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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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, ... Appellants-Respondents,

v.

Mervin Lee Johnson,...Respondent-Appellant.

FINAL BRIEF OF RESPONDENT-APPELLANT

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s/ Todd R. Flippin

William B. Darwin, Jr. (S.C. Bar No. 15109)
Todd R. Flippin (S.C. Bar No. 101197)
HOLCOMBE BOMAR, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 594-5300

Attorneys for Respondent-Appellant

Spartanburg, South Carolina

October 18, 2021

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STATEMENT OF THE ISSUES ON APPEAL

I. THE MASTER ERRED IN FAILING TO GRANT RELIEF FROM DEFAULT JUDGMENT UNDER S.C.R.CIV.P. 60(B)(3) BASED ON MISREPRESENTATIONS MADE TO JOHNSON'S INSURER PRIOR TO FILING SUIT.

II. THE MASTER ERRED IN FAILING TO GRANT RELIEF FROM DEFAULT JUDGMENT UNDER S.C.R.CIV.P. 60(B)(1) BECAUSE SURPRISE OR EXCUSABLE NEGLECT RESULTED FROM COUNSEL'S PRE-SUIT CONDUCT.

III. THE MASTER ERRED IN FAILING TO GRANT RELIEF FROM DEFAULT JUDGMENT UNDER S.C.R.CIV.P. 60(B)(5) BECAUSE THE DAMAGES AWARD INCLUDED PREVIOUSLY SATISFIED AND RELEASED CLAIMS.

IV. THE MASTER ERRED IN FAILING TO GRANT RELIEF FROM DEFAULT JUDGMENT UNDER S.C.R.CIV.P. 60(B) BECAUSE JOHNSON ESTABLISHED MERITORIOUS DEFENSES TO THE DAMAGES AWARDS.

STATEMENT OF THE CASE

This appeal arises from a default judgment entered against Respondent-Appellant Mervin Lee Johnson ("Johnson"). Appellants-Respondents Kacey Green and Charinrath Green's (collectively the "Greens") claims against Johnson arose from a collision on Interstate 26 in Charleston County, South Carolina on February 28, 2018. Johnson was operating a tractor trailer for CDS Transport, Inc. and was insured by Prime Insurance Company. None of the parties were treated by emergency medical services at the scene and each drove their vehicle from the site of the collision.

The Greens filed their personal injury lawsuit against Johnson in Orangeburg County on January 11, 2019. (R. pp. 34-39). On January 29, 2019, the Greens filed an affidavit attesting to personal service on Helen Johnson, whom the affidavit describes as "Parent=Co-Resident." (R. p.

40). The Greens moved against Johnson for an order of default, which Judge Edgar W. Dickson signed on March 8, 2019.

On or about June 17, 2019, Johnson appeared through counsel and filed a Notice of Motion and Motion to Dismiss, or in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead ("Motion to Dismiss"). (R. pp. 104-106). The Rule 60(b) motion sought an order relieving Johnson from default judgment and cited the Greens' damages allegations as justification for such relief. (R. p. 105). The Master held a hearing on Johnson's Motion to Dismiss on October 21, 2019. (R. pp. 102-103). Although the issue of the Greens' property damages was raised by the parties at the hearing, there was no court reporter present and the hearing was not recorded.[1] On November 4, 2019, the Master issued an order denying Johnson's motion but failing to address several issues, including the Greens' property damage award, raised in Johnson's motion and at the hearing. (R. pp. 13-18). Johnson timely filed his S.C.R.Civ.P. 59(e) Motion to Alter or Amend the Master's order on November 14, 2019. (R. pp. 117-122). The trial court held a hearing on Johnson's motion on July 13, 2020. (R. pp. 102-103). At that hearing, the Master denied the motion as to liability, but amended the damages awarded in the June 5, 2019 order.[2] (R. pp. 19-30). On August 24, 2020, the Greens timely filed a S.C.R.Civ.P. 59(e) Motion to Alter or Amend the Amended Order on Damages. (R. pp. 162-167).

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[1] The undersigned was not present at the October 21, 2019 hearing on Johnson's Motion to Dismiss. However, as the Greens' counsel informed the Master, the arguments presented that day were "basically all the same arguments [the Master] heard after this motion to dismiss." (R. p. 79, lines 3-12).

[2] As the Amended Order on Damages notes, the Greens' presented evidence of medical expenses totaling $12,826.00. (R. p. 23). The Master's original damages order awarded personal injury damages of $1,000,000.00, property damages of $10,000.00, and punitive damages of $750,000.00. (R. p. 9). The Amended Order on Damages awarded personal injury damages of $190,000.00, punitive damages of $60,000.00, and noted that the Greens settled their property damage claims prior to filing suit. (R. pp. 21 & 30).

