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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable James B. Jackson, Jr., Master-in-Equity

Case No. 2020-001254

Kacey Green and Charinrath Green, ... Respondents

v.

Mervin Lee Johnson, ... Petitioner

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Mervin Lee Johnson ("Johnson") petitions the Court for a writ of certiorari to review the Court of Appeals' opinion issued January 17, 2024, setting aside in favor of Respondents Kacey Green and Charinrath Green ("the Greens") the Master-in-Equity's Amended Damages Order. *Kacey Green,* et al. *v. Mervin Johnson*, Unpublished Op. No. 2024-UP-024 (S.C. Ct. App. filed January 17, 2024). For the benefit of the bench and bar this Court should correct the Court of Appeals' failure to find that the Greens' appeal was untimely. This appeal raises the recurring problem resulting when a party files a Rule 59(e) motion for reconsideration while simultaneously serving a notice of appeal. This Court has explicitly instructed that such an appeal be dismissed without prejudice to cure this jurisdictional defect. Despite this clear rule, and notwithstanding Johnson's repeated efforts to call attention to the issue, the Court of Appeals ignored this rule and rescued the Greens' defective appeal. For this and other reasons, this Court should grant a writ of certiorari.

In its unpublished order, the Court of Appeals set aside the Master-in-Equity's Amended Damages Order and reinstated the Damages Order issued prior to Johnson's appearance in this action. The Court of Appeals erred when it rejected Johnson's arguments and failed to conclude: a) that the court lacked jurisdiction over the Greens' notices of appeal; b) that evidence relied on by the Master to reduce the excessive default damages award was presented to the trial court prior to the hearing on Johnson's Rule 59(e) motion; c) that the Master properly admitted evidence at that Rule 59(e) hearing; d) that the Master's orders omitted any factual findings to support the excessive punitive damages award; and, e) that it was error for the Master to hold that the Greens' attorney's conduct in negotiating with Johnson's insurer supported setting aside default. Johnson craves reference to his Final Appellate Brief, Final Return to Appellants-Respondents' Amended

Initial Brief, and the Record on Appeal in support of this Petition. Moreover, Johnson invites this Court's attention to his Motion to Dismiss the Greens' appeal together with the Court of Appeals' erroneous order denying that motion.

ARGUMENTS

I. THE COURT OF APPEALS NEVER OBTAINED JURISDICTION OVER THE GREENS' NOTICES OF APPEAL.

The Court of Appeals erred in failing to dismiss the Greens' notices of appeal. The Greens' first notice of appeal was filed after they filed a Rule 59(e) motion, which undeniably stayed the appeal deadline. The court did not dismiss that notice of appeal and the Greens never withdrew their Rule 59(e) motion. After Master-in-Equity James B. Jackson, Jr. (the "Master") cured this deficiency and ruled on that motion, the Greens did not serve a notice of appeal within the 30-day time limit required by Rule 203(b), SCACR. Accordingly, the Court of Appeals never obtained jurisdiction over the Greens' appeal.

As argued in § II, A of Johnson's Return to Appellants' Final Brief, the Greens' notice of appeal was untimely because the Greens filed a Rule 59(e) Motion to Alter or Amend the Amended Order on Damages within ten days of the Master's Amended Damages Order. (R. pp. 162-167). This motion stayed the time to appeal until "receipt of written notice of entry of the order granting or denying such motion." Rule 59(f), SCRCP. Therefore, the Court of Appeals did not have jurisdiction to hear the Greens' appeal until after the trial court ruled on their Rule 59(e) motion. The relevant procedural timeline is as follows.

