother was appropriate evidence as it speaks directly to the mental shock and suffering, wounded feelings, grief and sorrow, and loss of companionship and society Ms. Carwile suffered in the wake of the event and continues to suffer. It is axiomatic that if a child suffers, the parent suffers. Ms. Lobo's testimony establishes the worry and guilt Ms. Carwile struggled with

over her ability to provide Rylan the love, affection and parenting he needed, "but not having anything else to give him," following his sister's death.

Having made the above findings, in an effort to clarify any confusion about the consideration given the evidence above by the Court, the Court will GRANT IN PART the Defendants' motion-J and issue an amended Order clarifying the consideration given the above-evidence by the Court, but DENY IN PART the motion-J request for relief from the default judgment based on the consideration of inappropriate/improper evidence.

**b. The award is against the preponderance of the evidence.**

The Plaintiff plead that the beneficiaries under the Wrongful Death Act "have experienced pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of" Marlayna's society. Complaint, ¶56.

Allegations made in a complaint, other than those as to *the amount of damage*, that are not denied are deemed admitted. Rule 8(d) SCRCP, emphasis added.

The Defendants are in default. A party in default admits liability but not the amount of that liability. Howard v. Holiday Inns, Inc., 271 S.C. 238, 242 (1978) ("In essence, the defaulting defendant has conceded liability. However, a defaulting defendant does not the amount of liability."). The amount of damages in a default action must be proved by a preponderance of evidence. Howard at 203.

South Carolina courts have long held that preponderance of the evidence means "just what it says," *i.e.*, the greater weight of the evidence. McCutcheon v. Pacific Mut. Life Ins. Co., 153 S.C. 401 (1929). Or as more recently explained by the South Carolina Supreme Court, "evidence which, when fairly considered, is more convincing as to its truth than the evidence in opposition." S.C. Dept. of Social Servs. v. Pringle, 405 S.C. 608, 615 (2013).

Setting aside the fact that the Plaintiff's plead allegations of the *types* of damages the beneficiaries suffered as a result of the death of their daughter are now admitted via the default, the evidence presented at the April 13, 2023 hearing, was entered without objection, little cross examination and no argument challenging it in anyway. Not only was the evidence presented to the Court unchallenged, but it was also found to be "extremely credible." Order-J, p.3.

The emotional pain, burden and struggle Ms. Carwile and Mr. Baxter shared during their testimony was so genuine and credible, Defense counsel was visibly moved, explaining that "Now I feel bad because I feel your pain," before sharing about a close loss that he had suffered. *Transcript of April 13, 2023 hearing*, p.40, l.16-25.

I FIND that the evidence presented to the Court in support of the damages suffered by the statutory beneficiaries substantially overcame the preponderance of the evidence burden the Plaintiff carried. The testimony by both Ms. Carwile and Mr. Baxter was extremely credible, genuine and authentic. Their testimony of how Marlayna's death impacted them personally – mentally, emotionally and physically – and the impact they observed and experienced it have on each other, was unfeigned, unvarnished, and unadulterated. The unchallenged expert testimony of Ms. Lobo further supports the heavy and tragic burden these two parents now carry. Specifically, the evidence presented was "evidence which, when fairly considered, is more convincing as to its truth than the evidence in opposition."

**c. The award is grossly excessive and/or unduly liberal and outside the reasonable range of recovery permissible.**

South Carolina courts employ the "shock the conscience" test for evaluating whether a verdict is grossly inadequate or excessive. Under South Carolina law, a motion for new trial absolute is founded upon a contention that the "verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure was reached as the result of

passion, prejudice, caprice, partiality, corruption or other improper motives." Vinson v. Hartley, 324 S.C. 389, 404 (Ct. App. 1996).

A motion for new trial nisi remittitur, is founded upon contention that the verdict is not inherently unlawful, but rather, under the facts of the case, is unduly liberal. Elliot v. Black River Elec. Co-op, 233 S.C. 233, 263 (1958).

Defendants motion seeks both remedies, arguing that the "award of $15,000,000.00 to each parent is so grossly excessive as to be the result of passion, prejudice, caprice, partiality, corruption or other improper motives and/or considerations not founded on the evidence and/or the proper/allowable measure of damages recoverable for wrongful death of a child" and that the award "is unduly liberal and outside the reasonable range of recovery permissible…" Motion-J, p.2-3, ¶¶5-6.

Defendants concede that "consideration of a challenge to the amount of a wrongful death award, such as here, may be difficult because undoubtedly the child was priceless to her parents and because there is no mathematical formula or objective measurement for the intangible elements of damages for the loss of a life." Reply-J, p.4.