The Master-in-Equity denied the Greens' Rule 59(e) motion by Form 4 Order dated March 8, 2021. (R. pp. 31-33). Johnson timely served on April 7, 2021, his Notice of Appeal of the following orders filed by the Honorable James B. Jackson, Jr.: Order denying Defendant's Motion to Dismiss, filed on November 14, 2019; and, Amended Order denying, in part, Defendant's Motion to Alter or Amend, filed on August 14, 2020. Johnson on April 16, 2021, filed his Notice of Appeal with this Court.

STANDARD OF REVIEW

The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006). Thus, the standard of review empowers this Court to determine whether the trial court abused its discretion, as it did in this case. *Id*. "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id*., 369 S.C. at 551, 633 S.E.2d at 503. On appeal, this Court may correct errors of law in the trial court's assessment of whether the defendant's conduct was willful, wanton, or in reckless disregard of the rights of others. *South Carolina Farm Bureau Mut. Ins. Co. v. Love Chevrolet, Inc*., 324 S.C. 149, 152, 478 S.E.2d 57, 58 (1996).

ARGUMENTS

I. THE MASTER ERRED IN FAILING TO GRANT RELIEF FROM DEFAULT JUDGMENT UNDER S.C.R.CIV.P. 60(B)(3) BASED ON MISREPRESENTATIONS MADE TO JOHNSON'S INSURER PRIOR TO FILING SUIT.

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for … misrepresentation, or other misconduct of an adverse party." SCRCP, Rule 60(b)(3). The Greens' counsel's conduct in

negotiating this claim with Johnson's insurer, representing that he would make a demand, and indicating that the trucking company would be a defendant to the action satisfies the misrepresentation and misconduct standard justifying relief from default judgment under Rule 60(b)(3).

On March 13, 2018, only a few weeks after the accident, Mason West, counsel for the Greens', provided notice of representation to Johnson's insurer. (R. p. 133). A claims representative for Prime Insurance Company named Nikole Shields responded by fax on March 27th seeking additional information for Defendant's insurer to investigate Plaintiffs' claims. (R. pp. 134-135). The next day, Mr. West sent an email acknowledging Ms. Shields' fax and representing that he would, "[u]pon receipt of all medical records … submit the appropriate demand." (R. p. 136).

Mr. West emailed again on July 5, 2018, and provided medical and billing records for the Greens' medical treatment after the accident. (R. p. 142). Ms. Shields and Mr. West spoke on July 23rd and she sent him instructions for submitting a claim for the diminution in value of their vehicle. (R. pp. 143-145). On July 24, 2018, Mr. West provided a more complete description of Plaintiffs' claims and rejected Ms. Shields' $22,000 settlement offer. (R. pp. 146-147). He also provided a copy of the Greens' dashcam video[3] of the accident. It is apparent from the letter that Mr. West lacked authority to make a formal demand as he notes he intended to recommend to the Greens a settlement sum of $192,390.00. *Id*.

Without notifying CDS Transport, Inc. or Johnson's insurer, the Greens filed their personal injury lawsuit in Orangeburg County on January 11, 2019. (R. pp. 102-103). Only Mervin Johnson

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[3] Mr. Green testified in the damages hearing that he was driving a driving a 2016 Tesla Model S 90D "with the Autopilot 1.0 package" and had installed a dash camera with "one facing inside the cabin and one facing out to the road." (R. p. 47, lines 22-25).

was named as a party-defendant. Mr. West never communicated a settlement demand on behalf of the Greens. Instead, on July 7, 2019, the Greens' attorney sent Ms. Shields, via first-class mail, a copy of the July 5, 2019 Order of Damages awarding the Greens $1,760,000.00 in personal injury, property, and punitive damages. (R. pp. 110-112).

The effect of the Greens' attorney's course of dealing with Ms. Shields justifies relief from default as Mr. West's comments would reasonably cause her to understand that the trucking company would be named in any lawsuit. Mr. West in his settlement demand correspondence clearly indicated his intent to sue CDS Transport, Inc. for negligent entrustment. He wrote that "in no fashion should [Johnson] be entrusted with the safety and security of other drivers on the roads of South Carolina." (R. pp. 146-147). He further noted that "CDS Transport, Inc. has been previously sued for Unfair Trade Practices, and has been involved in other crashes in the last 24 months." *Id*. Johnson's insurer could reasonably expect that the trucking company would be a named party in any action against the driver. This Court, in *McClurg v. Deaton*, forecast that such conduct warrants relief from default judgment.