Amended Damages Order issued	August 14, 2020
The Greens' Rule 59(e) Motion filed	August 24, 2020
The Greens' Notice of Appeal served	September 14, 2020
Judge Jackson email denying jurisdiction over the Greens' Rule 59 Motion issued	September 18, 2020
Johnson's Notice of Cross-Appeal served	September 25, 2020
Johnson's Motion to Hold Appeals in Abeyance filed	December 9, 2020
Court of Appeals grants Johnson's Motion to Hold Appeals in Abeyance	February 4, 2021
Order (Form 4) Denying the Greens' Rule 59(e) Motion issued	March 8, 2021
Johnson's Notice of Appeal (2nd) served	April 7, 2021
The Greens' Motion for Extension of Time to File Amended Notice of Appeal filed	April 20, 2021
Johnson's Motion to Dismiss Appeal filed	May 7, 2021
Court of Appeals' Order Denying Johnson's Motion to Dismiss Appeal issued	June 28, 2021

This Court has unequivocally stated that an appeal noticed after a timely Rule 59(e) motion should be dismissed without prejudice to allow the trial court to consider the issues raised in such a motion.

> IT IS ORDERED that in the event timely post-trial motions are filed under Rule 59, simultaneously with or subsequent to the filing of a Notice of Appeal, the appellant shall notify the Clerk of this Court in writing. Upon receipt of such notice, the appeal shall be dismissed without prejudice.

Hudson v. Hudson, 290 S.C. 215, 216, 349 S.E.2d 341, 341–42 (1986). The purpose of the rule is so that "all ancillary matters can be timely heard, and appealed, if necessary, in an efficient and wholesale manner." *Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 162, 758 S.E.2d 483, 496 (2014).

The Greens' Rule 59(e) motion was filed within ten days of the Master's Amended Damages Order and effectively stayed the time to appeal until "receipt of written notice of entry of the order granting or denying such motion." SCRCP, Rule 59(f). Thus, their Notice of Appeal served on September 14, 2020, was premature and incapable of bringing this matter within the jurisdiction of the Court of Appeals.

Furthermore, as they argued in their Rule 59(e) motion, the Greens were required to raise their objections to the Amended Damages Order to the Master. (R. pp. 162-167). "A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. South Carolina Dept. of Transp*., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In their motion to alter or amend, the Greens argue that numerous issues were raised in the hearing, but not ruled on, in the Master's Order. (R. pp. 162-167).

Despite the Greens' argument to the contrary, their Rule 59(e) motion was not a duplicative or successive procedure. In *Coward Hund Const. Co., Inc. v. Ball Corp*., the court considered "whether [the defendant's] second Rule 59 motion stayed the time for filing its notice of appeal." 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct. App. 1999). Under the facts of that case, the court concluded that the appeal deadline expired 30 days after the denial of the *first* Rule 59 motion. The *Coward* opinion shows that the appropriateness of a Rule 59 motion is determined by the substance of the moving party's challenge. As is true in the instant action, the parties may be required to submit multiple Rule 59 motions to ensure their issues are preserved for appeal.

> [A] second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration. In such a case, a new judgment has replaced the previous judgment and the party aggrieved by the alteration may move for reconsideration.

Coward, 336 S.C. at 3, 518 S.E.2d at 58. The Master's Amended Damages Order significantly reduced the amount of the Greens' damages award and eliminated their property damages claim.

Therefore, according to *Coward*, their Rule 59(e) motion was timely and appropriate. Because they were the losing party in the trial court's ruling on Johnson's Rule 59(e) motion, the Greens' subsequent motion was mandatory, and not merely successive.

After the Greens served their Notice of Appeal, Johnson sought the trial court's guidance on the status of the outstanding Rule 59(e) motion. (R. pp. 168-170). The Master erroneously informed Johnson that the trial court no longer had jurisdiction to consider the motion. *Id*. Having relied on the stay imposed by the Rule 59(e) motion, Johnson found himself "between the proverbial rock and a hard place" predicted in *Elam v. South Carolina Dept. of Transp*. 361 S.C. at 25, 602 S.E.2d at 781. Therefore, Johnson on September 25, 2020, served his Notice of Cross-Appeal based on the date of the Master's correspondence. See *Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC*, 422 S.C. 211, 219, 810 S.E.2d 856, 860 (2018) (holding that "an email sent from the court, an attorney of record, or a party that provides written notice of entry of an order or judgment triggers the time for serving a notice of appeal for purposes of Rule 203(b)(1), SCACR").