That concession by Defendants is based on case law. "There are intangibles, the value of which cannot be determined by a fixed yardstick." Lucht v. Youngblood, 266 S.C. 127, 137 (1976). "There is no mathematical formula which can easily establish the value of this kind of loss [of a child], and it is not this court's place to do so." Scott v. Porter, 340 S.C. 158, 170 (Ct. App. 2000). *See also* TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 467 (1993) (Kennedy, J., concurring) ("the size of the award…is not the sole, or even necessarily the most important sign" of "bias, passion, or prejudice").

Defendants admit that Zorn v. Crawford, 252 S.C. 127 (1969) appears to be the only reported case in which an award for the wrongful death of a child was found to be excessive. Reply-J, p.9. Defendants argue that "evaluating challenges to the size of a wrongful death award may be difficult, but caselaw provides guidance and standards for assessing/evaluating challenges to the size of verdict/award."

Relying on Zorn and Lucht, Defendants argue for the comparison approach to determining if a verdict is excessive. Reply-J, p.8. Defendants then proceed to provide a list of reported opinions "in which the South Carolina appellate courts have found that an award for the wrongful death of child was **not** excessive," and apply an inflation calculator to those awards to arrive at the present-day values. Of the five (5) reported opinions Defendants provide, the largest award adjusted for present-day value, is $6,000,000.00 from Knoke v. S.C. Dep't of Parks, Recreation & Tourism, 324 S.C. 136 (1996).[7] Reply-J, p.9, emphasis added.

In discussing the very comparison approach Defendants' advocate, the South Carolina Supreme Court in Lucht found "the comparison approach is helpful and sometimes forceful, however, each case must be evaluated as an individual one, within the framework of its distinctive facts." Lucht at 136. The Lucht court **declined** to follow the defendant's proposed "comparison approach" and upheld the verdict as not "monstrous or plainly unjust" even though it was more than double the previous largest verdict in a similar case. Jimenez at 573, discussing Lucht at 136-137, emphasis added.

Defense counsel informed the Court the "top end" of cases he was aware of "is probably the Hurd case." *Transcript of September 15, 2023 hearing*, p.33, l.1-2.

[7] Knoke's $3,000,000 award was issued in May 1994 according to the Public Index, so the adjusted for inflation, present day value would actually be $6,230,546.56.

The Hurd case was a bench trial in heard by the Hon. David C. Norton of the Federal District Court and was decided March 8, 2001. Hurd v. United States, 134 F.Supp.2d 745 (D.S.C. March 8, 2001).

Hurd involved a father, his 16- and 13-year-old sons, and a 14-year-old cousin, who picked up a sailboat the family had purchased in Little River, South Carolina on December 26, 1997 and took to sea; intending to sail the boat to Jacksonville, Florida. The family encountered rough seas and collided with the north jetty leading into Charleston Harbor. All four drowned at sea. Tragically, the United States Coast Guard began to respond to mayday calls, but then inexplicably halted any search/rescue attempts. The personal representatives sued the United States and Judge Norton heard the case as a bench trial, ultimately awarding $6,000,000.00 as wrongful death awards to the estates of each minor child. Hurd at 777.

First, the Court would note that after adjusting for inflation, the $6,000,000 Hurd awards from 2001 total $10,433,525.42 in 2023 dollars.[8]

When discussing the wrongful death damages, Judge Norton specifically noted a $6,000,000 award for the death of a 17-year-old boy that the Fourth Circuit had affirmed arising from the Florence division of the South Carolina District Court. Hurd at 776, fn.34, citing to Steinke v. Player & Beach Bungee, Inc., 145 F.3d 1325 (4th Cir. 1998). Adjusting for inflation, that Fourth Circuit affirmed amount from 1998 would be $11,329,656.44 in 2023 dollars.

However, that $6,000,000 award in Steinke was a remitted award from an October 27, 1995 jury award of $12,000,000. Adjusting for inflation, the 1995 Steinke jury award and remitted award would be $24,235,354.33 and $12,117,677.17 in 2023 dollars respectively.

[8] Using the same inflation calculator Defendants used: https://www.usinflationcalculator.com

Judge Norton also cited to Jimenez jury award of $12,500,000.00 for the death of six-year-old boy that was later remitted to $9,000,000.00. That jury award was issued October 8, 1997. The remitted award was issued by the District Court on December 2, 1999. Adjusting for inflation, the Jimenez awards would be $23,971,105.92 and $16,627,256.90 in 2023 dollars respectively.

As the exercise in arithmetic above shows, this Court's award of $30,000,000 collectively ($15,000,000 to each parent/statutory beneficiary) is not the extreme outlier that Defendants argue. When adjusted for inflation, there are comparable jury awards and court awards from South Carolina.