In *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008) the plaintiffs' counsel engaged in a similar pattern of communications insinuating that the trucking company ("New Prime") would be named as a party to the suit. A draft complaint provided by the attorney named "New Prime as a defendant, and alleged New Prime was vicariously liable for Deaton's actions and was also liable for its negligent hiring, retention, and training of" the driver. *McClurg*, 380 S.C. at 567, 671 S.E.2d at 90. Just as with the Greens' lawsuit, the McClurg's attorney named only the driver in the filed complaint.

> [G]iven this history of contact and negotiations between counsel and Zurich, most notably the representations made by counsel to Zurich, the conduct of the McClurgs' counsel in failing to simply notify Zurich of the complaint filed against

> Deaton raises serious concerns for this court and quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3).

Id., 380 S.C. at 573, 671 S.E.2d at 92–93. In a spirited dissent, Justice Hearn cited language describing conduct of counsel analogous to the present case as "'smack[ing] of chicanery and unfair advantage' which could not be tolerated." *McClurg*, 380 S.C. 563, 671 S.E.2d at 97 (Hearn, C.J., dissenting) (quoting *McGee v. Reynolds*, 618 N.E.2d 40 (Ind. Ct. App. 1993)). In her dissent from the supreme court's order affirming the *McClurg* decision, Chief Justice Toal described the attorney's conduct as "trickery and deception." *McClurg v. Deaton*, 716 S.E.2d 887, 889, 395 S.C. 85, 89 (2011) (Toal, C.J., dissenting).

The *McClurg* court ultimately affirmed the denial of New Prime's motion to set aside default, finding that New Prime failed to argue a meritorious defense. However, Justice Hearn parted company with the majority on the issue of whether New Prime established a meritorious defense. Justice Hearn would have held that New Prime established a meritorious defense under Rule 60(b), reasoning:

> I agree there was no showing by [New Prime or Deaton] concerning Deaton's lack of responsibility for causing the accident, but I would hold there was evidence of a meritorious defense, provided by the McClurgs' own attorney, which related to the amount of damages. In negotiations with New Prime's carrier, Zurich, which were ongoing prior to and beyond the filing of suit, McClurgs' counsel made a settlement demand of $170,000. I would hold this course of conduct by McClurgs' attorney is sufficient to satisfy Rule 60(b)'s meritorious defense requirement.

Id., 380 S.C. at 581, 671 S.E.2d at 97 (Hearn, C.J., dissenting). The similarity with the Greens' counsel's conduct is striking.

Arguably, the conduct in the instant case is more pernicious. At oral argument before the supreme court, the McClurg's lawyer "admitted he was trying to fly under the radar in serving [the driver] because of the prolonged, and seemingly unsuccessful, settlement negotiations with Insurer." *McClurg*, 395 S.C. at 98, 716 S.E.2d at 894 (Toal, C.J., dissenting). In fact, the

correspondence between the insurer and counsel in *McClurg* lasted for years. The letter of representation in that action arrived in September of 2002, but the plaintiff did not file the complaint until April of 2005. However, the Greens' counsel wasted no time. The Greens filed their complaint on January 11, 2019, less than one year after first contacting Ms. Shields. (R. pp. 102-103).

Other state appellate courts that have addressed this issue have set aside defaults in analogous situations. See *McGee v. Reynolds*, 618 N.E. 2d 40 (Ind. Ct. App. 1993). In *McGee*, the plaintiff and the insured were involved in an automobile accident. Negotiations ensued between the injured party and the insured's insurance company. When those negotiations reached an impasse, the plaintiff filed suit against the insured without notifying the insurance company. Thereafter, the insurance company made further inquiries as to the claim's status and settlement, only to receive no response from plaintiff's counsel. Finally, a default judgment was obtained against the insured, and after notice of the judgment, the insured and insurer moved to set aside the judgment pursuant to Rule 60(b)(3). The Indiana Court of Appeals affirmed the trial court's decision to grant the defendant insured's motion to set aside the default judgment where the plaintiff's attorney failed to give notice of the lawsuit to the defendant's insurer. *Id*. at 41. Further, the court stated:

> While there is no general duty to inform the defendant's insurer of a lawsuit ... **the plaintiff's failure to notify the defendant's insurer of the existence of the lawsuit after negotiations had occurred was a valid consideration in determining whether to set aside a default judgment.**

Id. (citing *Boles v. Wiedner*, 449 N.E. 2d 288, 290 (Ind. 1983)) (emphasis supplied). The court recognized that failure to notify the insurer, standing alone, was not enough to justify setting aside the default judgment. However, the court held that the failure to serve the insurer after negotiations

were undertaken, when combined with the attorney's refusal to answer the inquiry by the insurance company as to the status of the claim and settlement, constituted grounds for relief. *Id*.