This jurisdictional defect was properly raised to the Clerk of the Court of Appeals in Johnson's Notice of Cross Appeal filed on October 5, 2020. In that filing, Johnson informed the Court that the Greens filed a timely Rule 59(e) motion, that the Master did not rule on that motion, and that they nevertheless served and filed a notice of appeal. According to *Hudson*, 290 S.C. at 216, 349 S.E.2d at 341–42, it was then incumbent on the Clerk to dismiss the Greens' notice of appeal without prejudice. This did not happen.

After the Clerk failed to dismiss the Greens' notice of appeal, Johnson filed a Motion to Hold Appeals in Abeyance, which the Court of Appeals granted[1] on February 4, 2021, and returned this action back to the Master for resolution of the Greens' Rule 59(e) motion. The Master then denied the Greens' motion. (Form 4 Order, R. p. 31). Any notice of appeal served prior to the Master's March 8, 2021, order was untimely and outside the Court of Appeals' jurisdiction.

On April 7, 2021, within 30 days of the Master's order denying the Greens' Rule 59(e) motion, Johnson served a new Notice of Appeal. The Greens, however, did not timely appeal from that Order. Instead, they filed on April 20, 2021, an "Amended Notice of Appeal" and simultaneously filed a motion for an extension of time to file the amended notice of appeal. The Greens never served this amended notice of appeal prior to the date of filing.

> Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal.

Canal Ins. Co. v. Caldwell, 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct. App. 1999). The Greens cannot demonstrate that either of their notices of appeal complied with this blackletter standard. Nor can the Greens seek a remedy for their untimely notice of appeal.

> The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.

Elam, 361 S.C. at 14–15, 602 S.E.2d at 775 (quoting *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985)).

[1] The court amended this order on March 4, 2021, to clarify that the Greens' appeal and Johnson's cross-appeal would both be held in abeyance pending the Master-in-Equity's consideration of the pending motion.

This issue was also raised in Johnson's Motion to Dismiss, filed on May 7, 2021. Also on May 7th, Johnson wrote the Clerk of the Court of Appeals to explain that the notice of appeal filed on April 16, 2021, was a new appeal from the Master's March 8, 2021, order. Johnson requested a new appeal number and submitted a check for the filing fee.

Instead, by order dated June 28, 2021, the Court of Appeals dismissed Johnson's motion to dismiss without explanation. On that same date, the Clerk issued a letter informing the parties that:

> The Court has received multiple notices of appeal from appellant/respondents and respondent/appellant in this matter. These appeals will be consolidated for consideration by the Court under the South Carolina Appellate Court Rules (SCACR), and we anticipate receiving one record on appeal. **The times for perfecting an appeal will run from the service of the last notice of appeal**.

Nondispositive Order, dated June 28, 2021 (emphasis supplied). Not only was this instruction contrary to the Rules of Appellate Procedure, but the Greens never served a notice of appeal from the Master's order denying the Greens' Rule 59(e) motion. Nor did the Court of Appeals grant the Greens' request for an extension, nor did it address their failure to timely notice their appeal. For these reasons, this Court should review the Court of Appeals' failure to hold that the Greens failed to perfect their appeal.