The Court finds the District Court's discussion from Jimenez instructive in determining whether an award is grossly excessive and/or unduly liberal.[9]

> Looking to South Carolina cases and the particular facts of this case, the Court observes that the South Carolina Supreme Court in Knoke approved a $3 million award without comment on whether that amount approached an upper limit on such damages. The facts in this case are more compelling than Knoke. Here, unlike in Knoke, Sergio's mother **witnessed his death, and the family broke up thereafter**. This case is also distinguished from Knoke and Steinke in that the decedents in those cases were 12 and 17 years old, respectively. Sergio **was only 6 years old when he was killed. While the pain of losing a child of any age is incalculable, Sergio's parents were deprived of** what Mr. Jimenez's counsel described at oral argument as **"the golden years of parenthood."**

Jimenez at 578, emphasis added.

[9] The Court is aware that the District Court in Jimenez was reversed, judgment vacated and remanded for partial new trial by the Fourth Circuit. *See* Jimenez v. DaimlerChrysler Corp., 269 F.3d 439 (4th Cir. 2001). In that opinion, the Fourth Circuit reversed the District Court on the negligent misrepresentation claim and punitive damages, directing that judgment be entered in favor of Chrysler on those issues, vacating the judgment and remanding for partial new trial. It does not appear that the amount of the remitted $9 million in compensatory damages award was challenged on appeal. On July 3, 2002, an *Order of Dismissal* was filed in the District Court indicating the case had settled.

As with the mother in Jimenez, Ms. Carwile and Mr. Baxter witnessed their daughter's death (or at least the immediate aftermath). The grief and sorrow they endured "broke" their relationship beyond repair, as happened with the parents in Jimenez.

Here, as in Jimenez, the child in this case was a special part of this family, who enjoyed extremely close relationships with both parents. Marlayna was "everything good in the world" to Ms. Carwile: "She was my sunshine." The parents decided on cremation, because "I wanted to take her with me. I didn't want her to be in the ground." Ms. Carwile wears a necklace containing some of her daughter's ashes. *Transcript of April 13, 2023 hearing*, p.11, l.22-23; p.27, l.21-25.

Ms. Carwile and Mr. Baxter both described his fear as a new dad, and explained that for the first year of Marlayna's life, Mr. Baxter "didn't really feel comfortable taking her because she was so little." *Transcript of April 13, 2023 hearing*, p.20, l.22-24. Mr. Baxter described, "I knew that I loved her. I just didn't know all the right things to do. So I learned a lot from Samantha. She taught me how to be a – a parent…And one she became around one years old, I felt that I was ready to take her home and – with me and have her overnight." *Transcript of April 13, 2023 hearing*, p.46, l.13-21.

As Ms. Carwile explained, "I never expected the relationship that I seen between the two of them. I never seen anything quite like that. When she was born, he was at the hospital and when he met her for the first time, it was like – I don't know, it was like you could physically see it. Like the connection the two of them had. So it was – it was beautiful…I seen a change in him from the start…It was like he went from like this kid that wanted to just play video games and wanted to live the bachelor life to somebody who wanted to make sure his daughter had everything he didn't. And she just worshiped him." *Transcript of April 13, 2023 hearing*, p.21, l.3 – p.22, l.8.

The evidence demonstrates that, before this tragedy struck, while they may have been an atypical family, Ms. Carwile and Mr. Baxter had built a relationship that exhibited all the characteristics of a loving family, with Marlayna serving as the glue and focal point of that family. As both testified, Marlayna's death "broke" them.

At three years old, Marlayna was even younger than the child in Jimenez, and at the very beginning of her development. In the next few years, her motor and communication skills would have continued to develop, and she would have soon been getting ready to enter kindergarten. Watching a child grow at that young age, expand their ability to communicate and develop their own personality, are, indeed, privileges of the "golden years of parenthood" to which the District Court refers in Jimenez. Ms. Carwile and Mr. Baxter lost the joy of those "golden years," a loss Ms. Carwile testified about:

> MR. ANDREWS: What are some of the things that you've done to remember Marlayna?
>
> MR. CARWILE: At first, on holidays, you know, Easter and Christmas and her birthday, I would buy her things. You know, I've got this shelf of some of her – some of her things, her favorite things. But it's different now. **She would be turning eight this year. And she would have been into different things. But I'll never know what – what she would have been into, how it would have changed, how she would have changed**.
>
> MR. ANDREWS: Do you think about that often?
>
> MS. CARWILE: Every day, to **what she would have been like, what she would have liked now**, what – you know, I will never – never get to see her go to prom, see her with her first boyfriend, you know, never see her get married, never meet my grandkids. It's – it's all over now.

*Transcript of April 13, 2023 hearing*, p.31, l.5-24, emphasis added.

The tragedy of this accident, and the grief and sorrow that followed, was amplified by the fact that it occurred on December 6, 2017, during the holiday season. Ms. Carwile testified that Mr. Baxter had "actually bought them a trampoline, which she didn't ever even get to play on it. Bought it for her for Christmas that year." *Transcript of April 13, 2023 hearing*, p.16, l.21-23. The parents explained the impact this tragedy had on that Christmas and future holidays:

MR. ANDREWS: Can you please tell us about that first Christmas afterwards?