The conduct described in the instant appeal fall squarely within the basis for relief from default judgment for an adverse party's misrepresentations as forecast in *McClurg*. Because Johnson preserved these issues by raising them to the trial court, he is entitled to relief from default judgment.

II. THE MASTER ERRED IN FAILING TO GRANT RELIEF FROM DEFAULT JUDGMENT UNDER S.C.R.CIV.P. 60(B)(1) BECAUSE SURPRISE OR EXCUSABLE NEGLECT RESULTED FROM COUNSEL'S PRE-SUIT CONDUCT.

According to S.C.R.Civ.P. 60(b)(1), the court may relief a party from default judgment due to "mistake, inadvertence, surprise, or excusable neglect." In *McClurg*, the court held that the surprise or excusable neglect requirement under Rule 60(b)(1) was satisfied when the plaintiff's counsel failed to provide the defendants' insurer notice of suit. 380 S.C. at 573, 671 S.E.2d at 92–93. The court concluded that the "insurer had a reasonable expectation it would be notified of any lawsuit arising from the employee's accident, or at least given copies of the filed pleadings, based on the plaintiffs' conduct in negotiating the claim." *Id*. at 573, 671 S.E.2d at 92. The Greens' attorney's course of conduct with Johnson's insurer makes clear that relief is warranted under Rule 60(b)(1).

In *McClurg*, the plaintiffs' counsel sent a time sensitive demand letter stating "If I haven't heard from you [by next week], I will file suit and serve the Defendant and send you a courtesy copy of the pleadings." 380 S.C. at 567, 671 S.E.2d at 89–90. Thereafter "counsel sent Zurich another letter, enclosing a copy of a complaint he prepared in the matter and indicating his intent to 'proceed to litigation' if the matter was not soon settled." *Id*.

Unlike the attorney in *McClurg*, Mr. West never notified Shields of his intent to file suit and he never sent a copy of a complaint he intended to file. Moreover, West's communications with Ms. Shields never indicated a deadline before suit would be filed. The Greens' counsel informed Ms. Shields that he would send a formal demand after the medical records were complete. However, when the full list of medical records arrived, there was no formal demand. Instead, counsel noted that he would recommend a settlement value of $192,390 to his clients. (R. pp. 102-103). It must be inferred from this statement that Mr. West did not, at that time, have authority to assert such a demand. Counsel never sent a demand to Ms. Shields. Instead, on Friday, June 7, 2019, counsel sent a copy of the damages order by first-class mail.[4] (R. pp. 110-112).

The Greens' counsel's conduct undoubtedly lured Ms. Shields into a false confidence that Plaintiffs would sue the trucking company in addition to Johnson and that she would receive notice of suit. The *McClurg* court's conclusion that such surprise and excusable neglect warrant relief from default judgment is fitting here because the issues were properly preserved for appeal.

III. THE MASTER ERRED IN FAILING TO GRANT RELIEF FROM DEFAULT JUDGMENT UNDER S.C.R.CIV.P. 60(B)(5) BECAUSE THE DAMAGES AWARD INCLUDED PREVIOUSLY SATISFIED AND RELEASED CLAIMS.

The Master erred by failing to set aside default judgment upon a showing that the June 5, 2019, damages order included an award for property damages despite the Greens' prior release of such claims through their insurer. "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding [if] the judgment has been satisfied, released, or discharged …." SCRCP, Rule 60(b)(5).

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[4] Although Mr. West and Ms. Shields corresponded via email and fax, the damages order was mailed to Johnson's insurer in Sandy, Utah by ordinary mail. It is reasonable to expect that the order would not arrive in less than three business days.

After the accident, Johnson's insurer received a subrogation demand from the Greens' automobile insurer, USAA Casualty Insurance Company ("USAA"). (R. p. 138). USAA provided invoices showing payments made for repairs to the Greens' Tesla and for nine days of rental car fees with Enterprise Leasing Company. (R. pp. 140-141). This demand included instructions to make the subrogation payment to "USAA as subrogee of Kacey Green." (R. p. 139). On February 1, 2019, Johnson's insurer sent a check to USAA to satisfy the $2,006.55 subrogation claim. (R. pp. 148-149). In bold print on the face of the check, which was written to "USAA a/s/o Kacey Green," are the words "Full and Final Settlement of any and all property damage claims arising on or about 2/28/2018." *Id*.