II. THE TRIAL COURT'S DECISION REDUCING THE DEFAULT JUDGMENT AWARD WAS BASED ON EVIDENCE TIMELY PRESENTED.

The Court of Appeals further erred in determining that the Master improperly relied on evidence submitted at the hearing on Johnson's Rule 59(e) motion. Even if the Master should not have considered specific evidence presented at that hearing, that does not impair the Master's decision to reduce the damages award for two reasons. First, the grossly disproportionate damages award was apparent from evidence previously presented at the default damages hearing, in

Johnson's Rule 60 motion to set aside default judgment, in the Affidavits of Nikole Shields and Breeann Richardson, and in the hearing on Johnson's Rule 60 motion. Secondly, the evidence presented at the Rule 59(e) hearing was relevant only to Johnson's effort to set aside default to allow Johnson to appear and defend the action on its merits. In other words, the trial court's discretion to reduce the patently disproportionate damages award was independent of the decision to deny Johnson's effort to set aside default judgment.

The evidence Johnson presented to support his Rule 59(e) motion included correspondence between the Greens' counsel and Johnson's insurer, a picture from the accident scene, and documentation of the Greens' property subrogation claim for repairs to their vehicle. (R. pp. 133-151). However, the Master's decision to reduce the damages award did not depend upon this evidence. The only evidence cited by the Master as justification for reducing the damages award was the "uncontested medical bills of $12,826.00; and the additional evidence presented at the hearing,[2] …." (R. P. 30).

Instead, the trial transcript from the July 13, 2020, hearing makes clear that the Master simply regretted the excessive damages award. At the hearing, the Master concluded that "I think the damages that I previously awarded are too high. And so I'm going to reduce those damages, okay. I don't know how much." (R. pp. 93-94). Referencing the default damages hearing, the Master offered that "when there's nobody here defending it, you know, and the Court only hears one set of argument on the damages … it's just kind of hard." *Id*.

What is not hard is concluding that the evidence presented to the Master prior to the Rule 59(e) hearing was sufficient to support his decision that the original award was excessive. The

[2] It is not clear from the order which of the three hearings the Master is referring to regarding the "additional evidence" he relied upon.

Greens testified and presented record evidence at the May 22, 2019, default damages hearing. Counsel for the Greens entered medical bills totaling $12,826.00 and suggested that "anywhere from 100 to 150 times medical expenses" was appropriate for an actual damages award. (R. pp. 53-54). Mr. Green testified that repairs to the Greens' car was "$3,000.00 or something." (R. p. 49). When Mr. Green attempted to sell the vehicle, he showed prospective buyers photos of damage caused by the collision and told them "See, look, it -- it didn't look bad." (R. p. 51). The Greens offered a video of the relatively minor accident, which the Master viewed during the hearing. (R. pp. 24 & 44-45). Accordingly, the Master's decision to reduce the damages award was based on evidence presented well before the July 2020, hearing and not on newly admitted evidence.

A close review of the Amended Damages Order shows that the evidence offered with Johnson's Rule 59(e) motion was considered by the Master in setting aside the $10,000.00 property damage award and in finding that the case of *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011), supported finding that Johnson had a meritorious defense under Rule 60(b). As to the single photograph of the accident scene, this evidence was merely duplicative of the video of the accident that the Master viewed at the default damages hearing. (R. pp. 24 & 44-45). Therefore, admitting this evidence was, at worst, harmless error. The impact of this evidence, whatever it may be, was not necessarily tied to the Master's decision, which was well within the trial court's discretion, to reduce an excessive damages award.

III. THE MASTER DID NOT ERR IN ACCEPTING EVIDENCE AT THE HEARING ON JOHNSON'S RULE 59(E) MOTION.

A. The Court of Appeals Erred Because the Record Does Not Definitively Establish What Evidence was Presented Prior to the Hearing on Johnson's Rule 59(e) Motion.

As a preliminary matter, the record does not conclusively establish that the evidence offered by Johnson at the July 13, 2020, hearing was not previously brought to the Master's attention. This is because there was no court reporter present at, and no recording was made of, the October 21, 2019, hearing on Johnson's Rule 60(b) motion. At the Rule 59(e) hearing, counsel for the Greens informed the Master that the arguments presented that day were "basically all the same arguments [the Master] heard after this motion to dismiss." (R. p. 79). Accordingly, the record casts doubt on the grounds relied on by the Court of Appeals to vacate the Amended Damages Order.