MS. CARWILE: I didn't – I didn't want to do it. I didn't – there was nothing happy. There was nothing there. Just like such a part of what made Christmas good wasn't there. I didn't want to celebrate – what is there to celebrate? What – I had to do something for my son. I felt like crap. I wanted him to have something.

MR. ANDREWS: And what did y'all do?

MS. CARWILE: We just went home. We did – it wasn't anything like what we had experienced before, like Christmases he had ever had before. And I mean, I didn't – I hadn't been back to work. I didn't have any money. I had some people that bought us some stuff for him.

*Transcript of April 13, 2023 hearing*, p.28, l.5 – 20.

MR. BAXTER: So I have never really been a fan of holidays. I just never looked forward to them. I lost my grandmother on Thanksgiving when I was seven years old and I just didn't have the greatest upbringing, so I didn't look forward to them very often. But this was the first time I was like, hey, I get it, I see what everybody – I see why everybody gets together; I see somewhat it's about; I see what all – you know, why people spend tons of money and travel thousands of miles, is to be with family. And I finally got to see that and experience that for the first time.

MR. ANDREWS: After Marlayna was born?

MR. BAXTER: That's correct.

MR. ANDREWS: What were holidays like after this tragedy?

MR. BAXTER: Full of jealousy, envy, rage, sadness. I just hated them. I – I didn't want to hear people talk about them. I didn't want to see people's Facebook photos of them. I just had to ignore them like they were just another day.

*Transcript of April 13, 2023 hearing*, p.56, l.25 – p.57, l.22.

The District Court's consideration of other verdicts in Jimenez is helpful in considering the size of this award:

> Additionally, the district court in Steinke initially approved the jury's $12 million award, and then on remand, went beyond Knoke to approve $6 million. **At the time that case was received on remand, there was no verdict of similar magnitude to which the district court could refer. This Court, however, has the benefit of the Steinke jury's $12 million award when looking to similar cases and finds the existence of that verdict additional information to process in the determination of remittitur.**
>
> This court concludes that the compensatory damage award in this case was unreasonably beyond the range of damages awarded in wrongful death cases involving children in South Carolina and therefore should reduced because it was unduly liberal. This court is of the opinion that **the loss is greater than that in Knoke for the reasons stated** and after consideration of all the facts and circumstances, this court believes that an award of **Nine Million ($9,000,000) is fair, amply justified and one that would be found appropriate by the South Carolina courts**. Judgment will be rendered accordingly.

Jimenez at 578, emphasis added.

Based on facts (similar to those in this case) which showed the loss was greater and the fact that it had the benefit of Steinke's $12 million verdict, the Jimenez District Court went beyond Knoke's $3 million award and awarded $9 million, finding that those facts justified tripling the highest reported award at the time. Adjusted for inflation, the District Court in Jimenez would have approved of a $11,506,130.84 increase in 2023 dollars.

The Court is aware of the current reality of civil litigation in the age of mandatory alternative dispute resolution. Most cases never make it to trial and are, instead, resolved outside of the courtroom; even more so in cases involving the death of a child; where the potential of large

damage awards means the risk of proceeding to trial is greater. Given that reality, the Court believes a comparison approach relying exclusively on reported opinions at the appellate level would be flawed, as it would necessarily exclude the majority of resolved cases.

Be that as it may, given that the inflation-adjusted amounts of the 1995 Steinke jury award would be $24,235,354.33 and the 1997 Jimenez jury award would be $23,971,105.92, and that the inflation-adjusted increase of $11,506,130.84 the District Court in Jimenez approved based on similar facts supporting greater loss, I FIND that the award of $30,000,000.00 ($15,000,000 to each statutory beneficiary/parent) in this matter is not grossly excessive or unduly liberal even using the comparison approach the Defendants propose.

While both Ms. Carwile and Mr. Baxter's damages manifested themselves in different ways, the evidence presented to the Court supports the conclusion that their losses are strikingly similar and are ultimately equal.

As such, Defendants' motion-J is DENIED IN PART as to the request for relief from Default Judgment based on the award being unduly liberal and/or grossly excessive.

**IT IS THEREFORE ORDERED** that Defendants' motion concerning the entry of default is **DENIED** and the Defendants' motion concerning default judgment is **GRANTED IN PART** and **DENIED IN PART** as discussed above. Contemporaneously with the filing of this Order, the Court will file an **AMENDED ORDER OF DEFAULT JUDGMENT** based on the findings and discussions above.

**IT IS SO ORDERED.**

November 1, 2023
Florence, South Carolina

**PATRICK J. MCLAUGHLIN**
Special Referee