Mr. and Mrs. Green testified at a damages hearing before Master-in-Equity James B. Jackson, Jr. on May 22, 2019. (R. pp. 41-56). The Greens' counsel notified neither CDS Transport, Inc., nor Johnson's insurer, of the hearing. During direct examination, Mr. Green testified that "the Tesla was damaged" and did "suffer a significant dollar amount" of damage. (R. p. 16, lines 11-21). As to the specific amount, he stated "I want to say, was it $3,000.00 or something? It's in here."[5] *Id*. Mr. Green further testified that after the Tesla was repaired the sold the vehicle, but at a $10,000.00 loss. (R. p. 49, line 17 – p. 50, line 25). Specifically, he stated that "we took it all around town and nobody wanted to touch it because it had been in a collision." *Id*. This was the case even though he "showed [potential buyers] the pictures. And like, 'See, look, it -- it didn't look bad.'" (R. p. 51, lines 11-16). The Greens eventually "ended up selling it back to the guys that we bought it from and we lost over $10,000.00." *Id*. In sum, Mr. Green testified that he had property damage that he needed to recover. At the conclusion of the hearing, the Greens' counsel

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[5] The Greens did not introduce documents related to property damage as evidence in the hearing.

argued that they were entitled to property damages and suggested the Greens suffered a $10,000.00 loss. (R. p. 53, line 11 – p. 54, line 6). There was no testimony regarding USAA's subrogation of the Greens' property damages. Despite having previously settled and released their property damage claims, the June 5, 2019, damages order[6] awarded the Greens $10,000.00 in property damages.

Relief from judgment[7] is warranted here because the Master's award of property damages gives the Greens a double recovery for their loss. "The law in South Carolina is unequivocal on the issue of satisfaction. A plaintiff may have but one satisfaction for a wrong done." *Garner v. Wyeth Laboratories, Inc.*, 585 F.Supp. 189, 192 (D.S.C. 1984) (citing *Truesdale v. South Carolina Highway Department*, 264 S.C. 221, 213 S.E.2d 740 (1975) overruled in part on other grounds, *McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)).

Courts outside of this state have analyzed releases such as the one at issue here. The Maine court analyzed the effect of a check offered in settlement of an automobile accident and containing the words "In Full and Final Settlement of" printed in small print on the check. *Bryson v. Kenney*, 430 A.2d 1102 (Me. 1981) (declining to grant summary judgment because of issues of fact regarding the injured party's intent to settle bodily injury claims in addition to property damage claims). Of significance in that case, the check also included the typed words "Any and all claims ...." *Bryson*, 430 A.2d at 1104. In resolving the case, the court relied on *Wiggin v. Sanborn*, 161 Me. 175, 210 A.2d 38 (1965). In *Wiggin* the plaintiff, after an automobile accident, reported to the

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[6] Even if the Greens had not already settled these property damage claims, the June 5th order was still deficient because it did identify any facts substantiating the Greens' property damage claim. (R. pp. 1-12).

[7] This damages award for losses the Greens had already settled with Johnson's insurer through subrogation satisfies the "meritorious defense" requirement for relief under Rule 60(b). *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct.App. 2001).

defendant's insurance company that he had suffered no personal injuries but had sustained damage to his car. The car was repaired and the insurance company issued a draft to the plaintiff for repair amount.

> On its face appeared the language: "In satisfaction of all claims." An "X" was typed in a box opposite the word "Final." Two weeks later, the plaintiff endorsed the check and received payment. We stated that when an amount is tendered on a clear and unambiguous written condition that it be accepted in full settlement of all claims pending between the parties, one who accepts the amount offered is bound by the condition as a matter of law. *Wiggin*, 161 Me. at 178, 210 A.2d at 39.

Bryson, 430 A.2d at 1104. As noted in *Bryson*, the *Wiggins* decision distinguished cases in which the intent of the parties was in question. *Id*. at 180, 210 A.2d at 41. In a footnote, the court noted that although questions of intent may exist where the release address bodily injury and property claims, "a specific reference to personal injuries and property damage in the written condition would be one step towards more fully and clearly stating what the debtor intended." *Bryson*, 430 A.2d 1102, 1104, fn. 2; see e.g. *Randall v. Martin*, 868 So.2d 913 (La.App. 5 Cir. 2004) (wherein the court found that a settlement was reached as evidenced by the signed release document and the cashed checks which contained the notations "Full and Final Settlement of Property Damages" and "Full and Final Settlement of All Claims.") The check at issue in this case clearly indicated that the payment was a release "of any and all property damage claims" arising from the Greens' accident with Johnson. (R. pp. 148-149). Therefore, the Master erred when he refused to set aside default based on the Greens' double recovery of property damages.