B. Evidence Presented Johnson's Rule 59(e) Motion was Properly Before the Master Because Johnson Could Not Have Offered the Evidence Prior to Default Judgment.

It is well established that "[a] party cannot use Rule 59(e) to present to the court an issue the party **could have raised prior to judgment** but did not." *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). The court overlooked the issue of whether Johnson, in the context of a Rule 59(e) motion challenging the court's refusal to set aside default judgment, could have raised **any** issue "prior to judgment." The fact is that Johnson made no appearance in this action, and was not represented by counsel, prior to the Master entering judgment by default.

Because this is an action to set aside default judgment, the evidentiary standards are governed first by Rule 60. The court agreed with the Greens that the evidence presented with Johnson's Rule 59(e) motion was not "newly discovered evidence" citing the standard of Rule 60(b)(2). Johnson, however, relied on Rule 60(b)(3), to which courts apply a more lenient standard

than to Rule 60(b)(2). *Schultz v. Butcher*, 24 F.3d 626, 631 (4th Cir. 1994). Moreover, Rule 60(b)(2), which was never relied on by Johnson, has limited application when the movant proffers evidence to meet the evidentiary burden to justify setting aside default judgment. Instead, relief from default under Rule 60 depends on factors including "the reasons for the failure to act promptly … the existence of a meritorious defense, and the prejudice to the other parties." *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct. App. 2001). It goes without saying that meeting this burden requires evidence and that such evidence was **not** presented prior to default judgment. Our courts do not hold that a party seeking relief from default judgment is constrained to offer only evidence that was offered prior to the entry of judgment. Ergo, our rules permit such a party to offer evidence even though it theoretically could have been raised prior to judgment but was not.

The issue remains whether this permissive approach to the admissibility of evidence includes evidence offered in a party's Rule 59(e) motion. If our courts had previously held that a party in default cannot present evidence with a Rule 59(e) motion that the party did not offer with its Rule 60(b) motion, then the Master clearly erred in admitting the evidence offered by Johnson here. But that is not the rule set forth by our courts. Because Johnson could not have offered this evidence prior to judgment, the Court of Appeals erred by vacating the Master's Amended Damages Order based on evidence offered at the Rule 59(e) hearing.

C. The Court of Appeals Erroneously Concluded that the Greens Preserved Objections to the Admission of Evidence at the Hearing on Johnson's Rule 59(e) Motion.

The Court of Appeals failed to account for[3] the Greens' Rule 59(e) motion when it held that the Greens preserved, via their unsolicited proposed order, their objections to the admission

[3] This is also significant because it demonstrates that the Court of Appeals failed to appreciate the effect of the Greens' Rule 59(e) motion on their untimely notice of appeal.

of evidence at the July 13, 2020, hearing. In fact, the Greens did not raise in their Rule 59(e) motion the issue of whether evidence could properly be introduced in support of a motion to reconsider. (R. pp. 162-164). As argued above, the Greens were obligated to submit a Rule 59(e) motion to challenge the Master's Amended Damages Order. The Court of Appeals' citation to *Eades v. Palmetto Cardiovascular & Thoracic, PA*, 422 S.C. 196, 810 S.E.2d 848 (2018), demonstrates its error in crediting the Greens' proposed order for the purpose of issue preservation. In *Eades*, the court noted that issue preservation requires "the issue must have been timely raised by the appellant with sufficient specificity and ruled upon by the [circuit] court." *Id*., 422 S.C. at 201 n.3, 810 S.E.2d at 850 n.3. A trial court is under no obligation to read, much less rule upon, a proposed order. Although the transcript shows that at the hearing the Greens objected to admission of the evidence, the Amended Damages Order does not address their objections. (R. pp. 19-30). Thus, the Greens were required to raise this issue in a timely Rule 59(e) motion. While their motion was timely filed within ten days of the Amended Damages Order, it omitted any objection to the timing of evidence offered with Johnson's Rule 59(e) motion. In light of the Greens' failure to properly preserve this issue in their motion for reconsideration, the Court of Appeals erred when it rescued their appeal with reference to the proposed order.