IV. THE MASTER ERRED IN FAILING TO GRANT RELIEF FROM DEFAULT JUDGMENT UNDER S.C.R.CIV.P. 60(B) BECAUSE JOHNSON ESTABLISHED MERITORIOUS DEFENSES TO THE DAMAGES AWARDS.

In determining whether to set aside a default judgment under Rule 60(b), the court should consider the following relevant factors: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the

prejudice to the other parties. *McClurg*, 380 S.C. at 573–74, 671 S.E.2d at 93 (Ct. App. 2008); *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct. App. 2001). As discussed below, Johnson not only possesses meritorious defenses to the Master's default judgment, these defenses were raised to the trial court and preserved for review.

The June 5, 2019, damages order erroneously concluded that Defendant Johnson's meritorious defense regarding the amount of the damages award was barred by *McClurg*. The Master's denial of Johnson's motion to set aside default judgment should be reversed because Johnson's meritorious defenses were raised to the trial court and preserved for appeal. In *McClurg*, this Court held that "[b]ecause New Prime failed to make the necessary prima facie showing of a meritorious defense required to set aside a judgment under Rules 60(b)(1) and 60(b)(3), the trial court did not commit reversible error in refusing to set aside the default judgment." 380 S.C. at 576, 671 S.E.2d at 94. New Prime argued that it proffered "evidence of a meritorious defense as to damages based on a judgment award of $800,000 and the fact that the McClurgs had earlier offered to settle the matter for a total of $170,000." *Id.*, 380 S.C. at 575, 671 S.E.2d at 94. The Court disagreed with this argument and concluded that "[n]owhere in the record is there any indication that New Prime raised this to the court as an argument that a meritorious defense existed." *Id*. The S.C. Supreme Court affirmed *McClurg* because "the issue of a meritorious defense was neither raised to nor ruled upon by the circuit court." *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011) (declining to decide whether a meritorious defense as to damages alone is an adequate basis for relief under Rule 60 or whether a meritorious defense to the damages awarded in the default proceeding would be entitled to have the entire judgment set aside or merely the damages award). Unlike the defendant in *McClurg*, Johnson clearly raised his defenses to the Greens' damages claims in his Motion to Dismiss. *See* Johnson's Motion to Alter

or Amend (R. pp. 118-120); Suppl. Brief (R. pp. 126-129); and Transcript (R. p. 70, line 8 – p. 77, line 17).

To establish that he has a meritorious defense, a complainant need not show that he would prevail on the merits, but only that his defense is meritorious. *McClurg*, 380 S.C. at 575, 671 S.E.2d at 93–94 (citing *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989)).

> [A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

McClurg, 380 S.C. at 575, 671 S.E.2d at 93–94. To "obtain relief from a default judgment under Rule 60(b)(1) ... not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a *prima facie* showing of a meritorious defense." *McClurg*, at 574, 671 S.E.2d at 93. Johnson's affidavits and the exhibits attached to his supplemental memorandum satisfied the *prima facia* meritorious defense standard.

A. Johnson Raised His Meritorious Defenses with the Trial Court.

As discussed above, at the October 21, 2019, hearing on Defendant's Motion to Dismiss there was no court reporter present and hearing was not recorded.[8] On November 4, 2019, the Master issued an order denying Johnson's motion but failing to address several issues, including the Greens' property damage award, raised in Johnson's motion and at the hearing. (R. pp. 13-18). In the absence of a transcript of the hearing, and given the paucity of facts relating to the Greens' property damages in the damages order, Johnson properly filed a Rule 59(e) motion to preserve that issue for appeal. (R. pp. 117-122). The necessity of such a motion was addressed by the court

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[8] The undersigned was not present at the October 21, 2019 hearing on Johnson's Motion to Dismiss. However, as the Greens' counsel informed the Master, the arguments presented that day were "basically all the same arguments [the Master] heard after this motion to dismiss." (R. p. 23, lines 3-12).

in *Home Medical Systems, Inc. v. South Carolina Dept. of Revenue*, 677 S.E.2d 582, 382 S.C. 556 (2009). In *Home Medical Systems, Inc*., the court discussed the purposes of motions for reconsideration under Rule 59(e). A "party must file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." 382 S.C. at 562, 677 S.E.2d at 586 (quoting *Elam v. South Carolina Dep't of Transp*., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)).

At the hearing, Johnson submitted a supplemental brief addressing, among other things, the issues raised but not decided in the Master's hearing on Johnson's Motion to Dismiss. (R. pp. 123-150). The transcript demonstrates that the issues raised in this appeal were raised with the trial court. These issues include Johnson's request for relief from default judgment (R. p. 62, lines 4-10), the Greens' counsel's misrepresentations to Johnson's insurer (R. p. 62, line 22 – p. 63, line 5), the award for previously released and satisfied property damage claims (R. p. 74, line 12 – p. 76, line 2), conduct of counsel giving rise to surprise or excusable neglect (R. p. 63, line 6 – p. 66, line 8), and excessive damages as evidenced by the Greens' attorney's settlement assessment and the Greens' modest actual damages (R. p. 65, line 14 – p. 67, line 21).

B. The Master Awarded Compensatory Damages That are Excessive as a Matter of Law.

After their accident, the Greens' combined medical bills totaled only $12,826.00. (R. p. 4). Nevertheless, the Master awarded compensatory damages of $1,000,000.00, which is a sum 78-times the Greens' actual damages. (R. p. 9). In *Austin v. Specialty Transp. Services, Inc*., the plaintiffs were seriously injured when a tractor-trailer truck driven by the defendant's employee ignored a stop sign while exiting I-85 and struck their car. 358 S.C. 298, 304, 594 S.E.2d 867, 870 (Ct. App. 2004). Mr. Austin suffered a permanent disability, "underwent four surgeries and [was]

expected to receive surgery every two years for the remainder of his life." *Id.*, 594 S.E.2d 867, 874, 358 S.C. 298, 312.

Based on his uncontested evidence of a total of $170,010.62 in present and future medical expenses, the court awarded $850,000 in actual damage. *Id.* Mrs. Austin's liquidated actual damages, which totaled $57,460.58, resulted in a $175,000 actual damages award. *Id.*, 358 S.C. at 312, 594 S.E.2d at 874. The *Austin* court's approval of the compensatory damages award demonstrates that the Master's damages order is grossly disproportionate[9] to the evidence in the record.

C. The Master's Punitive Damages Awards Were Excessive and Without Evidentiary Support.

The Master's June 5, 2019 damages order awarded punitive damages of $750,000.00. However, the order contains no factual findings justifying such an excessive amount. 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 the Greens' 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*, 358 S.C. at 314, 594 S.E.2d 867, 875 (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 any factual findings that Johnson's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996).

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[9] Even the Greens' counsel concluded this case did not justify a judgment of the magnitude provided in this Court's Order. On July 24, 2018, Mason West, counsel for Plaintiffs, issued a "demand" letter to Defendant's insurer. (R. pp. 146-147). In that letter, Mr. West informs Ms. Shields that he is recommending his clients demand $192,390.00. *Id.*

Even in the context of a default judgment, an appropriate award is limited to that supported by the allegations in the Complaint and the proof submitted at the damages hearing. *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988) ("In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted." (citations omitted)). Neither the pleadings, nor the testimony offered at the May 22, 2019 damages hearing, support trial court's punitive damages award.

D. The Master's Punitive Damages Award Violates Due Process Standards Prohibiting Grossly Excessive Punishment.

This Court in *Austin v. Specialty Transp. Services, Inc*. analyzed a trial court's punitive damages award against the standards established in federal and South Carolina state courts to validate the award of approximately 2.54 times actual damages for both plaintiffs. 358 S.C. at 316–18, 594 S.E.2d at 876–77. This analysis begins with the "Due Process Clause of the Fourteenth Amendment [which] prohibits states from imposing grossly excessive punishments on tortfeasors." *Id*., (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996)). Although the U.S. Supreme Court has declined to "impose a bright-line ratio which a punitive damages award cannot exceed…" it warns that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Austin*, 358 S.C. at 317–18, 594 S.E.2d at 877 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1524 (2003)). The *Austin* court noted that an award greater than four times the amount of compensatory damages was approaching the line of

constitutional impropriety. *Austin*, 358 S.C. at 318, 594 S.E.2d at 877 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032 (1991)).

The South Carolina Supreme Court, in *Gamble v. Stevenson,* 305 S.C. 104, 406 S.E.2d 350 (1991), developed an eight factor review which trial courts are required to conduct to determine if a punitive damages award comports with due process. The *Gamble* factors are:

> (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) "other factors" deemed appropriate.

Gamble, 305 S.C. at 111–12, 406 S.E.2d at 354. Despite this clear standard, the Master's punitive damages award is not supported by any record evidence. Therefore, the court should credit Johnson's meritorious defenses and reverse the Master's order declining to grant relief from this default judgment.