IV. THE COURT OF APPEALS OVERLOOKED THE MASTER'S FAILURE TO PROVIDE ANY FACTUAL FINDINGS SUPPORTING THE EXCESSIVE PUNITIVE DAMAGES AWARD.

The Master's June 5, 2019, Damages Order awarded punitive damages of $750,000.00. (R. pp. 2-12). The Amended Damages Order reduced this amount to $50,000.00. (R. p. 30). However, neither order contains any factual findings justifying an exemplary damages award. Although the trial court is not required to "make findings of fact for each factor to uphold a punitive damage award," the Master's orders failed to provide the slightest justification for this exorbitant award.

Welch v. Epstein, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct. App. 2000). Upon review of a punitive damages award, the trial judge's factual findings specific to that award must be reasonably supported by the evidence in the record. *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 314, 594 S.E.2d 867, 875 (Ct. App. 2004) (citing *Carjow, LLC v. Simmons*, 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002)). However, neither the Master's June 5, 2019, order, nor his August 14, 2020, amended order, contain a single factual finding that Johnson's conduct was willful, wanton, or in reckless disregard of the Greens' rights. *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996).

Even the Greens agree that the Master failed to set forth mandatory findings to justify the punitive damages award. As the Greens argued in their August 24, 2020, Rule 59(e) motion, the Amended Damages Order "contains an award for punitive damages and hereby seeks clarification on the findings of fact which support the award." (R. pp. 162-167). The Greens never raised their concerns with the Master's punitive damages award in the June 5, 2019, Damages Order.

V. THE COURT OF APPEALS OVERLOOKED RECORD EVIDENCE DISTINGUISHING JOHNSON'S APPEAL FROM *MCCLURG V. DEATON*.

The Court of Appeals further overlooked the distinctions between Johnson's effort to avoid default judgment and that of the defendant in *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011). The Court of Appeals erroneously anchored its critique of the Master's application of *McClurg* on the distinction that the McClurg's attorney promised the insurer he would send you a courtesy copy of the pleadings. The lack of evidence that the Greens' counsel promised to send a copy of any pleading to Ms. Shields merely points out a distinction without a difference. The *McClurg* case doesn't turn on the existence of a promise reduced to writing or even a verbal promise. Instead, it was that the insurer had a reasonable

expectation it would be notified of any lawsuit arising from the employee's accident based on the attorney's conduct in negotiating the claim.

Moreover, the Court of Appeals overlooked the significance of issue preservation in distinguishing this action from *McClurg.* This Court found in *McClurg* that "New Prime never even raised the issue of a meritorious defense before the trial court." 380 S.C. 563, 575, 671 S.E.2d 87, 94. This finding was central to the court's rejection of the *McClurg* defendant's argument that the plaintiff's attorney's misrepresentations entitled him to an order setting aside default judgment pursuant to Rule 60(b)(3). This issue was clearly raised by Johnson before the Master.

Furthermore, the Court of Appeals' conclusion that Johnson failed to show that the insurer was taken by surprise when the Greens filed their suit solely against the insured driver (without also informing the insurer) misapprehends the record evidence in the affidavit of Nikole Shields. (R. pp. 110-112). While the word "surprise" is absent from the affidavit, the clear import of her testimony was that despite her communications with the Greens' counsel, she was never informed that suit was filed naming the driver alone.

CONCLUSION

For these reasons, this Court should grant Mervin Lee Johnson's Petition, issue a writ of certiorari, review the Court of Appeals' erroneous order vacating the Master-in-Equity's Amended Damages Order, and correct the court's failure to allow Johnson to defend this action on its merits.

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