E. Johnson Proffered Competent Evidence to Demonstrate a Meritorious Defense to the Master's Damages Award.

Defendant timely produced two Affidavits, one by Breeann Richardson (a Claims Administration for CDS Transport, Inc. the trucking company Johnson worked with at the time of the subject accident) and one by Nikole Shields (a Senior Claims Consultant for Prime Insurance Company). (R. pp. 107-112). According to the South Carolina Supreme Court, an affidavit, even when presented by a non-party, is evidence of a meritorious defense sufficient to support an order setting aside entry of default. In *Williams v. Carpenter*, the court found that an affidavit from the defendant's counsel indicating the existence of a meritorious defense "constituted a *prima facie* showing of a meritorious defense to the plaintiff's action." 273 S.C. 339, 341–42, 256 S.E.2d 316, 317 (1979) (citing *Bledsoe v. Metts*, 258 S.C. 500, 189 S.E.2d 291 (1972)).

Therefore, the Master erred in failing to credit Ms. Shields' and Ms. Richardson's affidavits and finding a *prima facia* case of Defendant's meritorious defense. As Ms. Shields' attests, the damage to Plaintiffs' car "was relatively minor in nature, in terms of impact speed." (R. pp. 107-108). Also, she notes that "the property damage[10] to Plaintiffs' vehicle was relatively minor." *Id.* The Master's damages order states that the affidavits submitted by Defendant "make summarily, conclusive assumptions by insurance adjusters of the impact as 'minor' – an impact they did not witness …." Order, dated June 5, 2019, at pg. 4. However, Ms. Shields specifically cites a video recording of the accident in her affidavit. Aff. of Shields, at ¶ 8-10.

Although not explicitly recognized in South Carolina, courts in other jurisdictions have held that in the context of a Rule 60(b) motion, an allegation relating to the amount of damages satisfies the meritorious defense requirement. See, e.g., *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp*., 843 F.2d 808, 812 (4th Cir. 1988) (discussing the meritorious defense raised: "[a]lthough these statements address the amount, rather than the propriety, of Augusta's claim, we believe that taken together they are a sufficient proffer of a meritorious defense"); *Wainwright's Vacations, LLC v. Pan American Airways Corp*., 130 F.Supp.2d 712, 719 (D.Md. 2001) (discussing *Augusta Fiberglass* and concluding, "[t] he company has raised a viable dispute about the amount it owes Pan Am"); *Esteppe v. Patapsco & Back Rivers Railroad*, C/A No. H–00–3040, 2001 WL 604186 (D.Md. May 31, 2001).

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[10] Ms. Shields received a photograph that Defendant Johnson took of Plaintiff's car shortly after the accident. (R. pp. 150). In that photograph, there is no apparent damage to Plaintiffs' bumper.

F. Johnson Was Adequately Prompt in Responding to the Default Judgment and Setting Aside Such Judgment Will Not Unduly Prejudice the Greens.

After counsel for the Greens mailed the damages order on June 7, 2019, counsel for Johnson promptly appeared and filed a Motion to Set Aside Default on June 17th. (R. pp. 102-103). Any delay in appearing to seek relief from the default judgment was owing to the Greens' counsel's failure to alert Ms. Shields that the lawsuit was filed, failure to communicate that the matter was set for a damages hearing, and failure to send the damages order in a more expeditious manner.

The Master erred in concluding that granting Defendant's motion to set aside default would be unduly prejudicial to Plaintiffs because their out-of-state residence would make litigation in Orangeburg, South Carolina particularly burdensome. (R. p. 17). In weighing the alleged "prejudice" to Plaintiff's Master erred in failing to note that Plaintiffs opted to pursue this action in Orangeburg County despite their prior residence in Summerville and the fact that the accident occurred in Charleston County. The Greens cannot now complain they will be prejudiced by litigating an action outside of their hometown.

Furthermore, the inconvenience to Plaintiffs cannot compare to the prejudice Defendant will suffer from a judgment with such a disparity between the losses alleged and the damages awarded. As mentioned above, Plaintiff's own counsel initially recommended a settlement value of $192,390.00. (R. p. 147). The relief originally granted by the Master is nine times more than Plaintiff's own attorneys assert is justified in this action.

CONCLUSION

For these reasons, Respondent-Appellant respectfully requests the Court reverse the trial court's denial of Johnson's motion to set aside default judgment and permit him to defend this action on the merits.

HOLCOMBE BOMAR, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 594-5300

By: *s/ Todd R. Flippin*

____
William B. Darwin, Jr. (S.C. Bar No. 15109)
Todd R. Flippin (S.C. Bar No. 101197)
Attorneys for Respondent-Appellant